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Edward M. Purby.









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PARDUE v. JAMES *et al.*

(Supreme Court of Texas. June 11, 1889.)

INJUNCTION—ESTOPPEL—EVIDENCE.

1. In a suit to enjoin the execution of a writ of restitution issued on a judgment of forcible detainer, on the ground that such judgment did not embrace 49 acres which it was proposed to put the judgment plaintiffs into possession of under the writ, the description in that judgment was not controlling, but defendants were entitled to show that by former conveyances and transactions between the parties and their privies such a construction should equitably be put upon the description in the judgment, which followed the description in the deeds, as would embrace the 49 acres in dispute, and that plaintiff was by his acts precluded from denying the correctness of such a construction.

2. The court charged the jury: "If you believe said judgment was not rendered for the land described by plaintiff as a 49-acre tract, and that no writ of restitution was issued upon said judgment commanding the sheriff to place [defendants] in possession of said 49 acres, then you will find for plaintiff." Also, "if a party selling land point out the lines of his land to the purchaser, and thereby induces the purchaser to believe he is buying the land included within said lines, he will in law be deemed to have parted with the land so pointed out," etc. *Held*, that the first instruction was more favorable to plaintiff than it should have been, and that the second instruction was not necessarily in conflict therewith, as, if such representations were made, the fact might enable the jury to say that the description in the judgment embraced the 49 acres.

Commissioners' decision. Appeal from district court, Hill county.

Action by W. P. Pardue against I. L. B. and W. H. James, to enjoin the execution of a writ of restitution. Judgment for defendants, and plaintiff appeals.

A. P. McKinnon, for appellant. Jo Abbott and Thos. Ivy, for appellees.

COLLARD, J. Plaintiff sues by injunction to restrain the execution of a writ of restitution, issued from the county court upon a judgment rendered in a proceeding of forcible detainer against him and J. D. Pardue, upon the ground that 49 acres of the land claimed by him are not embraced in the description of the land, as given in the judgment or the writ. Defendants pleaded, and the court admitted evidence to show, that the description

contained in the judgment was not controlled by the call for distance on the south line of the survey. Plaintiff based his right to the injunction upon the one fact that the description of the land in the judgment and writ did not embrace the 49 acres. Defendants, by way of answer, set up a conveyance from W. F. Henry and others to J. H. Fisher out of the McKinney & Williams survey of 405 acres of land, the south line of which is described as extending to the south-east corner of the McKinney & Williams; and then a deed by Fisher to J. D. Pardue and R. M. Grantham to 100 acres out of the south-east portion of the 405-acre tract, which calls for the south-east corner of the same. Defendants also answered that, at the time of the sale to Pardue and Grantham, they, as part consideration for the land, executed to Fisher their four promissory notes for \$420 each, retaining a vendor's lien on the land, and that they entered into possession of the land, including the 49 acres in dispute; that Fisher, in making his deed to Pardue and Grantham, intended to, and did, in fact, convey to them all the land up to the south-east corner of the 405-acre tract, and the south-east corner of the McKinney & Williams survey, and that the deed conveyed an excess of 49 acres; that Fisher transferred the four notes to defendants I. L. B. and W. H. James, who sued on them, suing the makers and also W. P. Pardue as being in possession of the land; that prior to the suit on the notes Grantham sold his half interest in the land to W. P. Pardue, by deed describing the land exactly as it was described in the Fisher deed to J. D. Pardue and Grantham; that J. D. Pardue also conveyed the 49 acres to his father, W. P. Pardue, who knew that it was included in the deed from Fisher; that after suit on the notes propositions were made by J. D. Pardue and Grantham to James & James to reconvey the land to them in consideration of the cancellation of the notes and the dismissal of the suit, which proposition James and James declined to accept until W. P. Pardue also agreed to it, and agreed to transfer the land to them; that all parties agreed, and W. P. Pardue and wife executed a deed to J. D.

Pardue and Grantham on the 19th of August, 1885, and J. D. Pardue and Grantham on the same day executed and delivered a deed to defendants, and that in all the deeds the land was described as in Fisher's deed to J. D. Pardue and Grantham, and that this was done in consideration of the surrender of the notes, and the dismissal of the suit; that it was agreed and understood by all the parties that the deeds conveyed the land in controversy, and to the south-east corner of the McKinney & Williams survey; that pending negotiations for the cancellation of the notes, and dismissal of the suit, J. D. Pardue pointed out and indicated upon the land the boundaries as including the land in dispute; that at the time of the execution of said deed it was agreed that Grantham and J. D. Pardue might remain in possession of the land until the 15th day of November following, at which time they were to deliver possession to defendants, but that J. D. and W. P. Pardue had failed to so deliver the same, whereupon defendants brought suit in justice's court against J. D. and W. P. Pardue in an action of forcible detainer, where the Pardues recovered judgment, from which defendants herein appealed to the county court, where they recovered judgment; that upon the trial of the forcible detainer suit in the county court the question as to whether the 40 or 49 acres were included in the bounds of the description of the complaint, which was the same as in the Fisher deed, was fully and fairly submitted to the jury, who finding for defendants herein, the judgment mentioned in plaintiff's petition for injunction was rendered; and further that the 40 or 49 acres were included in the land described in the judgment.

It was in proof that the deed to Fisher for the 405-acre tract called to extend to the south-east corner of McKinney & Williams survey, and that to so extend the south line it had an excess of 40 or 49 acres; that he bought all the unsold balance of the survey from Henry and others; that no actual survey was made at the time of his purchase, but that afterwards Wade made a survey of it, and stopped the south line short of its south-east corner 223½ *varas*. It was also in proof that it was his intention by the deed to Pardue and Grantham to convey all the land before unsold by him of his 405-acre tract. He swears that he was not satisfied with Wade's survey, and proceeds: "I finally sold, or intended to sell, all the balance to R. M. Grantham and J. D. Pardue,—100 acres, more or less. Wade was sent for to survey the land, *i. e.*, to run off the 100 acres. Wade began at the south-east corner of the Cooper tract, previously sold by Fisher, and ran N. 60° E. for some distance, and stuck down his Jacob's staff. He then came back some distance, and drove up some stakes, saying that was the corner. I was not satisfied with it, and told him so at the time, but Wade said that was the corner of the McKinney & Williams survey. I was not satis-

fied, and told him such was not the corner, but from this point Wade went on to run the other lines. When I made the deed to Grantham and Pardue, I told them I would deed them all the land to the McKinney & Williams corner; that there was an excess, but I wanted to sell all. They paid me at the time \$200, and gave me four notes, etc. Grantham and Pardue then went into possession of that part of the land which was improved, and to within a few *varas* of where Wade fixed the south-east corner, and also, under said deed, took possession out to the Merriman line, lying east of the McKinney & Williams survey. I told them all the time I would make them a deed to the excess if the deed already made did not cover it, but the deed was intended to cover the whole. Grantham, after this, sold out to plaintiff in this suit, and he promised to pay Grantham's part of the debt. I waited some time on him, but could get nothing out of him. Being compelled to have money, I sold the note to I. L. B. & W. H. James, telling them at the time that the note was given for the whole of the land, including the excess of 49 acres. They brought suit against Grantham, J. D. and W. P. Pardue, on the note, but the matter was settled, they all agreeing to deed the land back to defendants, who, in consideration thereof, cancelled the notes and withdrew the suit. I told the James that, if they made any settlement with the Pardues by which he took the land, I would make him a quit-claim deed to the excess, if the deed did not cover all of it, which I have since done,—since this suit was brought." On cross-examination he testifies that he had never since claimed any part of the land; that he in good faith sold Pardue and Grantham the whole of it, and told them that the stakes put there by Wade was not the true S. E. corner; "that I would sell out to the full extent of the McKinney & Williams survey, or the Merriman line. They understood this, and took possession out to the line and S. E. corner, where Holland afterwards established it. W. P. Pardue got possession under Grantham and J. D. Pardue." Fisher's deed to Pardue and Grantham called for the south-east corner of the 405-acre tract.

It was proved that there was an excess of 49 acres in the survey, and, to stop the south line where Wade put down the stakes according to the call for distance, the tract would contain 100 acres. It was in proof that before defendants brought suit on the notes I. L. B. James went to see W. P. Pardue to collect his money, and while there Pardue showed him where the line of the survey was, and the south-east corner, claiming that there was an excess, and offered for a consideration of \$300, besides the cancellation of the notes, to reconvey all the land. James proposed to cancel the notes if all the parties would convey to him and his son the land. No settlement was made, and suit was brought on the note. A short time afterwards Grantham came to the elder James

and said that W. P. Pardue had sent him to settle the suit, and proposed that if the suit was withdrawn the Pardues would reconvey to defendants the land. James replied that he would do so. Afterwards the parties met for the purpose, when a settlement was made as follows: W. P. Pardue and wife executed a deed to J. D. Pardue and R. M. Grantham for the land, as described in Fisher's deed to them, calling for the south-east corner of the Fisher 405-acre tract; and J. D. Pardue and Grantham executed a deed to the defendants for the land, with the same description. Defendants gave W. P. Pardue an order on their attorneys for the notes, which were surrendered on presentation of the order, and defendants dismissed their suit. It was also proved by the testimony of both defendants that, at the time the deeds were executed, the Pardues agreed to deliver possession to James and James of all the land, including the 49 acres, on the 15th of the following November. This time was given to enable them to gather their crops. The elder Pardue testified that he did not intend to sell or reconvey the 49 acres, and that in pointing out the lines and corner to I. L. B. James he only pointed out the limits of the excess. The Pardues failing to deliver all the land at the expiration of the time agreed on, James & James brought their action of forcible detainer, finally resulting in judgment for complainants. The complaint described the land as in the deed from Fisher to J. D. Pardue and Grantham. The judgment of the county court contained the same description, as did also the writ of restitution. The sheriff executed the writ about noon on the 16th of June, and says that some hours afterwards he heard of the injunction. Judgment was rendered for defendants in the injunction suit, and plaintiff appealed.

His first assignment of error is that the court erred in overruling his special exception to that part of defendants' answer which set up the various transfers, because they constituted no defense, and in no way tended to show that the 49 acres were included in the description in the judgment in the forcible detainer proceeding, or in the writ of restitution. The gist of plaintiff's claim to equitable relief by injunction, as before stated, was that the judgment in the action of forcible detainer did not embrace in its description the 49 acres of land. Appellant's idea seems to be that the case must be tried solely upon the issues made in the bill for injunction. This is not correct. The court, having acquired jurisdiction of the cause, would proceed to do full equity between the parties. It would hear and determine the whole case. The defendants could not only show that the judgment of forcible detainer did include in its description the 49 acres in controversy, but they could set up any equitable defense that would defeat a recovery by plaintiff had the suit been an ordinary one for the property. They could, by former deeds and transactions, show what construc-

tion of right and good conscience should be put upon the description of the land, as well as to show that plaintiff himself was committed to that construction. *Willis v. Gordon*, 22 Tex. 243; *Bourke v. Vanderlip*, Id. 222; *North v. Swing*, 24 Tex. 193. Fisher's 405-acre tract called to extend the south line of that survey to the south-east corner of the McKinney & Williams survey, and, though the line so extended would be longer than the distance called, that corner would be the terminus of the line. Fisher's deed to Grantham and J. D. Pardue to the 100-acre tract called for the south-east corner of the 405-acre tract, and this, coupled with the allegations and proof that Fisher intended to convey all the land to this corner, notwithstanding the distance would not reach the point, clearly shows what the deed did actually convey.

The judgment in question has the same description as the deed, and, all the pretended rights of the plaintiff having originated in this deed, it and the deed to Fisher should be looked to with such explanations as might be shown to ascertain the meaning of the description in the judgment. In addition to this, by reference to these former transactions it is seen that the defendants James and James took the place of Fisher in the sale, and the plaintiff took the place of J. D. Pardue and R. M. Grantham. Plaintiff claimed under Grantham and J. D. Pardue. Assuming their liability to Fisher, he could be in no better attitude to resist the claim of defendants than could J. D. Pardue and Grantham to resist the claim of Fisher. He could not in one breath say the Fisher deed did convey the entire 149 acres in order to hold the excess under that deed, and then in the next breath say that his deed back to J. D. Pardue and Grantham, and their deed to James and James, (holding the vendor lien notes, executed to Fisher in the original purchase,) by which there was, in effect, a rescission of the original sale, did not convey the entire 149 acres. It was proper and right that these issues should be heard and determined in this proceeding.

Appellant complains of the charge of the court as follows: "The court erred in his charge to the jury in that part of his charge wherein he instructs the jury as follows: \* \* \* If a party selling land point out the lines of his land to the purchaser, and thereby induces the purchaser to believe he is buying the land included within said lines, he will in law be deemed to have parted with the land included within the lines so pointed out by lines, if any." (1) Because said charge is irrelevant, and not warranted by the issue made by the pleadings in this case. (2) The said charge was calculated to mislead the jury and prejudice the jury against the appellant, because the sole question for their decision was whether the 49 acres was included within the description of the 100-acre tract, and not in reference to the sale or purchase of any land. (3) The said charge is in conflict with

subdivision four of the court's charge in the latter part of said subdivision."

It was alleged in the answer of defendants that J. D. Pardue pointed out the east boundary of the land conveyed by Fisher's deed to him and Grantham as embracing the 49 acres excess, and that he so pointed it out to I. L. B. James, during the time of negotiations to cancel the notes by a reconveyance of the land. The assignment of error does not call for an expression of opinion as to whether there was evidence showing that he did so point out the boundary; but there was evidence showing that he agreed that such was the boundary.

We have already seen that the sole issue in the case was not as to whether the judgment described the land so as to take in the 49 acres, unaided by other extrinsic facts, and it is unnecessary to repeat what has been said upon that subject, but it is contended that the charge is in conflict with the following extract from the court's charge: "And if you believe said judgment was not rendered for the land described by plaintiff as a 49-acre tract, and that no writ of restitution was issued upon said judgment commanding the sheriff to place said I. L. B. and W. H. James in possession of said 49 acres, etc., then you will find for plaintiff." From what will be seen in the foregoing this charge is more favorable to plaintiff than it should have been; but, if plaintiff pointed out the boundary as the evidence shows he did do to I. L. B. James, we are not prepared to say, under the facts and circumstances of the case, that it would not be a means by which the jury might say the judgment and writ described the land as claimed by defendants to embrace the 49 acres.

Appellant assigns the following as error: "The fourth part or subdivision of the court's charge is erroneous, and calculated to mislead the jury and prejudice the cause of appellant, because the court therein instructs the jury that the only issue for them to find is what land was adjudicated by a judgment of the county court of Hill county, and whatever was there adjudicated by said court as to the possession of the land therein is final as far as any action can be had in this suit," because the judgment of the county court in said cause is conclusive of the matters litigated in said cause, and as to the legal effect of said judgment it is a question of law and not of fact."

The only error we are able to see in this charge is on the side of the appellant. It is in line with his theory that the jury could look only to the judgment to ascertain what land it applied to, while it has been shown that previous transactions and other deeds could be referred to in explanation of the description in the judgment.

The last assignment of error is that the verdict is not supported by the evidence. It is unnecessary to review the testimony to show that this assignment of error is not well taken. It is sufficient to say that the verdict is in accord with the testimony, the merits, and justice of the case. Finding no reversible error in the charge or the rulings of the court,

and believing that the verdict of the jury, under the testimony, is such as should have been given, we conclude the judgment of the court below should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

#### CAROTHERS *et al.* v. ALEXANDER.

(Supreme Court of Texas. June 11, 1889.)

#### STATUTE OF FRAUDS—DEED BY CORPORATION—PARTNERSHIP—EVIDENCE.

1. J. and K. entered into an agreement with B. and wife to establish the title in the wife to certain land granted by Texas when a Mexican state to B.'s wife, and to receive half of the land for their services. They performed their part of the contract, but B. and wife died without conveying any land to them, except such conveyance as was contained in the contract. *Held* that, the contract having been executed by J. and K., they were authorized by it to convey their interest, and such conveyance was sufficient to pass title.

2. J. and K., composing the partnership firm of J. & Co., owned together a one-half interest in the land. They divided their interest into twelfths, each claiming three-twelfths of the undivided whole. Soon after they took into the firm two other partners, with the verbal agreement that the new firm under the old name should own one-half of their joint interest, or three-twelfths of the whole. Subsequently a corporation was formed of all the old firm except K., who withdrew with his interest. By verbal agreement it was understood that the corporation succeeded to all the interest of the partnership. The corporation, becoming insolvent, assigned, and the assignee sold and conveyed its interest in the land to K. and plaintiff. K. then also deeded to plaintiff. Some time after this J., as president of the corporation, deeded the corporate interest to defendants, and also deeded to them his individual interest. *Held*, that the corporation acquired nothing under its verbal conveyance, and conveyed nothing by its transfers; that the deed of its assignee to plaintiff was void.<sup>1</sup>

3. The individual deed of K. of his interest to plaintiff conveyed his three-twelfths, and the individual deed of J. to defendants of all his interest conveyed two-twelfths, the other one-twelfth having been previously purchased by defendants; and plaintiff had the legal title to three-twelfths, and defendants, having acquired the interest of the heirs of B. and wife, to nine-twelfths, of the original grant.

4. The rule that land belonging to a partnership is, under some circumstances, treated in equity as personal property, applies only to the administration and adjustment of partnership affairs, and in no way abrogates the law requiring transfers of land to be in writing.

5. A deed, signed and executed by the president of a corporation, purporting to convey a corporate interest in land, when in fact the interest is owned by the president individually, is not sufficient to pass his title by estoppel, unless by the terms of the deed the conveyance is definite and absolute.

6. The admission of testimony concerning transfers of land by partnerships and corporations, when the alleged transfers are not in writing, is error.

Appeal from district court, Bexar county. *Mavey & Fisher, Hancock & Shelley, and Coopwood & Coopwood*, for appellants. *Clark & Dyer* and *Goodrich & Clarkson*, for appellee.

HENRY, J. This was an action of trespass to try title and for partition, brought by

<sup>1</sup> See note at end of case.

appellee to recover an undivided five-twelfths of an 11-league grant in Kinney county, in the name of Dona Dolores Soto de Beales, less certain tracts described and specially excepted. The defendants are alleged to be the owners of the remaining seven-twelfths. The defendants pleaded "not guilty," stale demand, and the statute of limitations of 10 years. Judgment for plaintiff was rendered on the verdict of a jury. On the 30th day of May, 1867, John Charles de Beales and his wife, Dolores Soto de Beales, of the one part, and C. R. Johns and J. C. Kerbey, composing the firm of C. R. Johns & Co., of the other part, entered into a written contract substantially as follows: Whereas, the government of Mexico did on the 18th day of April, 1834, grant to the said Dolores Soto de Beales 11 leagues of land on the Las Moras, a tributary of the Rio Grande river, in the state of Texas; and whereas, the said C. R. Johns & Co. have agreed to undertake the settlement of the title to said lands and the adjustment of the claims of the parties of the first part thereto, for a compensation of one-half of the interest therein of the parties of the first part in lieu of all other compensation and of all personal liability of the parties of the first part to the said parties of the second part, or any one employed by them: Now, therefore, the said parties of the first part, in consideration of the premises, do hereby agree to convey to the parties of the second part one equal half part of any tract, piece, or parcel of land of which they may by virtue of the rights and interests aforesaid secure a good and perfect title, and to release to them one-half of the proceeds in money or other property which they may realize for or in lieu of the rights and interests aforesaid, such conveyances or releases to be made from time to time, as soon as any definite arrangements shall appear from the reports and accounts of the parties of the second part to have been accomplished, such reports and accounts of their actions in the premises to be given to the parties of the first part as often as once in three months from the date hereof. Plaintiff's claim of title comes through C. R. Johns and J. C. Kerbey under the above agreement. Defendants' claim of title depends upon purchases from the heirs or devisees of John Charles de Beales and his wife, Dolores Soto de Beales. It follows that, if plaintiff has any title at all, the last-named persons are common source of title of both parties, and it becomes unnecessary to trace the title to the government, or beyond J. C. de Beales and wife. In order to prove title from the common source it was incumbent on plaintiff to prove such performance of the terms of the contract of May 30, 1867, as would entitle J. C. Kerbey and C. R. Johns to the interest in the land thereby provided for. To whatever extent plaintiff was required to prove title in Mrs. Beales in order to show that Johns and Kerbey had complied with their undertaking, the rule of common source had no ap-

plication. The two things should not be confounded. If plaintiff cannot prove that Johns and Kerbey performed their part of the contract, except by proving the Beales' title from the government down, he must do that. On the other hand, when he has proved such performance of the contract, the rule of common source relieves him from further proof on that line. The construction of the contract is a question of law. Its true meaning is to be arrived at by giving effect to all of its provisions read in the light of the circumstances surrounding the parties and the subject-matter at the time of its execution.

Looking to the contract itself, it is evident that it was not intended that Johns and Kerbey undertook to procure a grant from the government, nor to perfect an inchoate or imperfect grant, for the agreement expressly recites that "the government of Mexico did on the 18th day of April, 1834, grant to the said Dolores Soto de Beales eleven leagues of land on the Las Moras, a tributary of the Rio Grande river, in the state of Texas." Kerbey and Johns and their assignees are as much entitled to the benefit of this express stipulation in the contract, and the other parties and their successors are as much bound by it, as they are by any other clause in the agreement. The fact that the lands were titled being fixed by the agreement, Johns and Kerbey "agreed to undertake the settlement of the title to said lands, and the adjustment of the claims of the parties of the first part thereto." That the undertaking of Johns and Kerbey in agreeing to settle the title was not to procure one, but to quiet one already in force, is made manifest by what follows in the writing, whereby the parties of the first part bind themselves to convey to the parties of the second part "one equal half of any tract, piece, or parcel of land of which they may, by virtue of the rights and interests aforesaid, [meaning the title aforesaid,] secure a good and perfect title." If it had been the government title that the parties of the second part were to establish, it would properly have been referred to as a whole, not by parcels; but, the title being conceded, as it was, and the object being to settle or quiet it upon the land by removing conflicting claims, the language was properly applied to tracts or parcels of the land, as one after another they became clear to the adjustment or removal of conflicting claims, and by the acquisition of possession under the Beales title. The method of settlement with Johns and Kerbey, being by a release to them of "one-half of the proceeds in money or property which they may realize to be made from time to time as soon as any definite arrangements shall appear," and the provisions with regard to taxes and expenses, "after any parcel or tract of property shall have been secured and the title perfected by virtue hereof," still further illustrate that it was not the government title to Beales that was to be established, but the removal of

other claims that stood in the way of the enjoyment of that title. It is evident that the parties to the contract intended that, when such obstructions to the enjoyment of the Beales title were once removed, the obligations of Johns and Kerbey would be performed, and they would thereby become equitable owners of one-half of the lands so quieted, and their obligations under the agreement be forever discharged. It cannot be contended that, after the lands were once reduced to possession, and cleared of conflicting claims, Johns and Kerbey would be bound to protect them from future attacks of the same character; or that their title to their interest, being once earned, could afterwards be divested by the unlawful acts of other persons with which they had no connection. Briefly, we construe the contract to be an agreement of all parties that Mrs. Beales had a perfect title to the land, and an undertaking upon the part of Johns and Kerbey that they would clear the land of then existing adverse claims, and get possession of it under the Beales title, and a promise upon the part of the Beales that for doing that they should have title to one-half of the lands. This, we conclude, is the language that the contract itself speaks.

There seems to have been no conflicting testimony as to the circumstances surrounding the subject-matter and the parties when the contract was made, nor as to what was done in executing it. The conditions in these respects, as shown by the evidence of C. R. Johns, were as follows: That he and J. C. Kerbey were the original parties to the contract of May 30, 1867. That under the contract he and Kerbey undertook the settlement and adjustment of the Dolores title for a compensation of one-half of the land or proceeds thereof. That when the contract was executed he and Kerbey constituted the firm of C. R. Johns & Co., engaged in a land-agency business at Austin, Tex. That at the time last aforesaid the Dolores title was not recognized by the state authorities as a valid title. It had never been platted or delineated upon the maps in use in the general land-office, and the *testimonio* of the title on deposit in the land-office lacked evidence of authority to act in Fortunato Soto, the commissioner by whom the title purported to have been extended. That in 1867, within a month or two after the execution of the contract, C. R. Johns & Co., (as the firm was then constituted,) through J. C. Kerbey, took formal possession of the grant for the Beales, and executed a lease thereof to one O. A. Strickland. That during the same year Johns & Co. caused said grant to be surveyed by the duly-authorized surveyor of the land-district to which Kinney county, in which the land lay, belonged, and returned the field-notes to the general land-office. That after the return of the field-notes the grant was platted on the map of Kinney county, and has since been there represented. That, it being deemed necessary by the land-office to secure proper

evidence of the authority of Soto, special commissioner, to extend the title to Dona Dolores Soto de Beales, Johns & Co. made efforts to supply this defect in title. That they succeeded in finding Soto in Mexico, and finally succeeded in getting possession, through Dr. Beales, of the original letter of authority or commission under which Soto acted, and filed and deposited the same in the general land-office, where it has since remained. That, after the platting of the grant on the map, the then commissioner (Keuchler) recognized and respected said grant, and gave to Johns & Co. certificates to that effect, which were forwarded to Dr. Beales. That reports of what was being done were from time to time made by C. R. Johns & Co. to Dr. Beales, the principal correspondence being conducted in behalf of the firm by the witness (C. R. Johns.) That after the recognition by the land-office of the validity of the Dolores title, Johns & Co. regarded and treated the contract as performed on their part, and Dr. Beales, prior to his death, and, after his death, his children, and Miss Exter, Mrs. Beales' daughter by a former marriage, likewise recognized C. R. Johns & Co. as being entitled, under the contract, to one-half the grant. That the right of C. R. Johns was never questioned by Dr. Beales during his life, but was always recognized. That neither in his letters nor in several personal interviews which occurred between him and the witness (between 1870 and 1878) did Dr. Beales claim that anything remained to be done to complete Johns & Co.'s right under the contract. That all the correspondence—original letters from Dr. Beales, and from Miss Exter and J. A. G. Beales, (after the doctor's death,) and the letterpress copies of the letters from Johns & Co. to the doctor and to other members of the Beales family—were destroyed by fire; at Austin, in the burning of the Hancock building, in which witness had his office. That in addition to getting the grant upon the map, procuring the commission of Soto, and securing the recognition of the title by the commissioner, C. R. Johns & Co. took, kept, and held continuous possession of the grant, by tenants, from about 1867 until some time in 1883, when the defendants bought the Beales interest. That tenants were procured and kept upon the grant by Johns & Co., and at their labor and expense; leases being executed in writing, and from time to time renewed. That some of these leases were spread upon the records of Kinney county, but some might not have been recorded. That, after the completion of the contract by Johns & Co. in the manner stated, Dr. Beales furnished his proportion of money to pay taxes for his one-half; and after his death, in 1878, and that of Mrs. Beales,—which occurred in 1872,—the heirs and devisees of Beales and wife also furnished money to pay taxes on their one-half. That prior to the settlement of the title, Johns & Co., as they had agreed, paid all the taxes, costs, and expenses incurred in and about the



accomplishment of the end in the contemplation of the parties. That Dr. Beales, prior to his death, had printed and distributed a pamphlet, touching the condition of the Dolores and other grants to which he asserted title, in which he asserted that the Dolores title was a good title, and supported the assertion with the certificates referred to above as furnished by the commissioner of the land-office at the instance of C. R. Johns & Co. The witness further testified that when the contract was made there were no adverse claimants except S. A. Maverick, who held patents from the state for a part of the land lying within the grant. That his patents had been issued prior to the delineation of the grant on the maps, or its recognition by the land-office. That, after the recognition and the lodging of Soto's commission in the land-office, Maverick yielded to the Dolores title, returned for cancellation and had canceled his patents, and bought from C. R. Johns & Co., under the Dolores title, the land covered by the patents. That Johns & Co., in making this sale, acted for the Beales and for themselves as co-owners, and that the money realized from the sale was divided as agreed in the contract. That no deed or other conveyance, except the contract, was ever executed by the Beales. That Johns & Co. several times urged a partition of interests, so that they might sell and dispose of their interest separately, but Dr. Beales was disinclined to sever interests, expressing a desire to continue to receive the benefits resulting from what Johns & Co. might do in protecting the grant and effecting sales. That the correspondence for the period immediately following the making of the contract was chiefly with reference to the defect in the title, and securing a recognition of the title by the state authorities; but the correspondence for some time preceding the death of Dr. Beales never questioned the right of C. R. Johns & Co., and was directed mainly to an exchange of views with respect to disposing of the land, and realizing money therefor. That after the doctor's death a proposition was made by the heirs and devisees of Beales to partition the respective interests of the owners; but for some reason, perhaps the absence of Kerbey and Alexander, it was not effected. That at the time of this proposition,—1882,—J. A. G. Beales, Miss Exter, Mrs. A. K. Jaffray, Kerbey, and Alexander, and Tom D. Johns were recognized as the owners of the grant, each holding the following interests: James A. G. Beales, one-twelfth; Miss Exter, four-twelfths; Mrs. Jaffray, one-twelfth; Tom Johns, one-twelfth, and Kerbey and Alexander, five-twelfths. The witness further testified that he had made, in the capacity of agent for the owners of the grant, two contracts with counsel at Austin, looking to the conduct of certain litigation then pending, and litigation likely to ensue from adverse locations over and claims against the validity of the Dolores title; the first, dated January 1, 1879, with Hancock & West and Terrell &

Walker, and the other with Hancock & West and Maxey & Fisher, dated August 7, 1882. That under the first contract the attorneys named removed into the United States court at Austin a case which had been brought in the district court of Kinney county by the Clark Irrigation Company upon a claim to land within the Dolores grant, based upon patents issued by the state. This suit, after removal, was not prosecuted by the plaintiff, and the defendants, setting up the Dolores title, proceeded with the case, which resulted in a judgment reciting and affirming the validity of the Dolores title. The other contract never became operative; Kerbey refusing to ratify. About 1882 a large number of locations and surveys were made on the grant, and the purpose of employing counsel was to remove a cloud and quiet the title. That about six months after the attempted employment of Hancock & West and Maxey & Fisher the defendants bought out the interest of the Beales heirs in the Dolores grant, and that before the purchase by them they had been fully advised by him of the claims of owners of the grant, and how they claimed. That he informed them in conversations that Kerbey and Alexander had an interest, and the extent of it.

W. von Rosenberg testified substantially as did Johns as to acts of recognition of interest in C. R. Johns & Co. by the Beales. He further testified that no survey of the Dolores grant was ever made, so far as he knew, but that Johns & Co. furnished the land-office the field-notes of a connecting line which, with the field-notes in the grant, enabled the same to be delineated on the map. This was done August 26, 1867, while he was chief draughtsman, and the platting was done by him. That, through correspondence of C. R. Johns & Co. in Mexico, the whereabouts of Soto were ascertained, and also the fact that he still had the original commission upon which he acted in his possession. Soto was not willing to part with its possession, except for a large consideration. That Johns & Co. appealed to Dr. Beales, who was a family connection of Soto, to use his influence. That before the commission was procured Soto died, and Johns & Co. afterwards, through Dr. Beales, procured and filed same in land-office. Dr. Beales received it from the heirs of Soto. Upon the filing of this commission the estate of S. A. Maverick, which owned certain patented lands within the grant, surrendered the patents for cancellation, and bought the Dolores title. That the grant was recognized as valid by the land-office in 1874.

The deposition of Jacob Keuchler, a former commissioner of the land-office, who testified, in substance: That when he went into office he found the grant on the maps, and that it was officially recognized during his term of office, extending from 1869 to 1874, as a valid grant. That there were no locations over said grant while he was commissioner, and no patents on locations made

on said grant were issued during that period. That he obtained his knowledge of the Dolores grant from the maps in use in the land-office, on which the grant was delineated, and from the Spanish archives of the office. That the *testimonio* of the grant was on file in the Spanish archives of the office when he was commissioner, and no change was made in the *status* of the record during his term. That there was no English archive evidence of the Dolores grant in the land-office.

Appellants assign 47 errors. Assignments numbers 15 to 45, inclusive, relate to charges given and refused by the court. So much of said charges as we consider it necessary to comment upon read as follows: The court, of its own motion, charged, among other things, that "the pleadings of both plaintiff and defendants are general, but, as developed by the evidence, the plaintiff derails his title or right by virtue of which he seeks to recover as follows, viz.: (1) He shows two deeds executed by Anita Exter and by James A. G. Beales and Mrs. A. K. Jaffray and her husband, respectively, to the defendant, one dated on the 12th day of February, 1883, and the other on the 3d day of March, 1883. Said deeds are duly recorded in Kinney county. It being admitted that the makers of said deeds were and are the heirs of Dr. John Charles Beales and his wife, Dolores Soto, you are instructed that said deeds are sufficient to convey to the defendants such right as the said heirs then had, and no more. The plaintiff offered said two deeds for the purpose of proving a common source of title, and then produced, as a foundation of his right, a contract made by said Dr. Beales and wife, of one part, and by C. R. Johns and J. C. Kerbey, composing the firm of C. R. Johns & Co., of the other part, dated May 30, 1867. Construing this contract, you are instructed that said contract asserts right in Beales and wife to a grant claimed to be made to Mrs. Beales by the Mexican government in 1834, and also contemplates some defect or want of proof to establish the right claimed by the Beales. The particulars of such defects, and the acts necessary to be done to establish and adjust the title of Mrs. Beales to said tract of land, are not stated, but the obligation of said Johns & Co. is expressed in general terms, and in law bound Johns & Co. to maintain the right claimed by the Beales, and to secure to them the possession of the land. The contract bound Beales and wife, in consideration of the services to be rendered by Johns & Co., to convey to Johns & Co. one-half of all the lands or proceeds thereof recovered by virtue of the Beales claim, and provides that the right of Johns & Co. should vest as soon as said land or any part thereof should be recovered." "(4) You will perceive that the first question to be determined is: Did C. R. Johns and J. C. Kerbey, composing the firm of Johns & Co., or either of them, acting for the firm, do the things required of them by said contract? If, in view of all the facts

and circumstances in evidence in this case you find that Johns & Co. did and caused to be done all that was requisite in the premises, and all that was contemplated by the parties when said contract was made, then a right vested in Johns & Co. as soon as said acts were done, which right, being complete, could be held or transferred by Johns & Co. as other property could be held or transferred by said firm. (5) The plaintiff in this suit claims all the land thus vested in the firm of Johns & Co., except an undivided one-twelfth part thereof, which he concedes is vested in the defendants by the deed of Tom Johns. You will consider in making up your verdict a deed of assignment made by the corporation of C. R. Johns & Co. to A. J. Peeler, which deed is dated December 8, 1876; also a deed from said A. J. Peeler, as such assignee, to Alexander and J. C. Kerbey, dated the 17th day of March. Said deeds are sufficient to and do vest in the plaintiff Alexander and said Kerbey all the interest held by said corporation of C. R. Johns & Co. in the Dolores grant under the Beales contract at the time said deed of assignment was made. You will also consider in evidence a deed from J. C. Kerbey to plaintiff, dated on the 22d day of November, 1883, which deed is sufficient to and does convey to plaintiff Alexander all the interest held by the said J. C. Kerbey." "(7) The defendants, in support of the right claimed by them, have read in evidence two deeds made to them by Anita Exter and by James A. G. Beales and Mrs. Jaffray and her husband. Said deeds are dated, respectively, February 12, 1883, and March 3, 1883. They have also shown that Dr. J. C. Beales and wife are dead, and that the above-named Anita Exter, J. A. G. Beales, and Mrs. Jaffray are the only heirs, and by virtue of said heirship they are the owners of all the right, title, and interest held by Beales and wife in the Dolores grant, subject to such right as Johns and Kerbey, comprising the firm of Johns & Co., or their assignees, had under the contract of May, 1867. Defendants also read in evidence a deed from Thomas D. Johns to them, dated May 5, 1883, which deed conveys to said defendants 3,776 acres of land, being a portion, or one-twelfth interest, of the Dolores grant. (8) And the defendants also produced in evidence a deed from the corporation of C. R. Johns & Co. to them, May 5, 1883, which deed is sufficient to and does convey to defendants all the right in the Dolores grant then held by said corporation, and no more. Likewise a deed from C. R. Johns to defendants, dated May 5, 1883. Said deed is sufficient to and does convey to defendants all the right held by said Johns at the date of said deed in the Dolores grant, and no more. (9) You are further instructed that the two last-mentioned deeds can have no effect upon any previous conveyances made by the corporation of Johns & Co., or by C. R. Johns. Said deeds subsequently made convey such interest only as the gran-

tors had at the date of their execution, and no more. (10) If, therefore, you find from all the facts and circumstances in evidence in this case that Johns & Co. procured the recognition of the Dolores title by the commissioner of the general land-office of the state of Texas, and caused said grant to be platted on the official map of the land-office; and if you further believe from the evidence that Johns & Co. took possession of said land under the Beales title or claim, and adjusted or settled the adverse claims thereto, and that said contract was duly performed by Johns & Co.,—you will find a verdict in favor of plaintiff. (11) If, however, you do not believe from the evidence before you that Johns & Co. did perform said contract, or that such acts as they did were not accepted or acquiesced in as a performance thereof, then you will find a verdict in favor of the defendants. (12) But if you should find that Johns & Co. performed said contract, then you will next consider the extent of the claim made by the plaintiff, and whether the right of Johns and Kerbey (which is assumed to be an undivided one-half, or a six-twelfths of the grant) has become vested in the plaintiff, less one-twelfth, which plaintiff concedes has passed to the defendants through the deed of Thomas D. Johns, as before stated. (13) If you believe from the evidence that Kerbey did, by the consent of all the parties, withdraw a two-twelfths interest or claim in the Dolores grant, and that Johns likewise withdrew by the consent of all the partners a one-twelfth interest in said grant, leaving as partnership property owned by said firm a three-twelfths interest in said grant; and if you further believe from the evidence that the members of said partnership did by mutual consent incorporate themselves under the corporate name of C. R. Johns & Co., and that said partnership assets were by the mutual consent of all the partners thereafter treated and held by them as the property of said corporation, and that said former partners, in lieu of their shares in said partnership, accepted stock in said corporation,—then, if you find that Kerbey was the owner of a two-twelfths interest in said grant, Johns the owner of a one-twelfth interest in said grant, and that the corporation of C. R. Johns & Co. was the owner of a three-twelfths interest in said grant, you will in such a contingency find for the plaintiff the amount of land claimed in his petition, and you will find further that the balance of the land, being the seven-twelfths thereof, belongs to the defendants."

At the request of plaintiff the court gave the following charge: "If the jury believe from the evidence that C. R. Johns and J. C. Kerbey, or either of them, original parties to the contract with Dr. Beales and wife, of date May 30, 1867, have personally or in association with or through the instrumentality of others under their control and direction, performed said contract, or that what they have done has, with the knowledge of

the facts and circumstances, been accepted by Dr. Beales and wife and their heirs and devisees as performance; and if the jury further believe from the evidence that said Johns and Kerbey have by agreement and arrangement with W. von Rosenberg and F. Everett conceded to them an interest of one-twelfth each in the fruits and benefit of such performance, and that by further agreement and arrangement between C. R. Johns, W. von Rosenberg, and F. Everett, three-twelfths interest was passed to the corporation of C. R. Johns & Co., and that said corporation, acting by and through its sole members and incorporators, and said Johns, von Rosenberg, and Everett were at the time such sole incorporators, did convey said three-twelfths to an assignee for the benefit of creditors, and that said three-twelfths was sold by said assignee as the property and interest of the corporation, and was bought in by the said J. C. Kerbey and plaintiff, R. F. Alexander,—then the jury are instructed that as matter of law by reason of the transaction and conduct of the parties as aforesaid the said Johns, Kerbey, von Rosenberg, and Everett, and all persons claiming under them, are estopped from denying that said three-twelfths passed to and was sold by said corporation, and that whatever right, if any, to said three-twelfths at any time vested under said contract in said Johns, Kerbey, von Rosenberg, and F. Everett, or any or either of them, to the extent of three-twelfths thereof, passed to and became vested in the said Kerbey and said Alexander, or purchasers at the assignee's sale as aforesaid. And in this connection the jury are further charged that if they believe from the evidence that the defendants acquired the Beales title with notice of the title set up by plaintiff, and bought the interest of Tom Johns or others, founded upon a recognition of the rights and interests of Johns, Kerbey, von Rosenberg, and Everett, as the corporation of C. R. Johns & Co., as arranged and agreed upon between them, the defendants cannot question such arrangements, and cannot dispute such title as the evidence shows the plaintiff to have acquired under or in pursuance thereof, though this will not prevent the defendants from showing that said title is in other respects invalid."

Defendants requested the following charge, which the court refused to give: "You are instructed that there is no evidence of a written conveyance or a transfer to the corporation of C. R. Johns & Co. of any part of the land involved in this suit, and therefore the plaintiff cannot recover the three-twelfths (3-12) claimed by him through the corporation of C. R. Johns & Co."

The verdict of the jury was as follows: "In the case of Alexander v. Carothers & Searight, we, the jury, find that Johns & Co. performed their contracts with Dr. Beales and wife, and plaintiff Alexander is entitled to five-twelfths (5-12) of the land claimed by him, and we therefore find for the plaintiff."

The sixth, seventh, and eighth assignments

relate to the introduction of evidence, and read as follows: "(6) The court erred in permitting the plaintiff to read in evidence the eighty-seventh interrogatory propounded by plaintiff to the witness C. R. Johns, and the answer thereto, because said testimony, in attempting to prove by parol interests in land, is incompetent and irrelevant. (7) The court erred in permitting plaintiff to read in evidence the third direct interrogatory propounded by plaintiff to the witness C. R. Johns, in his supplemental deposition, and the answer thereto, because the same was incompetent and irrelevant, in attempting to prove a parol conveyance of an interest in land. (8) The court erred in permitting the plaintiff to read in evidence the twenty-fourth interrogatory propounded by plaintiff to the witness W. von Rosenberg, and the answer thereto, and also permitting the plaintiff to read in evidence the second direct interrogatory propounded by plaintiff to the said witness in his supplemental deposition, and the answer thereto. Said testimony was irrelevant and incompetent in attempting to establish a parol conveyance to an interest in land."

The eighty-seventh interrogatory to C. R. Johns, and his answer thereto, read as follows: "*Interrogatory 87.* Did you own any interest in the Dolores grant prior to the purchase by Carothers & Searight of the interest of the Beales heirs? If yea, please state what interest you owned. How was that interest divided? State fully and explicitly. *Answer.* I owned in my own right an undivided one-twelfth interest in the Dolores grant, which was divided as follows, under the original contract with Beales: J. C. Kerbey and myself, who composed the original firm of C. R. Johns & Co., were entitled to one-half of said grant. About 1869 or 1870 we took into the firm of C. R. Johns & Co. W. von Rosenberg and F. Everett, and by arrangement conveyed to them one-twelfth each of said grant; leaving two-twelfths belonging to me and two-twelfths to J. C. Kerbey. A short time thereafter J. C. Kerbey withdrew from the firm, retaining his interest of two-twelfths. Afterwards, to equalize the interests of the remaining partners, I withdrew, and retained one-twelfth interest in my own right, leaving the other one-twelfth interest belonging to the firm, making the interest of C. R. Johns & Co. three-twelfths. Two or three years ago my individual interest of one-twelfth was sold under execution, and bought in by J. C. Kerbey, who afterwards conveyed it to Thomas D. Johns."

The third interrogatory to C. R. Johns, contained in his supplemental deposition, and the answer thereto, read as follows: "*Interrogatory 3.* After the incorporation of the firm of C. R. Johns & Co., in what manner was the interest of the firm or of individual members of the firm in lands, including the Dolores grant, conveyed to and vested in the corporation? Were any formal conveyances

executed by the firm or its members to the corporation for any interest in the Dolores grant? If not, please state what arrangements, if any, were made touching this grant. *Answer.* The same answer I made to interrogatory second I make this. I was of the impression that deeds were executed, but my memory now does not enable me to say positively and definitely on this point. I suppose that the assignee of C. R. Johns & Co. would have in his possession whatever deeds and papers were executed in this matter. I only know that it was intended that everything owned by the firm did pass to and was owned by the corporation; all the property owned by the firm of C. R. Johns & Co. was passed to the corporation, and each member of the firm, to-wit, Johns, Everett, and Rosenberg, received in lieu thereof twenty-five thousand dollars of paid-up stock in the corporation; making the entire stock of the corporation seventy-five thousand dollars."

The answer of the witness von Rosenberg to twenty-fourth interrogatory contains the following statement: "At reorganization of the firm of C. R. Johns & Co., in 1869, C. R. Johns and J. C. Kerbey agreed that the junior members of said firm, to-wit, F. Everett, and W. von Rosenberg, should have together an equal interest with each of them,—that is, the half interest in said grant belonging to C. R. Johns & Co. was to be held as follows: C. R. Johns, one-third; J. C. Kerbey, one-third; F. Everett, one-sixth; and W. von Rosenberg, one-sixth. In 1872 J. C. Kerbey withdrew from said firm, taking with him his interest in all lands or rights to lands then held by contract or otherwise by C. R. Johns & Co. The remaining members have always recognized J. C. Kerbey's interest in the Beales grant as one-third of one-half. In 1875 the firm of C. R. Johns & Co. dissolved by forming the corporation of C. R. Johns & Co., consisting of C. R. Johns, F. Everett, and W. von Rosenberg; each member conveying an equal amount of property to said corporation. C. R. Johns, F. Everett, and W. von Rosenberg each conveyed to said corporation one-sixth of one-half of said Beales grant, so that the said C. R. Johns & Co.'s one-half interest in said Beales grant was then held as follows: Corporation of C. R. Johns & Co., one-half of the one-half interest, or one-fourth of the whole; C. R. Johns, one-sixth of the one-half interest, or one-twelfth of the whole; J. C. Kerbey, one-third of one-half, or one-sixth of the whole."

All of this evidence was objected to as an attempt to prove an unwritten conveyance of land. The court overruled the objection, and admitted the evidence. The last witness testified that neither Johns nor Kerbey executed deeds to himself or Everett; that "no papers were ever passed" between said parties. He also testified that "the possession of the Dolores grants, by tenants, was uninterrupted from 1867 to 1876." On the 1st day of January, 1875, proceeding under the laws of this state, C. R. Johns, F. Everett, and W. von

Rosenberg created a corporation named "C. R. Johns & Co.," for the purpose of carrying on a "real estate, general, and collecting agency, and in addition thereto, as a separate, distinct branch of business, banking and exchange, and to perform such operations as are necessary and usually incident to said purposes." No written conveyances of the land in controversy appear to have ever been made to said corporation. On the 8th December, 1876, the corporation of C. R. Johns & Co., in consideration of its insolvency, made to A. J. Peeler an assignment of "all and singular the lands, tenements, hereditaments, real estate, and interest therein and chattels real of the said corporation lying and being situate in the state of Texas, as the same are described and enumerated in Schedule A, hereunto annexed; but for a more full description of said lands reference is here made to the deeds and title papers pertaining thereto, now in possession of said party of the first part, which are to be delivered to the said party of the second part, and also all other lands and real estate and interest therein belonging to the party of the first part, if any such there be, not included in said schedule, though said schedule is designed and believed by the party of the first part to contain a correct enumeration of all such lands, and interests therein belonging to it."

The only reference in the deed of assignment or attached schedule that can be applied to the land in controversy occurs at the end of Schedule A, in the following words: "Our interest in Beales grant, 80,000 acres @ 30 cts., 24,000." The body of the assignment is signed as follows:

"C. R. JOHNS, Pres.

[Seal.]

"C. R. JOHNS & Co.

"A. J. PEELER.

"Attested: W. VON ROSENBERG."

It was acknowledged on registration by C. R. Johns, and recorded. Schedule A purports to contain a list of lands belonging to C. R. Johns & Co.,—C. R. Johns, F. Everett, and W. von Rosenberg. On the 17th day of March, 1879, A. J. Peeler, as assignee of the corporation of C. R. Johns & Co., under the said deed of assignment, sold and conveyed to J. C. Kerbey and R. F. Alexander land described as follows: "All the right, title, interest, and claim, legal and equitable, of the said corporation of C. R. Johns & Co. in and to a certain eleven-league grant of land granted to Dolores Soto de Beales by the [Spanish] Mexican government on the 15th day of April, 1834; the said grant being situate in Kinney county, state of Texas, on the Las Moras creek," and further describing the land by metes and bounds. On the 22d day of November, 1883, J. C. Kerbey deeded to plaintiff, R. F. Alexander, all of his "right, title, interest, and claim, estimated at thirteen thousand one hundred and eighty-four acres of land, and part of the Dolores Soto de Beales eleven-league grant, situated on the Las Moras, in Kinney county, state of Texas; said amount being an undivided interest in

said eleven-league grant of one-sixth thereof, by virtue of original contract and conveyance by J. C. Beales and Dolores Soto de Beales to C. R. Johns and J. C. Kerbey, and also by virtue of a deed from Thomas D. Johns to said J. C. Kerbey, [a tax-title,] and an undivided interest of C. R. Johns & Co., conveyed to J. C. Kerbey and R. F. Alexander by A. J. Peeler, assignee of C. R. Johns & Co." On the 5th day of May, 1883, C. R. Johns conveyed to defendants Carothers & Searight, by quitclaim deed, all of his right, title, and claim in and to the Dona Dolores Soto de Beales 11-league grant in Kinney county, Tex. On the same date Thomas D. Johns conveyed to defendants an undivided one-twelfth interest in the same grant that had been conveyed to him by J. C. Kerbey, who had previously purchased it at a sheriff's sale made under a judgment and execution against C. R. Johns.

It will be seen that plaintiff's claim of title to an undivided five-twelfths of the land depends upon the following state of facts: (1) The contract between Beales and Kerbey and Johns, dated 80th day of May, 1867; (2) the performance of their part of said contract by Johns and Kerbey; (3) a conveyance by Johns and Kerbey of three-twelfths interest in the 11 leagues to the partnership of C. R. Johns & Co., when composed of C. R. Johns, J. C. Kerbey, F. Everett, and W. von Rosenberg; (4) a conveyance of the last-named three-twelfths interest by the firm of C. R. Johns & Co., when composed of C. R. Johns, F. Everett, and W. von Rosenberg, to the corporation of C. R. Johns & Co.; (5) a conveyance of the same three-twelfths interest by the corporation of C. R. Johns & Co. to A. J. Peeler; (6) a conveyance of the same interest by Peeler to Alexander and Kerbey; and (7) a conveyance of his interest by Kerbey to Alexander. Some of the required links are not in writing, and unless some state of facts exists relieving this title from that requirement, it must be held defective in so much as it depends upon parol transfers. The court, by permitting evidence of transfers not in writing to go to the jury over objections, and by its charge that those in whom the written transfers vest the legal title are estopped, under the circumstances in proof, from denying that the title to the three-twelfths interest passed first to the partnership, and then to the corporation of C. R. Johns & Co., relieved the transactions in question from the operation of the rule requiring them to be in writing. We are unable to see anything in the facts of this case creating a title by estoppel, either in the firm of C. R. Johns & Co., of which Everett and von Rosenberg were members, or in the corporation of the same name. A number of individuals owning lands do not, by the mere act of associating themselves together as partners, invest the firm with a title to their real estate. Nor can a firm, by the mere act of incorporating themselves by the same name, invest the corporation with the title to the

real estate owned by the firm. Nothing more appears in this case than that, when the owners of the land desired to transfer the title to a partnership, and when the partnership afterwards desired to transfer the same title to a corporation, instead of making the conveyances in writing it was attempted to be done by verbal agreements, which the parties afterwards acquiesced in, and did nothing more. This does not, any more than any other parol agreement for the sale of land, create a title, legal or equitable, by estoppel or otherwise. The rule that land belonging to a partnership, under some circumstances and for some purposes, is treated in equity as personal property, cannot control or affect the question before us. When the rule does apply, it has a limited operation, confined to the administration and adjustment of partnership affairs, and does not affect the mode or change the law regulating the transfer of the title, which must still be in writing. In order that the equities of partners, whatever they may be, may be applied to their real estate, it is not necessary to hold that in their transactions with regard to it the statute of frauds is abrogated, or that the links in the chains of title coming through a partnership need not be in writing. 1 Devl. Deeds, § 50; Pars. Partn. 367-369.

The court committed error in its rulings with regard to the admission of evidence, and in giving charges recognizing that the firm or the corporation of C. R. Johns & Co. had acquired any title under the circumstances of this case; and likewise erred in refusing to give the charge on that subject requested by defendants. In other respects, with regard to title, we think the charge was correct, except that the court should have construed the contract, and might well have gone so far as to instruct the jury that the contract, in connection with the uncontradicted evidence of what was done and caused to be done under it by Johns and Kerbey, was sufficient to vest in them the equitable title to one-half of the 11-league grant. It follows that, though Kerbey and Alexander acquired nothing through the conveyance of A. J. Peeler to them, because neither the corporation nor the firm that it succeeded had acquired any part of the title of Johns or Kerbey, that Kerbey, instead of holding title only to the two-twelfths that he had never pretended to transfer to the firm, also owned the one-twelfth which he had proposed to transfer, but had not in fact done so. We think his deed to Alexander, undertaking to convey a larger interest than he really owned, was good and effective to convey the three-twelfths interest that he did in fact own. Notwithstanding C. R. Johns was in some respects in the same position as Kerbey with regard to the title, he was not so in all. Notwithstanding he, as president of the corporation, signed the deed purporting to convey an interest of the corporation in the land, when he, and not the corporation, owned the land, we do not think that deed, under the circumstances of this

case, carried his interest by estoppel. The form and terms of the deed influence us to this conclusion. If it had been an absolute conveyance of the entire interest in the land by the corporation, and the deed had been executed by Johns as president of the corporation, when he himself owned the property, we think the deed would have passed his title by estoppel. But in fact the deed only assumes to convey the right of the corporation to an undefined and indefinite interest, and at the same time recognizes an undefined interest in the same land in C. R. Johns that it does not convey. This, we think, must prevent the deed from operating on the interest of Johns, and from conveying anything save the interest of the corporation. A proper construction of the evidence leads, we think, to the conclusion that the plaintiff established title to three-twelfths of the land in controversy, and the defendants to the remaining nine-twelfths. The court erred in not granting defendants a new trial. We do not think it useful to discuss in detail all of the assignments of error. What we have said indicates our views of the material aspects of the case, and, except as referred to in what we have said, we have not found in the record before us what we consider material error. The judgment is reversed, and cause remanded.

#### NOTE.

STATUTE OF FRAUDS—CONTRACTS RELATING TO LAND—PART PERFORMANCE. The doctrine that part performance of a given character will take an oral contract relating to land out of the statute of frauds is thus stated by a prominent legal writer, whose language is quoted with approval in the case of *Hunter v. Mills*, (S. C.) 6 S. E. Rep. 907: "A verbal contract for the sale or leasing of land, if part performed by the party seeking the remedy, may be specifically enforced by courts of equity, notwithstanding the statute of frauds. The ground upon which the remedy in such cases rests is that of equitable fraud. It would be a virtual fraud for the defendant, after permitting the acts of part performance, to interpose the statute. \* \* \* The acts of part performance, therefore, in order to satisfy this principle, must be done in pursuance of the contract, and must alter the relations of the parties." Equity protects a parol gift of land as well as a parol contract of sale, if accompanied by possession, and the donee makes valuable improvements. *Dozier v. Matson*, (Mo.) 7 S. W. Rep. 283, and note. See, also, *Young v. Young*, (N. J.) 16 Atl. Rep. 921, and note; *Frame v. Frame*, (W. Va.) 9 S. E. Rep. 901. But the improvements must be substantial and valuable, and exceed the value of the rents, *Wooldridge v. Hancock*, (Tex.) 6 S. W. Rep. 818; and if the gift is made to take effect after the death of the donor, who retains possession until her death, it is ineffectual, though the donee make valuable improvements, *Id.* A decree of specific performance is necessary to pass the legal title to land which is the subject-matter of such a gift, so as to give a right to maintain ejectment therefor. *Hovell v. Elsberry*, (Ga.) 5 S. E. Rep. 96. In *Bradley v. Owaley*, (Tex.) 11 S. W. Rep. 1052, *HENRY, J.*, quotes from a former opinion in which *MOORE, J.*, said: "Although it is usual to say that part performance takes a case out of the statute of frauds, it is now, we believe, universally conceded that such is not the ground upon which the courts of equity go in such cases. It certainly has never been contended in this court that equity can enforce such a contract upon any other ground than that of preventing fraud." In that case it was held that where a purchaser entered into possession under a parol

contract after payment of the price, but made no valuable improvements, specific performance would not be decreed; and in *Stub v. Grimes*, (Minn.) 37 N. W. Rep. 444, mere taking possession was held not sufficient. In *Hunter v. Mills*, supra, taking possession and making improvements was held sufficient. See, also, cases cited in note to that case. In *Cloud v. Greasley*, (Ill.) 17 N. E. Rep. 826, complainant had agreed to furnish materials, and erect a house for defendant, in consideration of the conveyance of a tract of land. It was held that he was not entitled to specific performance where he had furnished a part of the materials, and done a part of the work only, though he was willing to complete his contract, and had entered on the land.

The contract must be certain and definite; the acts of part performance must have been done in pursuance thereof, and the contract must have been so far executed that a refusal to complete it would operate as a fraud. *Gallagher v. Gallagher*, (W. Va.) 5 S. E. Rep. 297; *Recknagle v. Schmalz*, (Iowa,) 33 N. W. Rep. 865; *Wallace v. Scoggin*, (Or.) 31 Pac. Rep. 558. Part performance to satisfy the statute is not shown where the purchaser has paid no part of the consideration, and, being a tenant, has continued in possession without surrendering the lease, and has made no improvements, except slight repairs to the roof to prevent its leaking. *Messmore v. Cunningham*, (Mich.) 44 N. W. Rep. 145. Where there is a sufficient part performance as against the vendor, an action may be maintained against his representatives after his death without executing a deed for specific performance. *Everett v. Dilley*, (Kan.) 17 Pac. Rep. 661.

Marriage is not in itself sufficient part performance of an oral contract by the parties thereto to convey land to avoid the operation of the statute. *Peek v. Peek*, (Cal.) 19 Pac. Rep. 227; *Adams v. Adams*, (Or.) 20 Pac. Rep. 633; but marriage of one of the parties to a contract to a third person in pursuance of the promise of the other party to the contract to convey land is a sufficient part performance. *Slingerland v. Slingerland*, (Minn.) 39 N. W. Rep. 146. Joint residence by husband and wife on land which, before the marriage, the man agreed to convey to the woman in consideration of marriage, will not take the contract out of the statute. *Peek v. Peek*, supra. An oral agreement between a husband and wife to make a particular disposition of their real property by will is binding on the wife after full performance by the husband, and the acceptance of the benefits thereof by the wife. *Carmichael v. Carmichael*, (Mich.) 40 N. W. Rep. 173. A parol promise to devise all one's property to a child, made to the child's father in consideration of his allowing the promisor to adopt the child, being void under the statute of frauds, is not enforceable in equity, though the child lived with the promisor as his daughter till her marriage, but never had possession of the property. *Pond v. Sheean*, (Ill.) 23 N. E. Rep. 1018.

Where, in pursuance of a verbal contract for the sale of land, a deed is executed and accepted, an action may be maintained for the price. The statute of frauds does not apply to such a contract. *Niland v. Murphy*, (Wis.) 41 N. W. Rep. 335; and payment of part of the price and taking and retaining possession of the land by the vendee takes such a contract out of the statute. *Lipp v. Hunt*, (Neb.) 14. A parol partition between tenants in common, under which each has taken possession of his allotted share, is valid. *Bruce v. Osgood*, (Ind.) 14 N. E. Rep. 563. In *Ducie v. Ford*, (Mont.) 19 Pac. Rep. 414, it is held that it is not a sufficient part performance of a verbal contract to convey a half-interest in a mine, to relinquish possession thereof, and abstain from filing a claim thereto; also that payment of the price is not *per se* a sufficient part performance. Payment of the price, accompanied by the vendee's possession, is not a sufficient part performance, where the possession is not taken in pursuance of the alleged oral contract. *Boozar v. Teague*, (S. C.) 3 S. E. Rep. 551; see, also, *Clark v. Clark*, (Ill.) 13 N. E. Rep. 553; but where possession is taken, and lasting and valuable improvements are made by a vendee, with the consent of the vendor, specific performance

will be decreed. *Burns v. Fox*, (Ind.) 14 N. E. Rep. 541. The improvements must be beneficial to the estate, and of a permanent character. *Gallagher v. Gallagher*, supra. For an exhaustive note on the subject of what is sufficient part performance of an oral contract relating to lands, to warrant specific performance, see *Martin v. Patterson*, (S. C.) 3 S. E. Rep. 859, and note.

### CASSIDY et al. v. KLUGE et al.

(Supreme Court of Texas. March 12, 1899.)

LIS PENDENS—RES ADJUDICATA—TRESPASS TO TRY TITLE.

1. The doctrine of *lis pendens* applies in Texas, where citation has been published for the time required by law, and the officer has made his return, and the petition affecting land is filed, though defendant has till the next term of court to answer.

2. A matter which determines the right to a second suit as to the title to land cannot be set up in the second suit as *res adjudicata* by virtue of the former suit.

3. In trespass to try title by the sole heir of an intestate, the administrator is a proper party plaintiff.

Commissioners' decision. Appeal from district court, Travis county.

*Walton, Hill & Walton*, A. W. Terrell, and A. S. Walker, Jr., for appellants. *Hancock, Shelly & Hancock*, for appellees.

COLLARD, J. The original suit was filed in the district court of Travis county, October 15, 1858, against John King, a resident of Arkansas. Citation by publication was issued, which was published in the *State Gazette*, a weekly newspaper published in Travis county, for the time required by law. It was returned by the sheriff prior to the first Monday in December, 1858, which was the first day of the fall term of the district court. Subsequent to this, but before the next term of the court, King, having the apparent title to the part of lot 5 in controversy, executed to S. M. Swenson a mortgage upon the same to secure an amount of \$1,200. This mortgage was afterwards foreclosed, the property sold, and bought in by Swenson. Mrs. Kluge deraigns her title from Swenson. She intervened in the original suit in 1883, setting up her title through the Swenson mortgage. On the 23d of June, 1885, the supreme court, affirming the judgment of the court below, rendered final judgment for the part of lot 5 in favor of Mrs. Kluge; the court holding that Swenson had no notice of the rights of the Cassidy estate to the premises by virtue of the "memorandum" executed by King to Thomas Cassidy in 1856, because the instrument was not recorded until after Swenson took the mortgage, and that *lis pendens* did not apply, because the record before the court did not show that there had been any service of citation upon King, by publication or otherwise, at the date of the mortgage. The record before the court did not show the facts of service by publication that are now before us, the parties assuming that the filing of the petition was the beginning of the suit, and that *lis pendens* would apply from that time, but the court decided that the doctrine of *lis pendens* would not apply until



after service of citation. The present suit was then brought, as a second suit of trespass to try title, within one year after the final judgment was rendered in the supreme court. The trial judge, upon Mrs. Kluge's plea of *res adjudicata*, decided that the judgment of the supreme court was final and conclusive, and that plaintiff was precluded from a second suit. This ruling was appealed from, and is the prominent point in the case. At the time the original suit was brought the plaintiff under statute was allowed a second suit of trespass to try title after losing the first. The Revised Statutes took away this right to second suit, (Rev. St. art. 4811,) but it did not prejudice the right of parties plaintiff in suits then pending to their second suit. Mrs. Kluge intervened in the original suit of Cassidy v. King, in 1883; the Revised Statutes being in force. It cannot be denied that she came in asserting title that was in the original defendant King at the time of the return of the sheriff, showing complete service of the citation by publication upon him. She claims from King by virtue of his mortgage to Swenson, and if *lis pendens* is applicable she can be in no better attitude than King if he were alive and defending. She would be entitled to the same defenses he would be, and none other. She took his place in the suit as defendant, so far as the title to part of lot in controversy is concerned, subject to all the equities of the Cassidy estate against it in the hands of King. We have no doubt of the proposition that suit was pending at the date of the mortgage by King to Swenson affecting all the parties with notice of Cassidy's claim upon the premises. The citation had been published for the time required by law, and the officer had made his return. The defendant King was allowed by law until the next term of the court in which to answer, but he was none the less served at the date of the mortgage as fully as he ever would be. Pasch. Dig. art. 1508. From this it must follow that the judgment of the supreme court in favor of Mrs. Kluge in the original suit was not final, but that this second suit could be maintained against her for the title to the premises; her title being subject to the right of Mrs. Cassidy, who owns and represents all rights of Thomas Cassidy, deceased, under the "memorandum" of King to him, and subject to such settlement as Cassidy was entitled to with King by virtue of the terms of the "memorandum," which recognizes Cassidy's equitable title to the land therein described, charged with certain debts due by Cassidy to King. When the case was before the supreme court it did not appear that there had been any service of any character upon King at the date of his mortgage to Swenson, and the fact was so adjudged by the court. This judgment in the former suit, deciding, as it did, a fact which if true would deprive plaintiff of the right to a second suit, cannot be set up as *res adjudicata*, any more than any other fact determined by the judgment. The

fact upon which the right to a second suit depends may be shown in the second suit, though adjudged in the former suit not to exist.

We do not think the court below erred in dismissing King's administrator from the case. King had in his life-time disposed of all the interest he had ever had in the premises. Mrs. Kluge holds the rights he had under the "memorandum," and can make the same defenses he could make if he had not disposed of his claim, and none other; and no judgment could be taken against King's estate for any balance that may be due, if any, to Cassidy's estate. To hold King's administrator as a party defendant could serve no useful purpose. We do not think it was improper to dismiss him. The suit was brought February 23, 1886, by James B. Cassidy, as administrator *de bonis non* of the estate of Thomas Cassidy, deceased, and Sarah J. Cassidy. It is alleged that Thomas Cassidy died in August, 1858, intestate, leaving petitioner, Sarah J. Cassidy, his surviving wife, and one child, which died in infancy, leaving its mother, Sarah J., sole heir; thus showing that she is the only real party plaintiff having any interest in the subject-matter of the suit. Upon exception of defendant, the court dismissed the administrator from the suit as an unnecessary party; it being apparent that the estate had no interest in the property sued for. We are not advised for what purpose the administration of the Cassidy estate has been kept alive. It may have been for purposes of this suit. It does not appear that the administration has ever been closed, and that the property in dispute has been ordered to be delivered to Mrs. Cassidy. Without deciding whether the administrator was or not a necessary party, we think he was a proper party plaintiff with Mrs. Cassidy. We are of opinion that plaintiffs have the right to a second suit, and that the cause should be reversed, and remanded for trial.

STATTON, C. J. Report of commission of appeals examined, their opinion adopted, judgment reversed, and cause remanded.

#### NOTE.

The following is the opinion in the case of King v. Cassidy, referred to in the opinion of Judge COLLARD, filed June 23, 1885:

WILLIE, C. J. It is insisted by the appellants that the decision made in 1872, (36 Tex. 531,) upon the first appeal taken in this cause, is conclusive of the rights of the parties upon all the material questions arising on the present appeal. The only question before the supreme court upon the first appeal was as to the correctness of the ruling of the district court sustaining a demurrer to the defendants' answer. Upon reversing this ruling, the court had no authority to treat the allegations of the answer as true, and direct the judgment below to be entered accordingly. It could only remand the cause for a new trial, in accordance with the principles of the decision, and its mandate must be so construed. Upon a new trial below, judgment went for the present appellant. Upon appeal from this judgment, the cause having been submitted to the commissioners of appeals for their award, the point was distinctly



taken that the previous decision of the court was decisive of all the questions brought in review and passed upon by that decision. The commissioners failed to sustain this point, held that they could reopen these questions, and proceeded to announce the law to be directly the reverse of what the supreme court has previously held. They thereupon awarded that the judgment be reversed, and the cause remanded for a new trial. Upon the next trial the court below, proceeding in accordance with the views of the commissioners, rendered judgment for the administrator and widow of Thomas Cassidy. Upon appeal from that judgment it is insisted that we must overrule the decision of the commissioners, because they erred in disregarding the previous decisions of the supreme court, and that we must adhere to the original decision without regard to its correctness, and must not examine into the reasons upon which it is founded. The statute creating the commission makes their award the law of the particular case submitted to them, but provides that it shall not be authority in any other case. It has the same binding force in the particular case that our opinions have in cases determined by us. Their decision in this suit had the effect of determining that, so far as the present case is concerned, the law is that the first decision of this court may be disregarded, and the principles of that decision may be overruled. What our ruling would be in another case, or if the question were an open one upon this appeal, it is unnecessary to intimate. We simply hold, in accordance with the views of the commissioners, that in this case the decision made in 1872 is not binding upon this court, and that we may proceed with its adjudication in the same manner as if no such decision had ever been made.

We concur with the commissioners in construing the "memorandum" signed by King to be a security for the debts mentioned in the instrument. It is true that at the time it was made King held the legal title to the Austin lots described in the "memorandum." But Cassidy had owned or claimed them; had incumbered them with liens; had allowed them to be sold at execution sales; and to one of them there was a claimant who disputed Cassidy's original acquisition of that particular. Col. King and his partner Duval held a large debt, and Duval alone held a small one against Cassidy, which were not liens upon the Austin lots, or upon any other property, so far as appeared from the "memorandum." The evident intention of the instrument was to make the two debts of King and Duval a charge upon the property equally with the incumbrances already placed upon it by Cassidy. The instrument itself bears testimony as to the facts and objects that gave it birth. The lots were valuable, and probably sufficient to pay off the liens with which they were incumbered, and King and Duval's debts also, if the titles to the property claimed by others could be extinguished. Hence the opposing titles and lien claims were bought in by King, he paying for them in the manner pointed out by the recitals of the "memorandum." Having the full legal title in himself, and being the owner of all the incumbrances upon the lots, there certainly was no necessity for King to solemnly charge his own property with debts due to himself, and to provide that when he sold the lots, and paid himself these debts out of the proceeds, another party should be entitled to the balance, unless that party had some interest in the property. It is not reasonable to suppose that he would also provide that another should have full title to the property, if he paid off the incumbrances within a certain time, unless such person had some claim to the property, or there was a previous agreement that this provision should be inserted in the instrument. The only conclusion to be drawn from the face of the instrument itself, especially when taken in connection with the admitted facts of the case, is that King, wishing to create a lien upon the lots to secure the debts of himself and Duval, placed the title to the land, as well as to the incumbrances upon it, in himself, with the understanding that when all these debts

should be paid, Cassidy was to have the property back, or such of its proceeds as should remain after all the debts and incumbrances upon it were satisfied. This is borne out by his own answer, which, however, need not necessarily be resorted to for proof upon this subject. Call this a mortgage, a deed of trust, or an assignment, or by whatever other name we choose, it was a clear declaration on the part of King that he had bought in the legal title, for the purpose of accomplishing certain objects, and the fulfillment and execution of certain trusts. He agreed to hold the property in trust for the following purposes: (1) To allow Cassidy two years within which to redeem it by paying off all incumbrances; (2) in default of such redemption, to sell it himself, and pay off previous incumbrances, as well as his and Duval's previously unsecured claims; (3) to allow Cassidy the privilege of selling the property within two years, the proceeds to be applied to the payment of said claims; (4) after paying all said claims and the expenses of the trust, to pay to Cassidy the balance of the proceeds of the property. In this instrument are found all the elements of a security for the payment of pre-existing debts. These debts are recited. The property once Cassidy's is not to be his again in absolute title till these debts are paid. If necessary to sell the property to pay these debts, Cassidy is to have the balance remaining after their payment. He virtually has the equity of redemption in the premises. If he does not redeem by paying within the two years, King does not get the property, but must still sell it, and in a certain contingency Cassidy is to share in the proceeds. It is not, therefore, a conditional sale. It is in effect an agreement by King in the consideration of having his and Duval's debts charged upon the property to hold it in trust (1) for the payment of the enumerated debts, and (2) for the benefit of Cassidy himself. It is true that Cassidy had been divested of all his title to the lots before King bought. But King obtained the title for the purpose of securing himself, and, after he was satisfied, of allowing his purchase to inure to the benefit of Cassidy. He invested Cassidy with an equity, to take effect immediately upon the satisfaction of his own claim.

The transaction was in effect the same as if the parties had resorted to the more circuitous method of having the lots conveyed to Cassidy by those holding title thereto, and the incumbrances transferred to King; there being a conveyance of the lots made by Cassidy to King, and an agreement made by King to Cassidy to hold in trust as in the present instrument. Equity looks at the substance, not the form, of such instruments; and as in the one case the form of the transaction would place the equitable title in Cassidy, and create a trust in the lots to pay the several debts enumerated, so in the other, the substance of the transaction and the real intention of the parties bring about the same effect. *Ruffier v. Womack*, 30 Tex. 383; *Alstin v. Cundiff*, 52 Tex. 453; *Loving v. Milliken*, 59 Tex. 423; *Perry, Trusts*, §§ 82, 95, 96; 3 *Jones, Mortg.* § 16; *Fish. Mortg.* 2.

The commissioners having remanded the cause for a new trial, the question before the district court was, what are the rights of the various parties if the instrument is treated as a mere security for the payment of debts? We cannot see that King's administrator had any title in the property left, worth contending for. He had sold to Hancock his title to the north half of lot 4, and Swenson had bought at foreclosure sale his title to the south half of lot 5. The questions demanding our decision on this appeal are as to the validity of the titles acquired through King by the intervenors Hancock and Mrs. Kluge. The "memorandum" made by King was not recorded till March 8, 1859. At the time it was made, viz., December 1, 1856, the apparent title to the property was in King. All persons dealing with King in reference to the property between these two dates must be protected, unless notice of Cassidy's interest was brought to them in some legal manner. Hancock bought in 1869, and of course cannot upon his deed alone claim to be a purchaser without

notice. The considerations paid by him were wholly foreign to anything like a payment of the debts mentioned in the original agreement. His purchase, too, was made more than 10 years after this suit had been commenced, and was at issue between the parties. He took, therefore, subject to Cassidy's rights, and to the final determination of the present cause. It is clear, therefore, that Hancock's rights are such only as attached to him by reason of the sale made by George Hancock to King in 1856, and the execution of the note by the latter to Hancock for the purchase money. Hancock did not intervene till June, 1871, after this note was barred by limitations, and the plaintiffs expressly set up the bar in answer to his intervention. There was no reservation of a lien in the deed or note which was given at the time of the sale by Hancock to King. Hence the contract of sale was executed; the title passed to King; and Hancock held a mere vendor's lien upon the land to secure the payment of the note. In default of its payment the vendor could not reclaim the land, but could only foreclose his lien by suit, and have the premises sold to satisfy it. *Ransom v. Brown*, 68 Tex. 188; *Webster v. Mann*, 53 Tex. 416; *McKelvain v. Allen*, 58 Tex. 883. His debt was subject to the bar of limitation in the same manner as any other debt, and when that had become complete his lien and remedy by foreclosure were gone, and, the title having previously vested in his vendee, there was no reason why the lot should not be set aside in lieu of a homestead, as in case of any property held by indefeasible title. The debt of Horan having been satisfied, there was no other claimant holding such lien upon the north half of lot 4 as would prevent it from being set aside to Mrs. Cassidy in lieu of a homestead. The court, therefore, did not err in deciding in her favor a recovery of a portion of the property in controversy.

Mrs. Kluge claims under Swenson, through deeds made subsequently to the record of the "memorandum." Her title must therefore stand or fall accordingly as Swenson's right to the land was acquired with or without notice of the "memorandum" of agreement between King and Cassidy. Swenson took his mortgage prior to the record of the "memorandum," but subsequent to the commencement of this. The first question for decision then is, was Swenson a mortgagee *pendente lite*? At the time he took the mortgage, so far as the record shows, nothing had been done in the case except to file the original petition. There is nothing to show that King had ever been served with process, and, if the original answer was filed by King, it was subsequent to the date of Swenson's mortgage. Unless, therefore, the *lis pendens* began with the filing of the petition, Swenson was not affected by it. In the case of *Board v. Railway Co.*, 46 Tex. 827, it was said that "in some of the courts, when *lis pendens* dates from the service of the subpoena and filing of the bill, the suit or action is begun by issuing the subpoena or other process, and not, as with us, by the filing of the petition,—a bill setting forth the cause of action." It was intimated that for this reason a different rule might prevail with us, and the *lis pendens* be held to commence from the filing of the petition. In England, as well as in the United States courts, and, with perhaps one or two exceptions, in all the state courts, suits in chancery are commenced by bill, which prays for the subpoena to be afterwards issued. Yet so far as we have been able to discover, without a single dissent, notice by *lis pendens* does not take effect till the subpoena is served. Anonymous, 1 Vern. 819; *Murray v. Lylburn*, 2 Johns. Ch. 445; *Murray v. Ballou*, 1 Johns. Ch. 576; *Bailey v. McGinniss*, 57 Mo. 362. See *Wade, Notice*, § 348, and authorities cited in note 2. In some of the states suits are commenced as in our own, by filing a petition, and in others by issuing a writ; but without regard to the act by which the suit is commenced for other purposes it seems to be universally held that, for purposes of notice by *lis pendens*, it does not begin till service of process, or its publication in case of an absent defendant. *Lyle v. Bradford*, 7 T. B. Mon. 112; *Ben-*

*net v. Williams*, 5 Ohio, 461; *Goodwin v. McGehee*, 15 Ala. 241; *Metcalf v. Smith's Heirs*, 40 Mo. 575. Against such an array of authorities we should not feel inclined to oppose one unsupported opinion under any circumstances, but we see no reason to doubt their correctness upon principle. We think, therefore, that Swenson was unaffected by any notice of this suit at the time the mortgage was executed.

When Swenson brought suit to foreclose his mortgage the "memorandum" was on record. This did not affect his rights under the mortgage, but it is said he should have made Cassidy's administrator party to the suit. The only effect of his failure to do so was to leave in Cassidy's estate all such right as it could have asserted had the administrator been made a party. Subject to this right Swenson transmitted his title to his vendee, and it finally reached the intervenor Kluge. Whatever this right in Cassidy's estate may have been, his administrator could have asserted it against Mrs. Kluge in the present case. Had Cassidy's administrator been made party to the mortgage suit, all the defense he could have set up was his intestate's equity growing out of the agreement with King. This equity the administrator has pleaded in the present case, and has had all the advantage of it here that he could have obtained from it in the mortgage suit. It could not have availed him there against Swenson, who took his mortgage without notice of the equity; it cannot avail him in this suit for the same reason. We think judgment should have been rendered for Mrs. Kluge for the one-half lot claimed by her. In the view we have taken of the case the admission of the answer of King, if error, was unimportant. There is enough evidence in the case without it to sustain the finding of the court against Hancock's title, and the facts stated in the answer have not affected our ruling upon the title of Mrs. Kluge.

We express no opinion upon the decision of the commissioners as to the necessity of presenting to Cassidy's administrator the claims stated in the "memorandum." We reserve our views upon that question till a case shall arise in which it shall be necessary for us to put them upon record.

It is ordered that the judgment of the court below, so far as it deems a recovery in favor of Mrs. S. B. Cassidy against King's administrator Lewis Hancock be affirmed, and that in so far as it deems a recovery in favor of the administrator of Thomas Cassidy against Mrs. Kluge it be reversed; and the court, proceeding to render such judgment here as should be rendered below, orders and decrees that the appellees take nothing by their suit against the said Mrs. Kluge, and that she be quieted in her title to the south half of lot No. 5, in block 10, city of Austin, and recover her costs in this behalf expended in this court and the court below.

Justice West did not sit in this case.

BOOKER v. HART *et al.*

(Supreme Court of Texas. May 28, 1889.)

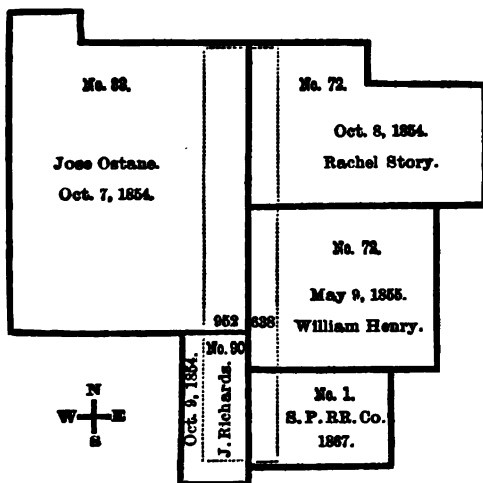
#### BOUNDARIES.

Plaintiff alleged a vacancy of 1,590 *varas* between two surveys having a common east line and three others lying to the east of them. Four of them were made by one surveyor, at about the same time, and all, by mutual use of the same lines and corners, were evidently intended to have a common line, and to include the whole territory. No marked lines were found on the ground, and, to locate their exterior lines by measurement from identified corners of adjacent surveys, several thousand *varas* distant to the east and west, and measuring the required distances towards the interior, the vacancy would exist as asserted. But, measuring from other nearer identified corners of like surveys, the discrepancy on one side of the line would be trifling. There was evidence from which the court might well find, as it did, that a pile of stones claimed by defendants as a corner in the common line was such corner. No vacancy was shown on the county map. Held, that the

identified corner of the surveys in question must prevail over measurements from contiguous surveys, and, while there was an apparent excess of land in some of the surveys, there was no vacancy.

Commissioners' decision. Appeal from district court, Archer county.

Appellant P. A. Booker, plaintiff below, brought this suit against J. P. Hart, appellee, by *mandamus* to compel Hart, who was the county surveyor, to make surveys of land claimed by Booker to be vacant, upon which he had filed certificates. Parties claiming the land where the vacancy was alleged to be were made parties defendant. Plaintiff contends that there is a vacancy between the Jose Ostane and John Richards on the west, and the Rachel Story, the William Henry, and the Southern Pacific Railroad surveys on the east. Defendants claim there is no vacancy. The plat below represents the surveys as defendants claim them to be, the dotted lines showing the alleged vacancy. All these surveys were made by the same surveyor, Twitty, (except the Southern Pacific Railroad survey,) on the dates marked on the plat.



The Jose Ostane survey was made October 7, 1854; the Rachel Story, October 8, 1854; the John Richards, October 9, 1854; the William Henry, May 9, 1855; and the Southern Pacific Railroad Company survey in 1867. The Jose Ostane survey, of one league, made October 7, 1854, is described as follows: "Beginning at the N. E. corner # 90, a pile of stones, from which a mesquite mkd. 'X' brs. N., 19 E., 50 vs.; thence west 4,445½ vs., the N. W. corner of # 106, on the east line of # 92; thence N. 5,841, to the S. W. cor. of # 82; thence E. 1,900 vs., to S. E. corner of # 82; thence S. 370 vs., to S. W. cor. of # 72; thence E. 2,545½ vs., to N. W. corner of # 72; thence S. 5,471, the beginning." The Rachel Story survey, made October 8, 1854, of one-half league and one-half labor, is described as follows: "Beginning at the N. W. corner of survey N. 71, Newton county school land; thence S. 2,188 vs., a corner; thence W. 4,622 vs., a corner

in the east line of # 83, in the name of Jose Ostane; thence N. 3,309 vs., the N. corner of the same; thence E., on the S. line of N. 76 & 77, at 2,566 vs., the S. E. corner of # 76; thence S. 1,126 vs., the S. W. corner of # 73, made in the name of H. Corzine; thence, on the south line of the same, to the beginning, 2,056 vs." The John Richards survey, of 640 acres, made October 9, 1854, is described as follows: "Beginning 663 vs., N. from the S. W. corner of # 72, a pile of stone, from which a mesquite brs. N. 19, E. 50, vs.; thence west 1,362 vs., a stake, from which a mesquite brs. S., 36 W., 36 vs.; thence S. 2,683, a stake, from which a bunch of mesquite brs. S., 49 W., — vs.; thence E. 1,362 vs., a cor.; thence N. 2,653 vs., to the place of beginning, bearings mkd. 'X.'" The William Henry survey, made May 9, 1855, of 1,564-6-10 acres, described as follows: "Beginning at the S. W. corner of Rachel Story survey # 72; thence E. 3,135, A. cor. of said Rachel Story survey; thence S. 2,820 vs., a cor.; thence W. 3,135 vs., a pile of stone for corner; thence N. 2,820 vs., to the beginning." The survey of 640 acres, made for the Southern Pacific Railroad Company in 1867, is described as follows: "Beginning at the S. W. corner of a survey made for Wm. Henry on the E. line of John Richards survey # 90; thence S. 1,900 vs., to a stake in prairie; thence E. 1,900 vs., to a stake in prairie; thence N. 1,900 vs., to a stake in the south boundary line of a survey in the name of Wm. Henry; thence W. 1,900 vs., to the beginning." The Henry S. Smith survey, made October 4, 1854, is a parallelogram 1,900 *varas* north and south, by 1,800 *varas* east and west. Its S. W. corner is identified by an elm west 250 *varas*, marked "X." The Barnwell survey of 640 acres lies south of the Smith, having its north-west corner identified by the S. W. corner of the Smith, and the Elm bearing, made October 4, 1854. The Corzine survey, made on the 7th October, 1854, begins at the N. W. corner of the Barnwell, identified as before stated. This survey of 3,107 acres extends by called distance 3,758½ *varas* west of the Barnwell, and runs around the S. W. corner of the Barnwell, in the form of an L, 408 *varas* on its south line. The Rachel Story, already described, forms an L around the S. W. corner of the Corzine. Defendants claim that the N. E. corner of the John Richards # 90, which is also the S. E. corner of the Ostane, is identified by a pile of rock from which a mesquite bears N., 19 E., 50 *varas*. The evidence of plaintiff is that measuring from the N. W. corner of the Barnwell to the stone mound, said to be the N. E. corner of the Richards # 90, there is too much westing by 150 *varas*. Defendants' evidence makes this excess of westing from the Barnwell corner only 30 *varas*. Beginning at the Rine survey, several thousand *varas* east of the Barnwell, the westing in excess of the calls to the stone mound is 638 *varas*. Measuring from known corners from the west, and so establishing the west line

of the Ostane, the excess of easting in the Ostane to the stone mound, 952 *varas*. The stone mound or pile of stones is claimed by defendants to be the N. E. corner of the Richards survey, and the S. E. corner of the Ostane, and the evidence tends to establish this fact. The court so found the fact, and thus located the east line of the Ostane and the Richards, which runs due north and south, called for by the Rachel Story and the Henry surveys on the west, and which also fixes the west line of the Southern Pacific Railroad survey. According to this finding there was no vacancy where plaintiff located his certificates. Judgment for defendants. Plaintiff appealed. The errors assigned relate to the court's findings and the judgment. Other necessary facts are stated in the opinion.

*F. E. Dycus* and *J. Jenkins*, for appellant.  
*L. W. Hart, Barrett & Stine*, and *Hunter & Stewart*, for appellee.

COLLARD, J., (*after stating the facts as above.*) Appellant, Booker, the plaintiff below, claims that the vacancy he is contending for is obtained by the excess of land found between the west lines of the Rachel Story, the William Henry, and the Southern Pacific Railroad surveys, and the east line of the Jose Ostane and J. Richards surveys; the vacancy being, as he says, 1,590 *varas* wide. Defendants claim that these surveys join, and that there is no vacancy between. Locating the division line where defendants claim it to be, plaintiff says that the excess on the east side of the Ostane and Richards would be 952 *varas* wide, and on the west side of the Story, the Henry, and the Southern Pacific Railroad would be 638 *varas* wide. To show the excess on the east side of the Ostane, plaintiff attempts to establish its west line from known corners of other surveys, and then its east line by distance. The Ostane has no marked lines, and, according to plaintiff, no corners found on the ground. He determines the position of its N. W. corner by measuring from the N. W. corner of survey # 182, a found corner, 8,430 *varas* east, and south 788 *varas*, the distance called for in the field-notes of # 182 and other surveys, to the point where the S. W. corner of survey # 82 should be, which is called for in the Ostane as its N. W. corner. This point is found only by measurement, as before stated; but plaintiff testifies it is nearly in line with the N. W. corner of the J. Nelson survey, whose N. E. corner plaintiff locates by its call for the creek, the N. W. corner of the Nelson # 106 being called for in the Ostane as its S. W. corner. Plaintiff's testimony also fixes the N. E. and N. W. corners of the Nelson by course and distance from the N. E. corner of survey # 103, well identified, and to the south some 5,400 *varas*. By this means he locates the west line of the Ostane, and contends that its east line can only be located by distance 4,445½ *varas* to the east. The lines and cor-

ners of the Rachel Story (which must govern the Henry and the Southern Pacific Railroad, are not found on the ground, but plaintiff attempts to establish its east line by beginning at the S. W. corner of survey # 57, in the name of J. M. Rine, some 13,000 *varas* to the east, a well-identified corner, and then measuring the distances given in the field-notes of other survey to obtain the connection for the east line of the Story. The called distance from the east to the west line of the Story is 4,622 *varas*, placing its west line something over 17,000 *varas* from the Rine survey. Thus approaching the alleged vacancy from the east and from the west from undisputed corners, an excess is found to exist. If, therefore, we had nothing more before us, and no other means of locating these surveys, it might be necessary to adopt the apparent mathematical demonstration of plaintiff, and decide with him in favor of the vacancy.

But there are other facts to be considered which, under the rules of law, will compel us to adopt a different conclusion. The Ostane survey was made October 7, 1854; the Story, on the day following; and the Richards, on the next day,—all made by the same surveyor, Twitty. The Ostane calls to begin at the N. E. corner of the Richards at a pile of stone from which a mesquite tree marked "X" bears N., 19 E., 50 *varas*; thence it runs west 4,445½, to the N. W. corner of the Nelson survey # 106, etc. The Story's third corner calls to be in the east line of the Ostane, and runs thence north, the course of the Ostane line to its N. E. corner. The N. E. corner of the Richards is identical with the S. E. corner of the Ostane, having the same witness tree. So we see that the surveyor who made these surveys gives them a common boundary north and south. The William Henry survey, made less than a year after these, by the same surveyor, calls to begin at the S. W. corner of the Story, and runs in such a manner as by its calls to leave no possible vacancy between it and the Ostane and the Richards on the west. The Southern Pacific Railroad survey begins at the south-west corner of the Henry on the east line of the Richards, and runs thence south 1,900 *varas*, necessarily with the east line of the Richards, leaving no vacancy between the two by the calls.

In this line of proof it should be noticed that the authorized maps of the county show no vacancy. It was evidently the intention of the surveyor who made the surveys in 1854, as well as those made afterwards, to include all the land claimed by plaintiff. It seems to us that the excess of westing in measuring from the Rine corner to the west line of the Story must be charged to other intermediate surveys,—if not all of it, at least the greater part of it. The N. W. corner of the Barnwell survey, made only a few days before the Story, on the 4th of October, 1854, is an identified corner. \* Its place on the

maps in evidence is only 1,701 *varas* east of the east line of the Story, as claimed by defendants. The excess in westings from this corner of the Barnwell to the stone mound and line claimed by defendants to be the corner, and on an extension of the west line of the Story, is, according to plaintiff's own testimony, only 150 *varas*, and according to testimony offered by defendants only 30 or 40 *varas*. Such a trifling excess, be it 150 or 40 *varas*, would be unimportant in such a distance. There is no reason to suppose that all the excess of westing must fall on the Story, if any weight is to be given to the evidence of identity of the Barnwell corner; on the contrary, the reason is against it. So we see the excess in the Story is slight, when its west line is run as defendants claim it was. The vacancy claimed is then practically reduced to the excess of the Ostane and Richards, claimed by plaintiff to be 952 *varas*. But defendants say the N. E. corner of the Richards survey, which is the S. E. corner of the Ostane, is located by the evidence where they claim it to be, and, if this be true, the east boundary of these surveys is fixed, and no vacancy can exist where plaintiff says he finds it. In the original calls this corner is "at a pile of stone from which a mesquite bears north, 19 east, 50 *varas*." This corner is 663 *varas* north from the S. W. corner of survey # 72, evidently the Henry. A pile of stone is found on the ground where defendants claim the corner to be, but no mesquite tree is there now; but there is ample evidence to justify the finding of the court that it once stood on the right course, and only four *varas* further off than stated in the field-notes, a discrepancy shown to be immaterial. The evidence also was that this was, for years before this suit was brought, recognized, by persons who ought to know, as the Richards and Ostane corner, and that it was not questioned until this suit was brought. There was a conflict in the evidence as to this corner. Plaintiff and others could find no evidence of the tree ever having stood there, but other testimony shows unquestionably that it was once there. The court below found that this was the corner, and we see no reason why this finding should be disturbed. In such case we need not look to other surveys at a distance away for the lines of the surveys in dispute; they are all incontestably fixed by this corner. Other facts and deductions from them disclosed in the record have no value in comparison with this one fact. This gives us the disputed line, a common boundary of the Ostane and Richards on one side, and the Story, the Henry, and the Southern Pacific Railroad on the other, dispelling the idea of any vacancy between them. The evidence strongly tends to show that there is an excess of land in surveys west of this line,—how far west or on what surveys we are not called on to decide. It is sufficient for this case that all the land in dispute was appropriated by these surveys long before plaintiff's locations were

made. It might be added that a mere excess does not always indicate a vacancy. When the limits of a survey can be certainly known by its own description, or by other undisputed contiguous surveys, the excess, unless considerable, will not constitute a vacancy. *Freeman v. Mahoney*, 57 Tex. 622; *Reeves v. Roberts*, 62 Tex. 550; *Moore v. Stewart*, 7 S. W. Rep. 771; *Booth v. Upshur*, 26 Tex. 70; *Fagan v. Stoner*, 67 Tex. 236; 3 S. W. Rep. 44; *Lilly v. Blum*, 70 Tex. 704, 6 S. W. Rep. 279. The judgment of the court below is supported by the evidence, and our opinion is it ought to be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

### CUSHNIG v. SMITH.

(*Supreme Court of Texas. May 21, 1889.*)

#### PRACTICE—STIPULATIONS.

A stipulation between the parties to an action of trespass to try title, that the "only issue is one of boundary and identification of plaintiff's and defendant's real estate," eliminates the question of the statute of limitations from the case.

Commissioners' decision. Appeal from district court, Bexar county.

Trespass to try title by Dan P. Smith against Gustave Cushnig. Judgment for plaintiff, and defendant appeals.

*Oscar Bergstrom*, for appellant. *Tarleton & Keller*, for appellee.

ACKER, P. J. Appellee brought this action of trespass to try title on the 29th day of November, 1886, to recover of appellant lot 2, in block 11, in the city of San Antonio. Appellant answered by plea of not guilty and the five and ten years' statutes of limitation. On the trial an agreement in writing was entered into between the parties, in which it was admitted that appellee owned the lot described in his petition, and that appellant owned lot 3, in the same block. It was also stipulated in the agreement that "the real and only issue is one of boundary and identification of plaintiff's and defendant's real estate." The trial was without a jury, and judgment rendered for appellee for the strip of land in controversy, about nine or ten feet wide, the same being a part of lot 2 owned by appellee, from which this appeal is prosecuted. The court filed no conclusion. The only assignment of error is: "The court erred in rendering judgment for plaintiff [appellee] for the strip of ground in appellant's inclosure, having a front of ten and eight-tenths (10.8) feet on Jackson street, and running back inside of appellant's inclosure, to the Upper Labor ditch, and having a front thereon of nine and one-half (9½) feet, because appellant had good title thereto, by reason of the statute of limitations of ten (10) years." Appellee contends that the written agreement eliminated the defense of limitation, and left the question of the boundary

between the two lots the only question in the case. We do not think the language of the agreement admits of any other construction than that contended for by appellee. No evidence was offered upon the trial that was at all inconsistent with this construction, or with the entire good faith of the agreement. The court having filed no conclusion, we are not informed of the ground upon which the judgment rests, but we think it is fully sustained by the construction we place upon the agreement, and the evidence adduced upon the trial. We are of the opinion that the judgment of the court below is correct, and that it should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

**BRADFORD et al. v. TAYLOR.**

(Supreme Court of Texas. May 28, 1889.)

**FRAUDULENT CONVEYANCES—SALES—DELIVERY.**

1. Plaintiff sued defendants for money due by defendant J., and sought to compel payment by defendant B. of the value of goods sold by J. to him, alleging that the sale was not consummated, and that it was fraudulent as to J.'s creditors. Defendants were partners, and owed debts; J. being insolvent, while B. was solvent. They dissolved, J. taking the assets and assuming the debts, giving his note to B. for his interest. Afterwards J. borrowed money of plaintiff, and, about three weeks after the dissolution, J. sold, or feigned to sell, the goods to B. again, in payment of the note, B. agreeing to take the goods at their cost, and, after paying his note and the unpaid firm debts, to pay J. the residue of the value of the goods, and it was these transactions that were attacked as fraudulent; plaintiff also claiming to have levied an attachment on the goods before they were delivered to B. Plaintiff offered to prove that the money loaned by him to J. was advanced to pay firm debts, which J. had agreed to pay, and was used for that purpose, and that B. had never refunded it. *Held*, that the evidence was admissible, as bearing on the *bona fides* of the sale by J. to B., and tending to support plaintiff's allegation that the transaction was intended to allow B. to retain the goods, and to relieve him from liability for the firm debts.

2. The testimony of J., given on a former trial, in which he stated that he had told a third person, in B.'s absence, two days before the sale to the latter, that he would have to sell out or turn the property over to B., and detailed the terms of the contract with the latter, and what was done pursuant thereto, with reference to invoicing and executing a bill of sale, is inadmissible; as such testimony was only the declaration of a vendor after parting with his property, and could not bind B.

3. Even as to J. himself, the testimony is irrelevant, as his liability for the debt was not questioned.

4. After admitting such evidence, defendants were entitled to introduce the balance of J.'s evidence given on the former trial relative to the same subject.

5. The court charged that if J. delivered actual possession of the goods to B., who by himself or agents took exclusive possession or control, against J., the delivery would then be complete. At defendants' request the court instructed that if J. was indebted to B. in a sum equal to the value of the goods, and before the levy of the attachment B., in good faith, agreed to buy at the invoice prices, and exclusive control of the goods was then taken by B., and nothing remained to be done but to take an inventory to ascertain the price, the title would pass to B., in the absence of fraud. *Held*, that these instructions sufficiently informed

the jury that the possession of B.'s agents would be equivalent to his own possession.

6. The goods, to the value of \$810, having been levied on and replevied by B., and converted by him, upon determining that they were subject to levy for J.'s debt it was proper to render judgment against B. on his replevy bond for \$581, the amount of the debt.

Commissioners' decision. Appeal from district court, Williamson county.

Suit brought by Emzy Taylor against F. S. Jordon and C. C. Bradford, April 2, 1883. On the 6th July, 1886, by amendment, plaintiff alleged, in substance, that the defendants entered into copartnership in Georgetown, under the firm name of Jordon & Bradford, to carry on a grocery business; that they were indebted to plaintiff and other parties to the extent of \$2,000; that on March 12, 1883, Jordon was insolvent, and Bradford solvent; that to defraud plaintiff and relieve Bradford they dissolved the partnership by Bradford selling out to Jordon, Jordon assuming the firm debts; that the money sued for was loaned to Jordon at the request of Jordon & Bradford, \$300 of which was paid by Bradford on the pretended purchase, the balance being used in the payment of the firm debts; that after the pretended dissolution Jordon drew the five checks sued on, on plaintiff engaged in banking business, aggregating \$58,125, which plaintiff paid out of his own funds; that in furtherance of the design to defraud plaintiff, on April 2, 1883, Bradford pretended to buy Jordon's interest; that the sale was not completed until April 3, 1883, after plaintiff had levied an attachment on the goods; that the sale was made to defraud plaintiff, and Bradford knew it; that the sale was without consideration; that the property, of the value of \$3,800, was converted by Bradford to be disposed of for their joint use; that on the 3d of April, 1883, plaintiff caused to be levied on \$810 worth of the property an attachment, which property on same day was replevied by Bradford, and that Bradford had converted same to his own use, etc.

To this petition appellant Bradford answered by denial under oath that the partnership of Jordon & Bradford existed at the date of any of the said checks, or that any of said checks were drawn by his authority, or the authority of said firm, or for him or the firm; that in 1882 he and Jordon entered into a copartnership; he invested \$1,700, and Jordon \$600; that on the 12th of March, 1883, and before the execution of either of the checks sued upon, the firm was dissolved, appellant selling his interest in the business to Jordon for \$300 cash. Jordon's note for \$1,700, and Jordon assuming the payment of all firm debts; that this sale was *bona fide*, there being no collusion to defraud any one; that the payment of all debts of the firm was then provided for; that the firm owed plaintiff nothing; that Jordon bought out appellant's interest at plaintiff's suggestion, plaintiff being Jordon's adviser, kinsman, and friend; that on the 2d of April, 1883, appellant being informed by Jordon that he could not pay the

\$1,700 note to appellant and the debts he had assumed, Jordon offered to sell out to appellant; that appellant bought the entire stock of goods at the invoice or cost price thereof, and the book accounts at their real value, and agreed to pay therefor the debts yet due by the firm of Jordon & Bradford, (which Jordon had assumed, and which, as between them, were Jordon's debts,) which were represented by Jordon to be \$1,940, and the \$1,700 note due appellant by Jordon, or so much thereof as the same would pay, and, if anything remained after paying these debts, it was to be paid in money to Jordon; that the sale was absolute and complete, and the property delivered to appellant on the morning of April 2d, before the institution of this suit or the levy of the attachment; that the inventory was completed on the morning of April 3d, showing the aggregate cost price of the property, including the value of the notes and accounts, to be \$3,500; that appellant deducted from this the \$1,940 of accounts due by the firm, and credited Jordon's note with \$1,560; that the purchase was open, fair, and *bona fide*; that appellant at once paid off the said firm debts, which in reality aggregated \$2,377.47; that all of said debts and the \$1,700 note were just debts then owing by Jordon; that appellant paid, in the manner stated, \$3,837 for the property; that same was not worth more than \$2,500; (6) that appellant did not know that Jordon was indebted to plaintiff, or to any other person, except the debts appellant assumed; that the sole and only purpose appellant had in buying said property was to save himself; that on the morning of the 3d of April, after the sale was completed and the possession of the property actually delivered to appellant, the plaintiff caused a writ of attachment to be levied upon a part of the property so bought by appellant; that appellant did not owe plaintiff anything, and the property was not subject to attachment for Jordon's debts. F. L. Jordon answered by general denial.

A verdict was rendered for plaintiff against Jordon & Bradford for \$581.25, with 8 per cent. interest from April 3, 1883. Of this amount plaintiff afterwards remitted \$112.40.

The evidence on the trial was, substantially: The five checks sued on,—one for \$300, dated March 12, 1883, payable to Bradford; three checks dated, respectively, March 14th, 20th, and 23d, payable to Steele & Sparks, aggregating about \$281.20; and one check for \$10, dated April 2, 1883, payable to Murray. These were drawn by defendant Jordon on plaintiff, and paid by the latter out of his individual funds. Jordon & Bradford were engaged in the mercantile business as partners, in Georgetown, from September, 1882, to March 12, 1883. Bradford had invested about \$1,700, and Jordon about \$700. On that day the stock appears to have been worth about \$3,000. They had, while partners, dealt with plaintiff as their banker. Jordon was insolvent; Bradford, solvent. The firm was indebted on March

12th, but to what extent is not clear. On that day Jordon purchased the interest of Bradford, executing therefor his note for \$1,700, which was to be paid in monthly installments of \$300. He assumed also the payment of the firm debts. Jordon informed Bradford that he would get the means from plaintiff to pay the first installment of \$300, and to assist him in making the trade. The defendants saw Taylor, and told him of the trade. Taylor agreed to furnish the money to Jordon to pay the firm debts, understanding that they amounted to a few hundred dollars, but knew nothing of the \$1,700 note executed by Jordon to Bradford. The checks were all paid by Taylor, amounting to \$581. The \$300 check was paid to Bradford by plaintiff. The checks in favor of Steele & Sparks were drawn by Jordon in settlement of debts due by the firm of Jordon & Bradford, which he had assumed. Jordon also stated that he was carrying on the business on April 3, 1883. That the plaintiff on that day, about 6 o'clock A. M., attached a part of the same. Jordon had the keys of the house in which the goods were levied on. That he commenced a sale of the goods to Bradford on April 2, 1883, and a bill of sale was executed on the 3d of April, about noon. He sold to B., to secure a claim held by him, the \$1,700 note. B. paid no money. A separate bill of sale was given for the books and accounts. The goods and books invoiced about \$3,800. The note given by Jordon to Bradford for \$1,700 on March 12th was not surrendered to Jordon by Bradford when the sale was made on April 3, 1883. Jordon was insolvent at that time, which fact was known to Bradford. When the attachment was levied, Bradford was at Round Rock. Jordon had the keys, and unlocked the door where the goods were for the officer to make the levy, on April 3, 1883. On cross-examination Jordon stated that the sale was begun on April 2, and the keys and bill of sale delivered April 3, 1883. The attachment was levied on about \$810 worth of goods, as shown by the officer's replevin. The goods were replevied by Bradford on April 3, 1883. Bradford's evidence with reference to the sale of the goods to him by Jordon, on April the 2d or 3d, was, in substance, that he bought the goods from Jordon to secure the claim he held against him of \$1,700,—the note given by Jordon at the sale of March 12, 1883. That the stock of goods amounted to about \$2,300, and the accounts \$300 or \$400. That the terms of the sale were that he assumed the payment of the old firm of Jordon & Bradford's debts, estimated to be about \$1,940, the excess to be credited on Jordon's note. Stock was to be taken, and he was to pay the cost price marked. If the goods footed up more than sufficient to pay the old notes, he was to pay Jordon the excess. A bill of sale was to be made to Bradford as soon as an inventory of the stock was taken. This was on the 2d of April. The inventory was not taken until the 3d of April, after the attachment was levied on that morning.



Bradford testified that he put clerks in possession of the goods and store on April 2d, and received the proceeds of sale on that day, and rented on the same day the store. That he paid about \$2,800 of the debts of the firm, and realized about the same on the goods, and credited the \$1,700 note of Jordon with \$1,500. That both sales—that of March 12 and April 3, 1883—were made in good faith. That Jordon retained no interest in the goods. That he did not know Jordon owed Taylor anything. That he was trying to save his own debt. That he thought, from an examination of the goods, there were enough to pay the debts, and gave no thought to the imaginary excess. But if there had been any excess he was to pay Jordon at the invoice prices. It was also testified to by Jordon that they were to divide any excess in the goods. That the amount of debts assumed by Bradford was about \$2,100. That there were about \$600 of debts due him on the books. He had never called on Bradford for a settlement. Makemson testified to the terms of the sale, and that the bill of sale was prepared on the 2d of April, but was not delivered, because the invoice of the goods had not been taken. That Bradford placed clerks in possession of the stock of goods, and rented the house, on the 2d of April. The bill of sale was executed on the 3d of April by attaching the invoice of goods to it. There was testimony showing that Bradford had possession through Strayhorn, Murray, and clerks, and sold goods on the 2d of April, 1883, and the proceeds were delivered to Bradford.

The testimony of the witness Jordon, to the effect that "the checks drawn by him in favor of Steele & Sparks, and paid by plaintiff, were drawn in payment of drafts on Jordon & Bradford, that he did not owe Steele & Sparks, and that Bradford did not refund the money to him," was objected to by defendant Bradford, which was overruled, and it is assigned as error, as also the testimony of this witness that he expected after the business was settled up that Bradford would repay him, as the agreement was to that effect if anything was left over and above; and that the checks were given for the debts due by the firm of Bradford & Jordon prior to their dissolution of March 12, 1883, and were the debts assumed by Jordon, and which fact Taylor was informed of when he paid the checks. The grounds of objection were that the testimony was irrelevant and prejudicial to defendant Bradford during the trial. The testimony of defendant Jordon, given on a former trial, was offered in evidence by plaintiff, with reference to the sale made by him to Bradford on April 3, 1883, as follows: "On Saturday before April 2d [which was Monday] I told Murray I would have to sell out or turn over to Bradford, and that I would do the best I could for him, [Murray,] and try to get him into business. The agreement between Bradford and myself was to take the goods at invoice price. He was

to pay the old firm debts. We were to take an invoice, and then I was to give a bill of sale. It was also agreed that we were to divide any excess over the debts. We finished the invoice on the 3d, and then I gave a bill of sale." This was objected to by defendant Bradford, because not admissible for any purpose; the only issue being as to the ownership of the goods attached, and Jordon asserted no rights herein. It was hearsay, irrelevant, and calculated to prejudice the rights of Bradford. The objection was overruled, the evidence admitted, and this is assigned as error. And also that "(4) the court erred in excluding from the jury, on objection of plaintiff, other parts of the same statement made by Jordon at the same time, and referring to the same subject-matter as that introduced by plaintiff, which was offered by this defendant, as shown by the fourth bill of exceptions."

After plaintiff had read in evidence to the jury the matter set out in the last preceding statement as Jordon's declarations, explaining the sale to Bradford of the goods, etc., appellant offered to read to the jury a part of said Jordon's same statement, made at the same time, and relating to the same subject, as that introduced by plaintiff. The statement offered was already proven up by plaintiff, and was as follows: "On the 2d of April, 1883, I sold the stock of goods, including the goods levied upon by plaintiff, to defendant C. C. Bradford. Capt. Strayhorn, George Allen, and Robert Murray were employed by Mr. Bradford, and George Allen and myself commenced at once, on the morning of the 2d of April, to take invoice of the stock of goods. Mr. Bradford was to give me the invoice price of the goods, and a bill of sale was to be executed. We did not get through taking stock that day. At night I offered to give the key I had to Capt. Strayhorn, whom I understood to be in possession of the goods for Mr. Bradford, but he preferred that I should keep the key until we got through with the invoice. It was my understanding that I only had the key, and that the possession of the goods was delivered to Bradford on the morning of April 2, 1883. Bradford had employed Capt. Strayhorn, Messrs. Allen and Murray, as clerks, and they were put to work in the house on the morning of the 2d of April, soon after the sale was made. On the 3d of April, after we completed the invoice, a bill of sale was made. It was not made on the 2d, because we did not know the amount the invoice would foot up. When we knew the amount of the goods on the morning of the 3d of April, we made the bill of sale, and attached thereto the inventory of the stock. Strayhorn had quit three weeks before April 2, 1883, and was employed by Mr. Bradford on the morning of April 2d, and was placed in charge of the house. Strayhorn was not in my employ on April 2d. I understood that he was in Bradford's. I think Bradford had Murray employed. I was to get for the goods from Bradford the



amount of the invoice when taken." The other assignments relate to the charge of the court, and are set forth in the opinion.

*J. H. Robinson and Makemson & Price*, for appellants. *Fisher & Lowmes*, for appellee.

**HOBBS, J.**, (after stating the facts as above.) Appellee, Taylor, brought this suit against F. L. Jordon and C. C. Bradford, to recover the sum of \$581 advanced and loaned to Jordon on five checks drawn by Jordon on plaintiff. It was alleged that the checks were executed by authority of defendant Bradford, who was alleged to have been a partner of Jordon. This was denied under oath. There was no proof of liability upon the part of Bradford growing out of the execution of the checks sued on. Besides a recovery of the judgment for the amount paid by plaintiff on the checks, the petition sought to subject to an attachment lien (against Bradford to the extent of the judgment obtained against Jordon) certain goods levied on by plaintiff as the property of Jordon, and which were replevied by Bradford. This attachment was levied by plaintiff on the property on April 3, 1883. Bradford claimed the goods by virtue of a sale of the same to him by Jordon, made on April 2, 1883. The question in the case was whether there was a complete consummated sale by Jordon to Bradford prior to the levy of the writ of attachment, and whether the sale was a fraudulent one. The grounds relied upon by appellee for a recovery, as against Bradford, were—*First*, that there was no such complete sale as the law recognizes to be valid prior to the levy; and, *second*, that if the sale was consummated in legal form it was a fraudulent sale and purchase of the same, made with the intent to deprive appellee of the collection of his debt. Upon these issues the testimony was conflicting, and, as no assignment questions the sufficiency of the evidence to support either, a statement of the facts with reference to them would seem to be unnecessary. There was a verdict and judgment for the amount sued for in favor of plaintiff against both Jordon and Bradford, from which this appeal is taken upon assignments relating to the admission and exclusion of evidence and to the charge of the court.

The first and second errors assigned relate to the admission of the court over the objections of the defendant Bradford of the testimony of the defendant Jordon, and that of the plaintiff, Taylor, to the effect that the money sued for was advanced by plaintiff, Taylor, to Jordon to pay the firm debts; that the checks drawn by Jordon in favor of Steele & Sparks, and paid by Taylor, were in settlement of debts which Jordon & Bradford owed, and which Jordon assumed the payment of at the time of the sale by Bradford to Jordon on March 12, 1883. The objections to this evidence were that it was irrelevant, and calculated to prejudice the rights of defendant Bradford. The contention of appel-

lee was that the conveyance of Jordon to Bradford on April 2, 1883, and the former conveyance of Bradford to Jordon on March 12, 1883, were fraudulent and colorable, and were made with the intent to relieve Bradford, who was solvent, of liability for the amount of debts, which the firm was bound for, and which were paid by Taylor in advancing the money for that purpose to Jordon. It was proven that Bradford received \$300 of the money advanced by Taylor; that he had access to the books, and knew when he bought from Jordon on April 2, 1883, that they showed the amounts which Taylor had loaned Jordon to pay the debts he had assumed in the trade with Bradford, of March 12, 1883; and it was also in evidence that Bradford assumed the old firm debts in buying Jordon out. It was certainly admissible, in support of the issue raised as to the good faith or fraud in this last sale, to show that the old firm debts which Bradford assumed as part of the consideration paid in buying from Jordon had been paid with the money advanced by Taylor. Jordon, it is true, was alone individually liable for the money loaned him by Taylor, and it would be ordinarily immaterial and irrelevant as to what disposition was made of the money. But upon the issue of fraud, and as a circumstance tending to indicate it, it was not irrelevant to show that when Bradford bought Jordon out in April, 1883, a part of the consideration paid by him was the assumption of firm debts, which under a previous sale by him to Jordon had been assumed by Jordon, and which the evidence showed he must have known had been paid to the extent of the money loaned by Taylor; \$300 of that amount having been paid to Bradford in person, and \$281 paid by Taylor on the drafts in favor of Steele & Sparks, which liquidated the firm debts of Jordon & Bradford to that extent. In view of the fact that the defendants were partners in business, and the charge that the sale from Bradford on March 12th, who was solvent, to Jordon, who was not, was for the purpose of obtaining the money from plaintiff to assist Jordon in the payment of the firm debts, and that the conveyance by Jordon to Bradford in April was with the alleged intent to place the property beyond the reach of plaintiff, and relieve Bradford of liability for such debts, we think the testimony was admissible.

The third and fourth assignments relate to the admission of the court, over the defendant's objections, of the evidence of Jordon given upon a former trial of this cause, and the exclusion of the same witness' evidence when offered by the defendant, given at the same time, and in relation to the same subject-matter. It appears that the deposition of the defendant Jordon taken in this case had been read by the plaintiff in support of his allegations with respect to the sale of the goods by him to Bradford in April, 1883; and his testimony taken from a statement of facts prepared upon a former appeal was of-

ferred and read, to the effect that "on Saturday preceding the sale, which was on Monday, April 2d, I told Murray I would have to sell out, or turn over to Bradford. I would do the best I could for him, [Murray,] and try to get him into business. The agreement between Bradford and myself was to take the goods at invoice prices. He was to pay the old firm debts. We were to take an invoice, and then I was to give a bill of sale. It was also agreed that we were to divide any excess over the debts. We finished the invoice on the 3d, and then I gave the bill of sale." This was objected to by defendant Bradford, because the only issue in the case was whether the property levied on was subject to Jordon's debt, and Jordon claimed no legal right in the property, and Jordon's declarations could not be used to the prejudice of Bradford. We think there was error in the admission of this evidence. These statements were but the declarations of the vendor, after he had parted with his title to the property, and were not made in appellants' presence, and could not be used to affect the title of the purchaser. *Schmick v. Noel*, 64 Tex. 408. It is contended that they were admitted only as against Jordon. If so, they were immaterial and irrelevant, as the liability of Jordan was shown by the checks offered in evidence, and the payment of them, shown by plaintiff. As the testimony related to the character of the transaction and sale between Jordon and Bradford, on April 2, 1883, it could only have affected the rights of Bradford involved in this issue.

After these declarations had been offered as explained, defendant Bradford offered the statement of the same witness from the same statement of facts, as follows: "On April 2, 1883, I sold the goods [including those levied on] to Bradford. Strayhorn, Allen, and Murray were employed by Bradford. Allen and I commenced at once, on morning of April 2d, to take invoice of stock. Bradford was to give me invoice price, and a bill of sale was to be executed. We did not get through taking stock that day. At night I offered the key to Strayhorn, whom I understood to be in possession of the goods, for Bradford, but he preferred that I should keep the key until we got through with invoice. It was my understanding that I only had the key, and that the possession of the goods was delivered to Bradford on morning of April 2, 1883. Bradford had employed Strayhorn, Allen, and Murray as clerks, and they were put to work in the house on the morning the sale was made. On April 3, 1883, we completed invoice and bill of sale was made. It was not made on the 2d, because we did not know the amount the invoice would foot up. When we knew the amount of the goods on the 3d of April, we made bill of sale and attached the inventory," etc. Such is the material part of the statement offered by the defendant, and which, upon objection by the plaintiff, was excluded. The deposition of this witness had been already used by plaintiff, and his

testimony appears to be that which was mainly relied on to establish the alleged fraud of the sale, and also to show that the sale was not completed before the levy of the attachment, on April 3, 1883. He had testified to many circumstances indicating that there had not been a change of the possession and control of the property from himself to Bradford prior to the levy. He was the plaintiff's witness, and we think the defendant should have been allowed to have in full his testimony by the introduction of the statements referred to. There being in this case no objection to the evidence, on the ground that it was a part of a statement of facts prepared and compiled at a former trial of the cause, then if that part of it, used by the plaintiff, had been admissible in his behalf, any portion of the declarations by the same witness, relating to the same subject, made at the same time, would unquestionably have been admissible for defendants.

The remaining assignments necessary to be disposed of relate to the charge. It is objected that the jury were not instructed that Bradford had the right to buy to save himself, even if Jordon intended to defraud his other creditors. On the contrary, the court charged the jury as follows: "If, however, Bradford, being a creditor of Jordon, took the goods for the sole purpose of securing his own debt, and took them at reasonable value, and in reasonable quantity, then having the right to collect his debt and protect himself, the title would pass to Bradford, and any subsequent levy would be invalid against such title." It is also objected that the charge fails to define what would constitute a delivery of the property under the facts in this case, and should have charged the jury that if Bradford or his agents were in possession of the goods, and Jordon remained only to assist in taking an inventory, the delivery was sufficient. In the tenth paragraph of the charge the jury were instructed, in substance, that if Jordon delivered actual possession of the goods to Bradford on the 2d of April, and Bradford and his agents on said day had exclusive possession and control against Jordon, then the delivery would be complete, etc. The court also, at appellants' request, instructed the jury that, "if Jordon was indebted to Bradford in a sum equal or greater than the value of the goods, and before the levy of the attachment Bradford in good faith agreed to buy at the invoice prices, and the property was delivered, and exclusive control was taken by Bradford, and nothing remained to be done except to take an inventory to ascertain the aggregate price, the title would pass to Bradford, and the goods would not be subject to levy in the absence of fraud." The general charge we think sufficiently conveyed the idea to the jury that the possession by Bradford's agents would be equivalent to his own possession, and, if it did not, the special instruction last quoted should have called its attention to the supposed omission.

The ninth assignment is that the court in the ninth paragraph of the charge instructed the jury that if a bill of sale was to be delivered and an invoice taken, then the sale would not be complete until both were done. The charge was: "If, however, the parties negotiated on the 2d day of April for the stock of goods, and that as a part of the contract a bill of sale was to be made and delivered by Jordan, or the aggregate price of the stock was to be ascertained by taking an invoice before the completion of the sale, and the sale was not completed April 2d for want of the same, then the goods were subject to levy made before such completion, and if from the testimony the sale was so incomplete at the time of levy, they would find for plaintiff." The effect of this instruction was to inform the jury that if by the contract of sale a bill of sale was made essential to perfect the sale, then it would not be completed until the delivery of such bill of sale. There was evidence from which the jury may have believed that by the contract a bill of sale was deemed by the parties an essential feature of the sale.

The fifteenth assignment is to the effect that there was no proof of the value of the property which would support a judgment against the defendant Bradford. The proof was that the goods were levied on by the writ of attachment in favor of plaintiff to the extent of \$810; that the defendant Bradford gave a replevy bond therefor; that they were the goods claimed to have been bought by Bradford from Jordan in April, 1883; and that Bradford used and appropriated the same. The judgment against Bradford was for the amount of the debt established against Jordan, \$581, with interest. The trial having resulted in the ascertainment of the only question at issue, namely, that the goods were subject to the attachment, it was proper to render judgment against the defendant upon his replevy bond. For the errors indicated in the admission and exclusion of the evidence referred to we think the judgment should be reversed, and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment reversed, and the cause remanded.

#### HALEY *et al.* v. GATEWOOD *et al.*

(Supreme Court of Texas. June 11, 1889.)

##### WILLS—CONSTRUCTION.

1. A will disposing of "all the estate I now own and possess" applies to realty acquired after its execution.
2. Such language is not sufficient to show an intent on part of testator to dispose of his wife's interest in community property.
3. The fact that the widow, as executrix, inventoried land as part of the testator's estate, does not preclude her from showing that it is her separate property.
4. In a suit by heirs against the executors and devisees for partition, in which the executors sought to be reimbursed out of the estate for payments made on behalf thereof, one of the items be-

ing for payment of taxes, the burden was on plaintiffs to show how much, if any, of such item was for taxes on the widow's separate property.

Commissioners' decision. Appeal from district court, Johnson county.

*English & Ewing* and *Poindexter & Padelford*, for appellants. *Smith & Davis*, for appellees.

ACKER, P. J. B. D. Gatewood died on the 18th day of September, 1882, leaving a will which had been executed on the 8th day of August, 1874. The appellees, Amanda B., his widow, and W. H. Gatewood, were appointed independent executors. The will was duly probated, and the executors qualified and took possession of the estate in November, 1882. Alice Haley, one of the children and heirs of B. D. Gatewood, joined by her husband, brought this suit on the 10th day of October, 1884, against the widow and other children and heirs of B. D. Gatewood, for partition of the property of which the father died possessed. It was alleged in the petition that a portion of this property—two tracts of land conveyed to the father after the execution of the will—was his separate property, and was not disposed of by the will, and that all other property was the community property of the father and mother, the appellee Amanda B. Gatewood. The defendants answered by general denial, general demurrer, and special exception, to the effect that it appeared from the petition and the will exhibited to the court that B. D. Gatewood did not die intestate as to any of his property, and specially denied that any part of the property was the separate property of B. D. Gatewood, and alleged that the two tracts of land conveyed to the testator subsequent to the execution of the will were the separate property of the defendant Amanda B. Gatewood. Defendants also answered that no part of the property belonging to the estate was subject to partition until the youngest child and heir attained majority, and that one of them was still a minor; that the estate was indebted to Mary G. Cunningham in the sum of \$1,579.38, which was held by B. D. Gatewood as a trust fund for her, which was claimed by her, and paid by the executors to Amanda B. Gatewood, the only heir of Mary G. Cunningham, who died in May, 1883; that the executors had paid out of the separate means of Amanda B. Gatewood debts against the estate amounting to \$3,000, and prayed that she be reimbursed out of the property of the estate before partition.

The trial was by court without a jury, and resulted in judgment to the following effect: (1) Sustaining defendants' special exception to the plaintiffs' petition. (2) That the property described in plaintiffs' petition is community property, except 252 acres of land of the R. T. Smith survey, in Hill county, and 119 1-9 acres undivided interest in the 426 acres of the D. Moore survey; being the two tracts of land conveyed to B. D. Gate-

wood after the execution of his will, which are adjudged to be the separate property of Amanda B. Gatewood. (3) That the estate of B. D. Gatewood is indebted to the executors of said estate in the sum of \$254.04. (4) That by the terms of the will 320 acres of the D. Moore survey, and 50 acres of the Ince survey, constituting the homestead, cannot be partitioned until the minor heir becomes of age. (5) That it appears from the will that the testator did not intend to thereby dispose of his wife's interest in the community property. (6) That by the will B. D. Gatewood devised all his property to his wife and his six children by her in equal parts, subject to the limitations of the use and disposition of the property for maintenance and education of the children. (7) That by the terms of the will each child was entitled to have its part of the personal property set apart on attaining majority, and that all of the children were of age except the youngest, who was then 19 years of age. (8) That the community property, except the homestead, be partitioned as follows: One-half to Amanda B. Gatewood, and the other half in equal parts to the widow, Amanda B., and the six children of the testator by her.

The first assignment of error is: "The court erred, in sustaining the defendants' special exception to plaintiffs' second amended original petition, in this: that the language in said will does not authorize the court to hold, as a question of law, that property acquired after the making of said will passed to the legatees and devisees as named in said will." The language of the will is: "I will and bequeath to my beloved wife, Amanda Gatewood, and my children by my said wife, Amanda, all the estate I now own and possess." The precise question here presented was decided adversely to appellant in the case of *Henderson v. Ryan*, 27 Tex. 674, and we approve and follow that decision. It was there said: "The will must be understood to speak from the time of the testator's death, and whatever estate he then possessed must be held to have passed according to its terms."

The second assignment of error is: "The court erred in holding that, by the language and terms of the will, the testator intended to convey his half of the community property only; it being apparent from said will that the testator not only intended to convey his half, but also his wife's half, of all community property then on hand." The will does not contain any special bequest as to any particular property, other than the homestead, and the disposition of that, by the terms of the will, is in strict conformity with the provisions of our statute with reference to the control and disposition of the homestead after the death of one of the spouses. "I will and bequeath all the estate I now own and possess." We do not think this language indicates an intention on the part of the testator to dispose of any property which he did not "own and possess," nor do we think the directions given in the

will to the executors, as to the management and disposition of certain community property for the maintenance and education of his children, clearly manifest an intention to deprive the wife of the right to control and dispose of her interest in the community property. The intent upon the part of the husband to dispose by will of the wife's interest in the community property must be evidenced by clear and explicit language. *Carroll v. Carroll*, 20 Tex. 743; *Moss v. Helsie*, 60 Tex. 435. We think the court did not err in the particular complained of under these two assignments.

The third assignment of error is: "The court erred in holding that the widow Amanda B. Gatewood, was entitled not only to one-half of all community property on hand at the time of making the will, but also to one-seventh of the other half of said property, when the facts and the law only authorized her to recover, and hold for herself and minor children, the homestead consisting of 320 acres of the D. Moore survey, and 50 acres of the John Ince land." We have already decided that the court correctly construed the will, in holding that it did not dispose of the wife's interest in the community property, and that interest therefore remained to the widow, as if the will had not been executed. We know of no rule of law that precludes the husband from bequeathing to the wife all or any part of his property, and we think it clear that, under the terms of the will, appellee Amanda B. Gatewood was entitled to her half of the community estate, just as she would have been under the statute, and in addition thereto she was entitled to share equally with her six children the testator's estate. The court did not err in so holding. *Carroll v. Carroll* supra. What we have said disposes of the fourth and fifth assignments of error adversely to appellants, as these assignments raise substantially the same question as that presented by the third assignment.

The sixth assignment of error is: "The court erred in holding that one hundred and nineteen and one-ninth acres of the D. Moore and 252 acres of the R. T. Smith, survey were and are the separate property of Amanda B. Gatewood, for the reason that the evidence fails to sustain said finding; the facts showing that she inventoried and treated said property as community, and never claimed the same to be her separate property until after the institution of this suit." We think the evidence conclusively shows that these lands were purchased with the separate means of Amanda B. Gatewood, and were therefore her separate property. Indeed, the record discloses no evidence against this conclusion, other than the circumstance that she and her co-executor inventoried these lands as parts of the estate of her deceased husband. All of the property was so inventoried. This fact did not preclude her from showing that they were in fact her separate property, or that they belonged to the com-

munity estate. The inventory was not conclusive. Rev. St. art. 1928; *Carroll v. Carroll*, supra.

Under the seventh assignment of error, it is contended that the court erred in finding that the executors had received on account of said estate only the sum of \$1,116, besides the money on hand at the death of the testator, when it appears from the evidence that they had received the sum of about \$1,500, and had charged themselves with only \$1,140 of the \$1,175, money on hand at the death of the testator. We think this assignment is well taken. It clearly appears from the evidence that the executors received from the sales of stock, wheat, and cotton belonging to and collections on claims due the estate the sum of \$1,314, and it also appears that of the money on hand at the death of the testator there was \$35 in bank, subject to the order of the executors, in addition to the sum of \$1,140, with which they had charged themselves, making the sum of \$233, with which the executors should have been charged in addition to the amount found by the court.

The eighth assignment of error is: "The court erred in not deducting from the charges by the executors the taxes paid by them on the property found by the court to be the widow's separate property." It appears that the sum of \$223 had been paid out by the executors on account of taxes, including the taxes assessed against the lands which were adjudged to be the separate property of the widow, but it does not appear how much of this amount was used in payment of taxes on the property. Appellants were plaintiffs below, and the burden was upon them to show what they were entitled to recover. They could easily have shown how much of the \$223 had been applied to the payment of the taxes against the separate property of the widow, and we think they should have done so. Had this proof been made, we have no doubt the court would have deducted the amount from the credit given the executors.

The minors Lena and Ula Terrell had no interest in the estate, were not proper parties to the suit, and the appointment of a guardian *ad litem* for them could not affect the rights of the other parties, and the action of the court in appointing the guardian was wholly immaterial.

The court below adjudged that the estate was indebted to the executors in the sum of \$254.04, and that this amount was a charge against the assets of the estate. We are of opinion that the executors should be charged with the sum of \$233, as we have herein before determined, which should be deducted from the judgment in their favor, and that the judgment of the court below should be reformed, and judgment rendered here in favor of the executors, Amanda B. and W. H. Gatewood, for the sum of \$21.04, and that in all other particulars the judgment of the court below should be affirmed. As appellants failed to call the attention of the court

below to the error indicated by motion for new trial or otherwise, we are of opinion that they should pay the costs of this appeal.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment modified and affirmed in accordance with said opinion.

#### LANGSTON et al. v. MAXEY.

(Supreme Court of Texas. May 28, 1889.)

##### ABANDONMENT OF HOMESTEAD.

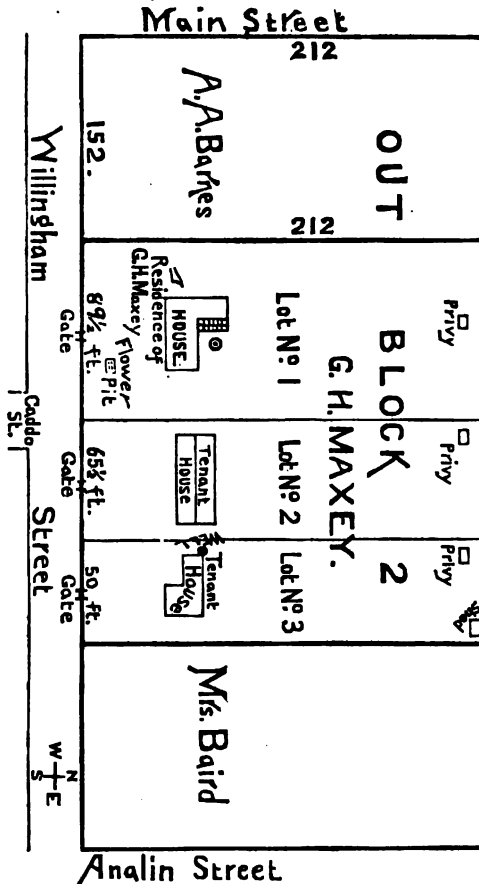
Plaintiff was the owner of land in a city, which he claimed as a homestead. He moved from his old house in the middle of the land to a house which he built on the west end of it, and rented the old house as a boarding-house. He afterwards built a third house on the east end of the lot, which he rented for the purposes of income. The property had never been subdivided by survey, but fences had been built between the houses. Plaintiff reserved no rights in the rented property, but used a cistern on the line of the fence between the middle and the eastern houses, crossing the middle lot for that purpose. Held, that plaintiff still had a homestead in the middle lot, but the east lot, having been abandoned as a homestead, was no longer exempt from execution.

Appeal from district court, Johnson county. *W. Poindexter*, for appellants. *Smith & Davis*, for appellee.

GAINES, J. Appellee brought this action to enjoin a sale under execution of a certain parcel of land in the city of Cleburne, which he claimed as a homestead. He was the head of a family, and had his residence upon the western portion of the property described in his petition. Upon its middle and eastern parts there were two small residence houses, and some of the usual appurtenances, which were occupied by his tenants. The defendants below declared in their answer that the western portion of the property, being that upon which the plaintiff actually resided with his family, was embraced in their levy by mistake, and disclaimed all right to subject that to the payment of their judgment. They, however, alleged that the other parts of the land were not a part of the homestead, and were subject to sale under execution. There was a general verdict for the plaintiff, and a judgment perpetuating the injunction as to the whole property, and it is assigned that the court erred in not granting the motion for a new trial, upon the ground that the verdict was contrary to the law and the evidence.

From the plaintiff's own testimony it appears that he bought the whole block in 1867, and inclosed it and built a residence upon it near the middle. He subsequently sold a lot off the east end, and another off the west end, leaving the parcel in controversy, which extends about 210 feet north and south and about 205 feet east and west. He resided in the house near the center of this parcel until 1878, when he built a new residence on the west portion, into which he then moved, and where he has ever since resided with his family. For some time he rented the old

house as a boarding-house, and he and his family took their meals with the tenants. This house has been occupied by tenants ever since, and was so occupied at the beginning of this suit. In 1879 he built another residence on the east part of this property, which he testified he built for the purpose of leasing it to tenants for the income to be derived therefrom. This house with its appurtenances had been leased ever since its construction, and was occupied by a tenant when the suit was brought. The following is from a sketch made by appellee, and offered in evidence, and shows the situation of the property at the time of the trial:



east lot, he ceased to use it directly for any purpose whatever, and fails to show that he had an intention at any future time to devote any part of it to domestic uses of himself and family. This evinces a permanent abandonment of the use of the lot under consideration for homestead purposes. If the head of a family, by abandoning his residence upon a homestead once acquired, with the intention of never resuming it, may subject it to forced sale, although he may not have acquired another homestead, we think, for a stronger reason, it should be held that a part so abandoned ceases to be exempt from execution, although it may be contiguous to the remaining homestead of which it originally formed a part.

We conclude that as to the east lot, as practically defined by its inclosures, the verdict of the jury is not sustained by the evidence, and that, for this reason, the court should have granted the motion for a new trial. What we have already said we think sufficient to indicate a proper charge upon another trial of the case, and we therefore deem it unnecessary to consider the assignment based upon the supposed error in the instruction of the court. For the error pointed out the judgment is reversed, and the cause remanded.

HENRY, J., did not sit in this case.

LANG *et al.* v. DAUGHERTY *et al.*  
(Supreme Court of Texas. June 4, 1889.)

REPLEVIN—EVIDENCE—PRACTICE.

1. The statutory remedy by which a claimant of property seized under judicial process as the property of another may try his right thereto is not exclusive, and he may instead bring a suit at law for that purpose.

2. Where a bill of sale has no subscribing witnesses, the vendee is, under Rev. St. Tex. art. 2248, a competent witness to prove its execution.

3. The court has no power, in a replevin suit, to render judgment on a bond given by one not then connected with the suit, but subsequently made a party defendant as a co-trespasser, conditioned for the return of the property "by the defendant,"—a form of bond not known to the law.

4. In a suit for the recovery of cattle, a judgment for a sum of money equal to the number of cattle, multiplied by their value per head as found by the evidence, and also providing for their return to plaintiffs, to be credited on the judgment at the same value per head, is in effect a judgment for the return of the cattle or their value.

5. A cattle company executed a bill of sale to D. for an undivided interest of 563 cattle of a particular brand in its herd. One R. was also entitled to receive a number of cattle, of no specified brand, from the company. D. and R. authorized one B. to receive the cattle for them. He received 471 head without designating which were for D. and which for R., intending to divide them afterwards. They were then seized under execution in favor of a creditor of the company, and the sheriff put with them other cattle belonging to the company, and levied on at the same time, making a total of 649 head. It was then agreed between the company and D. and R. that they should accept these 649 as part of the cattle contracted to them. Some of these were of the brand called for by the bill of sale, but some were of other brands. The execution levy was afterwards vacated. In an action by D. and R. to recover the 649 head, held, that the bill of sale to D. was admissible as a link in his title.

6. Defendant, the execution creditor, having alleged that the sales under which plaintiffs claimed were made as illegal preferences, and with intent to defraud other creditors of the company, testimony was properly admitted that at the time plaintiffs accepted cattle in payment of their claims an offer of settlement on the same terms was made to all other creditors, and particularly to defendant, and that he advised the other creditors to take as many cattle at that rate as they could get, but refused to accept anything but cash for his own claim.

7. Plaintiffs' agreement to accept the 649 head levied on having been made with one W., it was proper to admit in evidence a bill of sale made before the levy, by which the company sold all its cattle to W., with reservations in favor of plaintiffs.

8. Plaintiffs' title to the 649 head of cattle being clearly established by their contract with W., defendant could not have been prejudiced by an instruction, abstractly correct, on the doctrine of confusion of goods.

9. Defendant having relied as a defense solely on his alleged right to subject the cattle to payment of his judgment against the company, he is not in a position to invoke the doctrines applicable to the right of creditors to share equally in the assets of an insolvent corporation.

Commissioners' decision. Appeal from district court, Wichita county.

Replevin for 649 head of cattle, brought by F. M. Daugherty and Al. Robertson against J. J. Lang and others. Verdict and judgment for plaintiffs, and defendants appeal.

Donald & Cobb and Hogsett & Greene, for appellants. Davis & Garnett, for appellees.

COLLARD, J. The Stone Cattle & Pasture Company was a private corporation under the laws of this state. Being insolvent, a resolution was passed to wind up the affairs of the company, and pay its debts out of the assets. Creditors were offered cattle at \$20 per head, and land at \$3.50 per acre in settlement of debts. This was in August, 1885. J. W. Sacra was vice-president and a stockholder, and had a claim against the company for \$2,366.28. He owed plaintiff Daugherty \$4,000, an amount paid by the latter as his surety. Knowing that the company would pay its debts in cattle at \$20 per head, Sacra sold his homestead to one D. H. Phillips for two notes held by Phillips against the company, amounting to \$10,997.91, besides interest, which notes, with his own, Sacra indorsed to Daugherty in satisfaction of the \$4,000 security money paid. On the 7th of August, 1885, the company sold to Daugherty 563 head of cattle, at \$20 per head, for the Phillips notes. Before Daugherty took the notes of Phillips and the Sacra note against the company, Daugherty had made an arrangement with Sacra, J. W. Wilson, president, and John H. Stone, as well as Phillips, by which they agreed that he should have cattle at \$20 per head on the notes. Phillips was a stockholder in the company. On the 7th day of September the company, by its president, J. W. Wilson, executed a bill of sale to Daugherty for an expressed consideration of \$11,260, conveying an undivided interest of 563 head of cattle in the I brand, at that time unincumbered, excluding beef cat-



tle, providing that Daugherty should hold possession jointly with the company. This settled the Phillips notes. The balance due on the Sacra note was not then so settled, but there was an agreement to do so, which it seems was afterwards carried out. The note is indorsed, "Paid September, 1885, by S. C. P. Co." The company also owed R. McCubbin \$8,780.66, which was by J. T. Harris, indorsee, transferred to A. Robertson on the 4th day of August, 1885. This note is indorsed, "Paid by the Stone Cattle & Pasture Co., 257 head of cattle, at \$20 per head, \$5,140, Sept. 7th, 1885." Same day the bill of sale was executed to Daugherty. Daugherty had no interest in the cattle Robertson was to get, nor was Robertson interested in the cattle Daugherty was to have. McCubbin was stockholder in the company. The company's note to him was for cattle he had sold them, taking stock in the company, and the note in payment for the cattle. By a verbal agreement McCubbin reserved an interest in his note at the time it was assigned of \$2,080. Robertson held the note as collateral security for a debt of about \$800. James Beattie, one of the indorsees, owed him, and he, with Beattie's consent, agreed to take cattle from the company at \$20 per head; Robertson to hold the cattle as he had held the note.

Sacra went to the pasture to receive the cattle for Daugherty, and James Beattie to receive cattle on the McCubbin note. Sacra became sick, and left, and Daugherty got Beattie also to represent him in receiving the cattle. Beattie had determined to receive the cattle due Daugherty and Robertson jointly, and not separate them in Wichita or Archer counties, but drive them to Cooke county, and there have them separated by Daugherty and Robertson, when each party was present to represent himself; and up to the 28th of September, 1885, the company had gathered and turned over to Beattie for Daugherty and Robertson, without designating which were for Daugherty and which for Robertson, 575 cattle. Of these Beattie delivered to McCubbin 104 head, for McCubbin's \$2,080 interest in the note, and was holding the remaining 471 head for Daugherty and Robertson; when on the 6th of October, 1885, they were levied on and taken from his possession by the sheriff of Wichita county under the execution in favor of Lang against the company. The sheriff placed with this herd other cattle of the company, making in all 649 head, and it was impossible to distinguish the cattle taken from Beattie from the other cattle with which they were commingled by the sheriff. On the 26th of September, 1885, the Stone Cattle & Pasture Company executed to W. S. Woods, president of the Bank of Commerce, Kansas City, a creditor of the company, a bill of sale to all of its remaining cattle, reciting therein that it had contracted 676 head to F. M. Daugherty, and about 300 head to Al. Robertson, and reserving said cattle for said Daugherty and Robertson; reciting that the whole

of them had not been delivered to said Daugherty and Robertson. The receipt of the sheriff to Beattie for the cattle that had been turned over to Beattie for Daugherty and Robertson was for 471 head of cattle in various brands. It is stated in the receipt, that "it is understood between Beattie and myself [the sheriff] that, if there should be any cattle in the herd not claimed by either of us, the receipt does not apply to them. There are 7 head of steers branded with a straight bar, that does not come in the receipt, although included in the count. Most of the cattle are in the following brands: T, JJJJ, JJJ, and XOZ. There may be some not in these brands." These were No. 1 cattle worth \$15 or \$16 per head. After the sheriff had taken the cattle from Beattie, and placed other cattle with them, aggregating 649 head, it was agreed by W. S. Woods, J. W. Wilson, the president the company, and Daugherty and Robertson, that Daugherty and Robertson should take as part of their cattle the entire 649 head, and they were charged up to them by Woods as part of the cattle reserved in the sale to him.

Defendant J. J. Lang recovered judgment in the district court of Wise county against the company and others for \$26,621 on the 28th day of August, 1885. Execution issued on the 26th September, 1885, and on the 28th September was levied on the cattle now claimed by plaintiffs, and 33 other cattle, in the following brands: T, JJJ, JJJJ, the most of them in the T brand. Sale was advertised to take place on the 22d October, 1885, at which time the sheriff offered 33 head for sale, and one Levail offered \$5.10 for the entire 33 head. The sheriff then postponed the sale to the 23d; but, then receiving no reasonable bid, sale was again postponed to the 24th; and, there being no reasonable bid, it was postponed to the 26th of October, 1885, at which time W. T. Waggoner bid \$6.75 per head for the balance of the cattle, 649 head, and they were knocked off to him. On the 26th February, 1886, the district court from which the execution issued, on motion of the defendants in execution, all the parties being before the court, declared the execution illegally issued, and set aside the sale. Plaintiffs' writ of sequestration was levied on the cattle while in Waggoner's possession, on the 26th October, 1885, and Waggoner replevied. After the sheriff's levy and sale were set aside, on the 27th February, 1886, *alias* execution issued on Lang's judgment, was levied on the same cattle, and sale was made by the sheriff to W. E. Cobb on 29th March, 1886. There was no secret as to the company's intention and method of settling up its debts. Lang was offered for his debt the same rates as others, and then, on his refusal to accept, he was offered cattle at \$18 per head. When informed of the proposed method of settlement, he advised the parties representing the company to settle all the debts they could on the terms mentioned, but declined to accept the terms himself.



Appellants' first and second assignments of error and propositions thereunder are given below; other portions of the record and proceedings are stated in the opinion: First assignment of error: "The court erred in overruling defendants' first special exception in their first supplemental answer, filed May 11, 1886, to that part of plaintiffs' second supplemental petition mentioned in said special exception." Propositions: (1) Where property has been seized under execution, and is claimed by a person not the defendant in execution, the statute for the trial of the right of property provides the remedy for claiming and recovering such property, and an action for sequestration will not lie against the plaintiff in execution. (2) In order for a plaintiff to recover, he must have a cause of action against the defendant at the time he files his suit. Twenty-first assignment of error: "The court erred in refusing to give special charge No. 2, asked by the defendants." Said charge is as follows: "The jury are instructed by the court that plaintiffs instituted this suit on the 22d day of October, 1885; and if you find from the evidence that the cattle sued for were not at the time in the possession of the defendants, but were in the possession of the sheriff of Wichita county, held by him under and by virtue of a writ of execution, and levy and seizure thereunder, then plaintiffs cannot recover in this action, and you will find a verdict for the defendants." Proposition: In order to entitle a plaintiff to recover, he must have a cause of action against the defendant at the time of filing suit.

When a claimant of personal property, levied on by execution, attachment, sequestration, or other such writ, as the property of another, resorts to his statutory remedy to try the right to the property, he thereby waives his privilege of suit at common law. *Vickery v. Ward*, 2 Tex. 212. But he is not compelled to adopt the statutory remedy. It is simple and less expensive than a suit, and is the better practice when applicable; but he "may interpose his claim under the statute, or he may resort to his common-law right, and sue the sheriff or the plaintiff, if the plaintiff had caused the seizure to be made." *Moore v. Gammel*, 18 Tex. 122. He might not be allowed to intervene in an attachment suit without complying with the statute by filing oath and bond, as was decided in *Carter v. Carter*, 36 Tex. 693; and he could not enjoin a sale under execution because of his legal remedy, as was decided in *Ferguson v. Herring*, 49 Tex. 129, but he would not be forced to seek relief under the statute. So we conclude the law is against appellants' assignment of error on this point.

One of appellants' objections to the ruling of the court admitting in evidence the bill of sale by the Stone Cattle & Pasture Company to Daugherty was that it was proved only by the grantee. We think the grantee was a competent witness to prove its execution, there being no subscribing witnesses to it.

Rev. St. art. 2246; 1 Greenl. Ev. § 575; *Meuley v. Zeigler*, 23 Tex. 88.

It is further objected that it was inadmissible (1) because plaintiffs sue for 935 head of specific cattle, while the bill of sale purports to convey only an undivided interest in the cattle; (2) because it conveys an interest in cattle to Daugherty alone, while plaintiffs set up a joint interest in the cattle; (3) because the description in the bill of sale varies from the description in the petition. To properly consider these objections, it will be necessary to notice some other facts. The company had a large stock of cattle, and under the bill of sale Daugherty was entitled to an undivided interest in 563 head of them. There was an agreement between the company and Robertson (plaintiff) that to pay a claim he held against it he was to have of these cattle enough to pay his claim at \$20 per head. Daugherty and Robertson authorized one Beattie to receive the cattle for them. He received the cattle from the company, without designating which were for Daugherty and which were for Robertson, intending to drive them to Cooke county, and there divide them, where the owners could be present. In this way he received 471 head of cattle for his principals, when the sheriff seized them under execution in favor of defendant Lang, when the sheriff proceeded to levy upon other cattle of the company, making the whole number levied on 649 head. It was then agreed by all the parties except Lang that Robertson and Daugherty should take the cattle so seized as part of the cattle contracted to them. So then it appears that as to these cattle there was a partition between Daugherty and the company, and such a partition as made Daugherty and Robertson joint owners of the 649 head. So it follows that if Daugherty and Robertson had a right to sue for the cattle at all they could sue as joint owners, and for these cattle so partitioned to them, and taken by them under their agreements. It was not in proof that Robertson was to receive cattle in any particular brand. Under the bill of sale to Daugherty he was to have cattle in the T brand, and it appears that most of the cattle levied on by the sheriff were in this brand; but if they were in other brands it would be immaterial, because in a division with the company he had the right to receive cattle in other brands if the company chose to deliver them to him, provided such an arrangement did not interfere with Lang's rights under the levy. His bill of sale was evidence of the fact that the company had sold him 563 head of cattle, and it was admissible for that purpose, notwithstanding other brands of cattle were delivered to him in the partition. It would then be immaterial that the bill of sale described cattle not described in the petition. The bill of sale was a link in his title which he had the right to put in evidence, and then show, if he could, that he received in settlement of it such cattle as it described, and others as were described in his petition, provided he did not by

so doing interfere with any right of Lang under his levy. Such a settlement did not in fact interfere with any right of Lang under his levy, or with the rights of Waggoner, the purchaser at the execution sale; because, after this, the court from which Lang's execution issued, on motion of the defendant therein, the Stone Cattle & Pasture Company, all the parties appearing, vacated the execution, and set aside the sale, in which judgment of the court both Lang and Waggoner acquiesced; Lang suing out an *alias* execution, and Waggoner disclaiming all rights under his purchase. Lang's subsequent levy upon the same cattle could not relate back to his first levy, so as to affect the division of the cattle between the plaintiffs and the company.

It is claimed that the court erred in admitting evidence of J. W. Sacra, vice-president of the company, that after the rendition of the judgment in favor of Lang against the company, and before the issuance of execution thereon, the company offered to pay the judgment in cattle at \$20 per head, but Lang refused the offer, stating that he wanted his money; that witness told Lang that other creditors were agreeing to accept cattle in satisfaction of their debts at \$20 per head, and that Lang replied that that was a good trade, and advised witness to make as many trades of that kind as he could; also that the court erred in admitting evidence of witness Babb that he had been a creditor of the company, and that early in September, 1885, before Lang's first levy, he accepted the offer of the company to pay him in cattle at \$20 per head, and that at the same time the company sent word to Lang by witness to come and get cattle on his debt at the same rate; that he delivered the message, and Lang replied that he did not want cattle, but intended to have his money. There was no error in admitting the evidence. It was admissible under Lang's allegations of fraud, charging the company with illegally preferring the debts held by Daugherty and Robertson, and conveying to them cattle in payment of their debts. The company was insolvent, and was winding up its affairs. It had passed a resolution to pay its debts in cattle at \$20 per head, and lands at a certain price above their real value, and it was legitimate to show that all creditors were treated alike, and especially to show that no advantage was given to other creditors over Lang; that the same offer was made to him as to others, and that he refused; and to show that he advised the company to so settle its debts.

A bill of sale by the company on the 26th day of September, 1885, to W. S. Woods, for all the cattle belonging to the company, with certain reservations, among which was a reservation of the cattle conveyed to Daugherty and Robertson, was admitted in evidence over defendants' objections. There was no error in this ruling. After Lang's first levy upon the 471 head of cattle delivered to Beattie for Daugherty and Robertson, the sheriff took into his possession and levied on other cattle as the property of the company, mak-

ing the whole number levied on 649 head. It was proved that Woods agreed with plaintiffs and the company that plain should take all the cattle so levied on in agreement of the company with them. Evidence was admissible to show Woods' authority to make this agreement, and the effect of his recognition of plaintiffs' right to the specific 649 head of cattle levied on.

Appellants complain of special charge the court given at request of plaintiffs the effect that the Stone Cattle & Pasture Company, a private corporation, could owe debt to one of its shareholders, and could legally pay the same, in like manner as other debt, and could legally prefer its debts, as well as others, in assets of the company, provided the property was taken at fair price, and provided the debts were overpaid. The objection to these instructions is that they do not apply to insolvent corporations. This company was insolvent had ceased to do business, and was winding up all its affairs. To do this it proposed its creditors to pay them in cattle and land at certain rates above value. This offer was made to defendant Lang, and he refused to accept. Other creditors accepted the offer among them plaintiffs Daugherty and Robertson, who received the property (levied by Lang's execution) in part satisfaction of the claims held by them. These debts were originally contracted to stockholders, and evidence tends to show that the vice-president of the company, Sacra, who was also a shareholder, had some remaining interest in the notes held by Daugherty. It has been held that an insolvent corporation can pay its creditors, but the better opinion is that equity will not sustain an unequal distribution of the assets. When a corporation comes insolvent, and ceases to carry on business for which it was organized, its assets become a common fund for the payment of debts ratably among its creditors. If there is not sufficient property to pay all the debts in full, it must be distributed equally and fairly among the creditors, according to their respective rights, so as not to pay one more than his ratable share. Equity will interfere to prevent unjust preferences. 2 M. & P. Priv. Corp. §§ 802, 803. See, also, *Railroad Co. v. Bee*, 48 Cal. 398; *Richards v. Insurance Co.*, 43 N. H. 263; *Jackson v. Luling*, 21 Wall. 616; *Hightower v. Mustie*, 8 Ga. 506. No distinction is made as to creditors who are shareholders, if their shares are paid up. Shareholders are not liable for the debts of the corporation. They have the same rights as other creditors, if not in arrears for unpaid shares. If they are in arrears, they can be compelled to pay the amount so due, and then, if they have delinquent shares, they are entitled to their distributive portions of the assets of the insolvent company. 2 M. & P. Priv. Corp. §§ 861, 862. The court believed it could not apply these principles relating to insolvent corporations to the case before it, as Lang was not before the court asking for

equitable distribution of the assets of the company. He had not applied to the equity powers of the court for relief against an improper preference of other creditors. He relied solely upon his claim to subject the property to the payment of his debt by virtue of the levy of his execution. In such case, if he was unable to show that plaintiffs had received more property of the company than enough to satisfy their debts at a fair valuation, he was entitled to no relief. His defense for interfering with the settlement made by the officers of the corporation rested upon his ability to show that property had been delivered to plaintiffs that was subject to his levy, not upon the rights of a creditor to have the property prorated among all the creditors. He was himself attempting to enforce the payment of his debt to the disadvantage and exclusion of other creditors. See *Id.* § 863. He refused to accept the mode of settlement proposed by the insolvent company, and attempted the collection of his debt by execution. If the company was making an unfair and inequitable adjustment among creditors, or preferring creditors to his disadvantage, his remedy was to invoke equity, and have a receiver appointed. There was no error in the charges of the court as specified in the assignment of error upon this subject.

The court charged the jury as follows: When one person wrongfully takes cattle of another, and places them with other cattle so that the true owner cannot identify his property, the burden is upon the wrong-doer to separate and identify the cattle, and unless he does so the true owner is entitled to recover, not only his own cattle, but the cattle with which his own have been commingled. This charge is assigned as error. It was intended to apply to that part of the evidence which plaintiffs say shows that, after the sheriff had levied on the 471 head of cattle that had been received by the plaintiffs, he afterwards levied on other cattle of the company in the same brands, and mixed them, and so rendered it impossible to identify the 471 head. The principle contained in the charge is correct, but whether it should have been given in this case it is not necessary to decide; because, after the sheriff had so levied on and mixed the cattle, it was agreed between plaintiffs, the company, and Woods (the owner of the residue after plaintiffs' number had been taken out) that the entire lot in the hands of the sheriff, 649 head, should be taken by plaintiffs under their agreement of settlement; the execution, the levy, and the sale all being afterwards vacated and set aside by the court. Lang acquired no rights by this levy, nor did Waggoner, the purchaser at the sale thereunder. It was abandoned by the parties, so the question as to the identity and ownership by mixing is unimportant. The court in the next paragraph of the charge given correctly instructed the jury as to the ownership of plaintiffs under the agreement made after the levy. The abstract charge as

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to commingling the cattle could have had no effect, as plaintiffs' ownership was established by an undisputed agreement. These remarks will apply to appellants' twenty-third assignment of errors, which relates to the mixing of the cattle, and failure of plaintiffs to plead title by such mixing. Plaintiffs did not and were not bound to plead their title, and we have seen it did not depend upon a wrongful mixing, but upon a positive agreement.

Plaintiffs' amended original and first supplemental petition set up that defendants wrongfully took possession of the cattle (935 head) on the 9th day of October, 1885, at which time they were worth on an average \$16 per head; that by bad treatment while in the hands of defendants the cattle depreciated in value so that at the time the suit was brought, on the 22d day of October, 1885, they were worth only \$12.50 per head; that by such depreciation plaintiffs were damaged in the sum of \$3,275.50. The prayer was for the recovery of the cattle and the damages aforesaid, and for general relief. The verdict of the jury, under the charge of the court, was for plaintiffs for 666 head of cattle, at \$16 per head; whereupon judgment was rendered reciting, among other things, that plaintiffs' writ of sequestration had been levied on the cattle, and that they were replevied by defendant Waggoner, and left in his possession, upon his executing a replevin bond in the sum of \$16,874, with L. C. Mayes and the defendants Lang and Cobb as sureties, payable and conditioned as prescribed by law. It then proceeded to give judgment for plaintiffs against Lang, Cobb, Waggoner, and Mayes, jointly and severally, "for \$9,735, the value of said cattle at fifteen dollars per head;" thus estimating the cattle at 649 head, at \$15 per head, according to *remittitur* entered by plaintiffs. The judgment provided that if the cattle and their increase were returned to plaintiffs within ten days they should be credited on the judgment at \$15 per head.

The appellants insist that the verdict should be set aside, because there was no evidence that 666 head of cattle had been seized. To this it may be said, in reply, the *remittitur* cured the error. They also say the suit was for the cattle, alleged to be worth \$12.50 per head, and \$3.50 damages to the cattle; and the jury found the value of the cattle to be \$16 per head, which verdict they say was unauthorized by the pleadings. The petition alleged that the cattle were worth at the time of seizure \$16 per head, and the evidence showed that at such time they were worth \$15 to \$16 per head. Under the allegations of the petition, it was proper for the jury to find the value of the cattle at the time of seizure, and the value so found was not in excess of the value claimed in the petition, or in excess of the highest value shown by the proof. The judgment was for so much money as 649 head of cattle were worth at \$15 per head, curing any error there might be in the verdict under the proof. The judg-

ment properly provided for the return of the cattle to plaintiffs at \$15 per head. This cured any error in the form of the judgment under a claim that it should have been for the cattle or their value at the time suit was brought, and for damages for injury to them while in defendants' possession. In a suit for specific property, judgment should be for the recovery of the property or its value. *Morris v. Coburn*, 9 S. W. Rep. 345; *Blakely's Adm'r v. Duncan*, 4 Tex. 184; *Cheatham v. Riddle*, 8 Tex. 168; *Hoeser v. Kraeka*, 29 Tex. 450.

W. T. Waggoner, who was not a party to the suit at the time plaintiffs' writ of sequestration was levied, was in possession of the 649 head of cattle, having purchased them at the sheriff's sale under Lang's first levy. The sheriff allowed him to retain possession, upon executing what is termed by the parties a "replevy bond," in the sum of \$18,000, with Lang, Cobb, and Mayes as sureties, "conditioned that, if defendant is condemned in the above-entitled action, [F. M. Daugherty et al. v. J. J. Lang et al.] he, or some other person will return the above-described property or its value to satisfy the judgment which may be rendered against him, together with interest thereon from date." This bond is signed by J. J. Lang, J. H. Cobb, (by J. J. Lang,) then by W. T. Waggoner and L. C. Mayes. The style of the suit is first given, and the bond is made payable to plaintiff "F. M. Daugherty et al." We do not know whether this instrument was intended for a replevy bond, or the bond of a claimant for the trial of the right of property. Waggoner could not replevy, not being a party to the suit, and he made no claim to the property under oath, as required by law; nor does the bond indicate that he is claiming it. The condition of the bond is that the defendant is to return the property, not Waggoner. This is altogether an anomalous proceeding. The sheriff levies a writ of sequestration in the possession of one not a party defendant, or in anywise connected with the suit, and allows him to retain possession of the property upon giving bond that the defendant shall return it. Such a proceeding is unknown to the law. Upon this bond the court rendered a summary judgment as upon a claimant's bond or a replevy bond. This the court had no power to do. It was not declared on, and could not be in this suit, because there could be no breach of its conditions until this suit was at an end.

After Waggoner was so allowed to retain possession of the cattle he was made a party defendant by plaintiffs, and was charged to be liable as a co-trespasser with Lang and Cobb. This he was, as a consequence of his unwarranted interference with the levy of the sequestration, aiding Lang to hold the cattle for his second levy and final conversion; but, the bond not being a statutory bond, the court could not render a summary judgment thereon, as might have been done had Lang replevied the cattle. The evidence does not

show that J. H. Cobb was a co-trespasser with Lang; hence no judgment could be rendered against him as such. We find there was error in rendering judgment on the bond, and that it should be set aside without prejudice to plaintiffs' right to sue upon it hereafter, if its conditions should be broken.

The language used by counsel in argument was not authorized by the evidence, but we are not prepared to say from our stand-point that it prejudiced the jury against Lang. There was evidence to support the verdict as to the value of the cattle, and there is ample evidence to show that there were 649 head of the cattle taken by Lang and Waggoner. The jury found that there were 666 head so taken. It does not appear but that this was a mere mistake in making the estimate. The trial judge had superior opportunities to any we have to determine the effect of the language used. We cannot say his decision was wrong in overruling the motion for a new trial upon this ground. The evidence sustains the verdict that Lang and Waggoner were co-trespassers, that there was no fraud in the sale to plaintiffs, and that the cattle were not subject to Lang's execution. We think the judgment should be here rendered upon the verdict and *remittitur* such as should have been rendered by the court below, viz., that appellees, plaintiffs below, F. M. Daugherty and A. Robertson, should recover of appellants the 649 head of cattle upon which plaintiffs' writ of sequestration was levied, as described by the return of the sheriff thereon, and as described in plaintiffs' petition, and all costs incurred in the district court; and, if the cattle cannot be forthwith had, that the appellees recover of appellants Lang and Waggoner the sum of \$9,735, the value thereof as assessed by the jury, after deducting amount remitted, and 8 per cent. interest per annum thereon from the 14th day of May, 1886, the date of the rendition of the judgment below, and all costs in the district court. The defendants J. H. Cobb and L. C. Mayes should be dismissed from the suit, with their costs in the district court. Appellees should be adjudged to pay all costs of this appeal.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment reversed, and rendered in accordance with said opinion.

#### ADAMS et al. v. ODOM.

(Supreme Court of Texas. June 4, 1889.)

#### JUDICIAL SALES—REVERSAL OF JUDGMENT.

When a judgment of mortgage foreclosure is on appeal affirmed as to the sum found due, but reversed in so far as it directs the sale of certain land, the effect, as to such land, is to destroy the title of the mortgagee, acquired at a sale before the reversal under process issued on the judgment and directing the sale of the land decreed to be covered by the mortgage, including the land in question.

Appeal from district court, Medina county

*Simpson & James*, for appellants. *S. B. Easley, Tarleton & Keller*, and *Denman & Franklin*, for appellees.

STAYTON, C. J. The parties to this appeal have made an agreed case, under rule 59, and caused same, with briefs, to be printed, which entitles it to precedence. The two tracts of land in controversy belonged to Henry Castro on and prior to June 30, 1852, and so continued until after December 24, 1854, unless his title was divested by proceedings between those dates, which will be hereafter stated. Prior to June 30, 1852, John H. Illies was prosecuting in the district court for Bexar county a suit against Henry Castro, in which he sought to recover a debt due to him by Castro, and to foreclose two mortgages held by him to secure it. All the lands on which Illies sought foreclosure were situated in Medina county. The two tracts in controversy, and many others on which Illies sought foreclosure, were not embraced in either of the mortgages, but he claimed that they should be substituted for lands so embraced, in pursuance of a verbal agreement which he claimed had been made between himself and Castro. On June 30, 1852, a judgment was rendered in favor of Illies for \$20,228, with foreclosure of mortgage as asked by him. That judgment stated what lands were covered by the mortgages and what lands were substituted, and directed the sale of all, in so far as necessary to discharge the judgment in favor of Illies. The judgment then proceeded as follows: "And it is further ordered, adjudged, and decreed by the court that, in case the proceeds of the sale of the foregoing lands should prove insufficient to pay the amount of this judgment, with interest and costs in the sum of twelve thousand five hundred dollars principal, and the further sum of five thousand two hundred and twenty-eight dollars and forty-three cents interest on said debt until paid, and also the further sum of two thousand five hundred dollars and costs, without interest on the sum of twenty-five hundred dollars, with stay of execution on the sum of six thousand dollars, until the defendant Illies shall have filed a bond in the sum of nine thousand dollars, with approved security, or shall have filed such a release or evidence of the payment or cancellation of the drafts for fourteen and sixteen thousand francs as alluded to in the parties' pleading, said stay of execution shall continue to exist until such bond or release are approved by the judge and filed in the district clerk's office of Bexar county, then that execution shall issue against all the goods, chattels, lands, and tenements of said Castro, to pay and satisfy the balance which may remain due and unpaid. And that this judgment operate as a general lien upon all the real property and slaves of said Castro situated in the county of Medina, from the date of its registration in said county, and in the county of Bexar from date hereof. And it is further ordered,

adjudged, and decreed that the said John H. Illies do recover of said Henry Castro his reasonable costs in this behalf expended." On June 8, 1853, a writ was issued from the district court of Bexar county, directed to the sheriff of Medina county, which contained a full description of the several tracts of land on which mortgage had been declared and foreclosure decreed, which, except as to the description of lands thereby directed to be sold, was as follows:

"The State of Texas, County of Bexar—To the Sheriff of Medina County, Greeting: Whereas, John H. Illies, on the 25th day of June, A. D. 1852, at our district court, hath recovered against Henry Castro, of Castroville, in Medina county, the sum of seventeen thousand seven hundred and twenty-eight dollars and forty-three cents, with interest thereon from the said 25th day of June, 1852, until paid, and also the further sum of two thousand and five hundred dollars and costs of suit; and whereas, by said judgment, there was a decree of foreclosure of mortgage on the following lands belonging to said Henry Castro, to-wit: \* \* \* These are therefore to command you that of the mortgaged lands above set forth and described you proceed to sell a sufficient quantity to pay the full amount of this execution, together with your legal fees and commissions for collecting the aforesaid amount; and that you have this writ at the clerk's office of said court on or before the return-day hereof, certifying how you have executed the same. Witness: JOHN M. CAROLAN, Clerk of the District Court, and seal of said court at San Antonio, this 8th day of June, A. D. 1853. [SEAL.] J. M. CAROLAN, Cl'k D. C. B. Co. By TRO WARD, Deputy."

In pursuance of this writ the lands were all sold by the sheriff of Medina county on July 5, 1853, under a recited levy of date June 10, 1853. Whether Illies bought all the lands described in the judgment and writ is not made to appear by the agreed statement, but he bought the lands in controversy, for which he bid \$130. The entire amount of sales was \$3,695.40, for which Illies receipted to the sheriff on July 11, 1853. The judgment was recorded in Medina county some time in the month of July, 1853,—whether before or after the sale made by the sheriff does not appear. The sheriff made a deed to Illies, and after the return of the writ under which the sales were made an execution issued, on which was credited the sum realized on the sale. Within two years, but after the sales referred to were made, Castro prosecuted a writ of error, without *supersedeas* bond, on which this court rendered the following judgment:

"Thursday, December 24, 1854. This cause came on to be heard on the transcript of the record of the court below, and, the same being inspected, it is ordered, adjudged, and decreed that the judgment of the court below be modified and rendered here; and this court, proceeding to render such judg-

ment as the court below should have rendered, it is ordered, adjudged, and decreed that the judgment and decree of the court below, so far as it relates to the sum due to Illies and his cost, be affirmed; and it is further ordered, adjudged, and decreed that so much of the decree of the court below as decrees the sale of the specific land described in the two deeds of conveyance to Illies and Wurzbach in satisfaction of the money decreed to be due to Illies, as far as it goes, be affirmed. It is also affirmed so far as it directs execution in favor of Illies for any balance remaining due to him after the sale of the land specified in the mortgage deeds; and it is further ordered, adjudged, and decreed that so much of the judgment of the court below as directs the sale of lands not described in the deeds of mortgage, but substituted in lieu of a part of the lands so described, be, and the same is, reversed. And it is further ordered, adjudged, and decreed that so much of the decree of the court below as directs a lien on other lands belonging to Castro, the plaintiff in error, not included in the mortgage deeds, be reversed, annulled, and held for naught; and it is further ordered that the defendant in error recover of the plaintiff in error his costs in this court, as well as in the court below, expended, and this decision be certified below for observance." *Castro v. Illies*, 13 Tex. 229.

Neither Illies nor Castro conveyed this land until long after the judgment by the supreme court. Appellants claim the land in controversy by *mesne* conveyances under Castro since the supreme court decree, and appellee under Illies since said date. Appellee is in possession.

The agreement as to question of law to be decided, and of other facts on which to base a decree, is: "Did John H. Illies acquire title to the two surveys, Nos. 131 and 132, District No. 1, in controversy, by virtue of the deed from the sheriff of Medina county to said Illies under this judgment, record thereof, and sale as shown? If so, this judgment may be affirmed. If not, this judgment may be reversed and rendered for appellants for the land in controversy, and the rental value of said surveys, (320 acres,) at 5 cents per acre per annum from March 29, 1884, and allowing appellee the value of improvements in good faith thereon, in the sum of \$200, and fixing the value of the land at two dollars per acre." If the judgment in favor of Illies had been reversed *in toto*, under the rule followed in this state, which seems to be generally adopted, there could be but little controversy as to the rights of the parties. The general question as to the effect of reversal of a judgment, after property has been sold under it and bought by the person in whose favor the judgment was originally rendered, was considered in *Stroud v. Casey*, 25 Tex. 755, and it was said: "The consequence is that the reversal of the judgment puts an end to the title." *Freem. Judgm.* §§ 481, 482. To the same effect are

the following cases: *Marks v. Cowles*, 61 Ala. 302; *Delano v. Wilde*, 11 Gray, 17; *Gott v. Powell*, 41 Mo. 420; *Reynolds v. Harris*, 14 Cal. 678; *Hubbell v. Broadwell*, 8 Ohio, 127; *Bryant v. Fairfield*, 51 Me. 159; *Galpin v. Page*, 18 Wall. 373. It would seem to be a useless formality to institute proceedings to have declared the purchaser's claim invalid, when the effect of the reversal is to declare invalid the proceedings through which such a purchaser sought to acquire title. It was suggested in *Reynolds v. Hosmer*, 45 Cal. 629, that the owner after reversal may, at his election, either have the sale set aside and be restored to the possession, or have his action for damages. We do not understand that the court intended in that case to hold that in such a case it was necessary for the owner, after reversal, to take any steps to avoid a sale; for in that case an application was made in the circuit court to set aside a sale on reversal of the judgment under which it was made, which was refused, and it was contended that this was an adjudication that the sale was valid, but the supreme court said: "We do not think so. When the supreme court reversed the judgment of the circuit court, and adjudged that the plaintiff had no lien on a portion of the canal, and its mandate was filed in the lower court, showing those facts, the judgment was reversed, whether the lower court afterwards made any order confirming its judgment to that of the supreme court or not. If the plaintiffs have any rights here, they come from the reversal by the supreme court, and not from any subsequent action or want of action by the circuit court." In that case the owner of property sold before reversal brought suit for damages, and not for the land sold, and in such a case it may be that the owner ought to be held to have ratified the sale and the power of the officer who made it.

The judgment establishing the sum due to Illies having been affirmed, it is contended that the judgment was in so far valid, and that the process issued under it conferred lawful power on the sheriff to make the sale. It is further contended that the objections raised to the validity of the sale amount, at most, only to irregularities. The court rendering the judgment having jurisdiction of the parties and subject-matter, a sale made to a stranger before reversal, under the process issued, would have passed title not subject to be defeated by subsequent reversal. As between Castro and Illies, however, the process issued could confer on the officer who made the sale no power other than such as the judgment gave, and the extent and character of this, as between them, must depend on their rights, as ascertained and declared by the judgment rendered in this court on writ of error. That judgment, in effect, declared that the land in controversy could not legally be sold on such process as was issued and executed. The statutes in force at the time provided what the judgment or decree for the foreclosure of a mortgage should be, as well

as for the further procedure, and the judgment and process issued under it are such as were appropriate for the enforcement of a specific lien. Pasch. Dig. art. 1480. That statute required the judgment to direct an order of sale to issue to the sheriff, directing him to sell the mortgaged property, and it was only in the event that the same could not be found, or should not sell for a sum sufficient to pay the judgment and costs, that process was authorized to issue under which other property might be seized and sold to satisfy the judgment. If the writ under which the land in controversy was sold had contained a command to the sheriff, in the event the mortgaged property did not sell for enough to satisfy the judgment and costs, then to levy upon and sell other property sufficient for that purpose, it might be held that the sale was valid, and the issuance of such process before the mortgaged property was sold and found insufficient only an irregularity. The process, however, contained no such command, but required the sale of the property in controversy absolutely, if necessary to satisfy the judgment, and thus cut off the right of Castro to point out other property, as he would have been entitled to do under the law, after the property really mortgaged had been sold and found insufficient. *Id.* art. 3775. It is said that "if the land in controversy, and in fact all said substituted lands, had been sold under an ordinary execution, directing the sheriff to sell any and all lands of Castro to satisfy said judgment, instead of under said writ, directing sale of the lands therein described, the sale would have passed title to Illies." If this proposition be conceded, and if it could be admitted that, under a judgment foreclosing a mortgage and directing the specific property to be sold for its satisfaction, an ordinary execution could be issued, levied, and property sold under it, before a sale of the mortgaged property, this would not relieve appellee from the difficulty that meets her. The officer had no such writ, and could only do that under the process held by him which it commanded, had the judgment under which it issued been entirely lawful. In *Maupin v. Emmons*, 47 Mo. 308, it appears that under the statutes of Missouri, as in many of the other states, when a *fleri facias* has been levied but returned without sale, a *venditioni exponas* may issue, directing the sale of the property levied on, and, in the event that be deemed not sufficient to satisfy the judgment, commanding the sheriff to seize and sell other property. A writ issued, directing the sale of property seized under the writ returned, but omitting the command to seize and sell other property in the event the officer deemed the former levy insufficient. The former levy did not embrace a tract of land, but the sheriff, under the last writ, levied upon it and sold; and, in a contest growing out of this, it was claimed that the sheriff was clothed with the same power as though the command to make an additional levy, if necessary, had been inserted in the

writ. The court, however, said: "This proposition runs counter to all our ideas of the powers and duties of sheriffs. It has always been considered that he was but the executive officer of the court, bound to obey its lawful commands, and, in executing a writ, that he must look to the face of it for the extent and boundary of his duties and his powers. It does not matter what writ might have been issued,—to what writ the party was entitled by law, if he had chosen to sue it out. When it is issued and placed in the officer's hands, his only duty is to see what are its commands, and, if he finds them within the authority of the court, he must obey them. But he cannot go beyond those commands, or question their regularity. If he is ordered merely to sell certain property, the order gives him no authority to seize and sell any other property." *Quinn v. Wiswall*, 7 Ala. 645; *Canaday v. Nuttall*, 2 Ired. Eq. 265; *Allemong v. Allison*, 1 Hawks, 325; *Dunn v. Nichols*, 68 N. C. 109. In *Reynolds v. Harris*, 14 Cal. 678, it appeared that a court having jurisdiction of the parties and subject-matter entered a judgment foreclosing mortgages, into which entered an improper order as to the manner of sale in foreclosure. A question arising as to the validity of a sale made under the judgment before its reversal, it was held that the reversal destroyed the title acquired by an assignee of the judgment, who purchased under it, and, in disposing of the question, it was said: "We see no difference between the total reversal of the judgment in that case, so far as this question is concerned, and a partial reversal; for the effect of the reversal was to declare that this sale, as ordered by the decree of the court below, was improperly so ordered, and that the sale should have been made, by the law of the land, in a different manner in substance and in fact."

Before the reversal of the judgment obtained by Illies, the sales made under the process issued not having realized a sum sufficient to satisfy it, execution issued and was levied on other property of Castro, which was sold, and in a controversy as to that it was claimed that the sale under execution was invalid on the ground that the mortgaged property had not been first sold, and on the further ground that the reversal of the judgment vacated all sales made under it. In disposing of that case it was held "that all the mortgaged lands included in the decree, and all which by the judgment of this court were subject to seizure and sale under the decree, were first sold. The judgment was not superseded upon prosecuting the writ of error. It was, therefore, an authority for the issuance of execution, and it cannot affect the title of the purchaser at the sale that property was not sold under the decree to which the defendant in execution had no title, and upon which the decree could not legally operate, or which was not legally subject to seizure and sale on execution under the decree." *Castro v. Illies*, 22 Tex. 496. The facts on which the rights of the parties to this action depend



were before this court when the decision in the case last referred to was made, and we have in it a recognition of the fact that the property in controversy was not subject to seizure and sale under the decree of foreclosure, although it would have been on execution issued on the general judgment for money. No right existed under the judgment to have any particular land sold, other than such as was embraced in the mortgages; and the judgment of this court, which declared this, swept away all claim of Illies founded on the sale made under process issued only to carry out the decree of foreclosure. After reversal so much of the decree as directed the sale of land not embraced in the mortgages, as between the parties to it, was as though it had never been entered; and process issued under it, as between such parties and those claiming through them by conveyance made after reversal, cannot stand on other ground than does the decree.

It is urged that Illies acquired a lien on the land, and that for this reason sale made under the process issued should be sustained. That no lien was given by the decree was decided, (*Castro v. Illies*, 13 Tex. 236,) and that none was acquired by registration of the judgment is clear. Had a lien been acquired in either of these ways, we do not see that this would in any manner affect the question involved in this case. No facts are shown which would operate as an estoppel between *Castro* and *Illies*, or between their vendees. The judgment of the court below will be reversed, and here rendered for appellants, in accordance with the agreement of the parties. It is so ordered.

**BONNER et al. v. HEARNE.**

(Supreme Court of Texas. June 23, 1889.)

**RAILROAD CORPORATIONS—APPOINTMENT OF RECEIVERS—VENUE.**

1. Rev. St. Tex. art. 1198, § 21, provides that suits against railroad corporations may be brought in any county in which the railroad extends or is operated. Act April 2, 1887, provides that if the property sought to be put into the hands of a receiver is a corporation whose property lies within the state, the suit to "have a receiver appointed shall be brought in this state in the county where the principal office of said corporation is located." *Held*, that the district court of S. county, through which the road of a railroad corporation extended, had authority to appoint a receiver for such corporation, though the principal office of the corporation was in A. county.

2. One G. brought an action in debt against a railroad corporation in S. county. A stockholder of the corporation intervened, and asked the appointment of a receiver. Persons claiming to be creditors also intervened, and asked for a receiver. On the application of the stockholder a receiver was appointed. G. obtained judgment. The intervening stockholder withdrew its plea of intervention, and on motion of G. the receiver was continued. Pending this litigation an application for a receiver was made in the district court of another county. *Held*, that the jurisdiction of the court of S. county dated from the first application, and the receiver's authority was derived from his first appointment, and the withdrawal of the intervening stockholder did not vacate the receivership, but it continued on application of the plaintiff.

3. If such proceedings were erroneous, they

were not void, and the possession of the receiver is legal, and he cannot be dispossessed at the suit of another receiver appointed afterwards by another court of co ordinate jurisdiction.

Appeal from district court. Anderson county.

This was a suit by John R. Hearne against T. R. Bonner and J. M. Eddy to recover possession of the road and property of the International & Great Northern Railroad Company, such possession being held by the latter as receivers of said road and property, appointed by successive decrees of the district court of Smith county, Tex., on February 16, March 11, and March 30, 1889. John R. Hearne claimed the property as receiver appointed by decrees of the district court of Anderson county, made April 15 and 29, 1889. Case was tried before the court without a jury, and judgment rendered in favor of Hearne and against Bonner and Eddy for possession of said railroad and property. Motion for new trial overruled. Defendants appeal.

A. H. Willie, W. S. Herndon, J. M. Duncan, and H. Chilton, for appellants. *Burnet & Hays* and *Gregg & Reeves*, for appellee.

GAINES, J. This action was brought in the district court of Anderson county by appellee, as receiver of the International & Great Northern Railroad Company, appointed by a decree of that court, to recover possession of the property of that corporation in the hands of appellants, as receivers appointed by a decree of the district court of Smith county. The case was submitted below to the judge without a jury, who filed the following as his conclusions of law and fact: Conclusions of Fact: "The facts are of record, and, so far as they affected the rulings made and judgment rendered upon the trial of this cause, are undisputed. I shall state only the facts upon which the judgment is based. (1) It appears from the record that plaintiff claims title to the possession of the International & Great Northern Railroad and its properties by virtue of orders of the district court of Anderson county appointing and qualifying him as receiver of such property. (2) That defendants assert right to the possession of the same property under prior orders of the district court of Smith county, constituting them receivers thereof. (3) It appears affirmatively from the record of the proceedings in the district court of Smith county, resulting in the appointment of defendants, that the property sought to be placed in their hands was and is that of a railroad corporation organized and acting under the laws of Texas, and whose property was and is situated in this state; and that at the time such proceedings were instituted, and when the various appointments of defendants were made, such corporation had its principal office established, not in Smith county, but in Anderson county." Conclusions of Law: "From these facts I conclude



—*First*, that the district court of Smith county had not jurisdiction to make the appointment of receivers as attempted, and that its orders, under which defendants claim, are void; and, *second*, that the district court of Anderson county did have jurisdiction to make the appointment of receiver, and that, by virtue of its orders appointing him, plaintiff was invested with the right to the possession, control, and management of the property sued for, and is therefore entitled to recover it from the possession of defendants."

If the conclusion of the court below that the district court of Smith county did not have jurisdiction to appoint a receiver of the property of the corporation be correct, then the judgment below should be affirmed; for if the appointment be void, the appellants are in possession of the property without authority of law, and appellee is entitled to recover it. If, on the other hand, the court of Smith county had authority to make the appointment, then the appointment of appellants must be held valid, and their possession of the property legal, and the property must be considered in the custody of the court which appointed them, and not subject to be interfered with by the action of any court of co-ordinate jurisdiction. The determination of the question depends upon the construction of section 18 of the act of the twentieth legislature concerning receivers, approved April 2, 1887. The section reads as follows: "If the property sought to be placed in the hands of a receiver is a corporation whose property lies within this state, or partly within this state, then the action to have a receiver appointed shall be brought in this state in the county where the principal office of said corporation is located."

The question is, was it the intention of the legislature in the enactment quoted to take from all courts in the state the power to appoint a receiver of the property of a corporation except those in which the principal office of the company is situated, or merely to confer upon the corporation the privilege of having receivers of their effects appointed in the county of their general office? It is contended on behalf of appellee that the intention was to deny power absolutely to all but the one court, and it is insisted that there are considerations of public policy underlying the statute which make this intention apparent. It is argued that in passing the act under consideration the legislature had prominently in view the appointment of receivers of railroad companies, and that the injustice and inconvenience which had resulted from the appointment of receivers of such corporations at places remote from their general offices were recognized by the legislature, and were sought to be remedied by the statute. It is claimed that by the appointment of receivers in the county of the general office of a corporation fraud may be prevented, and that the affairs of the corporation will be managed more to the interest of the public at

large. The fallacy of the argument consists in the assumption of the premises upon which it is based. Does it tend to prevent fraud between the managers and lien creditors of a railroad company, in the appointment of a receiver, to require absolutely that no court shall appoint him except a court of the county in which the principal office of the company is situated? If so, how does it prevent it? If the managing officers of such a corporation and its bondholders conspire together to place its property in the hands of a receiver, why cannot this be as speedily and effectually accomplished in any one court as in another? We see nothing in the requirement as to venue to prevent such a result. Then, again, let us ask in what way does a provision that a receiver shall be appointed by a court of the county in which the company's principal office is located tend to subserve the public interest? If the requirement was that the receiver should be a resident of that county, or should abide or make his office in the county during the term of his appointment, we could see some reason for it. But such is not the requirement of the statute. It merely provides that, if the property lies within this state, the receiver shall be a *bona fide* citizen and qualified voter in the state. Laws 20th Leg. p. 120, § 2. Hence it follows that it is not true, as the appellee's argument seems to imply, that the law was intended to secure the appointment of a receiver resident in the county of the principal office of the corporation. There is nothing in the law to have prevented the district court of Smith county, if it had jurisdiction, from appointing appellee, nor to preclude the district court of Anderson county from appointing appellants. Looking at the statute from another stand-point, we do not see a reason why the legislature may have deemed it proper to confer upon railroad companies the privilege of being proceeded against for the appointment of receivers of their property in the counties of their principal offices only. We do not concur in the proposition that, in fixing the venue of ordinary suits, a purpose is manifested to disregard their rights or to embarrass them in the defense of actions brought against them. In determining the venue of such suits it was the duty of the legislature to consider the rights and interests of the citizens as well as those of the companies, and to so frame the law as to afford the former a fair opportunity to prosecute and maintain their actions, and in such a manner as not unreasonably to embarrass the companies in making their defenses. It is a necessary incident to the operation of a railroad that claims for injuries to persons and property, for loss and damage to goods in transit, as well as for many other wrongs, arise all along its line of road. These claims are frequently small in amount. It results from this state of affairs that if each claimant was required to bring his suit in the court of the county where the principal office of the company is situated, it would in many

cases work a practical denial of justice. The expense of prosecuting their suits in a distant forum would preclude many poor men with just claims from litigating their rights, and in cases where the demands were small would make it folly for those who are pecuniarily able to attempt their enforcement in the courts. The practical result of the statute as it exists is almost universally to cause the action to be brought at some place on or very near the company's line, where it may make its defense at comparatively little expense. Section 21 of article 1198 of the Revised Statutes reads as follows: "Suits against any private corporation, association, or joint-stock company may be commenced in any county in which the cause of action or a part thereof arose, or in which such corporation, association, or company has an agency or representative, or in which its principal office is situated, and suits against a railroad corporation \* \* \* may also be brought in any county through or into which the railroad of such corporation extends or is operated." It seems to us that in thus departing from the general policy of the statute, manifested by the requirement that gives to a defendant the privilege of being sued in the county of his residence, the legislature has carefully weighed the rights of the railroad companies as well as those of the citizens, and have restricted the privilege of the former no further than the demands of justice required. It follows that in our opinion the assumption that the legislation upon this subject manifests an unfriendly spirit towards corporations cannot be maintained, and that the argument that section 13 of the act of 1887 is to be construed as if imbued with the same spirit falls to the ground. We repeat, then, that there does not appear a good reason why it may have been thought proper to restrict the operation of section 21 of article 1198, quoted above, and to confer upon corporations the privilege of being sued for the appointment of receivers in the counties of their principal offices only. In such actions the reasons for extending the venue to other counties no longer exist.

Suits for the appointment of receivers are from the very nature of the case infrequent, and the plaintiffs are ordinarily abundantly able to prosecute their actions as well in the proper court of the county of the defendant's principal office as in any other forum. There being no reason for restricting the privilege of the defendant in such cases, there is good reason why there should be a return to the general policy of the venue statutes, and to require, if the defendant shall so demand, that suits for the appointment of a receiver of a corporation shall be brought only in the county of its principal office, which, by analogy of law, is the county of its residence. Therefore, if we look to the reason and spirit of the law under consideration, they would indicate rather that by section 13 the legislature intended to confer a privilege upon the defendant than that it intended absolutely to

deprive any district court of the state of the power and jurisdiction to appoint a receiver in the event the defendant waived the question of venue. Recurring, then, to the language of section 13, if the act stood alone, if there were no other statutes *in pari materia*, if there were no authoritative constructions of similar statutes, and if there were no constitutional restrictions in the way, it might be held that the construction claimed by appellee is correct. The language "shall be brought \* \* \* in the county where the principal office of said corporation is located," when literally construed, implies that it shall not be brought elsewhere. But we have had, and still have, statutes fixing the venue of causes, not less mandatory and not less plain in their terms, which have been construed, not to deprive any district court of the jurisdiction conferred by the constitution, but merely to confer a privilege upon the defendant to confer the jurisdiction to the courts of the counties specified in the statute. The counsel for appellee, with all their industry and research, have cited us to no case in this court in which a contrary ruling has been made. In *De La Vega v. League*, 64 Tex. 214, it is said: "Our statutes in force at the time the reconvention was filed provided that suits for the recovery of land should be brought in the county where the land, or a part thereof, is situated. This is one of the exceptions to the general rule requiring suits to be brought in the county of the defendant's residence. This requirement is not a matter that affects the jurisdiction of the district courts over the subject-matter of controversies about the title or possession of lands. Every district court in the state has cognizance of such suits. The requirement as to the county in which the suit may be brought is a mere personal privilege granted to the parties, which may be waived like any other privilege of this character." The language of the act referred to in the opinion is: "(11) In cases where the recovery of land or damages thereto is the object of a suit, in which cases suit must be instituted where the land or a part thereof is situated." Pasch. Dig. art. 1423. The same ruling was made in *Ryan v. Jackson*, 11 Tex. 391, and was subsequently approved in *Morris v. Rannels*, 12 Tex. 176. In *Cavanaugh v. Peterson*, 47 Tex. 206, Chief Justice ROBERTS says: "The statute provides for a mortgage on land to be foreclosed in the county where the land is situated. It does not follow from that that a judgment of foreclosure would be void if it was foreclosed in another county, the district court having general jurisdiction of the subject-matter. \* \* \*" The principle has been recognized in the following cases: *Hutchins v. Chapman*, 37 Tex. 612; *Burnley v. Cook*, 13 Tex. 585; *Pool v. Pickett*, 8 Tex. 122; *Masterson v. Cundiff*, 58 Tex. 472; *Beazley v. Denson*, 40 Tex. 416; *Lewis v. Davidson*, 51 Tex. 251; *Kendall v. Hackworth*, 66 Tex. 499. The doctrine was again very distinctly recognized in *State v. Snyder*,

66 Tex. 687, as applied to a statute which specially provided that suits to set aside certain sales of school lands should be brought in the district court of Travis county. In the opinion in that case the present chief justice says: "District courts, under the constitution, having jurisdiction over the subject-matter of such an action, the state, as might any other plaintiff, might maintain such an action in any county in the state in so far as jurisdiction over the subject-matter is concerned." In cases of doubt statutes *in pari materia* are to be construed together. When language in a statute has been construed by the courts, and the same language is used in a subsequent statute relating to the same subject-matter, it is presumed to have been adopted with the interpretation precisely placed upon it by judicial construction. In view of the previous decisions of our courts upon similar statutes and these rules of construction, we do not hesitate to hold that section 13 of the act of April 2, 1887, was intended to confer upon corporations the privilege of having suits for the appointment of receivers of their property instituted in the counties of their principal offices, and not deprive any district court of the power of making such appointment in the event the corporation failed to plead its privilege. It follows that we are of opinion that the district court of Smith county had jurisdiction to appoint the appellants receivers of the property of the International & Great Northern Railroad Company when it made its decree to that effect. This view of the case renders it unnecessary to pass upon several questions presented in the briefs and arguments of counsel. Since we hold that it was not the intention of the legislature to deprive the district courts other than those of the counties in which the corporations of the state have their principal offices of power to appoint receivers of their property, it is not necessary to decide whether the legislature has the power to take away that jurisdiction or not. Upon that point we give no opinion. Nor do we decide whether or not section 13 was intended to apply to all receiverships of the property of corporations, or only to cases of insolvent corporations in which the corporation itself and all its assets are taken in to the hands of the court for the purpose of winding up its business.

There is, however, one other question raised by appellee which it is necessary briefly to consider. The history of the litigation is as follows: On the 4th of February, 1889, Jay Gould brought an action of debt against the International & Great Northern Railroad Company in the district court of Smith county for about the sum of \$450,000. On the 11th day of the same month the Missouri, Kansas & Texas Railway Company, claiming to be a stockholder of the former company, intervened in the suit, and asked the appointment of a receiver. On the same day J. W. Mitchell and others, claiming to be creditors, also intervened, and also asked that a receiver

be appointed. On the 16th receivers were appointed upon the application of the Missouri, Kansas & Texas Company, the court being in doubt as to its power to appoint upon the application of the other intervenors. They were, however, permitted to prosecute their pleas of intervention in the suit. On March 11, 1889, Gould obtained a judgment which was declared a lien upon the earnings of the defendant company. Thereupon the intervening corporation immediately withdrew its plea of intervention, and Gould filed a motion that the receivers be continued, which was granted. The petition asking the appointment of a receiver was filed in the district court of Anderson county on March 22, 1889. It is now insisted that when the Missouri, Kansas & Texas Company withdrew its intervention the receivership was vacated, and that the authority of the appellants, therefore, dates from a period subsequent to the time that the proceedings were commenced in the Anderson county district court. It is argued that since at the time the proceedings were instituted under which appellants hold their appointment the suit for the appointment of a receiver had been instituted in the district court of Anderson county, the former court had lost its jurisdiction of the subject-matter of the receivership, and that therefore appellants' appointment is void. We think, however, that the jurisdiction of the Smith county court dates from the first application, and that appellants' authority is derived from the first appointment. The withdrawal of the intervening corporation from the suit did not vacate the receivership, although the appointment was made upon its application. Immediately upon the withdrawal of the plea of intervention the receivership was continued upon the application of the plaintiff. Whether these proceedings were regular or not, we need not determine; whether they were erroneous or not, we need not determine. They were not void, and therefore the possession of appellants of the property placed in their hands by the order of that court is legal, and they cannot be dispossessed at the suit of another receiver appointed at a subsequent time by another court of co-ordinate jurisdiction.

In determining this case we have individually read and considered the numerous able arguments of counsel, together with the elaborate and well-considered opinion of the learned judge who tried the case below, and upon consultation have arrived at the conclusion that the law is with appellants, and that the judgment should be reversed and here rendered for them. It is accordingly so ordered.

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WESTERN UNION TELEGRAPH CO. v. EDSALL.

(Supreme Court of Texas. June 14, 1889.)

ERROR IN TRANSMITTING TELEGRAM—DAMAGES.

1. Plaintiff, who had purchased a flock of sheep, which he wished to drive to his ranch,

directed a telegram to a servant to meet him at a certain place and "bring Shep," (meaning a sheep dog on the ranch.) The message was delivered so as to read "bring sheep." The servant accordingly drove plaintiff's sheep from the ranch to meet him. In an action for damages to the newly-purchased sheep, additional expense in keeping them, and for loss, exposure, and injury to both flocks, etc., plaintiff alleged that when he sent the dispatch he informed defendant's agent in charge of its office that he wanted the dog to assist in driving the sheep to his ranch. Held, that defendant had direct notice of the object of the dispatch, and was chargeable with notice of all attendant details, and liable for negligence in transmitting the message.

2. Where the evidence showed that plaintiff sent a messenger to the designated place to meet the servant, and give him further instructions, but that the servant was so delayed and impeded by the sheep from the ranch, which he was driving, that the messenger left before he arrived; and that the servant, on arriving and failing to find plaintiff, returned to the ranch, after a short stay, on account of lack of provender and shelter for flock in his charge, and injuries sustained by the sheep in the long journey, it was not error to instruct the jury that plaintiff might recover for loss to the flock purchased by him between the place at which the servant was to meet him and the ranch, there being no contributory negligence in the servant's failure to meet him.

Appeal from district court, Cooke county.

Action by R. S. Edsall against the Western Union Telegraph Company for damages for an error made in transmitting a message from him to one Joel Butler. Judgment for plaintiff, and defendant appeals.

*Stemmons & Field*, for appellant. *Potter & Hughes*, for appellee.

HENRY, J. This suit was brought by appellee to recover damages for the negligent transmission of a telegraphic message by appellant. The message directed to be sent read: "Meet me immediately with two horses at Buffalo Springs; bring Shep." As delivered it read: "Meet me immediately with two horses at Buffalo Springs; bring Sheep." The message was sent from Gainesville, Tex., to Fort Griffin, Tex., and from there mailed to Throckmorton, Tex.

The plaintiff then owned and had on his ranch in Throckmorton county a flock of 2,500 head of sheep. He had just purchased a flock of about 1,300 head in Cooke county, which he proposed to drive to his ranch in Throckmorton county. The message was sent on the 20th day of January to one Joel Butler, who was the servant of plaintiff, in charge of his sheep in Throckmorton county. "Shep" was a dog belonging to plaintiff, and in charge of Butler, trained in the management of sheep. The purpose of the dispatch was to have Butler meet plaintiff on the way between Cooke county and Throckmorton county, in order that he might have his assistance, and that of the dog, in driving the purchased sheep, known as the "West Flock," to his ranch. On account of the error in the dispatch, as delivered to Butler, "sheep" instead of "Shep," Butler at once drove the Throckmorton, or ranch, flock of sheep to Buffalo Springs. It is charged that the consequences of the mistake occasioned damage

to both flocks and additional expense; that by reason of the greatly longer time required for Butler to reach Buffalo Springs with the sheep than it would have done with the dog, plaintiff was prevented from making connection or communicating with him; and for the want of his assistance and that of the dog, he was greatly delayed in driving the West sheep, and put to great additional expense; and that the longer exposure of the sheep, and the more inclement weather on the last part of the route,—that from Buffalo Springs to the ranch,—the West sheep perished in great numbers; and that by reason of the ranch sheep being taken from their range, where they were well provided for, and driven to Buffalo Springs over a barren country, where they could not get feed, and were exposed to inclement weather, they perished in large numbers; and besides, those of both flocks that survived were greatly injured and lessened in value; and that the dog would have greatly lessened the number of hands required, and, at the same time, have enabled plaintiff to complete the drive in a shorter time. Judgment was rendered for plaintiff.

Appellant complains of errors committed by the district court in not sustaining its exceptions to plaintiff's pleadings on the grounds—(1) Because they failed to charge that defendant had any notice of the object and purpose for which the telegram was sent, further than shown by the telegram, and, by it, there was no notice that the damages sued for would follow a breach of the contract in transmitting and delivering the telegram. (2) Because they show on their face that, in acting on the message as delivered, there was such contributory negligence on the part of plaintiff's agent as precludes a recovery. (3) Because they do not show that defendant had any notice that plaintiff owned any sheep in Throckmorton county; that the dispatch did not give such notice, and no damages from that cause were in the contemplation of the parties when they made the contract. (4) Because the item of \$100 damages, or expense of driving sheep to and from the ranch to Buffalo Springs, is not an element of damage, because it was not in contemplation of the parties at the time the message was accepted for transmission.

Plaintiff alleges in his petition that when the dispatch was sent "he informed the agent of defendant, who was then in its office, and in charge thereof, that he wanted to telegraph to Joel Butler requesting him to bring the dog, and meet him to assist in driving the sheep purchased by him in Cooke county to his ranch in Throckmorton county." This allegation shows that direct notice was furnished defendant that the object of the dispatch was to get assistance for the purpose of driving sheep on part of the journey from Cooke to Throckmorton county; and the telegram, as delivered, directing that the ranch sheep should be taken to Buffalo Springs, there cannot be a question of want of notice in either

case. When notice of the main fact was given, we think the defendant was chargeable with notice of every incidental fact that would attend the transactions that it could then have ascertained by the most minute inquiry. Notice of the main purpose was sufficient to put it upon inquiry as to the attendant details, and it is chargeable with all it could have learned by such inquiries. This rule enforced in all cases is emphatically applicable to telegraph companies. The condensed methods of expression in use in their business requires them to take notice of whatever the dispatch suggests, and if they need fuller information on the subject, they should seek it, and if they do not do so, they must be held, as we have suggested, to have all the knowledge that such inquiries could have elicited. In this case, knowledge of the fact that the two herds were to be driven between known points, at a stated season of the year, would properly charge the company sufficiently with notice of the distances, character of the country, expense of driving, and effect of delay on the sheep, considering the weather and other things incident to driving flocks of sheep over the routes, to make it responsible for damages growing out of such causes or conditions. We are unable to see in what consisted negligence on the part of Butler, the servant of plaintiff, in obeying a plain command to him to take the flock of sheep to Buffalo Springs. The dispatch contained no word inconsistent with that direction. It contained nothing to suggest a doubt of its entire accuracy. If he had entertained such a doubt, he had no means of removing it. The dispatch had been brought to him by mail from the end of the telegraph line, and, not having the means of immediately communicating with the sender, if that could have been required of him under any circumstances, he was under the necessity either of obeying or repudiating it. We do not think it can be fairly contended that, under the circumstances, it was not his duty to obey the message as he did.

Appellant complains that the court erred in its charges to the jury as follows: (1) In failing to submit to the jury the question of notice to defendant of any object to be accomplished by the telegram, further than shown by itself; and as to whether damages to the sheep were in contemplation of defendant when it received the telegram for transmission; and in failing to submit the question of contributory negligence. (2) In charging that plaintiff might recover for loss on the West flock between Buffalo Springs and plaintiff's ranch, because all the evidence showed that Butler reached said destination before plaintiff did, and plaintiff's loss was occasioned by his failing to meet Butler there. In the main, these objections are the same as those raised upon the exceptions to the pleadings, and have no more merit in one view than in the other. Moreover, in so far as they complain of the omission to give charges,—those given by the court being found un-

exceptional,—the omitted charges, even if they had been correct, ought to have been brought to the attention of the court.

With regard to the objection to the charge as to damages for driving the sheep between Buffalo Springs and the ranch, based upon the evidence that Butler arrived at the Springs before plaintiff did, and that plaintiff's not finding him there at all was his own fault, we think that on this point the evidence shows that plaintiff sent a messenger to meet Butler at Buffalo Springs and give him further instructions, consistent with the original purpose, but, on account of Butler being impeded by the ranch sheep which he was driving, he was greatly delayed, leading to the messenger's leaving the destination before he reached it. From the same cause Butler, when he arrived at the destination, could get no information, and as, for the want of food and shelter, the sheep under his control were being greatly injured, he, after waiting there a short time, prudently returned with the sheep to the ranch; from which it resulted that he was not at Buffalo Springs when plaintiff reached that point with the other flock, and no communication was established between the two until afterwards. As the record now stands, owing to portions of it having been stricken out on motion of appellee, there is nothing to support the remaining assignments of error discussed in the brief of appellant. We think the judgment ought to be affirmed.

#### MANN v. KELSEY *et ux.*

(*Supreme Court of Texas.* Oct. 30, 1888.)<sup>1</sup>

#### SALE OF HOMESTEAD—EXEMPTION OF PROCEEDS.

1. Rev. St. Tex. art. 2324, provides that an officer who has collected money on execution shall pay the same over to the party entitled thereto at the earliest convenience. Article 2325 provides a penalty for failure to do so. A sheriff had collected money due a husband and wife on an execution for the sale of land under a vendor's lien, and refused to pay it over, alleging that he had applied it in payment of an execution against the husband. The land sold under the vendor's lien was the homestead of the parties, the proceeds of which they had intended to apply to the purchase of another homestead. *Held*, that the sale of the homestead, in the absence of a law authorizing an exchange or transfer of homestead, was a voluntary conversion of the exempt property into money, which at once became subject to execution.

2. Money made by the sheriff on an execution may be applied to the payment of another execution which he holds against the first judgment creditor.

Commissioners' decision. Appeal from district court, Wise county.

*Gordon & McMurray* and *Wallace Hendricks*, for appellant. *Charles Soward*, for appellees.

HOBBY, J. This was a statutory proceeding, instituted under articles 2324, 2325, Rev. St., by appellees on this appeal, C. K. and M. J. Kelsey, against W. J. Mann, sheriff of

<sup>1</sup>Publication delayed through failure to receive copy.

Wise county, appellant, requiring him to pay over money collected by him under an order of sale issued from the district court of said county in their favor against one T. V. Shilling, for \$374.60. There is no material controversy about the facts in the case. Appellees recovered a judgment upon two notes amounting to \$374.60, with 10 per cent. interest per annum, against Shilling, in the district court of Wise county, with a foreclosure of the vendor's lien upon the land sold by them to Shilling, it being their homestead at the time of the sale to Shilling. An order of sale issued, and W. A. Huffman became the purchaser at the sale, paying to the sheriff, appellant, the sum of \$400. After satisfying the execution and costs, a balance remained in the sheriff's hands of \$375.40, which appellees demanded, and which appellant refused to pay over, upon the ground that he had applied it to valid executions then in his hands against appellee C. K. Kelsey and E. Henson, in favor of W. A. Huffman, amounting in the aggregate to \$358.55; that the money in the appellant's hands was the community property of appellees, and was subject to said execution. At the time of the sale of the land to Shilling by appellees it was their homestead, and it was the intention of appellees, when the notes sued upon were collected, to invest the proceeds in another home, having no other means for that purpose. Since the sale to Shilling of appellees' home, they had taken steps to obtain a home in Erath county under the pre-emption laws, and caused the same to be surveyed, but subsequently ascertained that the survey selected had been previously located. Judgment was rendered in the lower court against appellant, Mann, for \$375.40, with interest at the rate of 10 per cent. per annum, and \$90.20 damages. This judgment was subsequently set aside and reformed, and judgment rendered against him for \$375.40, and costs, and judgment for the sureties for their costs. From this judgment both parties have appealed.

The questions involved in this appeal are: First, whether the money, \$375.40, in the hands of the sheriff, appellant, and collected by him under the order of sale issued upon the judgment in appellees' favor foreclosing the lien upon the homestead, was exempt from execution and seizure by reason of the fact that this amount was the proceeds of the sale of the homestead, and was intended by appellees to be invested in another home, they then being without one, except in so far as their homestead rights might exist under the settlement, survey, and residence in Erath county by virtue of the pre-emption law; that they were still residing upon the land in Erath county, and had settled upon it with the intention of making it their homestead. After appellees had caused the survey to be made of the tract of land in Erath county, the surveyor warned them not to put any valuable improvements thereon, because it had been located. Appellees placed none on

this land, but rented and cultivated an adjoining tract of land. No patent had issued to the land upon the location prior to appellees', and they were uncertain as to the title being issued to them. The exchanges made of exempt property for other property are by law classified into two kinds, voluntary and involuntary; the legal effect of the former differing materially from that of the latter, according to the principles laid down and concurred in by a majority of the American courts. In reference to a voluntary exchange of property specifically exempt from execution for property not so exempt, the debtor, in such a case of a voluntary exchange of property, cannot claim exemption for the property received in exchange. The reason of the rule is said to be that "the law designates the species of property it exempts, and does not allow the debtor to choose for himself in respect to the kind or species of property to be exempted. To permit this would be to substitute the choice of a debtor for the provisions of the statute. When exempt property is voluntarily converted into money or other property, not also exempt by law, the right is gone. *Thomp. Homest.* § 750; *Whittenberg v. Lloyd*, 49 Tex. 642; *Schneider v. Bray*, 59 Tex. 670. In the case of *Watkins v. Blatschinski*, 40 Wis. 347, it was held that the proceeds of the sale of the homestead was protected, when designed in good faith to be applied to the purchase of another, and while in transition from one homestead to another. But this decision is based upon a statutory provision with reference to that subject in that state. We are not aware of any such statutory regulation in our state with respect to the proceeds of the sale of the homestead. In the case before us, whatever may be the hardship arising out of the rule, it is the result of the voluntary act of the appellees in exchanging property fully protected by the law for that to which the law affords no such protection as is claimed. And we are therefore of opinion that money in the hands of the sheriff, collected under an order of sale issued upon a judgment foreclosing the vendor's lien upon the judgment creditor's homestead, which had been voluntarily sold, is subject to valid execution in the sheriff's hands.

Appellees — who are appellants on cross-appeal — assign as error the refusal of the court to allow them 10 per cent. per annum and 5 per cent. per month on the money collected by the sheriff, and which he refused to pay over. There can be no question that appellees' motion was in strict compliance with the rules of practice prescribed by the supreme court under this statute. *Rev. St. arts.* 2324, 2325. It was not a suit against the sheriff, but it was in form of a motion. The money was shown to have been collected by the sheriff; the demand was made for payment; and it was filed at the term next following the demand, in the court from which the order of sale issued; but it was admitted that the money was applied by the sheriff

to the payment of regular executions, already in his hands, issued upon valid judgments, and the return thereof made by him. This confronts us with the question whether money so in the hands of the officer is subject to execution. This question was thoroughly discussed in the well-considered case of *Hamilton v. Ward*, 4 Tex. 856, in which a motion was filed against the sheriff for failing to make a return and for refusing to pay over money collected under an execution. The judgment and execution were in proof, as were also the facts that he had collected \$192.56, and had applied the same to an execution against the plaintiff and Hamilton in favor of Latimer & Bagby. This case cited is characterized by an exhaustive review of the leading cases having reference to this subject, notably the cases of *Dolby v. Mullins*, 3 Humph. 437, and *Turner v. Fendall*, 1 Cranch, 118. The last-named case, supporting the proposition that money in the hands of the sheriff cannot be levied on and applied to an execution against the owner of the money, was reviewed by Judge GREEN in *Dolby v. Mullins*, citing Justice BULLER, 1 Term R. 370, (*King v. Egginton*;) and, says Judge WHEELER: "The argument [of Judge GREEN] answered, in every aspect which that argument [in *Turner v. Fendall*] has presented the question, with equal clearness of discrimination and force of reasoning, and with almost the precision of actual demonstration." Our supreme court felt no hesitancy in adopting it as the judgment of the court, and it was concluded that the sheriff had the right to appropriate the money of the plaintiff in his hands in satisfaction of the execution against the plaintiff, and the judgment below against the sheriff was reversed and dismissed. In *McClane v. Rogers*, 42 Tex. 218, it is held that if money comes into the hands of the sheriff while he holds a valid execution against the party to whom it belongs, he may no doubt apply it in satisfaction of such execution. To the same effect is the case of *Walton v. Compton*, 28 Tex. 575. We do not think the judgment against appellant Mann is authorized under the law and facts in this case, and are of opinion that it should be reversed and the cause dismissed.

STAYTON, C. J. Opinion adopted.

#### LION FIRE INS. CO. v. STARR.

(*Supreme Court of Texas*. Nov. 18, 1888.)<sup>1</sup>

#### CONDITIONS OF FIRE INSURANCE POLICY—FRAUD—EVIDENCE.

1. In an action to collect money due on a fire insurance policy, the clauses of which provided that "any fraud, or attempt at fraud, or any false swearing on the part of the assured, shall cause a forfeiture of all claim under this policy," if the insured was guilty of willful fraud or false swearing, the warranty was broken, and he could not recover.

2. It was necessary for defendant to show that the fraud, or attempted fraud, or false swearing, was willful, and not the result of inadvertence or mistake; but it was error to charge that before the plaintiff's right to recover was forfeited it must appear that not only his own testimony, but also that of "other witnesses produced by him, was false and corrupt."

3. An insurance policy, containing a clause requiring the assured to produce account books and vouchers in case of loss by fire, is not avoided by failure or refusal to produce them, unless the policy provides in express terms for such forfeiture; but the failure or refusal may be proven, and is a proper subject of comment before the jury as to the extent of the loss.

4. The extent of actual loss or injury to the property is the measure of damages recoverable under the policy.

5. It was error to exclude testimony as to the excessive valuation placed on the goods insured, because the testimony was that of a witness who was an employé of defendant's agent, as that fact, if it could affect the witness at all, could only do so as to his credibility.

6. The opinion of a witness, as to whether the plaintiff's demand was based on a fair valuation of the property, was properly excluded.

Commissioners' decision. Appeal from district court, Bexar county; GEORGE H. NOONAN, Judge.

Henry P. Drought, for appellant. T. T. Vander Hoven and Shook & Dittmar, for appellee.

ACKER, J. Frank Starr brought this suit on a policy of insurance issued by appellant on the 18th day of October, 1884, in the sum of \$1,000, on appellee's restaurant, restaurant supplies, fish-stand and fixtures, household goods, and wearing apparel. The policy was for a year, and permitted \$1,000 concurrent insurance. A fire occurred on the premises on June 23, 1885, by which appellee alleged that the property insured under the policy was destroyed, and this suit was brought in November, 1885, to recover the amount of the policy. The value of the insured property alleged to have been destroyed was laid in the petition at \$4,387. The defenses interposed by appellant necessary to be considered on this appeal were that the amount claimed by plaintiff for his loss and damage was far in excess of the cash value of the property claimed to have been destroyed; that the claim was grossly excessive and fraudulent in this: that plaintiff did not have in his possession or on his premises the goods claimed to have been destroyed or damaged; that plaintiff claimed that goods were destroyed that were not destroyed; that the loss did not occur from fire or water, but the loss incurred was by reason of plaintiff's refusal to comply with the terms of the policy, by not taking proper care of the property after the fire; that plaintiff failed and refused to furnish to defendant his books of account or invoices when demanded; that he refused to put his property claimed to have been damaged in a condition to be examined and appraised; that plaintiff had been guilty of fraud, misrepresentation, and false swearing, whereby the policy was rendered void. The trial was by a jury, and verdict and judgment rendered for the amount of the policy.

<sup>1</sup>Publication delayed through failure to receive copy.



The first, sixth, and seventh assignments of error relate to the charge given, and two special charges asked by appellant and refused. The charge given and complained of was as follows: "If the jury believe that plaintiff has willfully, and with intent to cheat and defraud defendant, refused to produce vouchers which he had, and has willfully and corruptly sworn falsely, with a view to obtain damages from the defendant which he knew he had not suffered and that his testimony and other testimony produced by him was false and corrupt, with a view to defraud defendant, then the plaintiff has forfeited all right to recover under the policy sued on." The special charges asked and refused were as follows: "(7) If the policy of insurance sued on contains a stipulation that the plaintiff shall, if required, furnish his books of accounts and vouchers, and exhibit the same for examination, and shall also furnish certified copies of all bills and invoices of the property insured and claimed to have been destroyed, the originals of which cannot be produced; and if the jury find that the vouchers and invoices and account-books, or any or either of them, were demanded by defendant, and plaintiff failed to comply with the demand, and it was possible for him to comply with it, in whole or in part,—then you will return a verdict for defendant." "(9) If the jury find from the evidence that the policy of insurance sued on contains a stipulation or agreement that any fraud, or attempt at fraud, or any misrepresentation in any statement touching the loss, or any false swearing on behalf of the assured, the plaintiff, or his agent, in any examination, or in the proof of loss, or otherwise, shall cause a forfeiture of all claim on this defendant, and the policy shall become wholly void, then, if the jury find from the evidence that there has been any misrepresentation, fraud, or attempt at fraud, or false swearing, or false statements touching the loss, then the jury will return a verdict for the defendant." The policy contains the following express provisions: "In no case shall the claim be for a greater sum than the actual damage to or cash value of the property at the time of the fire. If required, the assured shall produce books of account and other proper vouchers, and exhibit the same for examination, \* \* \* and shall also furnish original or properly certified duplicate invoices of all property hereby insured, whether damaged or not damaged. Any fraud, or attempt at fraud, or any false swearing, on the part of the assured, shall cause a forfeiture of all claim under this policy."

A policy of insurance on personal property is a contract on the part of the insurer to indemnify the insured to the extent of the loss actually sustained, upon such conditions stated in the contract as are reasonable. A loss being shown, then the prime object of inquiry is the extent of the loss. The amount of the policy is not even *prima facie* evidence of the extent of the loss, for by the terms of

the contract strict and particular proof of the extent of damage or amount of loss sustained is required to be made by the insured. If this were not so, unscrupulous agents, more intent on augmenting their income by increased commissions than considerate of the protection and security of their companies, co-operating with speculators in crime, could bankrupt the insurers and greatly increase the dangers to the property of honest persons by encouraging willful burnings to secure the excessive insurance money.

The provisions of the policy just quoted are the only provisions bearing upon the questions raised under these assignments of error. We do not find in the policy any provision making it void, or denying to the insured the right of recovery, solely upon the ground that he had refused to produce books of account, vouchers, etc., when demanded by the insurer. The means provided by this provision for inquiring as to the amount of property owned by the insured at the time of the fire are well calculated to greatly assist in arriving at the truth upon that question, and such refusal might with propriety be made the subject of comment to the jury; but the terms and provisions of the policy did not authorize the seventh special charge asked and refused, and we think the court did not err in the ruling complained of under the sixth assignment of error.

So much of the charge given and complained of under the first assignment as required the jury to believe that not only the testimony of the insured but "other testimony produced by him was false and corrupt," before the right to recover was forfeited, we think was error. The parties had expressly agreed in their written contract that "any fraud, or attempt at fraud, or any false swearing, on the part of the insured, should work a forfeiture of all claim under the policy." This defense had been pleaded by appellant, and there was evidence which authorized the submission of that question to the jury, just as stipulated in the contract, and we think appellant was entitled to have it so submitted without regard to whether or not the other testimony produced by appellee was false and corrupt. The fraud, or attempt at fraud, or false swearing, to cause a forfeiture of all claim under the policy, must have been willful, and not the result of inadvertence or mistake. It is for the jury to determine whether there has been fraud, attempt at fraud, or false swearing, upon the part of the insured, and, if so, the jury is to determine, also, whether it was willful. If the insured has been guilty of willful fraud, attempt at fraud, or false swearing, the warranty is broken, and all benefits under the policy forfeited. May, Ins. §§ 156, 477; Wood, Ins. § 429; Claffin v. Insurance Co., 110 U. S. 81, 3 Sup. Ct. Rep. 507; Howard v. Insurance Co., 4 Denio, 508.

The ninth special charge asked and refused was not a strictly correct charge, as it went beyond both the letter and the spirit of the



provision of the contract on which it was founded, but it called the court's attention directly to the error in the charge given, and the court should have corrected the error thus pointed out.

Appellant offered to prove by the witness Wentworth that at the time the contract of insurance was made the goods covered by the policy were not worth \$500. The evidence was objected to, "because the witness was at that time in the employ of defendant's agent, and defendant could not now be heard to question the correctness of the matters set forth in the policy." The objection was sustained, and the evidence excluded, and this ruling is assigned as error. The fact that the witness was an employé of appellant's agents did not affect his competency. If that fact could affect the witness at all, it could do so only as to his credibility, and that question was exclusively for the jury. If we rightly comprehend the second ground of the objection, it was directed against the evidence offered, rather than the witness, and seems to have been predicated upon the theory that the amount of the policy was conclusive, and that the value of the goods could not be inquired into. We have already in this opinion decided against that view, and from what we have said it follows that the court erred in excluding the testimony of the witness Wentworth.

The tenth assignment of error relates to the ruling of the court in excluding an interrogatory propounded by appellant to its witness Langdron, and the answer thereto. The interrogatory was: "Do you believe that plaintiff's demand for recompense for total loss of one thousand dollars on each of two insurance policies on the contents of his restaurant and fish-stand is based on a just, honest, and fair valuation of the property destroyed? If 'No,' then state your reasons for so believing." The witness answered, "Most positively, I do not;" and then gave, in a general way, his reasons for the opinion. The objection was upon the ground that "the witness should testify to what he knew, and not what he believed."

We think the court did not err in the ruling here complained of. The interrogatory called for the opinion of the witness, and he gave it. His opinion was not admissible as evidence. For the errors indicated we are of opinion that the judgment of the court below should be reversed, and the cause remanded.

STAYTON, C. J. Opinion adopted.

FULLER v. CODDINGTON *et al.*

(Supreme Court of Texas. June 14, 1889.)

#### TRESPASS TO TRY TITLE.

In an action of trespass to try title to two tracts of land, it appeared that S., under whom plaintiff claimed, held an interest of 378 $\frac{1}{4}$  acres, and B. and M., under whom defendants claimed, an undivided interest of 756 $\frac{1}{2}$  acres jointly, under

a certificate granted to their common grantor; that in March, 1854, the widow of S. conveyed her interest of 378 $\frac{1}{4}$  acres to F., (plaintiff's husband,) who, in July, 1854, located the certificate upon the 304-acre tract in dispute in his own name as assignee, and also upon the 452 $\frac{1}{2}$ -acre tract in April, 1855, in like manner; but the field-notes of this last survey, as filed in the general land-office in May, 1855, showed that the words "F., as assignee of" had been crossed out. In April, 1857, the transfer of B. and M.'s interest in the certificate was filed in the land-office with the field-notes, and in June, 1871, patents to both the tracts in controversy were issued to them as assignees of the common grantor. *Held*, that defendants were entitled to the possession of the 452 $\frac{1}{2}$ -acre tract under the patent, in the absence of clear and convincing proof of plaintiff's equitable right thereto.

Appeal from district court, Fannin county.

Trespass by Elvira A. Fuller, as executrix of the will of Calvin J. Fuller, deceased, against Mary A. Coddington, to try the title to two tracts of land containing 304 acres and 452 $\frac{1}{2}$  acres, respectively. Judgment was rendered for plaintiff for the 304-acre tract, and for defendants for the other tract. Plaintiff appeals.

R. B. Semple, for appellant. *Bramlette & Steger* and *Taylor & Galloway*, for appellees.

GAINES, J. This was an action of trespass to try title, brought by appellant, as the executrix of the will of Calvin J. Fuller, deceased, to recover two tracts of land lying in Fannin county, which were located and patented by virtue of a certificate granted to one Thomas Stalcup for 2,910 acres of the public domain. On the 4th of August, 1845, Stalcup conveyed to Rice Smith and Hugh Braley each an undivided interest of 756 $\frac{1}{2}$  acres in the certificate, and on the same day a like interest to W. T. Braley and Eli Merrill, jointly. Subsequently, Hugh Braley located his interest in the certificate; but neither his rights nor the land located by him are in any manner involved in this controversy. The remaining 640 of the certificate was conveyed by Stalcup to C. J. Fuller after the location of the land in controversy, and was located by him on a tract of land in Grayson county. It is conceded by both parties that neither that transfer nor location in any manner affects the merits of this suit. The testimony shows that Rice Smith died in 1844, which is presumed to be a mistake, since the transfer of Stalcup to him is dated in 1845. He left a widow and children. His widow conveyed her interest in the certificate, amounting to 378 $\frac{1}{4}$  acres, to C. J. Fuller on the 18th of March, 1854. Fuller acquired no other interest in the certificate until the lands in controversy were located. On July 17, 1854, he located the certificate upon the 304-acre tract in his own name as assignee. On April 30, 1855, he located the other tract in controversy in the same manner. The field-notes of the latter survey in the surveyor's office recite that the survey was made for "Calvin Fuller, assignee of Thomas Stalcup." In the copy of the field-notes of this survey filed in the general land-office, the words

"Calvin Fuller, assignee of" appear to have been originally written, but to have been crossed out. These field-notes were filed in the general land-office, May 12, 1855, and on April 22, 1857, the transfer of 756½ acres of the certificate from Stalcup to W. T. Braley and Eli Merrill was filed in the general land-office, with the field-notes. On the 28th June, 1871, patents were issued to both tracts in controversy to W. T. Braley and Eli Merrill, as assignee of Thomas Stalcup. The defendants claimed under Braley and Merrill. After the land in controversy was located, Smith's heirs conveyed their interests in the land to Fuller. The cause was submitted to the court without a jury, and judgment was rendered for the plaintiff for the tract of 304 acres, and for the defendants for the tract of 452½ acres. The defendants have not appealed, so that only the title to the latter tract is now in question before us.

The trial judge in his conclusions found the facts substantially as detailed above, and his findings of fact are not excepted to. It is, however, complained that the court erred in concluding that the location of the tract of 456½ acres was made for Braley and Merrill, and that the plaintiff was not entitled to recover it. We think, however, there was no error in this court's ruling. It must be borne in mind that the defendants had, by virtue of the patent issued to Braley and Merrill, the legal title to the land. The evidence by which it was sought to establish the plaintiff's equity consisted mainly in the fact that the field-notes in the surveyor's office recited that the survey was made for Fuller as assignee. At the time of the survey, Fuller had only an unlocated balance of 74½ acres in the certificate. Hence it could not have been made wholly for him. The fact that when the field-notes were filed in the land-office his name was stricken out, would indicate that he was not claiming anything under the survey. It is true there is some evidence tending to show that he said he made the survey for "some heirs;" but he did not say the Smith heirs. There is also some evidence tending to show that he may have, at one time, intended to pay tax on the land, and that it was known as the "Fuller Land," after he took a conveyance to it from the heirs of Rice Smith. Indeed, his purchase from these heirs tends to show that he thought the survey was made for them. But we are of opinion that, after this long lapse of time, in order to overturn a legal title, the evidence adduced to establish the equitable claim should be clear and convincing. If we were permitted to disregard the fact that the land had been patented to the ancestors of the defendants for more than 10 years before the suit was brought, we might conclude that the weight of the evidence showed the location was made for Smith's heirs, and not for Braley and Merrill. But as the case is presented to us, we deem it only necessary to say that the evidence adduced by the plaintiff is not sufficient to prevail against the

clear, legal title to the land which is shown to be in defendants by the patent from the state. There is no error in the judgment, and it is affirmed.

#### BALLOW *et al.* v. WICHITA COUNTY.

(*Supreme Court of Texas.* June 14, 1889.)

##### RELIEF AGAINST EXECUTION—INJUNCTION.

Rev. St. Tex. art. 2874, provides that no injunction shall be granted to stay any judgment except so much of the recovery as complainant shall in his petition show himself equitably entitled to be relieved against, and so much as will cover the costs. Defendants, as sureties on a treasurer's bond, prayed relief from a judgment and execution against them on such bond, on the ground that their attorneys had failed to show that they signed the bond on condition that two other responsible persons should sign it, whose signatures the principal and one of the county commissioners promised but failed to procure, and that the bond was accepted by the county commissioners' court without their knowledge that such signature had not been obtained. *Held* that, as the defense would have been unavailable in the suit on the bond, the proceedings on the judgment will not be enjoined.

##### Appeal from district court, Wichita county.

Bill in equity by W. H. Ballow and W. N. Barker for a writ of injunction to restrain Wichita county, its officers, agents, and attorney, from selling certain of their real estate under an execution issued on a judgment rendered against them in favor of said county upon an official bond signed by them as sureties for one T. C. Wilson as county treasurer of said county. Judgment was rendered on the merits for defendant, and the injunction dissolved. From this judgment plaintiffs appeal.

*W. W. Flood and Wray & Stanley*, for appellants. *Cobb & Boyd*, for appellees.

HENRY, J. T. C. Wilson, as treasurer of Wichita county, gave two bonds, on one of which the plaintiffs in this suit were his sureties. The county sued upon both bonds. The suit to which plaintiffs were not parties was numbered in the court docket 108; the one to which they were parties defendant was numbered 109. Plaintiffs, Ballow and Barker, plead that they signed Wilson's bond as sureties upon condition that before it was used the signatures of two other parties named, who were then and are now solvent, should be procured to it; that they so signed at the instance of Wilson and one of the county commissioners, who promised them they would procure the additional signatures, but they failed to do so, and, without the knowledge of such failure by said sureties, the county commissioners' court accepted said bond. Default was made on both bonds, and the county sued upon both. Both suits were defended by the same attorneys, who were employed by Wilson, who promised plaintiffs that all defenses should be made. The defensive pleadings made by the attorneys were the same in both cases. Plaintiff filed exceptions to the legal sufficiency of the defenses, which, having been argued in cause 108, were sustained by the court, and,

the proof sustaining plaintiffs' case, judgment was entered in its favor, from which the defendants prosecuted an appeal. 4 S. W. Rep. 67.

The special defense of plaintiffs mentioned above—that is, the failure to comply with the condition that the names of other sureties to the bond should be procured—was not pleaded, and plaintiffs, as well as their attorney, testified that it was not mentioned to the attorneys until after judgment in the cause was rendered. The attorney for defendant expressed to plaintiffs his perfect confidence of success upon the defenses pleaded, which is stated by one of the plaintiffs to be his reason for not mentioning his peculiar defense. When judgment was rendered in cause 108, the pleadings and facts being the same, an agreement was made by the attorneys that the same judgment should be entered in cause 109, which was done without introducing any evidence in that case, though the judgment recited the proceedings of a regular trial on the facts. An agreement in writing, signed by the attorneys, was filed in cause 109, to the effect that execution should be stayed, and the judgment should abide the result of the appeal in cause 108. This court afterwards affirmed the judgment in cause 108, after which execution was sued out on the judgment in 109, and levied upon the property of the plaintiffs, who instituted and now prosecute this suit to enjoin said execution.

The grounds relied on by plaintiffs are that they are not bound by their signatures to the bond because of the non-compliance with the conditions on which they were procured, and which, they claim, would have been a good defense to the suit on the bond. They charge that Wilson promised and they believed all their defenses to that suit would be made, and that they were assured by their attorneys that the defense being made by them would succeed; that the entry of judgment in cause 109, without a trial, was unwarranted by law, it being in fact but a confession of judgment without authority; that plaintiffs were informed by their attorneys at the time said judgment was rendered that cause 109 had been continued, which they believed, and, relying on that statement, they had no knowledge that judgment against them had been rendered until after the judgment in cause 108 had been affirmed in this court. This cause was tried before the judge, and judgment rendered for the defendant. We do not think these objections are well taken. The record fails to disclose that plaintiffs had any right to rely upon their attorneys making such a defense. It is clear that they did not communicate to them that they had such. More than that, this record discloses that they had no valid defense on the grounds urged. Plaintiffs do not establish by evidence that it was ever brought to the knowledge of the county commissioners' court that they signed the bond on any conditions, or with any reservations. They only show that they expressed such condition to the treasurer and to one of

the commissioners, who was engaged in helping him to make the bond. When plaintiffs signed the bond they delivered it to those parties, and allowed them to deliver it to the court, and procure its approval, without objection. Under this state of facts they are bound unconditionally by the bond; and the defense, if it had been made to the suit on the bond, would have been utterly unavailing.

It is unnecessary to go into the questions raised as to the authority or regularity of the proceedings resulting in the judgment rendered in cause 109. If it was reopened, plaintiffs do not show any defense to it. It is proper to say that we think all allegations imputing want of good faith to defendant's attorneys in cause 109 are contradicted by the record. Article 2874 of the Revised Statutes reads: "No injunction shall be granted to stay any judgment or proceedings at law except so much of the recovery or cause of action as the complainant shall in his petition show himself equitably entitled to be relieved against, and so much as will cover the costs."

The judgment is affirmed.

#### PRIDHAM v. WEDDINGTON *et al.*

(Supreme Court of Texas. June 18, 1889.)

#### SUIT ON PROMISSORY NOTE—FRAUDULENT REPRESENTATIONS.

1. Where defendant, in an action on a promissory note, given for stock in an insolvent corporation, alleged that the agents of the payee falsely represented such corporation as solvent and in good financial condition, and that, confiding in the truth of these statements, he made and delivered said note, it was not error to permit him to state that he would not have purchased the stock but for the representations made to him.

2. An instruction to the jury that "if one, with intent to induce another person to enter into a contract, represents as true that which is untrue, and such person, relying upon such representations, acts upon the same, such representations are a fraud, and the contract procured thereby cannot be enforced; but mere erroneous statements of opinion as to future results would not render the contract void,"—is fully cured by other instructions as to what particular representations they must find were made to defendant that were untrue, and believed by him to be true, and by which he was induced to enter into the contract, before they could find a verdict for him.

Commissioners' decision. Appeal from district court, Tarrant county.

*Assumpsit* by F. R. Pridham, as receiver of the Texas Continental Meat Company, against W. M. Weddington and others, upon a promissory note made by said Weddington to said meat company in payment for 14 shares of its capital stock, and indorsed by the other defendants. Judgment for defendants, and plaintiff appeals.

*Wynne & Carter*, for appellants. *Ball & McCart*, for appellees.

ACKER, J. Appellant brought this suit, as receiver of the Texas Continental Meat Company, against appellees on a note executed by them to said company in payment for stock in the company sold to appellee Weddington. Defendants pleaded failure of

consideration, and specially answered that Weddington was induced to buy the stock and execute the note by the false and fraudulent representations of the officers and agents of said company, (setting out the alleged representations.) There was trial by jury, and verdict and judgment for the defendants.

The first assignment of error is: "The court erred in permitting the defendant Weddington to state, over the objections of the plaintiff, that he would not have purchased the stock had not the representations been made to him, because such statement was a conclusion, and permitted the defendant to decide one of the most important issues in the case." We do not think the statement a mere conclusion, but rather the terse statement of a fact, which was peculiarly within the knowledge of the witness. What particular influence acts upon the mind of an individual to induce him to perform a particular act is known to him alone until disclosed by his declarations and conduct. If there has been no such disclosure, then not only the best evidence, but the only source of information on the subject, is the testimony of the party himself. This testimony, we think, would be none the less admissible if there was also proof of declarations and acts inconsistent with it. The whole evidence should go to the jury, to be considered by them in deciding the issue as any other question of fact. The assignment is not well taken.

The second, third, fifth, and sixth assignments of error complain of rulings of the court in excluding evidence offered by appellant, but the bills of exception taken to the rulings do not disclose, in either instance, what the proposed evidence was, or what the witness would have stated in answer to the question. We are therefore unable to determine whether the rulings were prejudicial to appellant or not. He complains of them, and it is his duty to show us the particular in which they are erroneous to his injury. *Beeman v. Jester*, 62 Tex. 433; *Moss v. Cameron*, 66 Tex. 413, 1 S. W. Rep. 177. The fourth assignment of error is: "The court erred in permitting the defendant to prove, over the objections of plaintiff as to the owners and holders of stock in the Texas Transportation Company, the amount of stock owned in said company by A. F. Higgs, as shown by plaintiff's bill of exceptions No. 8." It appears from the bill of exceptions referred to that the witness Levi, in answer to questions by defendants, testified: "I don't know who owned the principal stock of said company. D. M. Higgs was the president, and a man named Haslet superintendent. I do not know whether or not Higgs took control of the company. He may have been one of the directors of the company. Under the contract the transportation company transported all the product of the meat company." This is the only evidence set out in the bill from which it is clear that the assignment of

error is not sustained by the record. It appears that no evidence was given as to who were the owners and holders of stock in the Texas Transportation Company, and it also appears that no evidence was given as to the amount of stock in said company owned by A. F. Higgs. The seventh assignment of error is: "The court erred in its charge to the jury wherein it instructed the jury, in the abstract, that a person, with intent to induce another to enter into a contract, represents as true that which is untrue, and the person to whom such representations were made relies upon and acts upon the faith of the same, such representations would amount to a fraud, and a contract so procured could not be enforced without any qualification as to the materiality of such representations, or any distinction as to the facts pleaded and the proof offered, and the jury were thereby misled and misdirected, and were permitted to consider all misrepresentations, whether material or not, and under such instructions allowed to consider immaterial matter in finding fraud." The charge complained of is as follows: "You are further instructed that if a person, with intent to induce another to enter into a contract, represents as true that which is untrue, and the person to whom such representations are made relies upon the same, and acts upon the faith of same, such representations would amount to a fraud, and a contract so procured could not be enforced, but mere statements of opinion as to future results, though erroneous, would not render a contract void." Immediately following this charge, and in the same connection, the following charges were given: "If you believe from the evidence that the agents of the plaintiff, for the purpose of inducing the defendant Weddington to execute said note, or purchase the stock for which the same was given, did represent to said Weddington that the Texas Continental Meat Company was a solvent company, and that its financial affairs were in good condition, and that said Weddington believed said statements, and that, relying upon the same, was induced to purchase said stock and execute said note, and if you further find that said statements were untrue, you should find for the defendants; or if you find that said Texas Continental Meat Company was, at the time said note was executed, insolvent, and that its financial condition was known to the agents of the plaintiff selling said stock, and that the said agents, with intent to deceive said Weddington, and thereby induce him to purchase, did conceal from said Weddington the condition of said company, you should find for defendant. Unless you believe from the evidence that said Weddington was induced to purchase said stock by representations of the agents of plaintiff as to the financial condition of said company, and, further, that such representations so made were false, or that said agents, with the intent to deceive said Weddington, concealed from him the true financial condition of said com-

pany, you should find for the plaintiff." We think the defect in the first paragraph of the charge, against which this assignment is directed, was fully cured by the other instructions which we have quoted. By the latter the jury were told what particular representations they must find were made to Weddington, and must find that these representations were untrue, and that appellee believed them to be true, and was induced thereby to enter into the contract before they could find a verdict in favor of the defendants. The representations which the charge required the jury to find were made, were certainly material. Under the eighth assignment of error it is contended that the verdict of the jury is contrary to the law and evidence. We think the court correctly gave the law to the jury, and the verdict is not against it. We think there was sufficient evidence to support the verdict, and it must stand. We are of opinion that the judgment of the court below is correct, and should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, the opinion adopted, and judgment affirmed.

#### CATES v. MAYES.

(Supreme Court of Texas. June 28, 1889.)

##### CONTINUANCE—SUBSTITUTION OF TRUSTEE.

1. A continuance will not be granted because an appeal is pending in another suit between one of the parties and third persons, which, it is alleged, will determine the questions raised in the suit in which the continuance is asked.

2. A deed of trust provided that if the trustee refused to make the sale, the beneficiaries could appoint a substitute. All of the beneficiaries executed a formal appointment of a substitute, except one beneficiary, who indorsed on the appointment a statement that he acquiesced in it, but that all his interest in the debts secured by the trust had been settled. *Held*, that the substitution was, in effect, made by all the beneficiaries.

Appeal from district court, Wise county.

Crane & Trenchard, for appellant. C. L. Potter, for appellee.

STAYTON, C. J. Appellant sought a continuance on the sole ground that another action was pending on appeal in this court between himself and others, which involved questions, the decision of which, he claimed, would be decisive of the questions raised in this. This was no sufficient ground for continuance.

Appellee claims the land in controversy through a sale made by a substituted trustee under a deed of trust, which provided if the trustee therein named should refuse, or, for any reason, be unable to make the sale in accordance with the provisions of that instrument, the beneficiaries should have power to appoint some person in his place, who should have all such powers as the instrument conferred on the trustee named in it. The trustees having refused to act, all the beneficiaries but one executed in writing a formal ap-

pointment of L. C. Sparkman as trustee by substitution, and therein requested him to sell the land. The other beneficiary made on the same paper, just below the signatures of the others, the following: "I agree to the above substitution, and acquiesce in the same, but further acknowledge and state that all interests of mine in the debts, secured by said trust, have been settled, and I have no further interest therein. This October 20, 1884. J. C. CARPENTER." When the paper appointing the substituted trustee was offered in evidence, appellant objected to it on the ground that the substitution was not made by all the beneficiaries. The substitution was, in effect, made by all the beneficiaries. The land having been sequestered, and replevied by appellant, the court below rendered judgment against him, and the sureties on his bond, for \$172.20, for rent while the land was in his possession, and for the judgment, which was for the land as well as for damages. Principal and sureties appealed. Appellee suggests delay, and the judgment of the court below will be affirmed, and 10 per cent. on the same adjudged to appellee will be awarded to him as damages for delay. It is so ordered.

#### WHITE et al. v. BOONE et al.

(Supreme Court of Texas. Nov. 13, 1888.)<sup>1</sup>

##### LEASE BY PARTNERSHIP.

Defendants, as partners, leased certain land of plaintiff for three years, and made cash payments thereon at different times. Some three months thereafter one of the partners (W.) retired, and the two remaining partners assumed all liabilities, and notice thereof was duly published. At the end of the first year a balance of \$1,896 was due on the rent, for which the new firm gave their note, but nothing was said about W., and no release given as to him by plaintiff. At the end of the second year the new firm gave up the land, being unable to pay the rent, and plaintiff rented it to a third person. *Held*, that W. was not discharged from his liability for the rent by the acceptance of the note of the new firm until the surrender of the land by plaintiff's consent.

Commissioners' decision. Appeal from district court, Montague county; F. E. PINER, Judge.

Action by Mary A. Boone and others against White, Barefoot & Bryant, as co-partners, for the balance due for rent of certain land leased by them for three years for pasturage. Judgment was rendered for plaintiffs, and defendants appeal.

Stephens, Matlock & Herbert, for appellants. Ben. F. Turner, R. Cobb, and Potter & Hughes, for appellees.

COLLARD, J. The questions in this case arise upon the following state of facts: Mrs. Mary A. Boone, owning a one-half undivided interest in pasture lands in Clay county, leased the same on the 16th of April, 1883, to White, Barefoot & Bryant, partners in cattle business, at \$2,496 per year, for three

<sup>1</sup>Publication delayed through failure to receive copy.

years, one-half of which was to be paid at the beginning of the year, and the remainder at the end of the year. Cash payments were made along, but at the end of the first year there was due \$1,896. In July or August, 1883, White sold out to the other partners, who assumed all the liabilities of the business, and ran the same under the style of Barefoot & Bryant. Barefoot made all the negotiations with Mrs. Boone, who was his relative. At the end of the year he came to Mrs. Boone, estimated the amount then due for the first year, and gave her the note of the new firm for the same; not having the money to pay it. Mrs. Boone was not able to state whether she knew at the time that White was out of the firm, but the fact and terms of dissolution had been published in the papers. At the time the note was given nothing was said about White; no agreement was made as to him, and no release given. The note of Barefoot & Bryant was given merely for the balance due at the end of the first year. She says that she took it as collateral, but Barefoot testifies that nothing was said about its being collateral. At the end of the second year Barefoot informed her that they could not keep the pasture for the full term of the lease because they were not able to pay for it,—asked her to take it back, which she did, and rented it to another person. White testified that Mrs. Boone came to his store after she had taken the pasture back, and before the suit was brought, and asked him to tell her how she could get her money out of Barefoot & Bryant, and asked him to assist her, and said nothing about his paying the money. Mrs. Boone denied the fact in her testimony. In all, before suit, there had been paid on the contract \$2,548. Under these circumstances, White claims that the taking of the note from Barefoot & Bryant changed the original contract, and released him from all liability on it. A retiring partner is not discharged from existing liabilities of the copartnership, nor from any unexpired lease made before retirement. The fact that the remaining partners have agreed with him to pay the debts and exonerate him from all liabilities upon a lease or other executory contract, would not affect the rights of the lessor. Such an agreement would be binding between the partners themselves only, unless creditors became parties to the agreement for a consideration. Upon this subject we adopt the language and principles stated by Mr. Parsons in his work on Partnership, page 458, as follows: "It is said the adequacy of consideration cannot be inquired into. And if a creditor of a firm contracts or agrees with a new firm to take their security in discharge of the old, the retiring partner is discharged from any liability to pay the debt, and whether such an agreement has taken place is a question of fact for the jury. To discharge a retiring partner, however, it is not sufficient to take a new security, but there must be an agreement to discharge him from the liability of the old firm."

See, also, side page on 417, Id. There is no pretense that Mrs. Boone agreed or made any contract to discharge White when she took the note. The undisputed evidence is, there was nothing said about it. The fact that she subsequently took the pasture back when the new firm informed her they were unable to keep it, could not affect the case. She does not sue for the third year's rent. White was bound upon the contract for the whole time it was in use, and until it was surrendered to her by her consent. The judgment of the court was correct, and ought to be affirmed.

STAYTON, C. J. Opinion adopted November 13, 1888.

#### CITY OF FORT WORTH v. CRAWFORD.

(Supreme Court of Texas. June 13, 1889.)

##### NUISANCE CREATED BY CITY.

1. The petition in a suit against a city for damages for injuries caused by the deposit of garbage, etc., on lands adjacent to plaintiff's home, alleged the incorporation of the city; the ownership for many years of certain land by plaintiff as his home; that it was free from noxious odors, and healthy; that defendant was in possession of land adjoining plaintiff on which it placed garbage, dead animals, and various kinds of filth; that defendant failed to prevent the deposits from poisoning the air, and that thereby the health of plaintiff's family was injured and his premises ruined. Held, that the petition sufficiently alleged that the injuries were caused by the acts of defendant; and it was not necessary to set out that the city took possession under an ordinance, that being a matter of proof.

2. An instruction that the jury must find for the defendant unless they found the injuries complained of were the direct "cause of the negligence of" defendant was properly refused; the evidence being that the negligence was the cause of the injuries, and not the injuries the cause of the negligence.

3. Evidence of a city ordinance designating the lot adjacent to plaintiff's home for the place of deposit of garbage, etc., and that the city took possession of the lot and prohibited its use by others, and directed the city scavenger to deposit filth on the lot, unmistakably establishes such control and possession of the lot by the city as make it liable for any nuisance committed by it, or which it could prevent.

4. Where a city has ample power to remove a nuisance, which it creates or permits to remain, it is liable for all the injuries resulting therefrom.

5. To render it liable for the noxious smells arising from the garbage, they must be such as to produce physical discomfort such as would interfere with the enjoyment of the property, but need not be hurtful or unwholesome.

Commissioners' decision. Appeal from district court, Tarrant county.

Capps & Canty, for appellant. A. M. Carter, for appellee.

HOBBY, J. Upon the former appeal in this cause, the judgment was reversed on the ground that the court failed in its charge to submit the proper test as to the appellant's liability, which was held to depend upon its negligence, with respect to the deposit of and burial of the bodies of dead animals, garbage, filth, etc., upon the land adjacent to appellee's home, and which resulted in the injury complained of. 64 Tex. 204. The petition in this case was excepted to on the ground

that it did not allege with sufficient certainty that the sickness and suffering and injuries to plaintiff and his family were occasioned from no other cause than the acts of defendant; and did not allege that the city had taken possession of, or assumed control of, the ground on which the deposit of filth, garbage, and dead bodies of animals was made by proper ordinance, or vote of its council, or that the city was acting in the scope of its authority, if it had so taken possession. These exceptions were overruled, and this action of the court is assigned as error.

The petition alleged the due incorporation of the city of Fort Worth; the ownership and possession in 1881, and ever since, by the plaintiff of 17½ acres of land near the city of Fort Worth, to the east, which was the home of the plaintiff, his wife, and children, "of which latter he had several;" that it had been his home for a long time prior to said date, (1881;) that it was free from all noxious and offensive odors, and was a healthy abode for the plaintiff and his family; that in 1881 the defendant was in possession of 10 acres of land in the city limits and close by the plaintiff's premises; that from some time in 1881 the defendant had continually, "wrongfully, negligently, and unjustly cast, carried, and deposited, and caused and carelessly and negligently permitted to be cast, carried, and deposited on said 10 acres of land in its possession great quantities of filth and refuse matter from privies, water-closets, stables, sinks, and streets, and carcasses and other noxious things, too filthy to name or write in a petition." That the defendant failed and neglected to take reasonable and proper action to prevent said deposits from poisoning the air, and so injuring the health of plaintiff and his family, and ruining his said premises; that had the defendant taken reasonable and proper steps, and acted in the premises in a reasonable and proper manner, "as it could and should have done," the injuries to plaintiff and his family would not have occurred. That on account of the sickness of the plaintiff's family, caused by said noxious odors, he was compelled to spend \$100 for medicines, and paid doctors \$100; that on account of said sickness he and his wife lost a great amount of time valued at \$200; that the value of nursing his family during said sickness was \$100. It was not necessary for the petition by direct averment to negative the supposition that the sickness and injury to himself and family were occasioned by other causes than those constituting the foundation of the suit. This was necessarily implied from the allegation that his home had, for a long time prior to 1881, been free from all noxious and offensive odors, and was a healthy abode; that the acts of the defendant were the direct cause of the injury is sufficiently stated in the averments, to the effect that his was a desirous and healthy home for plaintiff and his family prior to the time the defendant committed and permitted the nuisances hereinafter com-

plained of, etc., coupled with and followed by the allegations quoted, describing the nuisance; that in 1881 the defendant was in possession of 10 acres of land in the city limits, and close by plaintiff's premises. If the fact of the nuisance created and maintained by it was established by proof, while in its possession and control, its liability would attach; and whether the city took possession by an ordinance or by vote of the council would be a matter of evidence, and it would not, in such a case, be essential to plead the character or nature of its possession. The refusal of the court to give the following instruction is complained of: "You are instructed that you are to find for the defendant unless you find from evidence that the injuries arising from inhaling the noxious gases and effluvia complained of by plaintiff were the direct and immediate cause of the negligence of defendant's duly authorized agents, acting within the scope of their authority." The court instructed the jury "that if you believe that the agents and employes of the city used the burying ground in a careless and negligent manner, and that they failed to use such care and precaution as would have prevented any special injury to the plaintiff, not common to the public, and that the injury resulted therefrom to the plaintiff, to find for him." This sufficiently advised the jury that there could only be a recovery for injuries to plaintiff, not common to the public, which were the result of the negligence and carelessness of the defendant.

The requested instruction certainly was not correct; because, if it had been given, there could be no finding for the plaintiff unless the jury found from the evidence that the injuries arising from the noxious odors, etc., complained of, were the direct and immediate cause of defendant's negligence. There is no evidence that these "injuries" of the plaintiff were the direct cause of defendant's negligence; but there is evidence that defendant's negligence was the direct and immediate cause of plaintiff's injuries.

It is further complained that there is no evidence that the city had possession or control of the land adjoining plaintiff's, and that, the court's charge having submitted this as a condition precedent to a recovery, the finding to that effect was contrary to the charge. The evidence as to the control or possession of the land upon which the nuisance complained of was committed and permitted was the city ordinance (254) describing the burial grounds and place of deposit for filth, garbage, offal, dead animals, etc., and regulating the burial of the same, passed in May, 1880, and which designated for this purpose the lot or tract of land adjacent to plaintiff's; and the testimony of the witness Evans that he had frequently recognized it in passing the tract as that so designated; and the further evidence of Crawford that the defendant took possession of this land in 1881, and that the city passed an ordinance prohibiting, under penalty, persons from depositing



all offensive matter there, and appointed a policeman for the purpose of watching and detecting parties so doing. This evidence, with the further fact that the city, by ordinance, directed the city scavenger to deposit filth, garbage, dead animals, etc., on this ground, and regulating the manner in which this should be done, both by him and private parties, established, unmistakably, the exercise of control and possession upon the part of the city over this property, making it liable for any nuisance committed by it or which it could prevent.

The evidence also is, it is true, that other persons than the city scavenger made the deposits complained of. But it was clearly shown that the scavenger, Pardue, was grossly negligent and careless in the performance of this duty, and that he was remonstrated with by plaintiff, and that the city authorities were informed of the nuisance and its cause.

The effects of the negligent manner in which these deposits were made upon plaintiff were detailed at length. His home was rendered almost uninhabitable; his family and himself were kept in bad health; and he was, in the language of a witness, "a walking skeleton." This was caused by the noxious vapors arising from these deposits, either left exposed on the ground or partially buried. The stench was so offensive that he had to shut his doors to eat and sleep. It was a continual nuisance, and rendered his property, as a habitation, worthless. For a year and a half he lost half of his time by reason of sickness. Paid one doctor \$60, and bought and paid for medicines. Paid \$15 a week to have his business attended to. After the ordinance was passed, the burying amounted to nothing. Before it was passed, it was not so offensive. The testimony shows that the filth on this place of deposit was indescribable, and was so offensive as to make persons sick, and could be perceived a mile away. These facts were sufficient to support the verdict.

There is no doubt that a distinction exists between the liability of a municipal corporation for acts done exclusively for a public purpose, and those done for its own private advantage. The distinction is that in the former case it is only liable for the negligent or careless execution of its duty. In the latter it is liable, as would be an individual, for all damages resulting from the act, irrespective of the question of negligence. Wood, Nuis. § 745. There is also no doubt that every person has a right to have the air diffused over his premises free from noxious vapors and noisome smells that would not exist there except for the acts of the party complained of, and which are prejudicial to health, or noxious to the smell, or trench upon the rights of the person affected thereby. Id. §§ 471-473. In case of noisome smells arising from noxious vapors, the stench must be of such character as to be offensive to the senses, or to produce actual, physical discomfort, such

as naturally interferes with the comfortable enjoyment of property. It is not necessary that it should be hurtful or unwholesome. It is sufficient if they are so offensive, to produce such annoyance, inconvenience, or discomfort, as to impair the comfortable enjoyment of property by persons of ordinary sensibilities. Id. § 495. And when a municipal corporation has ample power to remove a nuisance that is injurious to health and endangers the safety or impairs the convenience of its citizens, or when in the prosecution of a public work it creates a nuisance (or permits it to remain,) it is liable for the injuries that result from a failure on its part to properly exercise the power possessed by it, and for the injuries resulting from its unlawful acts. Id. § 744. We believe these to be the legal principles applicable to the case, and we are of opinion that the judgment should be affirmed.

STAYTON, C. J. Report of commission on appeals examined, their opinion adopted, and judgment affirmed.

#### ROBERTSON v. CATES *et al.*

(Supreme Court of Texas. June 18, 1889.)

##### RUNNING OF THE STATUTE OF LIMITATIONS.

An action on a promissory note payable six months, and "given in part payment for tract of land, to become due when a proper chain of title from the state" was recorded, brought more than 10 years after the making thereof, but within 10 days after a proper chain of title was recorded, is not barred by the statute of limitation where it appears from the petition that it was the intention of the parties that the note was not to become due until the chain of title was recorded and that the delay in recording was with the consent and acquiescence of the defendant.

Commissioners' decision. Error from district court, Wise county.

*Assumpsit* by Jerome B. Robertson against C. D. Cates, Mary E. Hale, Roena T. Cates and R. R. McDaniel, upon a promissory note executed by said C. D. Cates as part payment of the purchase price of a certain tract of land sold to him by plaintiff. Other defendants were in possession of parts of said land claiming the same, and the vendor's lien was also sought to be foreclosed on the land. Defendants demurred to the complaint, and pleaded the statute of limitations. The demurrer was sustained, and the cause dismissed. Plaintiff brings error.

*Carswell & Fuller*, for plaintiff in error. *Charles Soward*, for defendants in error.

ACKER, J. This suit was instituted on the 17th day of August, 1885, by plaintiff in error against C. D. Cates, Mary E. Hale, Roena T. Cates, and R. R. McDaniel, upon the following promissory note, set out in the petition. "\$224.00. Six months after date promise to pay to Jerome B. Robertson (or order, two hundred and twenty-four dollars with interest at the rate of ten per cent. per annum from date, this June 24th, 1877. This note is given in part payment for a tract



of land this day conveyed to Chas. D. Cates by Jerome B. Robertson, by his agent, J. W. Colbert, and is to become due when a proper chain of title from the state to Jerome B. Robertson is placed upon the records of Wise county. CHAS. D. CATES." It was alleged that the note had been executed to plaintiff by Cates as part of the purchase money for a tract of land sold by plaintiff to Cates, the deed to Cates reciting the note as a part of the consideration; that the other defendants were in possession of parts of the land, claiming it; that they had full notice of the existence of the note and plaintiff's lien when they went into possession of the land; that it was understood between plaintiff and Cates that the note was to become due when a proper chain of title from the state to plaintiff was placed by plaintiff upon the records of Wise county; that on the 7th day of August, 1885, plaintiff placed upon the record of Wise county a proper chain of title from the state to him for the land; that plaintiff owned the certificate by virtue of which the land conveyed to Cates was located, but the transfers of the certificate from the original grantee to him was lost before it was returned to the general land-office, and the land was patented in the name of the original grantee; that after the conveyance to Cates, and the execution of his note, and ever since then, Cates declared that all he wished was a conveyance from the original grantee, or his heirs, and that it was immaterial when plaintiff procured the same; that he would pay off the note whenever such conveyance was placed upon record; that, if plaintiff has been guilty of any laches, it was because of the statements and representations of defendant Cates; that it was immaterial to him when the condition of said note was complied with by placing the chain of title upon record. By special exception No. 2 defendant Cates set up "that said original petition shows upon its face that the pretended cause of action of plaintiff set out in said petition is long since barred by the statute of limitations." The exception was sustained, and, plaintiff declining to amend, the suit was dismissed, and judgment rendered against him for costs, from which he prosecutes this writ of error.

The only assignment of error is: "The court erred in sustaining the special exception No. 2 of defendant C. D. Cates." For the purpose of testing the demurrer, the allegations of the petition are to be taken as proved. The contract sued on must be construed in accordance with the intent of the parties thereto, as that intent is disclosed by the language of the instrument. The construction placed upon the contract by the averments of the petition is not at all inconsistent with the ordinary signification of the language employed in expressing the contract. The note reads first to become due absolutely at six months, and then to become due when the chain of title is placed upon the record. Cates certainly intended to acquire

the title to the land, and Robertson intended that he should do so; otherwise he would not have accepted a note for the purchase money which he could not enforce payment of until he had procured and placed upon record the title. It appears from the petition that the note was not to become due, according to the intent of the parties, until the chain of title was placed upon the record, which was done 10 days before the suit was brought; and it also appears that the delay in placing the title upon the record was with the consent and acquiescence of the defendant Cates. We think the cause of action set out in the petition was not barred, and that the court erred in so holding. We are of opinion that the judgment of the court below should be reversed, and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and judgment reversed, and cause remanded.

#### DILLAHUNTY v. DAVIS.

(Supreme Court of Texas. June 18, 1899.)

##### VARIANCE BETWEEN PLEADING AND PROOF.

In a suit on two promissory notes the petition alleged that they were signed "DILLAHUNTY" by defendant. One of the notes produced in evidence was signed "DILLAUNTY," and the other "DILLAHINTY." Held, that the names came under the rule of *idem sonans*, and there was no variance.

Appeal from district court, Haskell county. Harrison Davis sued H. C. Dillahunty and two others on two promissory notes. From a judgment for plaintiff Dillahunty appeals.

H. G. McConnel and E. J. Hamner, for appellant.

HENRY, J. Appellee instituted this suit against appellant and two other parties upon their two joint promissory notes, which were set out in *hæc verba* in plaintiff's petition. Defendant Dillahunty answered by general denial, by a plea that he signed the notes only as security for his co-defendants, and with an express agreement with plaintiff that he (plaintiff) would procure one Warren to sign the notes as surety, and that if he failed so to do defendant Dillahunty should not be bound as a party to them; and that plaintiff did fail to procure said Warren's signature to the notes, whereby defendant was discharged from liability. He further pleaded that, at the time said notes matured, his co-defendants, who are the principals in said notes, were solvent, and that plaintiff failed to exercise ordinary diligence to collect them until said principals became insolvent; wherefore he prays to be discharged.

The court properly sustained an exception to the last plea, and gave plaintiff judgment for the amount of the two notes. The name of defendant was signed to the two notes produced in evidence as follows: To one, "H. C. DILLAUNTY;" to the other, "H. C. DILLAHINTY." It is insisted that on account of the variance between the notes offered in evidence and

those described in the petition they ought to have been excluded. We think the notes are within the rule of *idem sonans*, and were properly admitted as evidence.

A number of other errors are assigned, but are entirely unsustained by the record. The judgment is affirmed.

### RAMSEY v. HURLEY *et al.*

(Supreme Court of Texas. Dec. 4, 1883.)<sup>1</sup>

#### CONVERSION OF CHOSES IN ACTION—DAMAGES—EVIDENCE.

1. In the second trial of an action one of the plaintiffs testified that a list of the claims was given plaintiffs' attorney, and was used on the first trial of the cause; and that witness had not seen it since the trial. The attorney testified to receiving the list; that it was used on the first trial, and that it was put among the papers of the cause; and that he had not seen it since. *Held*, that secondary evidence of its contents was admissible.

2. Plaintiffs alleged that certain notes converted were worth \$619.30, and that they had sustained damage by the wrongful conversion in the sum of \$750. Defendant pleaded the insolvency of the makers of the notes, except as to the amounts he had collected on them, and plaintiffs replied that the notes could have been collected at the time they were received by defendant, though the notes are now worthless. *Held*, that whatever allegations plaintiffs' pleadings may have required to authorize the admission of evidence of the solvency or insolvency of the makers of the notes were fully supplied by defendant's pleadings.

3. In an action for the wrongful conversion of a chose in action, the measure of damages is the amount *prima facie* due on the face of the claim.

Commissioners' decision. Appeal from district court, Johnson county.

Action by W. J. Hurley and Tom Smith against W. F. Ramsey for damages for conversion. Verdict and judgment for plaintiffs. Defendant appeals.

*Bledsoe & Fisher*, for appellant. *Poin-dexter & Padelford*, for respondents.

ACKER, P. J. This suit was brought by appellees on the 24th day of December, 1883, in the county court of Johnson county, and transferred to the district court because of the disqualification of the county judge. Appellees alleged in their petition that in 1882 they were the owners of a note for \$1,200, executed by T. D. Farris, with J. S. Daugherty as surety, bearing interest at 12 per cent., and to become due January 17, 1883; that about the last of November or first of December, 1882, Farris transferred and delivered to them certain claims (describing them) for the purpose of securing the paying of said note; that thereafter Farris, as their agent, collected a portion of said claims, and took notes in settlement of the balance; that in 1883, and before bringing this suit, appellant wrongfully, and without their consent, got possession of said notes, aggregating the sum of \$619.30, and which were worth that sum, and appropriated them to his own use and benefit, to appellees' damage in the sum of \$700; that appellant had collected \$300 or

more of said notes. Prayer for judgment for the notes, for money collected on them, for costs, and for general relief. Appellant pleaded specially that Farris made an assignment on January 4, 1883, for the benefit of his creditors, and he qualified as assignee, by virtue of which he alleged that the titles to the notes were vested in him as assignee, and he received them as such; that at the time he so received them nearly all the makers were, and still are, insolvent; that by great exertion and expense he had collected \$231.15, which he had appropriated to the payment of debts established against Farris, and the remainder of said notes are wholly worthless; that appellees were cognizant of these facts, and informed him that they did not look to him or said notes; that the transfer of the notes to appellees, if ever made, was made in contemplation of an assignment by Farris, and for the purpose of giving an unlawful preference to appellees; that Farris was wholly insolvent, and, if the accounts were ever transferred by him to appellees, the transfer was voluntary, and without consideration, and made with intent to hinder, delay, and defraud creditors, of which appellees had notice; that the transfer from Farris to appellees was in writing, and was made on the 2d of January, 1883, and was not made in November or December, 1882; that the original transfer is on file with the papers in this cause, and is the only transfer made by Farris to appellees, and the same delivered by Farris to appellant, together with said notes. Prayer, if appellees should recover, that they be required to take the uncollected notes at their face value. Appellees filed supplemental petition, consisting of special denial, and specially denying that the claims were insolvent when appellant received them, and alleging that they could then have been collected by reasonable efforts; that appellees could then have collected them, and that the claims were of the value alleged in the original petition, though now worthless; that appellant did not take possession of said notes as assignee; that the creditors, for a very small amount of the debts of Farris, accepted under the assignment, and that before appellant received said notes he had in his hands money and property of said assignor far in excess of the amount of debts accepted for; that he had long since paid off all accepting creditors; that appellant unlawfully converted the notes to his own use and benefit, to their damage \$750. Appellant filed supplemental answer, alleging that at or about the time allowed by law for creditors to accept under said assignment he was garnished by creditors of Farris holding valid claims against him in excess of the value of assets received by him as assignee, including the notes and proceeds thereof sued for in this case, and judgment was rendered on said garnishments against him for the entire estate remaining in his hands after paying the claims of consenting creditors, including the notes and the proceeds now in

<sup>1</sup> Publication delayed through failure to receive copy.

controversy. The trial was by jury, and resulted in verdict and judgment against appellant for \$738.28 and costs, from which this appeal is prosecuted.

The facts proven upon the trial, about which there seem to be no controversy, are substantially as follows: That in 1882 T. D. Farris was a general merchant at Grandview, in Johnson county, and appellees Hurley and Smith held his note for \$1,200, with J. S. Daugherty as surety thereon, to become due on the 17th of January, 1883. In November or early in December, 1882, Daugherty informed appellees that he expected to leave the county, and requested them to obtain from Farris other security on the note they held. Some time after this, and prior to the 4th day of January, 1883, Farris transferred to appellees a number of claims due to him by persons residing in Johnson county, as security for the note. Most of these claims were in the form of accounts, and it was understood between the parties that they were to be collected or converted into notes, payable to appellees at the expense of Farris. By agreement the claims were placed in the hands of one Noah, to be collected or converted into notes, the proceeds to be paid to appellees, to be credited on the Farris and Daugherty note held by them. Noah held the claims for about two weeks, made some collections which he paid over to appellees, but obtained no notes because the debtors refused to execute notes to appellees. The claims were returned by Noah to appellees, and by them delivered to Farris to collect or convert into notes. Farris made some collections on the claims, and paid the collections to appellees, and they were credited on the note. Farris removed from Johnson county after he secured notes for such of the claims as he had not collected, and left the notes with W. D. Farris to be turned over to appellees, which he failed to do. In May, 1883, appellees brought suit on their note, and T. D. Farris then learned in August thereafter that the notes had not been delivered to appellees. Appellant was of counsel, who brought suit on the note for appellees. Farris procured the notes he had left with W. D. Farris, and turned them over to appellant. T. D. Farris made a general assignment for the benefit of his creditors on the 4th day of January, 1883, under which appellant qualified as assignee. The inventory of Farris did not contain the claims transferred to appellees, nor did his schedule of debts contain the note held by them. Farris' indebtedness amounted to about \$17,000, but \$600 or \$700 of which was accepted for under the assignment. Appellant, as assignee, at the expiration of six months from the assignment, paid off the accepting creditors in full, and was discharged by order of court, leaving in his hands about \$3,500 proceeds of the assigned estate, which was garnished by non-accepting creditors a day or two thereafter. The writs of garnishment were issued from the district court of Nolan county, to

which appellant answered, consenting that judgment be entered against him for assets of the assigned estate remaining in his hands, including \$231.15 which he had collected upon the notes turned over to him by T. D. Farris, plaintiffs in garnishment indemnifying him against further liability for the assets covered by the judgment against him, which included the uncollected notes received from Farris and the money appellant had collected on a part of them. On January 2, 1883, Farris executed a written transfer to appellees for the claims given to them as security for their note, which transfer was received by appellant with the notes, and was filed with the papers in this cause. Appellee Tom Smith testified to the claims having been transferred to appellees by Farris the last of November or first of December, 1882, and that "Farris showed us his books, and we selected such claims as we were willing to take, and a list of said claims was written out and transferred to us. There were three lists of the claims made out. One was given to J. P. Noah, who was to collect the claims for us. One list was kept by Hurley and one by me. I don't know what became of the lists that Hurley and Noah got, or whether the list that I got would be called an original or a copy. I kept the list I got until about the time this spit was brought, when I handed it to L. C. Padelford, one of our attorneys, and I saw it in court on the first trial of this case, I suppose it was burned when Padelford's office was burned, but do not know when the office was burned. I have made no search for said list or transfer." This testimony was objected to by appellant upon the ground that appellees "had not shown the loss of the original transfer, which was shown to have been in writing, nor had they laid the basis for parol proof of its execution or contents." The objection was overruled, and this ruling is assigned as error.

The paper about which the witness testified seems to have been no more than a list of the transferred claims. Such list could have served no useful purpose beyond identifying the claims transferred, and upon the question of identity there seems to be no controversy, for it was in effect admitted by appellant that the notes involved in this suit are part of the claims which appellees claim were transferred to them by Farris. Appellant specially pleaded that the only transfer ever made for the claims by Farris to appellees was made in writing on January 2, 1883, and was received by him at the time he received the claims, and was filed with the papers in this cause, and used in evidence on the trial. Appellees claimed under a transfer made the last of November or first of December, 1882, which might have been made as well by parol as in writing. We think, however, that, considering the paper as the original written transfer, its absence was satisfactorily accounted for, for the witness stated what he did with it, and that he had not seen

it since the first trial. S. C. Padelford, the attorney to whom Smith testified that he had delivered the list, testified that just before this suit was brought Smith handed to him a list of accounts, made out in pencil, that had no written transfer on it; that when this case was first tried he had the list in court and it was used on the trial; that it was then put among the papers of the cause; and that he had not seen it since. If used in evidence on the trial, it must be presumed that it was filed in the case, and, if filed, the proper place for it was with the papers in the custody of the court. If a file paper, no one had the right to withdraw it without leave of court. Besides this, the transfer of the claims to appellees in November or December, 1882, was testified to without objection by Farris, Noah, Hurley, and Daugherty, which, we think, renders the ruling here complained of immaterial. The fourth assignment of error is as follows: "The court erred in admitting the testimony of plaintiffs Smith and Hurley, to the effect that they were of the opinion and believed that the notes sued for could have been collected by plaintiff had they had possession of them since this suit has been pending, over objection of defendant, as shown by bill of exception No. 2, which is hereby made a part of this assignment." It appears from the bill of exception that "the plaintiffs W. J. Hurley and Tom Smith, as witnesses in their own behalf, were permitted to testify substantially as follows: That they did not know what the notes sued for were worth; that is, they did not know their market value; nor did they know that the makers of said notes had, at any time since said notes were given, any property subject to execution, nor that any of said notes could have been collected by law, but that they believed that, if they had had possession of said notes since this suit has been pending, they could, by taking pay in property and other things than money, have collected all or most of said notes; that some of the parties offered to pay them in property in 1883, but they refused because they wanted money; that they don't know that the parties who gave said notes are any worse off financially now than they were when said notes were given, but don't believe since this litigation they would be willing to pay, and one of them has moved off, perhaps to the Indian Nation." The objection to this testimony was upon the grounds "that the market value of the notes, with interest, was the measure of damages; that said statements are but the conclusions and opinions of the witnesses; and that there is no basis in the pleadings for such testimony."

Upon an examination of the statement of facts we find that appellees Smith and Hurley testified as follows upon the question of their ability to collect the notes sued for: Smith testified: "I don't think any of the parties who owe the notes sued for had, at the time the claims were transferred to us, more than the law allowed them, except, perhaps, the crops made by them. At said time they were

living in the neighborhood, and were good honest men, and would pay small debts. I can't tell what the market value of the notes was. I don't think there was a market for them, but if we had had the notes I am sure we could have collected them. I could have collected a good deal of it in corn, cotton, and stock, as I did some of them when I had them. After the notes came into the hands of the defendant some of them promised to pay me if I could get the notes. I don't think they are worth anything now. Most all of these parties have moved off now. I don't know where they are." Hurley testified: "I am unable to tell you what the market value of the claims sued for in this case was at the time they were taken by defendant. I don't think they could have sold them. There was no market for them. I don't think the parties owing the claims had more property than was allowed them by law; but they were honest, and were considered good for small debts the size of the claims we had against them. The two Carruths had been indebted to me before the time in claims larger than those we had against them, and they were prompt in paying me. In the year 1883 I was indebted to one of the Carruths in a larger amount than the claim against him, which was transferred to Smith and me, and Carruth wanted me to pay him partly in said claims, but I could not do so because I couldn't get his note from the defendant, and I had to pay Carruth the money which I owed him. Both of the Carruths during the year 1883, lived on my farm, and cultivated a portion of it, and had I had a note against the other Carruth I could have collected it. He was willing and able to pay me, but wouldn't pay me unless I would turn him over the note. I think that if I had Smith and myself had been permitted to have had possession of said notes we could have collected them all, either in property or money. I do not think I could collect said notes now."

The foregoing is the entire testimony of these witnesses upon the question of the solvency of the makers of the notes, and of the appellees' ability to collect them, as appears from the statement of facts, from which it is evident that the statement of their testimony, as it appears in the bill of exception, is not sustained by the statement of facts, which is in direct conflict one with the other. Which shall control? All reasonable presumptions must be indulged in support of the judgment, and he who would annul must show us sufficient reason for doing so. As said in this court in *McMichael v. Thibault*, 43 Tex. 220: "But if the record contradicts itself, and we are unable to determine to which portion of it credence should be given, we cannot say whether the court below erred or not unless we could do it. Appellant has no right to a reversal of judgment." See, also, *Wiseman v. Bay*, 69 Tex. 67, 6 S. W. Rep. 743, upon the question of contradiction between bill of exception and statement of facts. The wit-

Noah, who had had the claims for collection, and collected a part of them, fully corroborated Smith and Hurley as to the solvency of the makers of the notes, and the ability of appellees to have collected them, and also as to the fact that there was no market for the notes, and that they had no market value. In actions to recover damages for the wrongful conversion of a chose in action, it is the purpose and policy of the law as in other actions for damages to give to the injured party compensation for the damage he has sustained. The ordinary measure of damages in such cases is the amount *prima facie* due on the face of the claim. If the claim for the conversion of which the suit is brought is really of less value than its face it devolves upon the defendant to prove that fact. Field, Dam. § 828, and note 33; 2 Sedg. Dam. 403 et seq., and note a. If the makers of the notes were solvent at the time they were wrongfully taken possession of by the defendant, and they became insolvent while the possession of the notes was wrongfully retained by him, he would be liable to plaintiffs for the amount *prima facie* due on the face of the notes. King v. Ham, 6 Allen, 298. If the notes had no market value, but were of intrinsic value to the owners because of any peculiar circumstance or relation, the owners would be entitled to recover whatever they might show the note to have been worth to them. Rose v. Lewis, 10 Mich. 488. Appellees alleged in their pleadings that the notes were worth the sum of \$619.30, and that they had sustained damage by the wrongful conversion in the sum of \$750. Appellant specially pleaded the insolvency of the makers of the notes, except as to the amounts he had collected on them, and appellees replied that the notes could have been collected at the time they were received by appellant; that they could have collected them, though the notes are now worthless. If appellant excepted to the pleadings of appellees there was no ruling by the court upon his exceptions, and they were thereby waived. Whatever allegations the pleadings of appellees may have required to authorize the admission of the evidence of the solvency or insolvency of the makers of these notes, they were fully supplied by the allegations in appellant's pleadings. Hill v. George, 5 Tex. 87. In effect, appellant admits in his pleadings that he had received and converted the notes, and that the notes represented the claims that had been transferred by Farris to appellees on the 2d of January, 1883, two days before Farris made the assignment for the benefit of his creditors. Appellant sought to avoid liability for the conversion upon the ground that Farris was insolvent, and the transfer was made in contemplation of making an assignment, and to give unlawful preference to appellees, and that the claims were transferred by Farris without consideration, and with intent to hinder, delay, and defraud his creditors, and that appellees had notice of such intent.

These were questions of fact for the jury, and in our opinion they were fully and fairly submitted by the court. If the claims were in good faith transferred to appellees prior to the assignment in a manner and for a purpose permitted and protected by law, it was wholly immaterial whether the transfer was made two days or two months prior to the assignment. The fifth, sixth, seventh, eighth, and ninth assignments of error all relate to alleged errors in the charge of the court. No special instructions were requested, and upon a careful examination of the entire charge we are not surprised that appellant asked none, for the court fairly and fully submitted the law applicable to every issue in the case, and we think the charge quite as favorable to appellant as the facts proven would justify. The charge is not subject to the criticism made upon it by these assignments. The tenth assignment of error complains of an alleged omission in the charge. A sufficient answer to this is that no special instruction was asked to cure the alleged omission. What we have already said with respect to the sufficiency of the allegations of the pleadings to admit the evidence introduced on the trial, and with respect to the charge of the court, disposes of the eleventh and twelfth assignments. The thirteenth assignment relates to the action of the court in overruling the motion for new trial, in which the several matters presented under the other assignments are presented as grounds for the motion, and we think it unnecessary to discuss these matters further. After a careful consideration of every question presented, we find no error in the record for which we think the judgment should be reversed, and we are of opinion that it should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

#### MILLIKIN v. SMOOT.

(Supreme Court of Texas. Nov. 16, 1883.)<sup>1</sup>

#### SEPARATE PROPERTY OF WIFE—DEPOSITIONS.

1. In an action by a husband for the recovery of the separate property of his wife, the fact that such property was purchased with money arising from land limited to the wife for life, and to her children after her death, does not affect her right thereto for her life, nor to the possession thereof, nor are her children necessary parties to the action, and exceptions to an answer, pleading non-joinder of the children, were properly sustained.

2. It was not error to suppress the admission of depositions which were shown to have been taken without notice to the adverse party, as required by Sayles' Civil St. Tex. art. 2318.

3. An action to recover horses wrongfully sold under an execution is not a bar to a second action between the same parties to recover other horses sold at the same time under the same execution, but seized at a different time and place, although both claims might have been included in the one suit.

<sup>1</sup> Publication delayed through failure to receive copy.

Appeal from district court, Parker county; A. T. WATTS, Special Judge.

Action by T. S. Smoot against Frank Millikin to recover certain horses claimed by his wife, Mrs. M. J. Smoot, as her separate property, under a conveyance from her son R. T. Smoot. The horses were levied upon, sold under two executions against the son R. T. Smoot, one in favor of Jo. H. Brown, the other in favor of C. H. Millikin, cashier of the First National Bank of Weatherford, as his property, and were purchased at the sheriff's sale by the plaintiff, under which title he claims, on the ground that the sale to Mrs. Smoot, by her son, was fraudulent and void. Judgment was rendered in favor of plaintiff for possession, or their value if not delivered, but was reversed and remanded on appeal. 64 Tex. 172. On the second trial verdict was rendered for plaintiff, and defendant appeals.

*B. G. Blinwell*, for appellant. *Hood, Latham & Stephens*, for appellees.

WALKER, J. This is a second appeal, (64 Tex. 172,) where a statement of the case appears that the consideration paid for the horses—the subject of the litigation came from land limited to the wife for life, her children to take after her death—did not affect her right to the property for her life, nor to the possession of it. She had the right to reclaim the property, and it was her duty to do so. The answer of Millikin, pleading a non-joinder of parties, and insisting that her children should be made parties, was insufficient, and the exceptions to it were properly sustained. Legal title to the property was shown in the wife, coupled with possession. A trespasser could not inquire into the equities settled or charged upon the property. 5 Walt, Act. & Def. p. 471, § 5.

The depositions of the witness Carter were important, and had they been otherwise properly taken, upon the showing made by the notary taking them, and by the district clerk, that they had not been altered, the court should have permitted the notary to remedy his oversight and write his name across the seal of the envelope, and the district clerk to indorse on the package that he had received it from the hands of the officer taking the depositions. But it appears from the bill of exceptions that the depositions had been taken without the notice to the adverse party required by statute. This defect, properly urged, was a valid reason for suppressing them. The action of the court in suppressing the depositions was proper.

The refusal of the court to give the instruction asked by appellant, as to the claim made by appellee to four head of horses seized under the same execution with the horses sued for herein, was justified under the facts in evidence. The principle is well recognized that an aggrieved party cannot split up one cause of action into two or more suits. The testimony shows that the horses here in litigation were stock-horses on the range, and were seized in the range. The four head of

horses which had been claimed in the proceedings referred to were taken from the plow and wagon of appellee at a different time and place. It may well be presumed that the work-horses were needed upon the farm, and the prompt recovery of them was of importance. By such action the right of action for the stock-horses taken on the range was not lost. While all could have been included in one suit, the owner could pursue her rights against the two distinct invasions of her property. The sufficiency of the testimony to sustain the verdict is not presented by any assignment of error of which the court can take notice. But an examination of the statement of facts shows that the verdict was not without evidence to sustain it. The judgment is affirmed.

McCLELLAND v. FALLON et al.

(Supreme Court of Texas. June 4, 1889.)

WRONGFUL ATTACHMENT—EVIDENCE.

1. The bill of exceptions agreed to by the parties, and approved by the court, must prevail over a statement of facts made by the court, on failure of the parties to agree thereto.

2. On the trial of an issue of wrongful attachment, where the verdict was against the attachment plaintiff for actual damages only, he was not prejudiced by defendant's testimony that the goods, for the price of which the action was brought, were unsalable, and not such as the buyer ordered.

3. As tending to show that plaintiff had no reasonable cause for attachment, on the ground that defendants were about to dispose of their property with intent to defraud creditors, testimony was admissible that before the attachment defendants consulted plaintiff, and asked for his approval in the matter of a contemplated change in the partnership, this being the only intended disposition on which plaintiff relied for his attachment.

4. As defendants recovered only actual damages for the attachment, plaintiff was not prejudiced by their testimony as to what they had been doing since the attachment.

5. Both defendants having testified that their stock of goods, all of which was attached by plaintiff, was worth \$4,400 or \$4,500, a verdict for \$4,400, less the amount of plaintiff's claim, was warranted, though the sheriff's return valued the goods attached at only \$2,225, and it appeared that two other attachments, one for \$149 and the other for an amount not shown, were subsequently levied upon the same goods.

Commissioners' decision. Appeal from district court, McLennan county.

Action by attachment brought by Peter McClelland against Fallon & Lehr. Verdict and judgment for defendants, and plaintiff appeals.

*Anderson & Flint*, for appellant. *Herring & Kelley*, for appellees.

ACKER, P. J. Appellees were doing business as merchants at Dublin, in Erath county, and were indebted to appellant in the sum of about \$1,300. Appellant brought suit on his claim, and sued out an attachment upon the ground that appellees were about to dispose of their property with intent to defraud their creditors. The sheriff levied the writ upon, and took possession of, appellees' stock of merchandise, of the value of \$4,400 or \$4,500.

Appellees answered by general denial, and plea in reconvention, alleging that the attachment was sued out wrongfully, without probable cause, and with malice, and claimed \$5,000 actual and \$10,000 exemplary damages. The trial was by jury. Appellant's demand was admitted. The jury returned a verdict in favor of appellees for \$4,400, less the amount of appellant's demand, with interest from the levy at 8 per cent., making \$3,801.77, for which the judgment from which this appeal is prosecuted was rendered:

The first assignment is: On the trial defendants testified that they purchased goods of plaintiff, and both Fallon and Lehr were asked by their attorneys, while on the stand as witnesses for themselves, if plaintiff did not sell them unsalable goods, and such as they did not order, to which plaintiff objected, on the ground that this evidence was irrelevant, and calculated to prejudice the jury against plaintiff. It appears from the bill of exceptions that the objection was overruled. While the assignment does not allege that this ruling was error, we understand from the brief that it is contended it was. It appears from the statement of facts made by the judge, counsel having failed to agree, that the testimony objected to was elicited by appellant on cross-examination of appellees. There is, therefore, an apparent conflict between the bill of exceptions and the statement of facts. If the statement of facts had been agreed to by counsel, the record would contradict itself, and we would be unable to determine which was the more credible, the bill of exceptions or the statement of facts. Both being the result of agreement between the parties, and of equal dignity, we could not say whether the court below erred or not. *McMichael v. Truehart*, 48 Tex. 220; *Wiseman v. Baylor*, 69 Tex. 67, 6 S. W. Rep. 748; *Ramsey v. Hurley*, ante, 56, (Tyler Term, 1888.) The bill of exceptions appears to have been agreed to as provided by article 1364, Rev. St., while the statement of facts was made by the judge, upon failure of counsel to agree. It seems that in such case the bill of exceptions should prevail against the statement of facts, otherwise the trial judge, in making up the statement of facts, could deprive a party of the benefit of his bill of exceptions agreed to, and approved by the court. *Gaines v. Salmon*, 16 Tex. 312. We think the bill of exceptions does not contain a full and proper presentation of the testimony objected to, for it appears from the statement of facts that, while appellees testified to the matter complained of, it also appears that they, in the same connection, testified, "But we made no complaint to him about this." The jury returned a verdict for actual damages only, and it does not appear probable that they were influenced by this testimony to the injury of appellant. We do not think the evidence was calculated to so affect the jury, and in view of the verdict we think the ruling was immaterial.

The second assignment is: On the trial

of the case Rolla Fallon was asked by his attorneys, while on the stand as a witness for defendants, if he and Lehr did not contemplate a change in their business, and to take in the place of John Lehr a Mr. Simmons, of Goliad county, and if Simmons had not been to look at the business and expressed himself satisfied, and his intention of closing up his business and taking Lehr's place, and if he (Fallon) had not informed plaintiff of this before the attachment was sued out. To these questions plaintiff objected, on the grounds that the evidence was irrelevant, and plaintiff was not bound to rely on the information, which objection was overruled by the court, and the witness permitted to testify, as shown by the bill of exceptions. It appears that on the 25th day of April, 1888, Fallon wrote appellant in regard to getting Simmons to buy out Lehr's interest in the partnership, and asked that appellant would answer him at once in regard to the matter. On the 30th day of the same month, having received no reply to his letter, Fallon telegraphed appellant: "Do you accede to my proposition of the 25th? Simmons, of Goliad, wants me to let him know at once by telegraph. Answer this by telegraph." Both the letter and the message were received by appellant, but he made no reply to either. The ground of attachment was that appellees were about to dispose of their property with intent to defraud their creditors, and we think the evidence was clearly admissible as tending to disprove the ground of attachment. There was no evidence of any other contemplated sale or change in appellees' business, and this change was fully made known to appellant by Fallon, which, we think, was inconsistent with an intent to defraud their creditors. It was true that appellant "was not bound to rely on the information" received from Fallon through his letter and telegram, but it appears from his testimony that he did rely on it, for he states that he had no ground for attachment except his notes, and the letter and telegram from Fallon, and knew nothing but the information which these papers contained. We think the court did not err in the particular complained of in the second assignment.

The third assignment is: Each defendant (Fallon and Lehr) was asked by their attorney, while testifying on his own behalf, what they had been doing since the attachment was sued out. Plaintiff objected on the ground that what each had done since was immaterial, and could not affect the question at issue. These objections were overruled, and each defendant permitted to testify, as shown by exception No. 3. As the jury found only actual damages,—the value of the stock of merchandise taken under the attachment,—it is clear that appellant sustained no injury from the ruling here complained of.

The effect of the fourth assignment of error is that the verdict of the jury is contrary to the law and the evidence. There is no complaint



of the charge of the court. The only evidence as to the value of the stock of goods was the testimony of appellees, who testified that the stock was of the value of \$4,400 or \$4,500, and both of these also testified that the entire stock was seized and taken possession of under the attachment in favor of appellant, and there is nothing in the record tending to contradict their testimony. It is true that the sheriff's return upon the writ shows that he valued the goods levied upon at \$2,225, but there is nothing in the return, or elsewhere in the record, indicating that he did not levy upon the entire stock. The only evidence that other writs of attachment were sued out against appellees was the testimony of appellees themselves. They testified that two other attachments were levied on the goods after they were taken possession of under appellant's writ. One of these was in favor of McClelland & Oran, of which firm appellant was a member, for the sum of \$149, which was levied immediately after the levy of appellant's writ; and the other was a writ in favor of Bradley & Co., (for what amount does not appear,) which was not levied until about two months after the stock of goods had been taken under the writ in this case. We think the evidence abundantly sustains the verdict, and that the verdict and judgment are not contrary to law. We think it clear that the attachment was wrongfully sued out, without probable cause, and we are of opinion that the judgment of the court below should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

#### HOWELL v. ESTES.

(Supreme Court of Texas. Nov. 9, 1888.)<sup>1</sup>

##### EASEMENTS.

Testator built two houses on adjoining lots. They were two stories high, with a common partition wall. The upper rooms were reached by a stairway wholly in one of the buildings, but attached to the partition wall. Held, that a devise of the other building carried the right to use the stairway according to the custom of the testator.

Error from district court, Collin county; RICHARD MALTBIE, Judge.

*Garnett & Muse*, for plaintiff in error. *K. R. Craig*, for defendant in error.

GAINES, J. Daniel Howell, being the owner of certain contiguous business lots in the city of McKinney, constructed upon two of them two brick buildings, each two stories in height, with a common or party wall between them. The lower story in each building was designated and used as a mercantile store-house. In the upper stories offices were constructed, which were leased to professional men. The upper rooms of the two buildings were reached by a stairway, which was attached to the partition wall, and opened

upon the street or public square in front of the structure. The stairway was, however, wholly within one of the buildings, and upon the lot upon which that building was situated. Daniel Howell died, having made his will, by which he devised the building containing the stairway to his son, the plaintiff in error, and the other to his daughter, Mrs. Estes, whose title so acquired defendant in error now has. The plaintiff in error having denied the use of the stairway as an approach to the upper rooms of the other building, this suit was brought to enjoin him from interfering with the free use of the stairway by defendant in error and his tenants; and upon final hearing a perpetual injunction was granted.

The facts stated are substantially the facts alleged in the petition and found by the court. All the errors assigned present practically the same question: Did the use of the stairway, as appurtenant to the building, pass, by the devise of Daniel Howell, to his daughter? There is no statement of facts in the record, but the court found, in effect, that the stairway was not an absolute necessity to the use of the upper rooms in the other building; that, at an expense of \$50, a stairway could be constructed in that building, which would be more convenient to the use of the upper rooms, but which would be a material detriment to the use of the store-room below. Upon the precise point thus presented there is some conflict of authority. Counsel for plaintiff in error insist that while the title to both houses was in Daniel Howell there could be no servitude, and that by the devise no servitude passed by implication except such as is absolutely necessary to the enjoyment of the property conveyed. Upon the first proposition there is no conflict of authority. The principle is elementary that, to constitute an easement, the dominant and the servient estates must be held by different owners; and when the owner of an estate enjoys an easement over another, and acquires title to the latter, the easement is thereby extinguished. The supreme court of Massachusetts also hold that, in order to create an easement by implication, when the title to the two parcels is severed by grant or otherwise, it must be strictly necessary to the enjoyment of the estate in favor of which it is claimed; and that if another means can be provided equally beneficial, without unreasonable labor and expense, no easement will pass. *Randall v. McLaughlin*, 10 Allen, 366; *Carbrey v. Willis*, 7 Allen, 364; *Buss v. Dyer*, 125 Mass. 287.

But there is another view of this subject: "Strictly speaking, a man cannot subject one part of his property to another by an easement, for no man can have an easement on his own property; but he obtains the same right by the exercise of another right,—the general right of property; but he has not thereby permanently altered the quality of two parts of his heritage; and if, after the annexation of peculiar qualities, he alienates one part of

<sup>1</sup>Publication delayed by failure to receive copy.



his heritage, it seems but reasonable, if the alterations thus made are palpable and manifest, that a purchaser should take the lands burdened or benefited, as the case may be, by the qualities which the previous owner had undoubtedly the right to attach to it." *Gale & W. Easem.* 40. The authors from whom we have quoted also say that the "qualities" so annexed must be "apparent and continuous," and these terms have been generally adopted by the courts, at least in this country, as descriptive of the character of an improvement which will justify the claim of an easement. The word "continuous" is used in a technical sense, and, as we understand it, means continuously connected. A "discontinuous" easement is said to be one which requires the act of man to complete it; for example, a pump upon one lot, which is used to supply water to another lot, but from which the water has to be conveyed by hand. We think the weight of authority sustains the proposition that if an improvement constructed over, under, or upon one parcel of land for the convenient use and enjoyment of another contiguous parcel by the owner of both be open and usable and permanent in its character, and of such a nature as does not require the act of man to perfect or indicate its use, and the owner alienates the latter, the use of such improvement will pass as an easement, although it may not be absolutely necessary to the enjoyment of the estate conveyed. *Lampman v. Milks*, 21 N. Y. 505, and authorities cited; *Ewart v. Cochran*, 4 Macq. 123; *Kieffer v. Imhoff*, 26 Pa. St. 438; *Kilgour v. Ashcom*, 5 Har. & J. 82; *Seymour v. Lewis*, 13 N. J. Eq. 439; *Elliott v. Rhett*, 5 Rich. Law, 405. See, also, *Freeman's notes* to same case, 57 Amer. Dec. 762, and authorities cited.

In *Ewart v. Cochran*, supra, the court say the easement must be "necessary for the convenient and comfortable enjoyment of the property as it existed before the time of the grant." If, without alteration involving labor and expense, the convenience is necessary to the use of the property as it exists at the time of the conveyance, the easement passes. This seems to us the more reasonable doctrine. The reason of the rule, in case of an easement implied on account of strict necessity, is that the grantor shall not be permitted to derogate from his grant by denying to the grantee the means by which it is to be enjoyed. For the same reason he should not be permitted to deny the use of open and usable improvements, which, without alterations involving labor and expense, are necessary to the use of the property granted. The estate retained by him being used by him at the time of the grant for the benefit of the other, by means of an obvious artificial conveyance, and such use being necessary to the enjoyment of the latter in its existing condition, it is to be presumed that he intended to convey the estate accompanied by the easement.

We apprehend that it should likewise be

presumed that a deviser who devises property under like circumstances intended to devise with it a usable and permanent improvement upon contiguous property devised to another in the same will, which is necessary to its enjoyment in its existing state, and that the learned judge who tried the case below did not err in so holding. That such easement will pass by a devise is expressly held by the supreme court of Pennsylvania. *Phillips v. Phillips*, 48 Pa. St. 178. See, also, as to partition, *Kilgour v. Ashcom*, supra; *Thompson v. Miner*, 30 Iowa, 386; *Burwell v. Hobson*, 12 Grat. 322; *Morrison v. King*, 62 Ill. 30. There is no error in the judgment, and it is affirmed.

#### HAGUE v. JACKSON.

(Supreme Court of Texas. Nov. 16, 1883.)<sup>1</sup>

##### JUDGMENT—PARTIES IN FORECLOSURE.

1. A judgment for foreclosure of a mortgage recited its date and the date of the note for security of which it was given as of May 4, 1885, when the date of both was April 4, 1885. The petition alleged the proper date. The mortgage was attached to and made a part of the petition, and the note was introduced in evidence. *Held*, that the recital of the date of the note and mortgage was not a necessary part of the judgment, and should be treated as clerical error, it appearing from the whole record, with reasonable certainty, that the judgment was rendered in the cause of action set up in the petition.

2. In an action for foreclosure of a mortgage, the holder of a prior mortgage on the same land is not a necessary party.

##### Error from El Paso county court.

Action on a note, and to foreclose a mortgage. There is no statement of facts nor bill of exceptions. The only specific assignment of errors is as follows: "The judgment is contrary to both the law and the evidence in this: that plaintiff sued upon a note dated April 4, 1885, and to foreclose a mortgage dated April 4, 1885, and recovered a judgment on a note dated May 4, 1885, and not on the note sued on; and the decree foreclosed a mortgage dated May 4, 1885, and not the mortgage sued on." In the judgment the date of the note and mortgage was recited as May 4, 1885, while the petition alleged that the instruments were dated April 4, 1885.

*Walton, Hill & Walton, George S. Walton, and Hogue & Young*, for plaintiffs in error. *M. W. Stanton*, for defendant in error.

STAYTON, C. J. This action was brought by defendant in error to recover on a promissory note alleged to have been executed to him by plaintiff in error, bearing date April 4, 1885, and to foreclose a mortgage executed at the same time to secure it. The petition did not set out the note *in hac verba*, but gave it substantially; and alleged that it bore three credits, of which the several amounts and dates were alleged. The mortgage was attached to the petition, and made an exhibit.

<sup>1</sup> Publication delayed through failure to receive copy.

It bore date April 4, 1885, and on its face purported to be executed to secure the payment of the note described in the petition, which the mortgage accurately described as to date, amount, rate of interest, and time of maturity. The defendant answered by a general demurrer and general denial. The case was tried without a jury, and a judgment rendered in favor of the plaintiff. The judgment recites that a note was offered in evidence by the plaintiff, which, with the several credits indorsed thereon, it describes accurately as described in the petition, except that it recites the note as of date May 4, 1885, instead of April 4, 1885. It further declares that it appeared to the court that the defendant had executed a mortgage just such as was attached to and made a part of the petition, except that it states the date of the mortgage to be May 4, 1885. The defendant filed a motion for new trial, based on the sole ground that the petition stated no cause of action, which was overruled. The mortgage recites the existence of a prior mortgage, and it is insisted that the court erred in proceeding with the cause until the holder of that was made a party. No request was made in the court below that such person should be brought in as a defendant; and, had there been, the court would properly have refused to require it. The holder of a senior mortgage was not a necessary party.

It is further insisted that the recitals in the judgment that the note and mortgage on which the judgment was rendered were of date May 4, 1885, are conclusive of the fact that the judgment was rendered on a cause of action not alleged in the petition. The recitals in the judgment were not necessary; and if from the whole record it appears with reasonable certainty that it was rendered on the cause of action set up in the petition, an erroneous recital will be no sufficient ground for reversal. The entire recital in reference to the note is as follows: "And it appearing to the court that the cause of action was or is upon a promissory note, which was introduced in evidence by plaintiff's attorney after reading the petition in said cause, which note was originally given for the sum of six thousand four hundred and fifty-seven dollars and ninety-three cents, and bearing interest at the rate of ten per cent. per annum from the date of same, which said note was dated May 4, 1885, upon which note certain payments were credited,—one credit of seven hundred dollars, on July 17, A. D. 1886; another credit of six hundred and twenty-five dollars on October 19, 1886; and another credit of two hundred and fifty dollars on March 14, 1887." We have here, in effect, a declaration that the promissory note made in the petition the cause of action was read in evidence. The note described in the petition corresponded in every respect with that described in the judgment, including the credits, except as to the date of the note. Looking to the entire entry and record, we think there can be no doubt that the note offered in evi-

dence was the note described in the petition and in the mortgage made an exhibit, which must be presumed from the judgment, there being neither a statement of facts nor bill of exceptions, to have been read as the best evidence of what the mortgage was, and of the debt it was given to secure. The lands on which foreclosure was sought are accurately described in the petition and judgment, as they in the original mortgage made a part of the petition. That mortgage bears date April 4, 1885, and shows that it was given to secure the identical debt evidenced by the note described in the petition. The incorrect date of the note and mortgage contained in the recitals of the judgment evidently are mere clerical errors; and, in the face of the evidence furnished by the record, showing that the judgment was actually rendered on the note and mortgage made the foundation of the action, and correctly described in the petition, such recitals cannot be held to furnish sufficient evidence that the judgment was rendered on a different cause of action.

The judgment rendered is for a sum slightly less than it should have been for on the cause of action pleaded, which is not an error greater than frequently occurs in the computation of interest when several partial payments have been made; but it is large in excess of the judgment that should have been entered if based, as claimed by plaintiff in error, on a note for like amount, and with like credits, as that described in the petition but bearing date recited in the judgment. The petition stated a cause of action on which the judgment entered could be legally reversed. It was rendered as a solemn adjudication of the rights of the parties. No objection was made at the time of the trial to the introduction of evidence, though plaintiff in error had answered in the cause, but seems from the recitals in the judgment to have thought it necessary to be present in person or by attorney at time of trial. A motion for new trial was filed, but it was not sought on any ground now urged for the reversal of the judgment. No defense was interposed which required the production of any evidence other than the note and mortgage described in the petition. Even in contracts, testamentary and other papers, it is universally held that a matter of false description will not vitiate if, looking to the entirety, there be a sufficient description. *Maxim falsa demonstratio non nocet* has been applied to orders made in the course of a judicial proceeding. *Bittleston v. Cooper*, Mees. & W. 400. It may well be questioned if this court would be authorized, in any case in which there was an appearance by the defendant, to reverse a judgment rendered in conformity to a cause of action stated in the petition, merely on account of a recital in the judgment not necessary to have been made. In such a case it would seem that the complaining party should show through a statement of facts or bill of exceptions that the error which he seeks to show by a mere

cital actually exists. There is no error in the judgment entitling plaintiff in error to a reversal, and the judgment will be affirmed.

**KING et al. v. OLDS et al., (DEL RIO BUILD'G & LOAN ASS'N, Intervenor.)**

(Supreme Court of Texas. Nov. 12, 1888.)

**INTERVENTION IN TRESPASS TO TRY TITLE.**

1. Plaintiffs in an action of trespass to try title obtained possession under a writ of sequestration, claiming by purchase at a sheriff's sale; and intervenor thereupon filed his petition alleging that the levy and sale, under which plaintiffs claim, was expressly made subject to intervenor's mortgage lien; that said lien was subsequently foreclosed and intervenor purchased the property thereunder; that, being in possession of the property, plaintiffs, by false and fraudulent allegations in their petition, obtained a writ of sequestration and ejected it therefrom; and prayed for cancellation of the deed under which plaintiffs claim, for a writ of possession, and for general relief. *Held*, that a demurrer to intervenor's petition was properly sustained, since the facts set forth show no right by which intervenor could maintain an original action against plaintiffs for possession.

2. A petition which alleges that a sale of lands on judgment and execution was expressly made subject to petitioner's recorded mortgage lien, does not show that the purchasers thereunder had notice of such lien.

3. Where the petition alleged that such mortgage was subsequently foreclosed, but does not allege that the purchasers under the original sale were parties to the foreclosure suit, it does not show that they are bound by it.

Commissioners' decision. Appeal from district court, Val Verde county; L. A. FALVEY, Judge.

Trespass to try title, by King & Fordtrau against D. A. Olds and Michael Onion. The Del Rio Building & Loan Association intervened, who, together with plaintiffs, claimed title under certain judgment liens against one John O'Conner. Plaintiffs demurred to the petition for intervention. The demurrer was sustained, and upon the refusal of intervenor to amend the petition was dismissed, and intervenor appeals.

*Ware & Tugwell*, for appellant. *Clifford & Aycock*, for appellees.

**HOBBY, J.** The appellees, King & Fordtrau, instituted a suit on the 20th day of May, 1886, in the usual form of an action of trespass to try title against D. A. Olds and Michael Onion, to recover lots Nos. 15 and 16 in block E, in the town of Del Rio, alleging ownership in and ouster of plaintiffs by defendants on the 10th day of July, 1885. Appellees alleged the value of the lots to be, respectively, \$1,500 and \$500, aggregating \$2,000. Upon filing an affidavit and bond therefor, a writ of sequestration issued, which was levied upon the property on the 24th day of May, 1886, and replevied by appellees on the 14th day of June, 1886. Appellant intervened in the suit on the 26th day of October, 1886, between appellees and Olds and Onion, in the district court of Val Verde county, alleging that appellees, in November, 1884, recovered a judgment against John O'Conner for

the sum of \$548.01, with interest thereon, and \$28.35 costs of suit, and that appellees became the purchasers at the sale under that judgment of the lot 16 involved in this suit, through their attorney, U. B. Eastman, on July 7, 1885, for the sum of \$65. Intervenor alleged also that the levy and sale was expressly made subject to its recorded lien, which lien, by the judgment of the district court of Val Verde county against said O'Conner of date April 24, 1886, was ascertained to be \$953.60, and the mortgage securing the same in favor of appellant was foreclosed; that an order of sale for the satisfaction thereof was granted for the said lot 16, which was duly issued and executed by the sheriff on the first Tuesday in July, 1886, and at which last-mentioned sale appellant became the purchaser for the sum of \$1,025. Appellant alleged that, being seized and possessed of said lot No. 16 in fee-simple, on May 20, 1886, appellees, by false and fraudulent allegations in their petition, obtained under the writ of sequestration issued herein possession of said lot on June 14, 1886, and ejected appellant therefrom. Appellant alleged the claim of appellees to be a cloud on its title; their possession under the writ of sequestration to be a trespass; that appellant became subrogated to the rights of said O'Conner, defendant in execution; prays for judgment removing all cloud from its title, the cancellation of sheriff's deed to appellees for said lot 16, for the value and use of occupation from first Tuesday in July, 1886, for writ of possession, and for general relief. General and special exceptions were filed by appellees to the petition for intervention, upon the grounds that no act or words were charged therein amounting to fraud; that there was nothing shown in the petition calling for cancellation of appellees' title; that the allegation that the sale to appellees of the lots in July, 1885, was made expressly subject to appellant's lien shows that the sheriff had no authority to fix terms or qualifications other than the law would imply, nor was such authority alleged in Eastman; that the petition of appellant does not show that appellees are bound by the decree of foreclosure, in that it does not allege appellees were parties thereto. Appellees pleaded specially their title under the sale made in July, 1885, and alleged the filing of their deed from the sheriff for record in the office of the county clerk of Val Verde county. The exceptions of appellees to the petition of appellant were sustained, and, the intervenor declining to amend the petition, it was dismissed.

The rule regulating the right to intervene is stated to be as follows: "The intervenor's interest must be such that if the original action had never been commenced, and he had first brought it as the sole plaintiff, he would have been entitled to recover in his own name to the extent at least of a part of the relief sought; or, if the action had first been brought against him as the defendant,

he would have been able to defeat the recovery, in part at least. His interest may be either legal or equitable." Pom. Rem. § 480. This rule has been adopted in this state. *Pool v. Sanford*, 52 Tex. 633. If appellant had, under the operation of this rule, instituted the suit as plaintiff on the 20th day of May, 1886, setting forth specially its title to the lot No. 16, as pleaded in the petition for intervention, and alleging its title to be under the sale made on the first Tuesday in July, 1886, by virtue of the decree foreclosing the mortgage lien, it could not have recovered as against the title of appellees derived from the sale made in July, 1885, under their judgment against O'Conner.

The special exceptions of appellees to the petition for intervention called in question the superiority of appellant's title, and this did not appear satisfactorily from its pleading. It is not shown by the intervenor that the appellees had notice of its lien in July, 1885, when title vested in them. Nor was this lien of the intervenor foreclosed until April, 1886. If the action had been brought by the appellees against the intervenor, instead of the defendants Olds and Onion, it does not appear from the intervenor's petition that the appellees' recovery could have been defeated. We are of the opinion that the judgment dismissing the petition for intervention should have been without prejudice to appellant, and that, so reformed, it should be affirmed.

STAYTON, C. J. Opinion adopted November 13, 1888.

CLAY COUNTY LAND & CATTLE CO. v.  
EARLE.

(Supreme Court of Texas. Nov. 13, 1888.)<sup>1</sup>

PURCHASER OF SCHOOL LANDS.

1. The terms for sale of school lands, fixed by the county court, under Const. Tex. art. 7, § 6, providing for the protection of settlers on school lands in the prior right of purchasing the same to the extent of their settlement, were on nine years' time in ten equal payments, first to be made at the time of sale of one-tenth of the whole amount, balance payable annually. Defendant, an actual settler on school lands, tendered the first payment upon 160 acres, but the purchase was not closed, owing to a dispute as to the acreage of the tract he had settled upon. Plaintiff held title to school land embracing the land defendant had settled on under meane conveyances from the county subsequent defendant's residence thereon. Held, that in an action to try title defendant had a paramount claim as against plaintiff, and was entitled to possession on paying the amount accrued since the first tender, and securing the amount not yet due, his residence being notice to plaintiff and its grantors of his claim.

2. In such a case, the county is a necessary party in order that defendant may have title unincumbered from other purchasers, and plaintiff may receive abatement in the purchase price paid by it as grantee from the county.

Appeal from district court, Clay county;  
B. F. WILLIAMS, Judge.

Trespass to try title, by the Clay County Land & Cattle Company against P. J. Earle.

Judgment for defendant, and plaintiff appeals. For statement of facts, see 9 S. W. Rep. 340.

*Plemmons, Hazelwood & Templeton*, for appellant. *Swan & Bomar*, for appellee.

WALKER, J. The opinion of this court in the appeal against Wood, decided October 16th of the present term, (9 S. W. Rep. 340,) disposes of the material questions here raised. The suit was originally brought by appellant against Earle, Wood, and others, in trespass to try title. Defendants were allowed to sever. Separate trials were had, and separate appeals resulted. The judgments were for the defendants on each trial, and appeals by the plaintiff. Earle was an actual settler upon the public school land of Angelina county, and had the right to purchase 160 acres, including his improvements, at the price fixed by the county commissioners' court for the block 83, which covered his improvements. It seems that in the latter part of the year 1881 he tendered the first payment upon the purchase. The purchase was not closed between him and the county judge, who was the authorized agent of the county, because of a controversy as to the quantity of land in the block 83; Earle insisting that it contained 147 acres. Harrington, the county judge, guided by his map, claimed that 174 acres were in it. The law did not require Earle to pay for more land than he obtained. Being willing to take the block at its area, 147 acres, he should have had it at the price fixed per acre. But this tender and the refusal did not give Earle the land. He had the right to purchase it, and when he shall do so his title will be perfected. To defend himself against the suit of the plaintiff he should have renewed his tender, as well of the first installment as of the amount, principal and interest, of each annual payment due at the trial, according to the terms of sale prescribed by the county court. Harrington, the county judge, could not, as agent to sell, alter the terms of sale fixed by the court, and under which he was acting. The terms of sale, so fixed August 12, 1878, were "on nine years' time, in ten equal payments; the first to be made at the time of sale, which shall be one-tenth of the whole amount; the balance to draw ten per cent. per annum interest till paid, which interest shall be paid annually with the yearly payment of one-tenth of the amount of the purchase money," etc. The payments not then due should be secured as required under the said order of the county court. The residence of Earle upon the land was notice of his claim as a settler at the time of the sale of the land by the county to Eakman & Davidson, under whom the plaintiff claims. His right to purchase the 147-acre block has not been lost, and he can still acquire it by offering to proceed, and in fact proceeding, with his purchase by payment of the amount accrued, and securing that which is not yet due, taking count from his tender to Harrington in the latter part of the year

<sup>1</sup> Publication delayed through failure to receive copy.

1881. Upon so doing, his defense will be good against the plaintiff. Unless he elect to do so, judgment should go against him, for the plaintiff exhibits a good title, save his right to purchase. Angelina county should be made a party to the suit, so that Earle may have title unincumbered from other purchasers, and that plaintiff may have an abatement in the purchase money. The judgment is reversed.

**GARRETT v. CHRISTOPHER.**

(*Supreme Court of Texas. June 25, 1889.*)

**BONA FIDE PURCHASER.**

In an action of trespass to try title, plaintiff claimed through mesne conveyances under a lost deed alleged to have been executed by the patentee of the land in question in 1856. His title papers were not recorded until December 8, 1884. Defendant, who purchased the land in May 30, 1884, claimed title under a deed from the widow and children of the patentee, reciting that the grantee was "to have and to hold the premises in dispute unto their grantee, his heirs and assigns, forever," and had no actual notice of plaintiff's unrecorded deed. Held that, the intent of the deed being to convey the premises and not the grantors' interest therein, it was not a mere quitclaim, and defendant was a *bona fide* purchaser without notice, actual or constructive.

Commissioners' decision. Error from district court, Taylor county.

*Charles I. Evans*, for plaintiff in error.  
*Spoons & Leggett*, for defendant in error.

ACKER, J. D. F. Garrett brought this suit against J. H. Christopher in trespass to try title to 160 acres of land patented to I. G. Mabry, assignee of Tilghman Berry. Both parties deraign title from the patentee. The plaintiff claims title through a lost deed alleged to have been executed by the patentee to Wm. A. Hall on February 1, 1856, and mesne conveyances to himself. The defendant claims title through conveyance from the widow and children of Mabry, the patentee, to George W. Jalonick and C. Von Carlowitz, executed in 1881, and mesne conveyances to himself. The trial was without a jury, and judgment rendered for defendant, from which this writ of error is prosecuted.

The court filed conclusions to the effect that the plaintiff had failed to prove the execution of the lost deed under which he claims, and that the defendant was a *bona fide* purchaser of the land for a valuable consideration paid by him, without notice, actual or constructive, of plaintiff's claim. Under the view we entertain as to the law which must govern in the disposition of the case, it will be sufficient to consider the fourth assignment only, which relates to the court's conclusion that the defendant was an innocent purchaser for value, for, if the court was correct in that conclusion, it is immaterial whether plaintiff proved the execution of the lost deed or not. Plaintiff's title papers were not filed for record until the 8th day of December, 1884. The defendant purchased the land and received a conveyance therefor on the 30th day of May, 1884. It is certain that he did not have con-

structive notice of plaintiff's prior unrecorded title at the time he purchased, and it is not claimed that he had actual notice. It was proven conclusively that he paid the consideration of \$1,200 in cash at the time he purchased the land; but it is contended by plaintiff in error that the deed from the widow and children of the patentee to C. Von Carlowitz, through which defendant claims, is a quitclaim, and will not support the defense of innocent purchaser. If the deed is a quitclaim in the strict sense of that species of conveyances, then the assignment is well taken. Whether the conveyance be a quitclaim or not is dependent upon the intent of the parties to it, as that intent appears from the language of the instrument itself. If the deed purports and is intended to convey only the right, title, and interest in the land, as distinguished from the land itself, it comes within the strict sense of a quitclaim deed, and will not sustain the defense of innocent purchaser. If it appears that the intention was to convey the land itself, then it is not such quitclaim deed, although it may possess characteristics peculiar to such deeds. The use of the word "quitclaim" does not restrict the conveyance, if other language employed in the instrument indicates the intention to convey the land itself. *Richardson v. Levi*, 67 Tex. 366, 3 S. W. Rep. 444; *Lumber Co. v. Hancock*, 70 Tex. 314, 7 S. W. Rep. 724. The language of the deed now under consideration is: "Do by these presents sell, convey, remise, release, and quitclaim unto the said said C. Von Carlowitz, his heirs and assigns, forever, all our right, title, claim, interest, and demand, in and to and for" the land, (describing it.) Had the deed stopped here, and contained no language indicating a different intent, we would be constrained to hold that it is a quitclaim, and conveyed only the vendor's chance of title instead of the land. In immediate connection with the language just quoted, the deed contains the following: "To have and to hold the above-described premises unto the said C. Von Carlowitz, his heirs and assigns, forever." From this language we think it is quite clear that the parties intended by this instrument to convey the land itself, and that it is not simply a quitclaim deed. We think the court did not err in the conclusion complained of by the fourth assignment, and we are of the opinion that the judgment of the court below should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and judgment affirmed.

**NEWBY v. GUNN et al.**

(*Supreme Court of Texas. June 25, 1889.*)

**FALSE IMPRISONMENT — ARREST WITHOUT WARRANT.**

Under Code Crim. Proc. Tex. tit. 5, c. 1, requiring that a person arrested without a warrant shall have an immediate hearing before the nearest magistrate, where the petition in an action for false imprisonment alleges that plaintiff was ar-

rested without warrant, and was imprisoned without an examination, and these allegations are not contradicted, a judgment for defendants cannot be sustained.

Commissioners' decision. Appeal from district court, Lamar county.

Action for alleged false imprisonment by William Newby against W. T. Gunn and James A. Boothe. Judgment for defendants, and plaintiff appeals.

*F. W. Miner*, for appellant. *Hale & Hale*, for appellees.

**ACKER, J.** Appellant brought this suit against appellees to recover damages for false imprisonment, and alleged that he was arrested by appellees without warrant, order, or legal authority, and, without any examination, was confined in jail by appellees for four days, during extremely cold weather, which caused serious injury to his health, good name, and feelings.

The answer of appellees admitted the arrest and confinement as alleged, and pleaded in justification that the arrest was made on information received from a reputable citizen that plaintiff was suspected and was guilty of the theft of a coat, and was making his escape. The trial was without a jury, and resulted in judgment for appellees. An officer, or any other person, may arrest without warrant for a felony, or an offense against the public peace, committed in his presence; or a peace-officer may arrest without warrant on verbal order of a magistrate for a felony or breach of the peace committed in the presence or view of such magistrate; or such officer may arrest without warrant when it is shown by satisfactory proof of a credible person that a felony has been committed, and that the offender is about to escape. But in all the cases enumerated the person making the arrest is required to immediately take the person arrested before the magistrate who may have ordered the arrest, or before the nearest magistrate when the arrest was made without an order. Title 5, c. 1, Code Crim. Proc. Neither the allegations of the answer, nor the evidence adduced upon the trial, show any defense to the case made by the allegations of the petition, and we think the first assignment that the judgment is contrary to the law and the evidence is well taken. We are therefore of opinion that the judgment of the court below should be reversed, and the cause remanded.

**STAYTON, C. J.** Report of the commission of appeals examined, their opinion adopted, and judgment reversed, and cause remanded.

#### GULF, C. & S. F. RY. CO. v. YORK.

(*Supreme Court of Texas. June 18, 1889.*)

##### INJURY TO PERSON ON TRACK.

1. Plaintiff cannot recover for injuries received by being struck by an engine while walking on the ends of the ties on a railroad track on a stormy

night, with his hat pulled over his eyes, and "looking straight down."<sup>1</sup>

2. Threats made by the engineer after the accident, that he "would finish" the job with a coal-pick, and declarations made by him as to the number of men he had killed, were no part of the *res gestæ*, and were inadmissible.

8. Where there was no evidence that the engineer saw plaintiff in time to avoid the injury, an instruction that if the engineer made no effort to stop the engine, and gave no warning, the defendant was liable, was error.

Commissioners' decision. Error from district court, McLennan county.

*W. M. Flournoy*, for appellant.

**HOBBY, J.** Under the view we take of this case it will be unnecessary to dispose of consecutively each assignment of error presented, but will consider such only as we regard most important, and which, in our opinion, requires a reversal of the judgment. The plaintiff sued defendant to recover actual and exemplary damages for injuries inflicted on her minor son, D. A. York, through the alleged negligence of defendant's engineer in charge of its locomotive engine. It was alleged that the injuries permanently disabled her son mentally and physically, and deprived her of the benefit of his services and earnings during his minority, and for which \$5,000 actual damages were sought, and \$2,500 exemplary damages were claimed by reason of the wanton, willful, and malicious acts of defendant's employes in not stopping said train, or giving signals, etc. The verdict was: "We, the jury, find for plaintiff the sum of \$500."

The thirteenth and fourteenth assignments raise the question of the sufficiency of the evidence to support the verdict, and are to the effect that the verdict is contrary to the evidence, because the testimony shows the injuries of D. A. York to have resulted from his own negligence and voluntary act.

Plaintiff's witness Reed testified that he was with D. A. York at the time of the injury on October 24, 1884, at Temple, in Bell county. "We left Temple that night, going home. Witness lived with York's mother, about seven miles from Temple. We were walking on the Santa Fe Railroad in that direction. At Temple the Mo. Pac. R. R. crosses the Santa Fe close to the Mo. Pac. depot. We left Temple about 10 o'clock at night. It was a tolerable dark night; drizzling rain,—not much, just sprinkling. York and myself were not looking ahead. Wind blowing pretty hard from the north. It struck us on the side of the face. We had on hats, pulled down over our faces to keep the rain from hitting us in the face. York and I had large broad-brim hats. He was about 10 feet ahead of me. The train knocked York off the track. At that time we were on the Santa Fe Railroad. We had crossed

<sup>1</sup> Concerning the liability of railroad companies for injuries to trespassers on their tracks, see *Railway Co. v. Croasnoe*, (Tex.) 10 S. W. Rep. 842, and note; *Blanchard v. Railway Co.*, (Ill.) 18 N. E. Rep. 799, and note; *Barker v. Railroad Co.*, (Mo.) 11 S. W. Rep. 254.

the Mo. Pac. R. R. about 350 feet. I saw the train about the time it struck York; not before. Heard no bell or whistle. York and myself were walking south. The train was going north. We were going meeting the train. I did not see the train until it struck York, and I was in ten feet of York. We were walking along the outside of the track on the ends of the ties. We had our hats pulled down over our eyes. We were looking straight down. We didn't hear the train and were not looking for a train. Did not see the head-light until it struck York. Didn't see it down under my feet. It had a head-light. York had not been drinking. He was cool, sober. I never knew him to be drunk. I was with him all the evening and night. Guess we were 350 feet from the Missouri Pacific depot. \* \* \* I saw the back part of York's hat up, and know his hat was pulled down over his eyes. Didn't see the head-light till I looked up."

D. A. York testified for plaintiff: "We left Temple that night about 11 o'clock going home. We lived about six miles from Temple, at my mother's, south of Temple. It was a tolerable dark night, and it was raining. We were walking on the Santa Fe Railroad. We had just got across the crossing where the Missouri Pacific crosses the Santa Fe. I was not looking ahead. I had my hat down over my eyes to keep the rain out. The wind was blowing from the north on the side of my face. My hat was a big, white, broad-brimmed hat, a new hat bought that evening. The engine and train, coming up north, struck me on the Santa Fe Railroad. They backed the train, and put me in the caboose. I did not see or hear the train before it struck me. I heard no bell or whistle. When they put me on the train they carried me to Temple, and left me in the caboose that night. I was struck about a quarter of a mile from Temple."

A witness, John G. Agars, testified for the plaintiff that "he had discharged the duties of fireman on the Texas Central Railroad. That the fireman's station is generally with the engineer. He has an opportunity for looking ahead once and awhile when not putting in coal. Thought an engineer, on a tolerably dark night, the train running 15 miles an hour, could see the width of this room. Could see an object, but not tell exactly what it was. Thought he could see a man ahead of him in time to signal. Might not check up the train. Could check slightly. If there was a man on the road walking on the track with his hat over his eyes the engineer could see the man, but not his condition."

T. J. Hamil, for defendant, stated that "he was fireman on the engine on the night of October 24, 1884. Saw York fifty steps from the engine, walking in the middle of the track; train running north, the man going south. Train was running about 12 miles an hour. It was 21½ miles from Temple, and one and a half miles south of the crossing of

the G., C. & S. F. R'y and M. P. R. R. when I first saw him. I rang the bell. Can't say whether the engineer gave any signal. Engine had a head-light burning brightly."

Such is a full statement of the facts and circumstances disclosed by the record, under which D. A. York was injured. It is shown by the testimony of his mother that he was not quite 18 years of age at the time of his injury. It is manifest, we think, from the evidence of the injured party himself, which was fully supported by his companion, Reed, that the former did not exercise the most ordinary care, or the least degree of prudence, which it has been repeatedly held in this and other states is required by a person walking on a railroad track. The failure to listen and look, while on the track, to avoid an approaching train, is, as has been said, not merely an imperfect performance of duty, but an entire failure of performance which will bar the right to recover damages if it contributed proximately to the injury. A person who voluntarily exposes himself to such dangers as this, from which he might have saved himself by the proper use of his senses, contributes directly to his own injury, and no cause of action lies. *Railroad Co. v. Bracken*, 59 Tex. 73. In the case before us it is not only apparent from the plaintiff's evidence that no care or prudence whatever was exercised by York, but he voluntarily placed himself on the track, in a position necessarily exposing him to dangers, and instead of using his senses of sight and hearing to avoid them, by his own act deprived himself of this means of protection by shutting out his vision and impairing his hearing by placing his "broad-brim, big white hat" over his eyes, and "looking straight down." That the injury to York would not have happened but for his own negligence we think is too clearly shown by the facts to require discussion, and we are of opinion that the evidence does not support the verdict and judgment.

There are other questions raised by the assignments, and other errors disclosed in the record, which it is probably proper to notice.

The second and fourth assignments relate to the court's action in permitting the witnesses, John W. Reed and D. A. York, to testify to the threats of the engineer after York was injured. This witness Reed was permitted to testify that "at the time D. A. York was injured the engineer in charge of the locomotive stopped it, and came back, and got down and said to York: If he had not killed him, he would take his coal-pick and finish him; to which defendant objected, because the threats of the engineer could not bind the company, being outside of and not within the line of the engineer's employment." The witness York, the injured party, was asked the following questions by plaintiff: "Question. Before they put you in the caboose, did you see the engineer? Answer. No, sir; I never saw him. I heard him talk. Q. Did he talk to you? A. He was talking



to some fellow that was there. Q. Was anything said about his having anything in his hand? A. I think somebody asked him what he was going to do with that bar in his hand. Q. What did he say in reply to that? A. He said: By God! he was going to finish me." To all of which evidence the defendant objected because the questions were leading, and because any acts of the engineer, such as were elicited by the questions and answers, were not binding on the defendant; and defendant could not be held to respond in damages for such acts and threats of the engineer; and said testimony tended to improperly prejudice the jury." In this connection it will be proper to consider the third assignment, to the effect that the court erred in permitting Reed to answer a question propounded to him by the plaintiff's counsel, as to what the engineer said about its being the first man he ever run over." The bill of exceptions recites "that the witness was asked: What did he (the engineer) say just after York was injured? Did he say that he had ever run over anybody else before?" To which the defendant objected, because it was foreign to the case. The objection was overruled, and the witness answered that "the engineer said he had run over about thirty or thirty-five, and that was the first man he ever struck without killing." There can be no doubt, we think, that the objections to all of this testimony should have been sustained. It certainly did not constitute a part of the *res gesta*, tested by the most liberal construction applied to that character of evidence. It was not descriptive or illustrative of the particular way in which the collision occurred. It was not admissible because made by an agent in such manner as would bind his principal. To have had that effect it must have been made within the scope of the agent's authority with respect to the transaction in which the declaration or admission was made, and must have formed part of the *res gesta*. These threats or declarations are not shown by the proof to have been made while the engineer was in the discharge or performance of any duty in which he was authorized to act for the defendant. They were obviously made after the infliction of the injury, and not, therefore, a part of the *res gesta*. The length of time in this case would not, however, of itself, have rendered them inadmissible had they related to the nature or cause of the accident, and been otherwise competent. To whatever extent this evidence may have shown that the engineer acted from malice, and may have been personally liable, it was nevertheless shown to be an act not within the line of his duty, and one for which the appellant is in no manner responsible. *Patterson v. Railway Co.*, 19 N. W. Rep. 761.

There was nothing in the pleadings which would have authorized any proof as a basis for a recovery of exemplary damages against appellant if appellee could have recovered such damages at all. The evidence objected to was inadmissible for that purpose, and its

tendency was to mislead, if not to prejudice, the jury. The charge objected to under the 7th assignment, to the effect that if the jury found that the action of defendant's employes in driving said engine against York (if they so found) was wantonly, willfully, and maliciously done as charged, they would find such damage, not to exceed \$2,500, as they might think a sufficient punishment to defendant for such act of its employes, was erroneous, as neither the allegations nor proof authorized it in this case. *Hays v. Railroad Co.*, 46 Tex. 272.

The following charge given at the request of the plaintiff is assigned as error: "(1) Under the law each locomotive engine approaching a place where two lines of railway cross each other is required, before reaching such railroad crossing, to be brought to a full stop. If you believe from the evidence that D. A. York, the son of plaintiff, was struck by an engine in charge of the servants and employes of defendant while such engine was approaching the crossing of another railroad, and that at the time of such striking said D. A. York was at or near such crossing, and between defendant's engine and such crossing; and if you further believe from the evidence that the engineer in charge of such engine made no effort to stop for such crossing,—the defendant would be liable for all damages sustained by plaintiff by reason of such neglect, unless resulting from the negligence of D. A. York, (if any,) notwithstanding said D. A. York was upon the track of defendant at the time he was struck; provided, however, you believe from the evidence that said D. A. York would have escaped injury if such stop had been made for such crossing as required by law. (2) It is the duty of an engineer in charge of a locomotive engine to keep a lookout ahead of his engine, and if you believe from the evidence that the person in charge of the engine which struck D. A. York could by keeping such lookout have seen D. A. York, and made no effort to stop the engine, and gave no signal of warning for said York to get off the track, then such failure would be such reckless and wanton disregard of human life as would render defendant liable for whatever damages arose from such failure and neglect, unless caused by the neglect of D. A. York, (if any.)" The first paragraph of the above charge is not applicable to the facts of the case. The second is objectionable. If York was seen, and the injury could have been avoided after he was seen, then this part of the charge might have been given. But there was no evidence that the engineer saw York in time to have avoided the injury. In this connection, the instruction requested by the defendant was as follows: "The statute requiring railroad companies to have their trains stopped before reaching the crossing of another railroad, and to blow a whistle or ring a bell, is intended to prevent collision between trains of the two intersecting roads, and not as a warning to individuals walking upon the track of



a railroad; and if, as charged in plaintiff's petition, you believe from the evidence that the engineer on defendant's road failed to ring the bell, or blow the whistle, or neglected any other requirement of the statute, and D. A. York, the party alleged to have been injured, could have seen the approaching engine, had he looked, in time to have avoided collision, but neglected to look, or shut off his vision by his voluntary act in pulling his hat over his eyes, and the collision took place, and he was injured, he was guilty of such contributory negligence as would exempt defendant from liability, and you will find for defendant." The statute does not require the whistle to be blown or the bell to be rung when a locomotive approaches a place where two lines of railroad cross each other. This is required to be done when it is within at least 80 rods of a place where the railroad crosses a public road or street. Sayles, Rev. St. art. 4232. In approaching a place where two lines of railroad cross each other, the engine is only required to be "brought to a full stop." Consequently there was no error in refusing the special instruction asked by appellant.

The assignment that the verdict is contrary to the evidence because it was shown that plaintiff's son was but slightly injured, and his capacity for rendering services to plaintiff but little impaired, cannot be sustained. Upon this point the testimony was conflicting, the weight of it being in favor of the appellant. But we cannot say that there was not sufficient evidence to support the verdict in this respect. For the errors mentioned, we think the judgment should be reversed, and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment reversed, and the cause remanded.

#### AYCOCK *et al.* v. KIMBROUGH *et al.*

(Supreme Court of Texas. Nov. 18, 1887.)<sup>1</sup>

#### PAROL PARTITION—LEVY OF EXECUTION—JURISDICTION.

1. Where land has been partitioned among joint tenants, by parol agreement, the equitable title in the different parcels vests at once in the persons to whom the same have been allotted,—the legal title being held for them, respectively, in trust; and an execution levied on a parcel thus allotted to one of the joint tenants, to satisfy a judgment against another of them, cannot affect the rights of the one in whom the equitable title vests.

2. A partition of lands among joint tenants or tenants in common, made by parol agreement, is not within the statute of frauds, nor the statute regulating conveyances of land by married women, and is not affected by the registration law.

3. Where a plaintiff fails to establish any interest in lands which have been partitioned, he cannot be heard to say that there was error in the partition proceedings.

4. District courts have authority, either with or without a motion, to set aside any order, judg-

ment, or decree in a civil case during the term at which the same is granted.

Commissioners' decision. Appeal from district court, Falls county; B. W. RIMES, Judge.

The appellant Emma Aycock recovered a judgment, November 14, 1873, against A. P. Morris, and execution was duly issued thereon, which appears to have been returned *nulla bona*. Nearly four years later the father of the judgment debtor died intestate, leaving as his heirs Mrs. Perkins, Mrs. Price, and Mrs. Kimbrough, and the judgment debtor and another son. Within a few weeks after the father's death the heirs entered into a verbal agreement to divide the property, consisting mainly of lands and town lots. Subsequent to this agreement an *alias* execution was issued on the judgment of Mrs. Aycock against A. P. Morris, and the sheriff levied on and sold the interest of the judgment debtor in certain lands of his father's estate, which it appears had been apportioned, by the verbal agreement, to two of the married sisters, Mrs. Kimbrough and Mrs. Perkins, and the brother, J. R. Morris. B. L. Aycock, the husband of the judgment creditor, became the purchaser of the lands. The claimants, appellees in this suit, commenced an action prior to the sale of the land against the appellants Emma Aycock and B. L. Aycock, and A. P. Morris and the sheriff, to be quieted in their title, and obtained a temporary injunction against the sale, which was subsequently dissolved. Appellants filed their cross-bill in the suit, and obtained a judgment against appellees for quieting of title and partition, and commissioners were appointed to divide the land. On the following day, and at the same term of court, the attorneys of appellees, who were plaintiffs in the suit in the court below, appeared as the attorneys for A. P. Morris, the judgment debtor, who had been made a party defendant in the same suit, and moved in his behalf to set aside the judgment, which motion was granted. At the next term of the court, being the July term, 1885, a new trial was had by the court without a jury, resulting in a judgment for plaintiffs, from which judgment, and from the order granting a new trial, the defendants Emma Aycock and B. L. Aycock appeal.

*Emma Aycock and B. L. Aycock, in pro. per.* Goodrich & Clarkson, for appellees.

MALTBIE, J. It is insisted that the court erred in not sustaining Aycock's general demurrer to the defendant A. P. Morris' answer,—said answer asserting that the 100 acres of land had been allotted to Mrs. Perkins, Mrs. Kimbrough, and Mrs. Price in a parol partition of George Morris' estate among his heirs in the year 1877, the two former being married women.

It has been long settled that a parol partition of lands among joint owners or tenants in common is not within the statute of frauds.

<sup>1</sup> Publication delayed through failure to obtain copy.

*Houston v. Sneed*, 15 Tex. 309; *George v. Thomas*, 16 Tex. 89; *Stuart v. Baker*, 17 Tex. 419. That some of the parties to the partition are married women is not believed to be a valid objection to such partition, or, at all events, that it would not be void and subject to a collateral attack on that account. Married women, it is true, can only convey their real estate in the way pointed out by the statute; but a partition of lands is neither within the statute of frauds nor the statute regulating the transfer of real estate of a married woman,—a parol partition being a division, but in no sense a conveyance, of lands, and only vesting the equitable title of the respective shares in the tenants to whom allotted; the legal title remaining as before the partition, but held in trust for the benefit of those holding the equitable interest. There was no error in overruling the demurrer. It is claimed that there was error in the judgment of the court partitioning the lands belonging to George Morris' estate among his heirs, on account of the contradictory allegations in the petition of plaintiffs and the answer of the defendant A. P. Morris,—the petition alleging a partition by mutual deeds in 1878, and the answer alleging a parol partition in 1877. It not being apparent that said decree, if erroneous, could affect appellants,—it having been determined in this suit that they had no interest in the land partitioned,—we are of opinion that they cannot be heard to complain.

It is next asserted that the court erred in not finding that the suit as against appellants was collusive and fraudulent, and brought and conducted to defeat the collection of their debt. If there was a parol partition of the land in the year 1877, in which the 100-acre tract was allotted to the sisters of A. P. Morris, said partition being prior to the levy of appellants' execution on the 20th day of November, 1878, their title, being equitable, and not within the operation of the registration laws, was not subject to levy and sale under appellants' execution; and there could be no fraud in resisting appellants' execution; and there could be no fraud in resisting appellants' attempt to subject their land to the payment of A. P. Morris' debt. The court found that the partition was made in 1877, as claimed, and that there was a written partition in 1879 confirming the verbal partition, which the court in this case again approved and confirmed; and there being sufficient evidence to authorize the finding, though there may have also been circumstances calculated to throw suspicion upon some of the evidence upon which the finding was predicated, under repeated decisions of the supreme court, the finding will not be disturbed, there being nothing in the record inconsistent with its truth.

The last complaint is that "the court erred in not holding the defendant A. P. Morris and the plaintiffs estopped by the judgment rendered at the January term, 1885, against the plaintiffs and in favor of appellants,—

plaintiffs having abandoned the suit before the rendition of said judgment, and the judgment having been set aside solely on the motion of A. P. Morris, he never having before that time appeared in the case, and the attorneys that had before that time represented the plaintiffs then appearing for A. P. Morris; and that A. P. Morris, having been silent for six years, should not then be permitted to come into court and reopen the case upon a new issue." It was, no doubt, a very great irregularity for the court to permit A. P. Morris to appear, under the circumstances of the case, and favorably entertain his motion for a new trial. Why it was done the record fails to disclose. But it is undoubtedly the law in Texas that district courts, in civil matters, have authority to set aside all orders, judgments, and decrees of the term, when made either with or without a motion. Having this complete authority over its records, the setting aside judgments, or the granting of new trials, whether rightfully or not, cannot estop the parties thereto from again litigating the question involved; nor could the action of the court in an appeal be held to be error, as no judgment can be appealed from unless it is final.

There being no error in the record of which appellants can complain, we are of opinion that the judgment should be affirmed.

WILLIE, C. J. Opinion adopted.

#### SCARBROUGH v. ALCORN.

(*Supreme Court of Texas. June 18, 1889.*)

##### RIGHT TO PROPERTY—PAROL EVIDENCE—SALE.

1. Under Rev. St. Tex. arts. 4883, 4884, requiring that the issues in a suit to try the right to property shall be made in writing by direction of the court, and consist of a statement of the authority by which the plaintiff seeks to subject the property levied on to his writ, and of the nature of defendant's claim, it was error to submit questions of estoppel to the jury, where no facts constituting such a defense are set up in defendant's claim.

2. Where the vendor of property gives an unconditional bill of sale, he cannot, in an action against a purchaser from his vendee to try the title to the property, introduce evidence of a contemporaneous parol agreement by which the title was to remain in him until the price was paid.

3. Where an unconditional bill of sale is given for a half interest in a lot of cattle, the seller guaranteeing to deliver a certain number at a certain time, the title to that number passes at once, as against one who sold the cattle to the vendor by an absolute bill, which he alleges was in fact conditional, and who brings an action to try his title before the day set for delivery. A delivery before the day set was not an alteration, but a performance of the contract.

Commissioners' decision. Appeal from district court, Clay county.

On July 17, 1885, W. J. Scarbrough sued out a writ of sequestration against C. R. Lindsay and J. M. Boone, which was levied upon the cattle in controversy, which were next day claimed by William Alcorn, who set up title in himself. Verdict and judgment were rendered April 10, 1886, for defendant, and plaintiff appeals.

*Swan & Bomar*, for appellant. *Hasel-*

*wood & Templeton and R. D. Welborne, for appellee.*

COLLARD, J. It is well settled that in an action of trespass to try title under a plea of not guilty the defendant may prove estoppel. *McDow v. Rabb*, 56 Tex. 162; *Mayer v. Ramsey*, 46 Tex. 371; *Wright v. Doherty*, 50 Tex. 34. In other cases it is the general rule that any affirmative defense must be specially pleaded. *Smith v. Sherwood*, 2 Tex. 461; *Keeble v. Black*, 4 Tex. 69; *Thompson v. Thompson*, 12 Tex. 327. The object of the law is to notify the adverse party of the character of the defense, so that he may prepare to meet it. The common-law rule is that an estoppel *in pais* does not have to be pleaded. *Bigelow, Estop.* 585. It has been the practice in this state to specially set it up, and it would be inconsistent with our system of pleading, as established by numerous decisions, to hold that it is not necessary. *Banking Co. v. Hutchins*, 53 Tex. 67 et seq. The fact that this case is for the trial of the right of property will not change the rule. Plaintiff, Scarbrough, sued Lindsay and Boone for the cattle in controversy, sued out and had levied a writ of sequestration upon them, and defendant, Alcorn, claimed them under the statute, filing oath and bond. The issues made by plaintiff were as follows: He alleges that long before and at the time his suit was brought and the writ levied he was the owner of the cattle; that Alcorn acquired his title from Lindsay; that it was acquired subsequent to his suit, with full knowledge of it; that plaintiff prosecuted his suit, and recovered judgment for the cattle against Boone and Lindsay; that Alcorn and those under whom he claims confederated together to defraud plaintiff, and that they acquired possession of the cattle by wrongfully entering the pasture when they were upon their range, without authority, which possession was acquired after the suit was brought, and after the writ was issued and placed in the hands of the sheriff, with full knowledge of the suit and the writ. Defendant denied the allegations made by plaintiff; averred that the cattle were not subject to the levy of plaintiff's writ; that at the time of the levy and long before suit he was the owner and in the lawful possession of the cattle, and that plaintiff had no right to the same. There is no hint of estoppel in these issues. The statute requires in cases of the trial of the right of property that the issues shall be made by the parties in writing by direction of the court. *Rev. St. art. 4883*. It also requires that the issues shall consist of a brief statement of the authority and right by which the plaintiff seeks to subject the property levied on to his writ, and of the nature of the defendant's claim. *Id. art. 4834*. The issue is not made by the claimant's affidavit, but, as was said in *Wright v. Henderson*, 10 Tex. 205, 206, "it is the duty of the court to direct an issue in the foundation of which the parties would be required to set forth

upon the record by pleading the facts in which their rights respectively consist." Justice STAYTON says in a case (*State v. Bender*, 68 Tex. 678, 5 S. W. Rep. 674) that "the purpose of an issue in these cases is the same as in other classes of cases, and it must be made before a case can be intelligently and fairly tried." The statute itself requires that the nature of defendant's claim must be stated. If he claims ownership by virtue of an estoppel, he has not complied with the statute until he has set it up and pleaded the facts which constitute the estoppel. The court should only try the issues made. We are of opinion the court erred, as claimed by appellant, in submitting to the jury questions of estoppel.

Alcorn claimed title under Lindsay, and read in evidence a bill of sale, the substance of which is given in the statement of facts as follows: "A bill of sale dated July 14, 1884, executed by W. J. Scarbrough to C. R. Lindsay, absolute on its face, reciting a paid consideration of \$3,000, conveying 153 head of cattle, which bill of sale was duly acknowledged on the day of its execution, and duly recorded in Bill of Sale Record of Clay county on the 8th day of April, 1885." It was agreed that the 89 head of cattle levied on by plaintiff and claimed by defendant were included in the above bill of sale, as well as in all other sales in evidence. Lindsay, on the 4th of November, 1884, by bill of sale conveyed to W. M. and E. W. Alcorn a one-half interest in the cattle, estimating them at 205 head, guarantying to them 100 head of grown cattle, to be delivered on the 1st of July, 1885. He delivered the cattle in controversy in four or five days afterwards. November 11, 1884, E. W. Alcorn sold her interest in the cattle to W. M. Alcorn. In order to defeat the bill of sale to Lindsay, evidence of a parol agreement was admitted, which, as to time and terms, is best stated in the language of the witness Boone, by whom, as well as plaintiff and one Pike, it was sought to be established. He says: "When W. J. Scarbrough offered to sell the cattle he offered to give C. R. Lindsay one year's time on the price, except \$100, and to take witness as surety; and witness agreed to and did sign the note with Lindsay for \$2,900, under this agreement, viz.: That the cattle were to be delivered to witness in his pasture, and remain in his possession and control until said note was fully paid; that this agreement was made between him, Scarbrough, and Lindsay; that it was agreed and understood between them all that the title to the cattle, as well as the possession, was to remain in him until they were paid for, and unless Lindsay should pay the note he was to have no interest in or control of the cattle, and, if Lindsay should fail to pay the note, witness was to keep the cattle, and pay for them, or sell them for the money and pay for them, or, if he could do neither, he was to turn them back to Scarbrough; that he refused to go on the note, and would not do so without the cattle

were left in his possession; that the cattle were delivered to him by Scarbrough, and two of his hands, Pike and Thompson, and he took them to his ranch, and penned them, and turned them in his pasture, and kept them in his possession until some time about the 1st of May, 1885." Lindsay testified that no such contract in parol was made; that the cattle were delivered to him in Boone's pasture, where he kept them until he delivered them to the Alcorns. After this a month and some three days, Boone, becoming dissatisfied with the condition of things, wrote Scarbrough to send him a bill of sale for the cattle, which was done, dating the instrument back to the 14th of July, 1884, the date of the sale to Lindsay; the instrument reciting that it was made in consideration of \$100 cash paid, and the note of \$2,900, executed by Lindsay and Boone. We do not see how the parol agreement, as stated in Boone's evidence, could be set up in opposition to the absolute written conveyance made by Scarbrough to Lindsay. We can understand how a debtor can make a deed absolute on its face to his creditor, and by a contemporaneous parol agreement show that the conveyance was intended as a mortgage to secure the debt. Scarbrough was not a debtor, or creating a debt against himself. He was making a sale in writing, by the terms of which the title to the property passed to Lindsay, and would not be in an attitude to set up the parol contract. We can understand how a parol agreement could have been made between Lindsay and Boone that the title should be in the latter, and that he should hold possession of the cattle until the note was paid, or sell them and pay the note, on which he was a security, or which he was bound to pay, for this would be an independent contract from the sale; and it might be, in a proper proceeding, Scarbrough could himself take advantage of such an agreement between Lindsay and Boone, and, in order to secure the payment of his note, enforce the contract; but this is entirely different, as we understand it, from the object of the parol agreement as offered in evidence, which it seems was intended to bind all the parties, and destroy the written sale of Scarbrough to Lindsay, make it a conditional sale, or place the title in one other than the vendee named in the written conveyance. In the absence of fraud or mistake, a contemporaneous or precedent parol agreement cannot be set up to vary or contradict the terms of a written agreement. *Donley v. Bush*, 44 Tex. 1; *Bedwell v. Thompson*, 25 Tex. Supp. 245; *Smith v. Garrett*, 29 Tex. 48; and *Hunt v. White*, 24 Tex. 643. Scarbrough did not sue Boone and Lindsay on his note, but for the cattle; and it appears that the title had effectually passed out of him by the conveyance to Lindsay, and, if not by that, then by his conveyance to Boone, subsequently made. The burden was upon him to establish his ownership of the cattle, (as they were levied on while in Alcorn's possession,) and this he could not do if

he had conveyed it to Lindsay, from whom Alcorn claimed, or if he had conveyed it to Boone. The fact that he recovered final judgment against Boone and Lindsay for the cattle would be immaterial, because as between him and Alcorn their rights would be determined by the facts as they were at the time of the levy.

Plaintiff alleges that Alcorn acquired his title and possession of the cattle after his suit was brought. The evidence does not sustain this allegation. Scarbrough sold to Lindsay on the 14th day of July, 1884. Lindsay sold to the Alcorns on the 4th of November, 1884. E. W. Alcorn sold to W. M. Alcorn, the defendant, on the 11th day of November, 1885. Plaintiff's suit was filed the 8th day of March, 1885. Delivery is not essential to pass title of personal property where there is a valid sale. 1 Pars. Cont. 525; Id. 529. And in a suit for the trial of the right of property, ownership is the question to be tried; it is not bound to be accompanied by possession. *White v. Jacobs*, 66 Tex. 464, 1 S. W. Rep. 844. If Scarbrough sold by valid conveyance to Lindsay his title, and, as before stated, if the parol agreement in evidence could not affect the written conveyance, the title passed to Lindsay, and with it the right of possession. Alcorn claimed under Lindsay by valid conveyance, and as to possession Lindsay could deliver on the range or by pointing out the cattle. Plaintiff claims that the sale to the Alcorns was executory, and for only an undivided interest in the cattle. A sufficient answer to this, outside of what has been said of the sales by plaintiff to Lindsay and Boone, is that, if Lindsay saw proper to deliver the cattle before the contract of sale required him to do so, it was legitimate for him to do so, and such a delivery would not vary the original agreement; it would only be a performance of it. If the parties accepted such change in its performance it would be valid between them. It appears that this was long before plaintiff's suit was brought, and could in no wise affect him. He delivered specific cattle, and this was a partition as between them, of which plaintiff could not complain. Lindsay gave a guaranty in the bill of sale to deliver 100 head of cattle, and it does not appear that he delivered more. If he had delivered more it was a transaction entirely between Lindsay and Alcorn, of which plaintiff could not complain. His rights were in no way affected by it. He could not recover from Alcorn unless he could recover from Lindsay. There was no error affecting the rights of plaintiff, or, if error, it was harmless, in allowing Lindsay to testify that it was understood between him and the Alcorns at the time of his sale to them that the title should immediately pass, and that he guarantied to them 100 head of cattle out of the number sold. The written contract guarantied expressly the delivery of 100 head out of the number sold; and, as before shown, there was nothing destructive of the contract in performing it before the

time stipulated therein. On account of the error in submitting to the jury questions of estoppel not pleaded we are of opinion the judgment of the lower court should be reversed, and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and judgment reversed, and cause remanded.

#### ALFORD *et al.* v. HALBERT *et al.*

(Supreme Court of Texas. June 18, 1889.)

##### DEATH OF WARD — APPOINTMENT OF ADMINISTRATOR.

1. After the death of a minor under guardianship, the county court cannot order a sale of property of the estate to pay the debts, and has only jurisdiction, in the matter of guardianship, to receive and act on the guardian's final account, and order the estate turned over to the person entitled to receive it.

2. Where a ward dies owing debts and owning property, the county court of the county where the death occurred has jurisdiction to appoint an administrator of the estate, though the guardian has not made final settlement.

Commissioners' decision. Appeal from district court, Dallas county.

*Jeff Wood, Jr., and Leaks & Henry*, for appellants. *Read, Greer & Greer*, for appellees.

COLLARD, J. This is the second appeal of this case. See *Fortson v. Alford*, 62 Tex. 576. The former appeal was by Mrs. Fortson, now Mrs. Halbert, the present appellee, from the judgment of the district court of Dallas county, sustaining exceptions to her petition, and resulted in a reversal of the cause for trial on the petition. On the former appeal the orders of the probate court of Anderson county in the guardianship of Earle Cravens, and the orders of the probate court of Dallas county in the administration of the estate of the deceased minor, were reviewed and discussed; and it is claimed by appellee that it was the opinion of the commission of appeals, whose conclusions and opinion were adopted by the supreme court, that the Anderson county court, after the death of the ward, still had control of her estate for the purposes of settlement with the guardian, and that therefore the Dallas county probate court had no jurisdiction over the estate to grant letters of administration, or to order sales of property to pay the debts against the estate. The probate court of Anderson county restated the final account of the guardian, Alford, requiring him to account for land—24 tracts—which had been conveyed by the minor to W. G. Veal in trust, fixed the aggregate amount of the debts of the estate at \$1,560.86, of which \$1,061.76 were due the guardian, and the residue to others. It also ordered the guardian to retain in his hands, subject to future orders of the court, and for the payment of the debts, seven tracts of land, which, after payment of the debts, or what

was left of its proceeds, was to be delivered to the heir of the minor, Mrs. Fortson. The court, deeming the seven tracts sufficient to pay the debts, ordered the guardian to turn over to the heir all the rest of the estate; and it was further ordered that, "if the said Mary P. Fortson (the heir) should satisfy and pay off said debts and costs, that Alford, the guardian, should deliver to her the lands to be retained by him." Alford appealed from this judgment to the district court of Anderson county, filing his appeal-bond on the 30th of August, 1880. The district court rendered substantially the same judgment as that appealed from, when Alford again appealed to the supreme court, which affirmed the judgment on the 2d day of October, 1882. In September, 1880, the month following that in which the appeal was perfected from the decree of the Anderson county probate court, Alford applied to the probate court of Dallas county for letters of administration upon the estate of his deceased ward, setting up that she resided in Dallas county at the time of her death; that at the time of her death she owned considerable real and personal property, worth about \$700; and that there were debts outstanding against her estate, and that deceased was indebted to him. The administration was granted, and an inventory filed of only four tracts of land that were not embraced in the Veal deed, which were sold by order of the court to pay the debts; and application was then made to sell the remaining three tracts ordered to be retained by him by the Anderson county court to secure the payment of debts, when, on the 28th of February, 1882, the heir, Mrs. Fortson, filed a bill of review in the Dallas probate court, asking the court to review and annul all former orders in the administration, upon the ground that the court had no jurisdiction, and that the administration was obtained by fraud. The court, upon hearing, granted the prayer, and declared the administration null and void for want of jurisdiction, and canceled all former proceedings. Alford appealed to the district court of Dallas county, where, upon demurrer of defendants, the court sustained the demurrer, and dismissed the case. From this judgment Mary P. Fortson appealed to the supreme court, which, on the 5th day of December, 1884, reversed and remanded the cause as before stated. The judgment in the district court of Anderson county in the guardianship proceedings was affirmed by the supreme court October 20, 1882. In reversing the cause on appeal of Mrs. Fortson from the judgment of the district court of Dallas county dismissing her bill of review, the opinion of the commission argues as follows: "All the parties at interest were before the court when these proceedings were had in Anderson county. The courts there had jurisdiction of the entire subject-matter of the estate of Earle Cravens, deceased. Appellants asserted right thereto, and Alford's claim against the estate. Upon Alford's own application,

and, it seems, without any objection upon the part of appellant, he was permitted to retain control of seven tracts of land, which were adjudged to belong to appellant, to secure the payment of his claim. And by the terms of the decree the appellant had the right to pay off the claim, and thereby secure the possession of the seven tracts of land. But Alford, by his appeal to the district court, suspended appellant's right to pay the claim and secure control of the land, or at least rendered the exercise of that right doubtful. Under such state of case certainly the county court of Dallas county would have no jurisdiction or power over the subject-matter of the litigation then pending in the courts of Anderson county." Then, after reciting the allegations of fraud, the court say: "Upon these allegations, aside from the question of want of jurisdiction or want of power in the county court of Dallas county, appellant was entitled to a hearing." The court expressly declined to decide whether the probate court of Anderson county, after the death of the ward, on settlement of the guardian's final account, had the power to order a sale of lands of the estate to pay the debts still due. The probate court of Anderson county had not assumed such power. After adjusting the account requiring the guardian to account for all the land, as well that not embraced in the minor's deed to Veal as the other four surveys not conveyed, the court ordered him to deliver to the heir 21 of the tracts of land, and to retain the remaining 7, subject to payment of the debts found to exist, giving the heir the option to pay the debts and take all the land. The court then refused to discharge the guardian, but ordered his application for discharge "postponed until the payment of all debts against said estate, and that he report to this court." The district court on appeal did not assume to order a sale of any of the seven tracts of land to pay the debts, and on appeal of that proceeding to the supreme court, (57 Tex. 482,) Chief Justice GOULD, noting the fact that no order of sale was made by the court, said: "No question as to its power to do so is before us." He said, however, that the probate court, and, on appeal, the district court, had the power to do what was done.

Now, what proceedings were pending in the guardianship to which the language of Judge WATTS in the extract from his opinion above quoted can apply? Not a sale of land to pay debts. The entire proceedings were by order of the court suspended until the debts were paid out of the land adjudged to stand in the hands of the guardian subject to the debts, or until Mrs. Fortson should avail herself of the privilege allowed her to pay off the debts. The court did not require her to pay the debts. There was nothing pending then except Mrs. Fortson's right of choice to pay off the claims against the estate, and the final discharge that would follow for which the guardianship was continued. This

option to pay the debts she has never exercised. It is admitted in proof on the trial that she has never offered or tendered payment, though the judgment authorizing her to do so was affirmed in October, 1882, since when there can be no pretense of her intention to do so, or that she ever had any such intention. Notwithstanding Alford's appeal from the judgment of the probate court of Anderson county to the district court, had she offered to pay the debts, and made a tender, as she could have done, then there would have been no occasion for the administration in Dallas county. The facts now before us show that she never intended to do so, and that no right she intended to exercise was suspended by Alford's appeal to the district court; and in such case Alford had the right to apply to another tribunal that had power to order a sale of the land, and carry into effect the order giving security on the seven tracts of land to satisfy the debts, unless the probate court of Anderson county in the guardianship had that power. The orders of the court left him in possession of seven tracts of land subject to the claims, but made no provisions for the enforcement of the lien by sale. Mrs. Fortson then making no tender of the amount of the claims, how was he to force a sale of the land, and obtain the funds to discharge the debts and secure his discharge? He could not apply to the district court for such order, because he could not show that there was no necessity for administration. We think the only course left him was to administer in the proper court upon the estate of the deceased ward.

There is no authority under our law, in a guardianship proceeding, giving the probate court jurisdiction to order a sale of land to pay debts after the death of the ward. "Death of the ward necessarily terminates the guardianship." *Fortson v. Alford*, 62 Tex. 580. Under the statutes of this state, upon the death of a ward the guardian must make final settlement by filing his final account, notice of which must be given to his executor or administrator if he have one, and, if he have none, notice is provided for by publication or posting. Upon the approval of the account the court is required to direct the guardian to deliver the estate remaining in his hands to some person authorized to receive it, upon a compliance with which the guardian is to be discharged. Rev. St. arts. 2686-2688. The allegations of fraud in procuring the administration were not sustained by proof. The proof shows that Mrs. Fortson never intended to avail herself of the privilege of paying the debts shown to be due by the guardian's final account, and hence the appeal of Alford from the probate orders of the Anderson county court to the district court in no wise injured her in respect to that right. Such right is shown by the proof to be of no jurisdictional importance, if it even had any in the abstract. We conclude the court erred in revoking the letters of administration and other orders of the probate court

of Dallas county, and that the cause ought to be reversed and dismissed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment reversed, and cause dismissed.

HENRY, J., did not sit in this case.

# HALBERT *et al.* v. ALFORD.

(*Supreme Court of Texas.* June 25, 1889.)

## RES JUDICATA.

An action against an administrator to recover the value of lands sold by him as such under letters alleged to have been fraudulently procured cannot be maintained after a judgment revoking said letters of administration has been previously reversed on appeal in an action for that purpose.

Commissioners' decision. Appeal from district court, Dallas county.

Action by Mary P. Halbert and others against George F. Alford, to recover the value of certain land belonging to the estate of Earle Cravens, deceased, sold by him as administrator of said estate under letters of administration procured through fraud. Judgment was rendered for defendant, and plaintiffs appeal. This suit is a corollary of another suit between the same parties. For a statement of facts, see the opinion of COLLARD, J., in *Alford v. Halbert*, ante, 75.

*Read, Greer & Greer*, for appellants. *Jeff Word, Jr.*, and *Leake & Henry*, for appellee.

ACKER, J. This case is a companion of case No. 158,—*George F. Alford et al., Appellants, v. Mary P. Halbert et al., Appellees*, ante, 75, (decided at the present term.) The parties to the two suits are the same, and the questions of controlling importance in the two cases are identical. The appellants in this case and the appellees in case No. 158 were plaintiffs in the court below. In case No. 158 the suit was brought to annul and have adjudged void the administration of the estate of Earle Cravens, of which appellee, George F. Alford, was the administrator; and the court below held that the administration was void. That judgment was reversed and that suit dismissed by the judgment of this court at the present term. This suit was brought to recover of appellee the value of lands belonging to the Cravens estate, sold by him as administrator under what was alleged to be a void administration. The court below rendered judgment that appellants take nothing by their suit. In accordance with the decision in case No. 158, we are of opinion that the judgment of the court below should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, the opinion adopted, and judgment affirmed.

HENRY, J., did not sit in this case.

# THOMPSON *et al.* v. JONES *et al.*

(*Supreme Court of Texas.* June 18, 1889.)

## COLLATERAL ATTACK ON JUDGMENT—FORECLOSURE—SALE OF HOMESTEAD.

1. A sale of land, to satisfy a judgment on foreclosure, though made under an execution issued after the death of the mortgagor, cannot be avoided in a collateral proceeding, where there has been no administration on the estate.

2. Where two joint tenants mortgage their land, and one sells his interest to the other joint tenant's wife, she need not be made a party to a suit for foreclosure of the mortgage, though it was not recorded, as the only purpose of recording is to give notice to subsequent purchasers in good faith; and a judgment against the husband, affecting his separate estate and the community property, is binding on the wife.

3. A judgment on foreclosure, which designates an entire tract of land by name, giving the number of acres, the county in which it is situated, the adjoining survey, and the beginning corner, is not void for want of description.

4. To justify a charge on lands for improvements made in good faith it is not necessary that the purchaser show a complete chain of title.

5. The sale under mortgage foreclosure of a homestead, the wife not having waived her homestead right, cannot, for that reason, be contested after her death by one of her heirs, as her homestead interest ceased at her death.

Commissioners' decision. Appeal from district court, Fannin county.

*Chas. D. Grace*, for appellants. *R. B. Semple* and *Jas. H. Lyday*, for appellees.

HOBBY, J. The appellant Susan F. Thompson, in this action of trespass to try title, who was the only child and heir of Thomas P. and Nancy Harrison, who married in September, 1847, pleaded specially her title, consisting of the following links: Patent to John D. Black for the 320-acre survey in 1846; deed from John D. Black to Thomas H. and Francis E. Harrison, April 29, 1846; marriage of Thomas P. Harrison to Nancy Jones, September 1, 1847; deed from Francis E. Harrison to Nancy Harrison, conveying his undivided interest in the land, reciting a consideration of \$200, and dated May 2, 1848. The death of Thomas P. and Nancy Harrison,—the former occurring between the years 1849 and 1851, the latter, a year or so subsequently,—was established by the evidence, as also the heirship of appellant Susan Thompson. Such was the *prima facie* case made by the plaintiff. Defendant Jones, who claimed the east half of the land, and defendants Robert and John Adkins and Mary White, the west half, pleaded a general denial, the three, five, and ten years' statutes of limitation, and claimed compensation for improvements made in good faith. The unknown heirs of Welbourn Smith, who were cited by publication, adopted these answers by attorney *ad litem*. Plaintiff specially replied to the pleas of limitation and claim for improvements, alleging, in effect, her minority at the date of the death of her parents. The case made by plaintiff's proof of title was met by defendants as follows: Judgment of the district court of Fannin county, rendered April 6, 1849, in favor of John R. Garnett, administrator of Jobez Fitzgerald, against



Thomas and Francis E. Harrison, foreclosing a mortgage on the land—320 acres—involved. This judgment recited the execution of the mortgage by Thomas and Francis Harrison to said Fitzgerald on March 26, 1848, to secure a debt due Fitzgerald, and described the land as situated in Fannin county, on Red river, known as the "Hamilton Tract," deeded to said Harrisons by John D. Black, beginning at the south-west corner of a survey of Daniel Rowlett on Red river. Four orders of sale issued thereon; that of November 9, 1849, being the order under which the sale of the land was made by the sheriff to John R. Garnett, administrator, etc., for the sum of \$69, which amount was credited on the judgment. All of the other papers relating to the estate of said Fitzgerald were admitted to have been lost. No sheriff's deed to Garnett was found, although diligent search had been made therefor. Defendants Adkins and White then introduced a deed from Garnett to W. C. Whittsett, dated June 7, 1859, conveying the west half of the land, filed for record June 18, 1859. Deed from said Whittsett to Col. Whitty, August 27, 1859, filed for record February 23, 1860, conveying one-half of the 320-acre block survey, describing it as the same land conveyed by Whittsett to L. C. Alexander November 27, 1858, L. C. Alexander to Whittsett, November 26, 1855, filed for record December 28, 1855, conveying his interest in the Black survey. Special warranty deed from Col. Whitty to A. G. Adkins, February 23, 1860, conveying 160 acres by metes and bounds of the Black survey, recorded same day. It was admitted that defendants John and Robert Adkins and Mary White were the only children of A. G. Adkins, who died in 1866. It was in proof that Garnett took possession shortly after his purchase at the sale under the judgment, and the possession and occupancy continued of the west half by the successive purchasers. The improvements on this portion of the land aggregate about \$1,182.44. The value of the land, without improvements, was estimated at about \$3 per acre. The Jones title to the east half consisted of a deed from John R. Garnett to S. W. and J. A. Smith, dated August 27, 1869, filed for record October 17, 1869, describing it as "the east half of the John W. Black headright, beginning at the south-west corner of Daniel Rowlett's survey of 10 labors & 610,439 square *varas*; a stake from which a black-jack marked 'X' bears N., 85 E., 9 *varas*, and a post oak marked 'X' bears N., 7 W., 2 *varas*; thence 75 E., 672 *varas*, with said Rowlett's line; thence south, 15 W., to place of beginning." Deed from J. A. Smith and wife to A. H. Jones, September 2, 1871, to an undivided one-half interest in the east half of the Black survey, describing it as in the deed from Garnett to S. W. and J. A. Smith. Improvements on this portion of the tract were valued at about \$300; the value of the land, without improvements, \$3 per acre; and its rental value was estimated at about \$250 per

acre. The evidence is uncertain as to what time the land was designated or used as a homestead by Thomas Harrison and wife after their marriage in September, 1847, or whether before the rendition of the judgment under which Garnett claimed, in April, 1849. There is some testimony that he commenced to improve it in the winter of 1849. The preponderance of the evidence is that he moved on it about the latter part of that year, and that he died in 1850-51, when Mrs. Harrison left it, and, as before stated, Garnett took possession under his purchase. Mrs. Harrison was living when the land was occupied by Garnett, and died about 1852, at which time the appellant was about two years old. She married in December, 1867.

Under the foregoing facts the verdict was for the plaintiff for an undivided half of the 320-acre tract sued for, valuing it at \$3 per acre unimproved; further assessing the value of the improvements on the east half at \$1,200, and on the west half at \$600. Upon this verdict judgment was rendered in favor of plaintiff against the defendants for an undivided half of the land, directing partition, and appointing commissioners for that purpose. The judgment recited that the jury, having found the improvements on the east half of the land to exceed in value the rents \$400, if the plaintiff will pay to the defendants claiming the east half within one year said \$400, writ of possession should be issued to her. Upon her failure to do so it provided that if within six months after the expiration of said year the defendants should pay \$250—being half of the value of said land—to plaintiff, the latter should be barred, and, upon failure by defendants so to do, writ of possession to issue in favor of plaintiff. Appellants prosecute this appeal. Both parties assign error, and ask for a reversal of the judgment.

It will be observed from the foregoing statement that Thomas Harrison owned an undivided half interest in the land acquired from Black in 1846, prior to his marriage, making it his separate property; and that Mrs. Harrison, his wife, in May, 1848, after their marriage, acquired by purchase from Francis Harrison the other half, making it the community property. It appears from the recitals in the judgment recovered by Garnett, administrator of Fitzgerald, against Thomas and Francis Harrison, that in March, 1848, prior to any definite designation or use of the land as a homestead, it was mortgaged by Thomas and Francis Harrison to secure a debt due to Fitzgerald. They were parties to this judgment, and it does not appear that Mrs. Harrison was. The introduction of the judgment was objected to by plaintiff on the grounds that the mortgage had not been recorded in the county clerk's office of Fannin county; and that, Mrs. Harrison having bought the interest of Francis Harrison before the suit was instituted, she was not made a party thereto. Its admission over these objections is assigned as erroneous.



The only purpose which the record of the mortgage could have subserved would have been to give notice to subsequent purchasers in good faith, for a valuable consideration. This position in this case the plaintiff does not occupy; hence the question of notice, depending upon the registration of the mortgage, becomes unimportant. The failure to record it does not affect its validity as between the parties. The plaintiff's title in this suit is founded upon inheritance. Nor would Mrs. Harrison stand in the attitude of a purchaser for value without notice. There was no proof of the payment by her of a valuable consideration, or that she bought without notice of the mortgage. The interest of Francis Harrison was conveyed to her in May, 1848, incumbered with the mortgage executed in March, 1848, by him to Fitzgerald. That owned by Thomas Harrison being his separate estate, and that acquired by her after marriage constituting it community property, there was no necessity for making her a party. A judgment against him affecting his separate estate and the community property would bind the wife, whether she was a party or not. This necessarily follows as a legal consequence of his power to control, manage, and dispose of both.

The objection is made also to the judgment and order of sale that they did not describe the land. It is described as "320 acres of land, known as the 'Hamilton Tract,' situated in Fannin county, on Red river, and deeded to Thomas and Francis Harrison by John D. Black, beginning at the south-west corner of a survey of Daniel Rowlett on Red river." It is true that less indulgence is shown in favor of descriptions of property contained in deeds based on compulsory sales under judicial process than in those contained in deeds between private parties. *Mitchell v. Ireland*, 54 Tex. 301. And where the description is of a part of a tract or survey, leaving an undesignated portion unsold, and there is no means of distinguishing it from the portion sold, the description would be insufficient. *Wilson v. Smith*, 50 Tex. 369. In the present case, however, the entire tract, giving the number of acres, the county in which situated, the name of the tract, the adjoining survey, and the beginning corner, are all contained in the description. It cannot be said from the face of the judgment and order of sale that they are void for want of description. *Knowles v. Torbitt*, 53 Tex. 557, and cases cited; *Steinbeck v. Stone*, Id. 386. What we have said with respect to this assignment is applicable to a similar objection made to the other deeds offered by the appellees.

The court, it is claimed, should have instructed the jury that, if the land was mortgaged by Thomas and Francis Harrison before Thomas Harrison had designated his part of said land as his homestead, and that they died before said land was sold under the foreclosure by the sheriff of Fannin county, without any action of the probate court of

said county on the estate of said Harrison, no title passed by the sale. There can be no doubt that the great weight of the testimony is evidently to the effect that Thomas Harrison died subsequent to the sale in November, 1849. It is true that one witness states in his depositions that he died in the summer of 1849. But it is manifest from his own evidence that he was not in the state at the time; and that his testimony with respect to dates is inaccurate is further illustrated by his statement that Thomas Harrison married Nancy Jones in September, 1848, whereas the marriage certificate in proof shows it to have been on September 1, 1847. This is the only witness whose evidence could have afforded a predicate for the instruction, if it can be regarded as sufficient to authorize the submission of the issue. The question then arises as to the correctness of the legal proposition announced in the requested charge. The principle declared in the instruction is that a sale made after the death of Thomas Harrison in 1849, under an execution issued and a judgment rendered against him prior to his death, is void. This question has been discussed in the different American courts, and the decisions are conflicting. In our own state it has been fully considered, and the doctrine enunciated in the special instruction was declared to be correct, under the probate acts of 1846 and 1848, in *Conkrite v. Hart*, 10 Tex. 140. The soundness of the views expressed in that case were seriously doubted in the case of *Webb v. Mallard*, 27 Tex. 88. A further consideration of the same question is the case of *Taylor v. Snow*, 47 Tex. 466. And a review of the cases in this state, resulted in practically overruling *Conkrite v. Hart* in so far as the latter decided that such a sale was absolutely void, and could be so held in a collateral proceeding. In *Taylor v. Snow* it is held that, "where a defendant dies before the satisfaction of the judgment, our statutes require that its payment must be enforced through the probate court in the manner prescribed for the settlement of the estates, \* \* \* and not by execution. And if execution should issue against the defendant after his death, or his property be sold by the sheriff on an execution previously issued, it would be irregular and invalid; and such sale might with propriety be said to be void, because it has an inherent vice for which it may be avoided and held for naught, at least for the purposes of the administration, and at the instance of those interested in the proper application of the property of the decedent to the discharge of his just liabilities. It may also be said that such sale is void because it will be so declared, when the irregularity or error which renders it so is shown by the proper parties, and in the proper time and manner, just as a judgment having the like vice will be held void when its error is pointed out in the proper manner," etc. The principle was repudiated that "a sale of property under an execution apparently regular and

valid upon its face should be held under all circumstances, and as to all persons, absolutely, instead of relatively, void, and should be treated as totally null, and without effect, because the party against whom it issued died previous to the day of sale." *Conkrite v. Hart*, supra, was referred to as being the only case which gave "countenance to such conclusion." In commenting upon that case it was said to be "too meagerly stated by the reporter to justify any very positive conclusion as to the sense in which 'the ambiguous word "void,"' was used or intended to be understood by the court." The rule in *Taylor v. Snow* was declared to be "that, while a sale of property under execution after the death of the defendant is relatively void, and the title acquired by the purchaser at such sale cannot be maintained against the administrator or parties acquiring their title under and through the administration, and that such sale may be avoided by any party having an interest in the property, if he should seek to do so in the proper time and manner, this cannot be done where there has not been and cannot be any administration upon the estate in a collateral proceeding," etc. This, we think, is conclusive of the case before us.

It is only necessary to say, in disposing of appellant's eighth assignment, "that there was no proof of the value of the land without improvements," and that therefore the change in this respect was error; that the evidence was that "the land was worth \$3 per acre without the improvements." It was not necessary for the defendants to show a complete chain of transfer from the sovereignty of the soil, under full and complete deeds, to justify a charge on improvements in good faith. If this had been shown by defendants, they would have been entitled to a judgment for the land. And they are certainly not required to show such a complete chain of title, composed of perfect deeds, to entitle them to compensation for improvements, which would authorize a recovery of the land itself, before they would be entitled to pay for improvements. In *Bailey v. White*, 13 Tex. 117, it was held that, where the defendants claimed under a sale made on an invalid execution based on a valid judgment against the plaintiff's intestate, the execution being, as in this case, subsequent to the intestate's decease, and defendant went into possession and paid taxes, and there was no proof of payment of taxes by the plaintiff, the plaintiff could not recover for the use and occupation. It was held, also, that the defendant, being a purchaser in good faith, was entitled to compensation for improvements. Under the view we take of the case it is unnecessary to further consider the question of improvements, or the other assignments of appellant. Nor do we think it important to consider the cross-assignments. The judgment against Thomas Harrison of April, 1849, was binding upon his separate interest, and the community interest in him-

self and wife, in the land. In addition to this, as we have seen, the interest acquired by Mrs. Harrison in May, 1848, from Francis Harrison, was subject to incumbrance on the land, executed by him jointly with Thomas Harrison, in March, 1848, to Fitzgerald.

If it be conceded that the land was designated by Thomas Harrison as a homestead prior to March, 1848, (the date of the execution of the mortgage,) upon his death without a will Mrs. Harrison becomes entitled to a life-interest only in his half of the land. This homestead interest ceased at her death in 1851 or 1852. Whatever homestead right she might have had in it by reason of Thomas Harrison's designation of his part of it as a homestead before the execution of the mortgage did not survive to appellant, (*Shannon v. Gray*, 59 Tex. 252; *Tadlock v. Eccles*, 20 Tex. 782,) if her community interest in that portion of the land conveyed to her by Francis Harrison was not bound by the judgment to which her husband was a party. It was shown that possession was taken of the land by Garnett during her life-time, and for a year or more prior to her death, which put the statutes of limitation in motion against her, and was continued by defendants for a sufficient time to preclude a recovery of such interest by appellant. It results then, in this: that the judgment against Thomas and Francis Harrison bound his separate interest in the land, unless he had previously designated it as a homestead. To that extent, at his death, Mrs. Harrison possessed a life-interest in such part. This did not descend or survive to appellant. The judgment bound her community interest also, because she was not a necessary party. And if she had been a necessary party, and it did not bind her, defendants would have title by limitation. Independently of any question of limitation, we think that the title to the land was divested out of the plaintiff's parents, Thomas and Nancy Harrison, by the judgment of the district court of Fannin county in April, 1849, and that there is error in the judgment of the court below. We are of opinion that the judgment should be reversed, and here rendered that appellant take nothing by this suit, and be taxed with the costs.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment reversed and rendered in accordance with said opinion.

#### TEXAS MEX. RY. CO. v. LOOKE *et al.*

(*Supreme Court of Texas. June 18, 1889.*)

#### MEXICAN LAND GRANTS—DOCUMENTARY EVIDENCE—RECORDING TITLES—CONSTITUTIONAL LAW.

1. A report made by the secretary of state of the state of Coahuila and Texas to the political chief of Bexar, in 1833, giving a statement of a number of colonial contracts made under decrees of 1825 and 1833 with B. and G., and a report of the same date by the same officer to the same chief, showing concessions to purchase lands to the same persons, certified to by the Spanish translator and commissioner of the

general land-office of Texas in 1883, are admissible in evidence in a suit to establish title under those concessions, to show that the concessions and contracts were made before the date of the report, and that the concessions and colonies were within the territorial jurisdiction of the political chief of Bexar.

3. When the titles under which defendants claim purport to have been issued by the commissioner appointed to extend titles in a colony, a certified copy of the application for a colonization contract to the person who acted as commissioner in a colony in which the lands were situated is admissible.

3. Where the copy appears to be that of the original *testimonio* of application for and grant of a colonial contract, duly certified by the legal custodian of the protocol, and delivered to the *empresarios* as evidence of their right, it is admissible.

4. Such papers pertain to the archives of the respective colonies, and were properly filed in and certified from the general land-office.

5. That all of the lands contained in the concessions were not in controversy is no ground for excluding the records of the concessions.

6. The governor had authority to make the concessions broader than the applications.

7. While the concessions did not give title to land, they did give the consent of the government to its purchase, and were properly introduced in evidence to establish such right, and to show what officer could give the final title.

8. *Testimonios* of title, which have been in existence 40 years, and which were filed in the general land-office in 1845, and remained there until 1875, when they were withdrawn under a power of attorney from the grantees, will be received in evidence as ancient instruments, where there is no question as to the genuineness of the signatures, and the *testimonios* contain the essentials of final title, though their form is unusual.<sup>1</sup>

9. Though the protocols ought properly to be attached to the final titles, in their absence, they will be presumed to be in the proper archives.

10. A concession empowering the commissioner to put the petitioners in possession of said leagues, and to issue the corresponding title, will give the commissioner named, if the lands granted were within his territory and within that granted to G. and B., power to issue title to the land, unless his power was revoked by the law of March 26, 1834.

11. Const. Tex. April 17, 1876, art. 18, § 4, provides that no claim or right to land which issued prior to November 13, 1835, shall ever hereafter be used in evidence in any courts of the state unless archived in the general land-office, or recorded in the county in which the land is situated. Before the adoption of the constitution, failure to record title did not render them inadmissible in evidence on proof of their execution; and the protocols under which the *testimonios* were granted were filed in the office of a foreign government, and no provision was made for archiving authenticated copies thereof, nor for archiving the *testimonios* to individuals. *Held*, that article 18, § 4, is in violation of Const. U. S. amend. 14, providing that no state shall deprive any person of property without due process of law, and article 1, § 10, providing that "no state shall . . . pass any . . . law impairing the obligation of contracts."

12. Titles valid against the state of Coahuila and Texas on March 2, 1836, originally titled to Mexicans, and belonging to them on July 4, 1848, were protected in them by article 8 of the treaty of Guadalupe Hidalgo, and documents showing title under the Mexican law against said state, and conferring title subject to protection under said treaty, are admissible in evidence.

13. Mexican decree, March 26, 1834, No. 272, repealing all former instructions inconsistent with

it, and declaring that no further colonization contracts should be made, did not divest the governor of authority to complete the titles where there had been concessions already made under the law of 1825.

14. Where concessions confer the right to purchase lands, and the commissioner has power to issue title, the lands conveyed by him are "titled lands," within the meaning of Const. Tex. art. 14, § 2, providing that land certificates shall not be located on "any land titled or equitably owned under color of title from" the state, and locations of grants made on such lands do not constitute "titled lands" nor "color of title."

15. Persons so locating grants on lands acquired under the concessions cannot raise the question whether the conditions of the concessions were complied with, nor as to the proper location of the lands under them.

Appeal from district court, Bexar county.

*Ogden, Ogden & Johnson* and *Thomas W. Dodd*, for appellant. *Waelder & Upson, H. E. Barnard*, and *Coopwood & Coopwood*, for appellees.

STAYTON, C. J. This action was brought by appellant to compel the surveyor to survey certain lands located by it by virtue of genuine land certificates, of which it was the owner. Persons claiming the lands covered by the locations were, with the surveyor, made defendants; and no question is made as to the right of appellant to have the surveys made and field-notes returned to the general land-office, if the lands were vacant and unappropriated public domain. The locations were made on and subsequent to January 27, 1882. The defendants, who claim the lands, allege that all the lands located by appellant cover all or parts of four 11-league grants made by the state of Coahuila and Texas, on April 18, 1834, to Francisco Pereya, Narcisso, Antonio, and Pedro Aguirre. The land claimed through grant to Francisco Pereya is in part in Zavalla and in part in Dimmit county, and on the western margin of the Nueces river, while that claimed under grant to Pedro Aguirre is entirely in Zavalla county, and on the west margin of the same river. The two grants claimed to have been made to Narcisso and Antonio Aguirre are on the east side of the Nueces river,—the latter in Zavalla, and the former in that and Dimmit counties. The defendants are admitted to deraign title to these several grants, but the validity of the grants now or at any former period is denied by appellant. The controversy in the court below was as to the existence of these grants, and their validity; and the questions presented arise upon rulings of the court below on the admission of testimony, and upon the findings upon the evidence admitted.

Appellees introduced in evidence a report made by the secretary of state for the state of Coahuila and Texas to the political chief of Bexar, of date January 2, 1833, giving a statement of a number of colonial contracts made under decrees of March 24, 1825, and April 28, 1832, among which was stated to be a contract with Diego Grant and Juan Carlos Beales for the introduction of 800 families. They also offered another report,

<sup>1</sup> On the general subject of the proof of ancient documents, see *Prigden v. Green*, (Ga.) 7 S. E. Rep. 97, and note; *Lawrence v. Tennant*, (N. H.) 15 Atl. Rep. 543; *French v. McGinnis*, (Tex.) 9 S. W. Rep. 833; *Allison v. Little*, (Ala.) 5 South. Rep. 231; *Ruby v. Von Volkenberg*, (Tex.) 10 S. W. Rep. 514.

of same date, made by the same officer, to the same political chief, showing a large number of concessions to purchase lands, among which were concessions to the persons before named, under which they were each entitled to purchase 11 leagues of land. The papers offered were those certified by the Spanish translator and commissioner of the general land-office. "State of Texas, General Land-Office. Austin, October 20, 1883. I certify that the foregoing is a correct translation of two Spanish printed statements existing in the file of annual reports of colonization contracts and land grants by the executions made by the secretary of state of Coahuila and Texas to the political chief of Bexar, which file was transferred from the office of said political chief to the office of county clerk of Bexar county, and thence to the general land-office, and is now in existence in File 52 of the Spanish archives of this office." This evidence was objected to on the sole ground that it was irrelevant. Those papers were not irrelevant, but tended to show that the concessions through which appellees claim were made, and made before the dates these reports bear date; and further, that the colonization contract with Grant and Beales was in existence when the reports were made. Taken in connection with the laws then in force, they further tended to show that the colony, as well as the lands in controversy, were to some extent within the territory over which the political chief of the department of Bexar exercised jurisdiction.

Appellees next offered in evidence a copy, certified from the general land-office, of what purported to be the application of Grant and Beales for a colonization contract, of date October 5, 1832, and, in connection with this, a copy of the colonization contract, certified in the same manner, and bearing date October 9, 1832. The application was made to the governor of the state, and so much of it as was bearing on the questions raised in this cause is as follows: "Most Excellent Sir: Diego Grant, a citizen of the state, and naturalized in the republic, and Juan Carlos Beales, a native of England, and married to a Mexican woman, with children born in the country, with the greatest respect would represent to your excellency: That, whereas, the colonization law of April last invited all classes of persons, whether national or alien, to project, subject to said law, the settlement of the vacant lands of the state, the undersigned have determined to introduce into the department of Bexar eight hundred honest, industrious families from Europe, thus contributing to the fulfillment of the object of said law, and to converting into settlements useful to the state and Mexican nation the vacant and desert lands which in their present condition can be of no advantage whatsoever. In these terms, and with the object of complying with the federal and particular laws in this enterprise, to which we intend to devote ourselves, your excellency is requested to concede to us for the es-

tablishment of the families aforesaid the territory comprised within the following boundaries: Taking the line reputed as the dividing line of this state and that of Tamaulipas between the Rio Grande and the Nueces rivers, and following the left bank of the Rio Bravo up to the twenty-fourth degree west of Washington; thence up the said meridian to intersect the twenty-ninth of latitude, and following the same to the Nueces river; thence a line shall be run, following downward the right bank of said river, to intersect the line where the beginning was made. And whereas the territory comprised within these lines can suffice only for settling less than three hundred families, it becomes necessary that your excellency be pleased to annex to this concession the lands of Juan Lucio Woodbury's contract remaining surplus after those to which the two hundred families for whom he did contract are entitled shall have been computed or allotted, and to declare that if the said *empresario*, or his heirs, because he is dead, should fail to introduce the families referred to, within the term of two years to which he is still entitled, it is understood in that case that all the territory in said Woodbury's contract is from this date annexed to the territory which we have demarkated, for settling in it the remaining five hundred and odd families." The contract for colonization granted to the applicants the right to colonize land between the Nueces and Rio Grande, reaching from the northern boundary of the state of Tamaulipas to the twenty-ninth degree of latitude; and it provided, "if within the time lawfully allowed to Woodbury and Velein for the introduction of families as aforesaid, they should fail to effect it, the whole territory which was ascribed to them shall thenceforth remain in favor of the actual *empresarios*." The contract also sets out the boundaries of the Woodbury colony, the western line of which, from the southern boundary of Cameron's colony, followed the 100th degree of longitude to its intersection with the old road leading from Rio Grande to Bexar, and thence with that road to the Medina river, was a part of the southern boundary of the Woodbury colony. The contract with Woodbury was made November 14, 1826, and would have terminated November 14, 1832, but for an extension of two years, given by decree of congress of date February 12, 1829. Decree 78, p. 114, Laws Coahuila and Texas. The application for the colonial contract and the contract on file in the general land-office are one paper, the conclusion and certificate to which is as follows:

"Before me, the secretary of the office of the supreme government of the state, and for due authority they did sign hereto, his excellency ordering that a *testimonio* of the document be delivered to the said Grant and Beales to run thereon as a muniment and title in due form; the original remaining archived in the secretary's office in my charge, for due effects. City of Leona Vicario, the

9th of October, 1832. Rafael Eca Y Musquitz. Diego Grant. Juan Carlos Beales. SANTIAGO DEL VALLE, Secretary.

"This is a copy of the original existing in the archives of the secretary's office in my charge, from which it was caused to be transcribed by the order of his excellency, the governor. Leona Vicario, on the eighteenth day of the month of October, 1832. SANTIAGO DEL VALLE, Secretary."

The instrument was written on paper bearing stamp for the proper year. These papers were filed in the general land-office on December 30, 1845, and their admission in evidence was objected to on the following grounds: "(1) The same was incompetent as evidence, and irrelevant to the issues in the case. (2) The same purports to be a copy from an unauthorized notarial copy, and as such is incompetent as evidence. (3) The lands in question in this case are not shown to be within the boundaries of the colony for which this document purports to be a contract. (4) That it purports to be a colonization contract for the introduction of families in the department of Bexar, while it appears from the records in these causes that the defendants claim title under concession in sale authorizing the purchase of land in the department of Monclova, and that hence the document offered is irrelevant." The titles under which appellees claim purport to have been issued by the commissioner appointed to extend titles in a colony, and if the person who so acted was the commissioner for a colony in which any of the lands were situated, then the evidence was not irrelevant, as will be more fully seen when we come to consider the concessions, final titles, and commission of the officer who extended the titles and gave judicial possession.

The second objection is not sustained by the record, for the papers offered appear to be the original *testimonio* of application for and grant of a colonial contract, duly certified by the officer who was the legal custodian of the protocol, and delivered to the *empresarios* as the evidence of their right. The protocol is now an archive in a foreign government, and such evidence as was offered in this case was the very best evidence of the colonial contract which could be obtained and filed in the general land-office. Such papers as were offered have been considered as properly pertaining to the archives of the respective colonies, and so were properly filed in the general land-office, and no case can be found in which it has been held that a copy certified from that office was not admissible in evidence. The question arose in *Houston v. Perry*, 3 Tex. 393, and it was said "the presumption of law is that the document in the land-office is not a second or third copy of the protocol remaining in the archives of the government of the state of Coahuila and Texas, but is the original copy or *testimonio* issued to the *empresarios* at the time of the execution of the contract. Various provisions of the law required *empresarios*, under severe penalties on re-

fusal, to deliver to the commissioner of the general land-office all documents in relation to land titles, which had been and were considered archives, (Laws 1837, p. 44;) and the contract with the *empresarios* being an essential constituent of the archives of a colony, it is but a reasonable inference that this paper was deposited in compliance with the requisitions of law. The commissioner was under no legal obligation to receive any other document in evidence of the contract between the state and the *empresarios* than the one forming a part of the archives of the land titles of the colony, and the translation offered must *prima facie* be presumed to be a copy of the document thus legally received. The translation is admissible only on the supposition that the original document could be offered in evidence without proof of its execution." In the same case, on a second appeal, a certified copy of a colonial contract, as well as the paper in the general land-office from which it was taken, were received in evidence, and the ruling was sustained. 5 Tex. 462. In *Hatch v. Dunn*, 11 Tex. 713, such evidence of a colonial contract as was admitted in this case was held to have been properly received. The following cases have bearing on the question: *Bissell v. Haynes*, 9 Tex. 565; *Robertson v. Teal*, Id. 344; *Paschal v. Perez*, 7 Tex. 356, 360; *Herndon v. Casiano*, Id. 331. In some of the cases referred to it is declared that the courts have judicial knowledge of colonial contracts, and in *Paschal v. Perez* it was held to be unimportant in whose possession a paper properly an archive or record of some former office may have been before it was deposited in the general land-office. Some of the lands in controversy were shown to be within the boundary of the Grant and Beales colony, and that all may not have been was no reason for excluding the evidence, the relevancy of which will be considered in another connection.

The fourth objection is not sustained by the record, for while it appears that the applicants applied for permission to purchase each 11 leagues of land in the department of Monclova, the concession was for that quantity of land to each "at the place he may designate." The concession was broader than the application, and of the power of the governor so to make it there can be no question. The applications to purchase were all made on the same day, and were in the same form, as were the concessions to each. Those made by and to Narcisso and Antonio Aguirre were as follows:

"Most Excellent Sir: The citizens Narcisso and Antonio Aguirre, brothers, before your excellency respectfully represent that the colonization law permitting that Mexicans may acquire vacant lands of the state by title of purchase, your petitioners in conformity with that law humbly supplicate your excellency to be pleased to concede to them in sale to each of them eleven leagues of the vacant lands in the department of Monclova, with the right to unite them in one body, or

separate them in divers fractions, as may seem to them most convenient, obligating themselves, as they do, to pay at once the fourth part of its value, and to pay the balance in the terms the law prescribes, and complying also by the introduction of the number of sheep and cattle upon said leagues, conforming in every particular to what is provided in the said colonization law; wherefore they supplicate your excellency to be pleased to provide accordingly, whereby we will receive grace and justice. NARCISO AGUIRRE. ANTONIO AGUIRRE. Leona Vicario, October 12, 1832."

"Leona Vicario, October 16, 1832. In accordance with article 13th of the new colonization law, passed by the honorable congress of the state on the 28th of April, 1832, I grant in sale to each of the petitioners the eleven leagues of land which he solicits, at the place he may designate, provided the tract of each shall be united, and that it does not by any title belong to any corporation or person. The commissioner for the distribution of lands in the colony to which those which the petitioner shall solicit may correspond, and in defect of such commissioner, or the same not being embraced within any colony, the first or only alcalde of the respective or most immediate municipality complying with the provisions made touching the matter will put them in possession of said leagues, and will issue the corresponding title, after classifying the quality of them, for the designation of what they ought to pay to the state, which payment must necessarily be made by the interested parties in the manner and on the terms which the latter part of said article 13 provides, making the cash payment required by this article at once to the treasury of the state, evidence whereof they shall present in order that in view thereof the secretary's department may proceed to give each one of the interested parties a copy of this decree, so that by his appearing therewith before the commissioner, it may produce the corresponding effect. ECA Y MUSQUIZ. SANTIAGO DEL VALLE.

"('Satisfa,' underscored, is not valid.) It is a copy of its original, which exists in the archives of the state department under my charge, from which it was ordered to be taken by the decree of his excellency, the governor. SANTIAGO DEL VALLE, Secretary. Leona Vicario, October 17, 1832."

The parties made a written agreement in reference to each of the applications and concessions involved in this case, for use on the trial, in which it was agreed that each bore the "true and genuine signature in his official capacity of Santiago del Valle;" that the seal at the top of each of said instruments (omitted in statement above, as is the stamp, but shown in the record) "is a true and genuine impress of the great seal of the state of Coahuila and Texas, which was in use at the time of the purported execution of said instrument; that the paper stamp, also, upon the paper upon which said document is writ-

ten, was the legal stamp made by the state of Coahuila and Texas for the purposes for which it was used in this instrument during the years 1832 and 1833." It will be observed that those papers appear to be the original *testimonios* delivered to the parties as evidence of their rights each to purchase 11 leagues of land, and they came from the possession of persons claiming through them, and were objected to on the following grounds: "(1) Said documents are irrelevant to the issue in this cause, and do not tend to prove title to any of the lands in controversy herein. (2) Said documents purport to be *testimonios* of concessions authorizing the purchase of lands in the department of Monclova, and are not, therefore, competent as evidence tending to prove titles to lands situated in what was then known as the 'Department of Bexar.' (3) Said documents do not come from the proper custody. (4) If said documents ever had validity, they were but imperfect and inchoate titles, purporting to grant the right to select land for purchase, and as such are not competent as evidence tending to prove title to any particular land. (5) Said documents, and all rights and privileges thereunder, became and were forfeited by the terms and conditions of the law under which they purport to have been issued before any property rights had been acquired thereunder." The first step in the acquisition of lands by purchase was an application to the governor for a concession, which, when granted, was the foundation of the right in the particular instance. The concession ordinarily provided by whom the final title should be issued, and in most cases this was directed to be done as directed in the concessions before us. While the concessions did not give to each of the applicants title to any land, they did give to each the consent of the government that they might buy, and this was essential to the acquisition of such grants to purchase. This was a fact necessary to be shown, and evidence establishing or tending to establish it was not irrelevant. They were further relevant for the purpose of showing what officer or person was thereby given power to extend the final title, and do all other acts necessary to that end.

The second objection has been considered in another connection, and will be further considered hereafter. The concessions delivered to the several parties ought, perhaps, to have been attached to the protocols which remained in the archives of the government then existing, but, looking to the papers offered as final titles, the inference is that the officer who issued them deemed it unnecessary to do this, and thought it sufficient to recite in the titles themselves his authority for his act. This would seem to be sufficient, for the protocols of the original concessions must be presumed to be in the proper archives. The genuineness of the concessions being conceded, that they come from the custody of persons claiming through them is not sufficient reason for their exclusion, though

the usual practice may have been to attach them in the protocol of final title which remained in the proper archives.

The fifth objection to the introduction of these papers will be considered in another connection. Appellees offered in evidence the following instrument: "The alien Don Carlos Beales, having, on the fifth instant, applied to this government for the appointment of a commissioner to give possession of lands in the colony, for which he has contracted jointly with Don Diego Grant, I have deemed it proper to commission you for the indicated objects, and in accordance to the instructions issued for this class of commissioners by the honorable congress on the fourth day of September, 1827, a copy of which I inclose herewith, to proceed to the distribution of the lands to which the families contracted for on the ninth of October, 1832, by said Beales and his partner are entitled, a *testimonio* of which contract shall be placed in your hands by the *empresario*. It is understood that you must previously inform of this commission the political chief of the department of this capital for his knowledge, and in order that he may comply with the provisions of article 7 of decree No. 128, a copy of which I inclose herewith; also one of decree No. 62, which are referred to at the close of said instructions. God and Liberty. Monclova, the 13th of March, 1834. FRANCISCO VIDAURRI Y VILLIRENOR. J. MIGUEL FALCON, Secretary. To Senor Don Fortunato Soto." It has the proper certificate of the translator and commissioner of the general land-office attached, stating that it is a correct translation of an official document in the Spanish language, existing in file 43 of Spanish archives of that office; but there is no statement when or by whom it was filed, and the original is represented to have been under the "seal of the supreme government of the free state of Coahuila and Texas." The genuineness of this instrument is not questioned, but its admission in evidence was objected to on the following grounds: "(1) The same does not purport to confer upon the commissioner authority to extend title of the character under which defendants claim. (2) Said commission purports only to confer authority upon the commissioner to distribute the lands to which the families contracted for on the 9th of October, 1832, by Don Carlos Beales and Diego Grant, were entitled, which said colony was, according to proof already introduced by defendants, situated in the department of Bexar, while it appears from the record in this cause that defendants claim title under a concession in sale authorizing the purchase of lands in the department of Monclova; wherefore the document offered is not competent as evidence tending to prove the authority of the said commissioner in the premises. (3) Said instrument is not properly an archive of the general land-office of the state of Texas. (4) If said instrument ever had any validity it was revoked by law subsequent to its issuance, to-wit, on the 26th

of March, 1834." It is true that this commission does not in terms empower the commissioner to extend the titles involved in this controversy, nor like titles, but the concessions do empower "the commissioner for the distribution of lands in the colony to which those which the petitioners shall solicit may correspond, \* \* \* to put them in possession of said leagues, and will issue the corresponding title," etc. If the lands were within the territory allotted to Grant and Beales for colonization, and the commissioner named was the person appointed to extend titles to settlers thereon, then he had power to issue the titles in question, unless his power was revoked by the law of March 26th, 1834.

The seeming uncertainty raised by the evidence in this case, as to whether the lands in controversy were then recognized to be in the department of Texas or the department of Monclova, and its bearing on the rights of the parties in this cause, will be considered elsewhere. The instrument, the copy of which was offered in evidence, purports to be an original, and not a copy delivered to the commissioner as the evidence of his official character, as was usual in all such matters, the original remaining with the government as an archive, and if a question was made as to its genuineness this fact might call for explanation. As, however, no such question is raised, we are not prepared to hold that a paper which would be a proper archive of a government now foreign, affecting, as it does, lands in Texas, is not legally archived in the general land-office.

The fourth objection will be considered in another connection. Appellees offered in evidence papers purporting to be final titles to the persons through whom they claim, all issued on the same day by the commissioner Soto, and alike in form, one of which is as follows:

"In the town of Dolores, state of Coahuila and Texas, on the 18th day of April, 1834, I, the citizen Fortunato Soto, as commissioner of the supreme government of the state, in the Rio Grande colony, by virtue of the contract celebrated between the said government and its citizen, (Narciso Aguirre,) after compliance with all the other requirements and conditions which the laws provide on the subject, and in accordance with that which the governor ordains in his superior decree of the 16th of October, 1832, contained in the contract aforesaid, do in the name of the government extend the present title to the citizen John Charles Beales, attorney in fact for the citizen, (Narciso Aguirre,) whose power of attorney he has exhibited to me for the eleven leagues to which the aforesaid contract refers, which in their present condition I have classified as grazing land, and the limits whereof are as follows. [Here follows description.] And that in order that the property which the aforesaid citizen Narciso Aguirre has in said eleven leagues of land might in all due form of law always be evi-



dent and certain, I went with his attorney, the citizen John Charles Beales, and, after the same had been surveyed by the surveyor, the citizen William Egerton put him in possession, and taking him by the right hand, I perambulated the said eleven leagues of land with him in the name of the said government, and caused him to perform all the other ceremonies which the laws provide for this case of actual possession, omitting the citation of adjoining owners, there being none such. The citizens Victor Pepin, Edward Little, and George Colwell being witnesses in addition to those of my own assistants, all residents of this town, who, for due formality, signed with me and the interested party on the said day, month, and year. The party obligating himself to replace the paper of the seal, which corresponds, there being none such now in this town, nor its contiguities.

FORTUNATO SOTO.

"Of assistants: THOMAS J. PLUCKNETT. THOMAS H. F. O'S. ADDICKS. "JOHN CHARLES BEALES. "GEORGE COLWELL.

VICTOR PEPIN. "EDWARD LITTLE.

"I, the citizen Fortunato Soto, commissioner of the supreme government of the state in the Rio Grande colony, do certify that the foregoing *testimonio* is a literal and true copy of, and was legally taken from, its original, to which I remit myself, and which is extant in the respective book of the archives of this colony, and in compliance with the eighth article of the instructions of the 25th of April, 1880, I give these presents to the interested party to serve him as his title, the same going on common paper, there being none of the corresponding seal in this town, nor its contiguities, and for its due authentication I have signed the same, with assisting witnesses, the said day, month, and year.

FORTUNATO SOTO.

"Of assistants: THOMAS H. F. O'S. THOS. JAS. PLUCKNETT. "ADDICKS.

John Charles Beales held a power of attorney, made by all the grantees and several others, of date October 18, 1882, which gave to him the power to demand and receive the titles, and to exercise in regard to those most extensive powers irrevocable. There was an agreement that the signatures to those papers, "purporting to be *testimonios* of final title executed by Fortunato Soto, commissioner, on the 18th day of April, 1884, are the true and genuine signatures of the parties who signed the same," and that, when introduced with the agreement, "should be full and conclusive proof of all facts above stated, and of no other fact, plaintiff expressly reserving any and all other objections to said instruments." The instruments in Spanish, after having been proved for registration, in a manner as to which no question is raised, were filed for record in the counties in which the lands are situated on June 22, 1878, and were recorded on June 24th. It was shown by the commissioner of the

general land-office that the originals of the *testimonios* offered in evidence were not in that office, but it was made to appear that the *testimonios* were filed in that office in the year 1845 or 1846, and there remained until April 16, 1875, when they were withdrawn by C. R. Johns & Co., acting under power of attorney for John Charles Beales and the surviving children of his deceased wife. This power of attorney related to 9 separate 11-league grants, including those in controversy, which the parties claimed, and, from the power, it seems had been placed in the hands of Johns & Co. as early as 1867 for the purpose of having the titles perfected or cleared. The lands were placed on the maps in the general land-office as early as 1846, and on the maps in Bexar land district about the same time, and so remained until appellant made its locations. It was shown from the records of the comptroller's office that there was no evidence there that the lands had been assessed for taxes prior to the year 1871, since which time taxes were paid by C. R. Johns & Co., "trustees," or the defendants, until 1882. The grants were placed on the abstracts of titled lands printed in 1852 and 1878, but were not placed on abstracts published between these dates. There were 16 objections made to the admission of the papers purporting to be *testimonios* of title, in the Spanish language, translations thereof being offered at the same time. Many of those objections have been considered in disposing of other questions raised, and others go to the form and manner in which the titles are made up. The form of the several *testimonios* is unusual, in that they do not contain petitions to the commissioner for extension of final title, with general designations of land desired, accompanied with the concessions, a reference to the *empresarios*, their consent, order for survey, report of survey, and other like things which are usual in such titles, but it cannot be held, for the want of such things, that *testimonios* containing the essentials of final title ought to have been excluded. The absence of those things might excite inquiry bearing on the genuineness of the papers, and the time and circumstance of their execution, but the genuineness of the signatures to those is admitted, and such other inquiries as might thus be raised do not go to their admissibility in evidence. They are shown to have been in existence more than 40 years, and, coming from the custody in which they are shown to have been, ought to be received in evidence as ancient instruments unless suspicion other than such as may arise from their form be cast upon them, if there be no other reason requiring their rejection. It was urged, as the originals were never filed in the general land-office, nor the *testimonios* proved for record and registered in the county in which the lands were situated prior to the adoption of the present constitution, that the constitution forbids their use in evidence, and that, even if valid, they were stale, and



forfeited, "and the land to which they relate was remitted to the public domain." The present constitution of this state became operative on the third Tuesday in April, 1876, and article 13, § 4, of that instrument provides that "no claim of title or right to land which issued prior to the 13th day of November, 1835, which has not been duly recorded in the county where the land was situated at the time of such record, or which has not been duly archived in the general land-office, shall ever hereafter be deposited in the general land-office, or recorded in this state, or delineated on the maps, or used as evidence in any of the courts of this state, and the same are stale claims; but this shall not affect such rights or presumptions as arise from actual possession." The record forbids the holding that the claims of title or right to land, now asserted by appellees, had been duly archived in the general land-office prior to the time the constitution took effect, as does it forbid the holding that their evidence of right had been recorded in any manner in any county in the state prior to that time, and the question arises whether effect can be given to this section of the constitution in its entirety without violating the supreme law of the land. It is doubtless within the power of the people of a state, through a constitutional provision or legislative act, to declare what evidences of right may or may not be archived in the general land-office, or recorded in the several counties, or to declare what notice of ownership of land may not be evidenced by delineations on public maps; for while such prohibitions may make it more difficult for persons owning lands, against which such provisions operate, to preserve and manifest their rights, they do not prevent such persons establishing their ownerships in a court of justice, under the ordinary rules of evidence applicable to the admission of that which originally conferred title, and was given for the purpose of evidencing the right. The declaration that "no claim of title or right to land which issued prior to the 13th day of November, 1835, \* \* \* shall ever hereafter \* \* \* be used as evidence in any of the courts of this state," unless it had been archived in the general land-office, or recorded in the county in which the land was situated at the time of record, could have application only to such evidences of right as before that time could have been archived or recorded as writings evidencing titles. Its effect is to declare that unless the protocol, the only evidence of title to land which under the laws in force at the time the constitution became operative could be archived, unless it were an archive in some department of the former government, was then on file in the general land-office, a *testimonio*, the instrument given to be used as evidence of individual right, however well proved up, could not be admitted in evidence unless it, or a copy of the protocol, certified from the general land-office, had been recorded. The originals or

protocols of the papers offered in evidence, if they ever existed, ought to be archives of a now foreign government, and from the evidence offered presumably are so, and appellees, and those through whom they claim, have had no means through which these could be removed and filed in the general land-office, nor has this government at any time made any provision whereby copies of them, however authenticated, could be here duly archived. That the *testimonio* of a grant to an individual could not be legally archived is well settled, and in consequence of this, many persons, anxious to preserve and notify all persons of their rights, having filed such papers in the general land-office, as did those through whom appellees claim, the legislature authorized their withdrawal. Pasch. Dig. arts. 76, 77. Prior to the adoption of the present constitution, failure to register evidence of titles to land did not render them inadmissible in evidence on proper proof of their execution, and the only effect of failure to register was to render them inoperative as to creditors and subsequent purchasers for valuable consideration without notice.

There is no question of notice in this case, for appellees were in actual possession at the time appellant made its locations. The provision of the constitution gave no time after its adoption within which parties might record their titles, but declares that such as were not recorded at that time should never be received in evidence unless the titles were then archived in the general land-office. The effect of this was to deny to the holders of such claims the right or power to exhibit their rights in due course of law. A right existing to-day, and susceptible of proof under well-established rules of evidence applicable to all persons, by the writings creating and by law required to be given as the evidence of the particular right which in consequence of arbitrary legislation of to-morrow may not thus, or in any other manner, be established in a court of justice, is practically a right destroyed. The only means given to the section of the constitution referred to, to establish titles issued prior to November 13, 1835, not archived or recorded, is through such presumptions as arise from actual possession; and by that we understand that the title is not to be recognized unless the possession has been such and so long continued that a grant thereof, may be presumed under the rules applicable to that subject. Prior to the adoption of the constitution, persons owning such grants had not been required to remain in possession of them as a condition on which the continuance of the right depended, and a law which makes some prior act of the party, not necessary before its enactment, the only evidence which can be admitted to prove a title valid at the time of its enactment, would seem to be subject to all the objections that may be urged against retroactive legislation. There being no law in force prior to the adoption of the present constitution which enabled appellees, or those through whom they claim, to archive

their titles, record them in the county in which the lands were situated, or to remain in actual possession, no right accrued to the state on account of their failure to do any of those things, and the declaration that for failure in any of those respects those claims became stale is but an arbitrary declaration of a result not following from a former law, applied to facts existing at the time the constitution became operative.

Notwithstanding all we have said is true, the declaration found in the constitution that such titles shall not be "used as evidence in any of the courts in this state" must be given effect unless it contains some provision in violation of the constitution of the United States or other supreme law of the land. The fourteenth amendment to the constitution of the United States, among other things, provides: "Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Article 1, § 10, of the same instrument, provides, among other things, that "no state shall \* \* \* pass any \* \* \* law impairing the obligation of contracts." If appellees have rights, they arise on contracts made between the state of Coahuila and Texas and the several grantors through whom they claim, and their rights were never abrogated before Texas became a state of the Union. If ever valid claims, they were valid when the present constitution became operative, and to determine whether or not they were valid claims proof that the final titles were extended was necessary, and this could be established only by the written evidence of that fact or proof of the execution and contents of these; both of which methods are prohibited by the section of the constitution referred to. Legislation, in whatever instrument found, which forbids the introduction of evidence of a prior contract, admissible and made necessary to the validity and existence of the contract by the law in force at the time it was made, unless it provides some other method of making sufficient proof of the necessary facts accessible to the person called upon to make the proof, it seems to us impairs the obligation of a contract as fully as though such subsequent law in terms declared that the contract should no longer be operative, or be enforced through the courts, for it destroys the only means through which the contract may be established and enforced, if effect be given to the enactment. In effect, it renders the contract inoperative, for without proof of its existence and terms a contract, however valid, can have no standing in a court of justice, the only tribunal through which contracts can be enforced in the absence of voluntary compliance by the parties thereto, or by those claiming through them. We are of opinion that the provision of the constitution of this state, under which it is claimed the evidence under consideration should have been excluded, is in conflict with both of the provisions of the constitution of

the United States to which we have referred. It is not shown that the lands in controversy, originally titled to Mexicans, did not belong to them on July 4, 1848, when the treaty of Guadalupe Hidalgo was proclaimed. If they did, then they are protected in so far as valid titles against the state of Coahuila and Texas on March 2, 1836. The last paragraph of article 8 of that treaty provided that "in said territories (ceded territories) property of every kind now belonging to Mexicans not established there shall be inviolably respected. The present owners, the heirs of those, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to its guarantors equally ample rights as if the same belonged to citizens of the United States." The first paragraph of the same article secured to Mexicans established within the ceded territory the same rights. The last paragraph of the second article, explanatory of the treaty signed on February 2, 1848, declared that "those which were legitimate titles under the Mexican law in California and New Mexico up to the 13th day of May, 1846, and in Texas up to the 2d March, 1836, were within the protection of the treaty." Article 6, § 2, of the constitution of the United States declares that "this constitution and the laws of the United States \* \* \* shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." If the court below, on inspection of the documents offered, could have held that they did not confer such title, under the Mexican law, against the state of Coahuila and Texas, as was entitled to protection under the treaty, or that they conferred no title whatever, then they might properly have been excluded, but if they showed title, even though subject to forfeiture for breach of condition, they were properly in so far admitted.

It is urged that the papers purporting to be final titles, in connection with the other evidence offered, did not show title to any of the land in controversy, and some of the grounds on which this assertion is based will be considered. The concessions were made under decree 190 of date April 28, 1832, Laws Coahuila and Texas, 189, and it is claimed that the commission of Soto was annulled by decree 272 of date March 26, 1834. This proposition is based on articles 29 and 30 of the decree last named, which in terms repealed so much of all former instructions as were inconsistent with its provisions, and it declared that no further colonization contracts should be made, but that those heretofore made should be strictly forfeited in accordance with the law of March 24, 1825. Decree 272 contemplated a new system for the disposition of the public domain, but it never was inaugurated in Texas, nor any commissioners appointed under it, except the commissioners Smythe and Taylor, who were appointed under the express provisions of article 32 of that decree, and might have

been appointed without it. The entire legislation of the period manifests no intention to divest rights acquired under decrees 16 and 190. The effect of decree 172 upon rights acquired under decree 16 was considered in *Jenkins v. Chambers*, 9 Tex. 234, in which the same proposition was asserted in reference to rights acquired under decree 16 as are asserted in this case, against rights claimed to have been acquired under decree 190. In that case it was said that "the instructions to commissioners were repealed only in so far as they were offered to the provisions of the law of 1834, (decree 272, art. 29.) Those of the 4th of September, 1827, (Laws & Dec. 70,) were doubtless mainly intended for the government of commissioners for the distribution of lands to colonists proper. But their terms are sufficiently comprehensive to embrace, and they were made to embrace, other cases of concessions made under the law of 1825. The reason of the law, which required that colonization contracts should be carried out in accordance with the law of 1825, undoubtedly applied with equal force to the concessions in this case. That law did not in terms provide for extending titles to colonists introduced under those contracts; but it could never have been doubted that it was intended to include them, and there can be as little doubt that it was the then revised construction of the law that the repeal did not divest the governor of the authority to complete the titles where there had been concessions made to purchasers and settlers under the law of 1825. That construction seems more natural and rational than the opposite one, which would require us to suppose that the legislature intended, indirectly and by implication, to annul pre-existing rights and contracts guaranteed and confirmed by previous laws. We cannot suppose that such a consequence was intended, and the history of the times, it is believed, as connected with this subject, will afford abundant evidence that such was not understood to be the effect of the repealing law." Many titles in this state would be uprooted if the law upon this subject was as contended for by appellant, and in view of the course pursued by the governor of the state and other officials, who must be presumed to have understood their powers, and in good faith acted upon them, nothing short of a law clearly showing a usurpation of power would justify our holding that their acts were invalid. We therefore hold that the court did not err, in view of the other evidence in this case, in refusing to exclude the documents offered, on the ground that the commission to Soto had been annulled before he issued the titles.

It is further urged that the documents should have been excluded because no proof was made that the conditions on which the grants were made were ever complied with, and, further, that the grants were extended to an attorney in fact, which it is claimed was forbidden by article 12, decree 272. As

to the last of these objections we are of opinion that the law referred to was no application to this case. As to the first and to the further objection, that the real intention of the parties was to procure for John Charles Beales a large number of 11-league grants in contravention of article 12, National Colonization Law, article 24, decree 16, and article 13 of decree 190, the inquiry arises whether appellant is in position to raise these questions, or to question whether any of the lands were astride of the boundaries of Grant and Beales colony, or within the department of Coahuila or Bexar. Counsel for appellant proceed upon the theory that it is the holder of "junior title" or "color of title" which, under article 13, §§ 1, 2 of the constitution, would make grounds for forfeiture inure to its benefit, and cast the burden of proving full compliance with all the conditions on which the grants were made on appellees. Grounds for forfeiture for non-compliance with conditions may exist. It may have been the intent of the grantors and Beales to acquire for him more land than the law permitted to be held by one person, and that on this ground forfeiture might be claimed by the state or the holder of junior title or color of title, and it may be, and doubtless is, true that the commissioner issued titles to lands not within the limits of the colony for which he was commissioner, and the grants in so far may be void; and it may be that the grants are situated within limits then recognized by the authorities to be in the department of Bexar; but it does not follow, if all those things be true, that any of those can inure to the benefit of appellant. The concessions which conferred the right to purchase, if this record speaks the truth, were valid, and Soto had power to issue titles if the instrument evidencing his authority be not false, and, however much he may have exceeded his authority, the lands are, nevertheless, within the meaning of article 14, § 2, of the constitution, "titled lands;" *Truehart v. Babcock*, 51 Tex. 177; *Westrope v. Chambers*, Id. 187; *Summers v. Davis*, 49 Tex. 541; *Winsor v. O'Connor*, 69 Tex. 571, 8 S. W. Rep. 519, and cases therein cited. The section of the constitution referred to provides "that all genuine land certificates heretofore or hereafter issued shall be located, surveyed, or patented only upon vacant and unappropriated public domain, and not upon any land titled or equitably owned under color of title from the sovereignty of the state, evidence of the appropriation of which is on the county records or in the general land-office, or where the appropriation is evidenced by the occupation of the owner or some person holding for him." This provision of the constitution was construed in *Winsor v. O'Connor* and in other cases, and it cannot be claimed that by the locations made by appellant, in violation of law, it acquired such rights as under article 13, §§ 1, 2 of the constitution can be held to constitute "junior title" or "color of title." A

grant made by the state of Coahuila and Texas subsequently to the issuance of the titles under which appellees claim, or a patent from this state issued prior to the adoption of the present constitution, or subsequently under a location made before, would constitute "junior title," as would a location on valid land certificate made before the adoption of the constitution constitute "color of title," which would entitle their holders to the benefit of the provisions of article 13, §§ 1, 2, of the constitution. It is evident that it was not the purpose of that article of the constitution to validate invalid Spanish or Mexican titles, but, on the contrary, to reserve every right the state had to annul them for failure to comply with conditions precedent or subsequent, or for any other legal cause, and it is not believed that it was the purpose of decree 314 to give validity to any grants wanting in the essential elements of valid title; but, while this is so, it does not better the condition of appellant, who shows neither "junior title" nor "color of title." However defective the titles through which appellees claim may be, they show such facts as deprive appellant of the right to the writ of *mandamus* which it seeks.

There are many other incidental questions presented in the carefully prepared briefs of counsel, which, in this opinion, already too much extended, we cannot present, but those considered are decisive of the case before us, and the judgment of the court below will be affirmed.

#### TEXAS MEX. RY. CO. v. CARR *et al.*

(Supreme Court of Texas. June 18, 1889.)

Appeal from district court, Bexar county.

*Ogden, Ogden & Johnson* and *Thomas W. Dodd*, for appellant. *Waelder & Upson*, *H. E. Barnard*, and *Coopwood & Coopwood*, for appellees.

STAYTON, C. J. This action is of the same character as the case of *Railway Co. v. Locke*, ante, 80, this day decided, and in it the same questions are presented on a similar state of facts, the only difference being that some other lands situated in Dimmit county are involved. The questions of title and of procedure, however, are the same in the two cases, which were tried together in the court below, and are here together submitted. For the reasons given in the other case, the judgment of the court below in this will be affirmed.

#### HAYMOND v. HAYMOND.

(Supreme Court of Texas. June 21, 1889.)

JURISDICTION IN DIVORCE—ABANDONMENT.

1. Rev. St. Tex. art. 2862, declares that no suit for divorce shall be maintainable unless the petitioner shall, at the time of filing his petition, be an "actual *bona fide* inhabitant of the state," and shall have resided in the county where such suit is filed six months next preceding its filing. *Held*, that an allegation in the petition that the petitioner was "a *bona fide* citizen" of the county, and had been for more than six months prior thereto, was insufficient.

2. If the allegation were sufficient, it would not be sustained by evidence showing that petitioner went to Central America in 1881, where he resided until December, 1885, and that he returned to Central America in January, 1886, and remained until October, 1887, when he returned to the county, and filed his petition, though there was evidence that he never intended to permanently abandon his domicile in the state.

3. Plaintiff alleged that his wife had joined some religious fanatics, called "Sanctificationists;" that the belief separated him from his wife, alienated her affections, and estranged his children; that she believed that a believing wife should not live and cohabit with an unbelieving husband; that "defendant practiced this doctrine, and was thereby led to leave plaintiff's bed and board." *Held* that, under Const. Tex. art. 1, § 6, securing to "all men the right to freedom of worship," and asserting that the rights of conscience in religious matters should be uncontrolled by human authority, that part of the petition setting up the religious belief of defendant as a cause of divorce should have been stricken out on demurrer.

4. Evidence that plaintiff "was always more or less disagreeable in the family," and differed with defendant in business as well as religious matters, and that he did not live with her for two years, but occupied a separate room in the house, and after trying to eject her left the country and remained absent for six years, and that during that time defendant had fed, educated, and clothed the children with little aid from plaintiff, and occupied or rented the house for four years after plaintiff left, after which plaintiff directed that she should not receive the rent, is not sufficient to prove abandonment by defendant, and is not aided by proof that the religious society to which she belonged taught that it was sinful for her to live with him, or that other separations had occurred where the wife was a member of the sect.

Appeal from district court, Bell county.

Action by B. W. Haymond against Ada Haymond for divorce, and custody of their three children, commenced in October, 1887. Verdict for plaintiff, and defendant appeals. After notice of appeal given, plaintiff moved for the custody of the children, pending the appeal, and the motion was granted.

*Monteith & Furman* and *Frank Andrews*, for appellant. *James Boyd*, for appellee.

HENRY, J. B. W. Haymond instituted this suit against his wife for divorce and for the custody of their three children. Plaintiff alleged that he was married to defendant in the year 1873; "that in January, 1879, there crept into his home a destroyer that lodged in the bosom of his family and poisoned the atmosphere of his once happy home, blighted his life, alienated his wife's affections, estranged his children, and made desolate all that was once happy and comfortable." He alleged that "this destroyer was a band of religious fanatics, calling themselves 'Sanctificationists,' composed chiefly of women who congregate at private houses and other places, and relate to each other the divine revelations communicated to them, which they interpret to suit their own views and then blindly follow in their business and domestic relations; that Martha McWhirter, the mother of defendant, is the head of this sect, and seems to have the benefit of more revelations than all the others, and her interpretations thereof are law to her followers." Plaintiff further charges that "this band teach and enforce the doctrine that it is sinful for a wife, who

is a member, to live with a husband who does not believe the doctrine; that such a husband is a serpent in the house, and the wife should separate and depart from him." He alleges that "in 1879 his wife joined this band at the solicitation of her mother, and during his temporary absence permitted the band to hold its meetings in his house, and encouraged them to instill into the minds of his children their accursed doctrines; that, influenced by her mother, who taught her it was a sin to live with him, defendant withdrew herself from plaintiff's bed and board in January, 1879, and occupied a room and bed in another part of the house, and has ever since remained absent from his bed and board; that said Martha McWhirter has induced other wives to refuse to live with unbelieving husbands; that plaintiff in 1883 sent his children a barrel of oranges, which his mother-in-law destroyed because he was an unbeliever; that plaintiff was absent from the state from October, 1881, until December, 1885. In 1883 he wrote to his wife from Central America, expressing a desire to forget the past, and blot it out of their lives, if she would go to him with their children and remain until he was able to return to Texas, offering to send her money to pay her expenses. Defendant refused, saying she would not leave the sanctified band for any man, and that money would be no inducement to her to live with him. He charges that on his return home in 1885 he was very sick, and needed care and attention, which he received from strangers, but not from his wife, who, knowing his condition, did not visit or send his children to see him, and that after his recovery in January, 1886, still desiring to reunite his family, and separate them from the Sanctificationists and intermediers, he sought his wife and besought her to go with him and reunite their family and forget and forgive the past, in reply to which she said she would consult her mother and find what revelation would be made on the subject. Plaintiff alleges that, not hearing from his wife, he wrote her at the end of several days, repeating his request, to which she replied that she could not consistently with her faith live with him because he was an unbeliever. He alleges that with the consent of his wife her mother has taken complete control of their children, and hires them out to do menial work, receiving the money for their services, and refusing to send them to school, and that Martha McWhirter is the proprietress of the Central Hotel, where she has kept plaintiff's wife and children, and has knowingly permitted public prostitutes to board and lodge as her guests, thus associating his children with them. Plaintiff charges that in consequence of said express and cruel treatment his living with defendant is insupportable, and he prays for a divorce for that reason, and because of defendant's voluntary abandonment of him for the period of three years and more prior to the filing of his petition. Defendant excepts to so much of

the petition as relates to her religious belief and that of her mother, and denies all and singular its allegations. She specially denies that plaintiff's residence is in Texas, and charges that he is a resident of British Honduras, and that instead of her leaving him plaintiff abandoned her. She alleges that he was habitually cross to her, and on one occasion violently assaulted her, and circulated false charges against her character. She charges that from 1881 to 1885, while he was in Central America, he left her no provision for the support of herself and children, and that she furnished such support by her own efforts, and in 1885 he deprived her of the rents of their home. She charges that plaintiff remained in Central America until 1887, when he returned to Belton, and forcibly and fraudulently carried away her son, whom she had supported for the previous seven years without his assistance. She says her children are attached to and prefer to remain with her, and that she is able to care for and support them, and that plaintiff, if he obtains control of them, will remove them to some foreign country.

Plaintiff introduced the depositions of Mrs. Martha McWhirter, by whom he proved that perfect harmony never existed between him and his wife, though they were sometimes pleasant to each other. She testified that her faith does not teach that it is sinful for a believing wife to live with an unbelieving husband as his wife, if they were already married when the wife became sanctified; that the faith of the Sanctificationists teaches them to be good and obedient wives and mothers, and to discharge their duties perfectly as such, and teaches that if a husband chooses to leave his wife on account of her religion she should let him go. She testified that plaintiff and his wife did not live together from January, 1879, to February, 1881, and that plaintiff "was always more or less disagreeable in his family;" that disagreements continued between them until they finally separated, when plaintiff endeavored to eject his wife by force from their house, but he failed to eject her, and afterwards left her of his own accord; that they differed about business matters as well as religious, and that some meetings of the band were held in the residence of plaintiff by invitation of his wife. She testified that a half barrel of oranges came to defendant, but, not knowing who sent them, she withheld the oranges because she did not believe in accepting gifts from an unknown source, and that when plaintiff was sick in 1885 friendly relations did not exist between him and his wife, and she did not visit him. She testified that in the early part of 1886 plaintiff requested his wife to live with him again, but she declined, because she desired to live in peace, and was fully convinced that there would be none in the "same house with Ben Haymond. We both concluded she had better not go with him for that reason." She testified that in 1883 or 1884 plaintiff wrote his wife from

Central America, requesting her and his children to join him there, and offering to send them the money required for the purpose, but defendant refused to go. The same witness, testifying at the instance of the defendant, stated that plaintiff had never contributed anything for the support of his wife and children after he left for Central America in 1881; that plaintiff and his wife occupied the same room and bed until he tried to eject her from their house, after which defendant remained in the same room, and plaintiff withdrew to another one, which he continued to occupy until he departed for Central America. Other evidence was introduced by plaintiff, in substance, that Mrs. McWhirter was the leader of the band, and that while they do not teach separation between married people such is the tendency of their doctrines; that the doctrine had caused separations of husbands and wives in four other instances, (giving the names of parties living at Belton.) The evidence failed to sustain the allegations with regard to the evil character of occupants of the hotel kept by the mother of defendant, and of her children being subjected to evil associations, and as to their being hired out to perform menial labor, but established quite the contrary in those particulars. Plaintiff failed to fully prove the circumstances of the final separation between himself and wife, occurring in 1881. The daughter of plaintiff, introduced as a witness by defendant, corroborates Mrs. McWhirter upon that point by stating that in 1881 plaintiff made a violent assault upon defendant, attempting to put her out of the house, after which defendant continued to occupy the same room, but plaintiff occupied a different one. When plaintiff left her defendant was residing in their house. Afterwards she rented it for \$15 per month, until 1885, when, by plaintiff's direction, the rent was not allowed to go to her any longer. The evidence shows that after plaintiff's departure in 1881 he furnished nothing towards the support of his wife and their three minor children, but that all were maintained, and the children educated, by the exertions of the wife with such assistance as her mother gave her. On the verdict of a jury a decree was rendered granting plaintiff a divorce, and giving to him the custody of the three children. Plaintiff charges that he "is a *bona fide* citizen of the county of Bell, state of Texas, and has been for more than six months before the filing of this petition."

It is objected that the court erred in overruling defendant's demurrer to the petition, because it failed to charge that plaintiff was an actual *bona fide* inhabitant of Bell county, in the state of Texas. Article 2862 of our Revised Statute directs that "no suit for divorce from the bonds of matrimony shall be maintained in the courts unless the petitioner for such divorce shall at the time of exhibiting his or her petition be an actual *bona fide* inhabitant of the state, and shall have resided in the county where the suit is filed six

months next preceding the filing of the suit." Plaintiff's allegations may be true, and he still may not have been an actual *bona fide* inhabitant of this state and resident of Bell county for six months next preceding the filing of his petition for divorce. The allegations in the petition are not the equivalents of the facts required by the statute, and we think the demurrer should have been sustained. Even if the allegations in this respect had been sufficient, we do not think they were supported by the evidence which shows that plaintiff resided in Central America from 1881 to December, 1885, and again from January, 1886, until October, 1887. It is shown that he was a resident of Bell county before going to Central America, and there is some evidence that he never intended to permanently abandon his domicile in this state. We do not think that a temporary absence from the state or county of an inhabitant of the state during the six months next preceding the filing of his petition for divorce would affect his right to maintain it. We think, however, that there may be such a residence abroad, without the loss of citizenship or domicile for other purposes, as will cause the provisions of the statute referred to to be applicable, and deprive the party of the right to maintain a suit for divorce in our courts. Plaintiff's non-residence was of this character, and when it was developed by the evidence his suit ought to have been dismissed. One condition to which a party seeking a divorce in this state is subject is that he must reside in the county in which he brings his suit for the six months next preceding the filing of his petition. The fact that he was at some previous time a citizen and actual inhabitant of the state, and for six months or more a resident of the county, in no manner affects the question. When the facts required to exist by our statutes are not established by the evidence a decree of divorce should be refused.

We think the special exception to so much of the petition as sets out the religious opinions of defendant and her mother should have been sustained. In view of the constitutional provisions securing to "all men the right to worship Almighty God according to the dictates of their own consciences," and asserting that "no human authority ought in any case whatever to control or interfere with the rights of conscience in matters of religion," we do not think that questions as to the doctrines or practices of the Sanctificationists ought to have been permitted to enter to any extent into the trial, and on objection they should have been eliminated from the pleadings and the evidence. It was defendant's right to have any religious belief, or none, as best suited her. If her conduct as a wife was such as to furnish her husband grounds for divorce, the acts themselves would be the only proper subjects of investigation, without any regard to the religious connections that led to them. If her conduct was blameless, it was useless to al-

lege and prove that her religious connections inculcated evil views and practices.

The petition charged that she abandoned her husband for more than three years before he filed his suit. It was not necessary, nor did it help to prove the essential fact of abandonment, for the plaintiff to allege and prove that the religious society to which she was attached taught and believed that it was sinful for her to live with him because she was sanctified and he was an unbeliever. It was very improper to admit proof of other separations, or of a single one, where the wife was a member of the band or sect and the husband was an unbeliever. The plaintiff wholly failed to prove that his wife abandoned him, or that she was ever guilty towards him of excesses or cruel treatment of any description. It on the contrary shows that he was first unkind, then violent, and that he afterwards abandoned both her and the country. For years he seems to have entirely omitted to contribute to the support of his wife or children, casting that burden upon his wife entirely. It is unnecessary for us now to express an opinion upon the effect of his offer by letter in 1883 to resume his marital relations with defendant if she would join him with their children at his then residence in Central America, or of a similar proposition made to her in person in 1886. It seems to be well established that "the husband has the right to decide where the matrimonial domicile shall be, and if he changes his residence, and the wife declines to go with him, she thereby deserts him." 1 Bish. Mar. & Div. § 788. While this rule has been held to apply to emigration to a foreign government as well as a sister state, other principles, involving, among others, questions of health and conditions of civilization, may limit its application. There are many places to which the wife of an inhabitant of this state would not be required to change her domicile, or be held guilty of the desertion of her husband, so as to entitle him to divorce for that cause. When the other elements of abandonment exist, and the question of change of domicile by the husband becomes a question, the defense must be put on that ground, when its merits will be determined by the circumstances of the particular case. As other questions control the disposition of this cause, we do not deem it necessary to say more on this subject.

The parties had, when the suit was brought, a son aged 10 years, and two daughters, one 12 and the other 8 years old. For six years before suit was brought these children had been maintained by their deserted mother, with no thought or care from their father, so far as the record discloses, except to send them a half barrel of oranges, and to allow their mother during part of the time to take the \$15 per month which the rent of their homestead brought, of which he deprived her two years before he brought his suit. At the time of the trial the son was in the state of Michigan, to which place plain-

tiff had recently removed him without the consent of his mother. The two daughters testified at the trial that they wanted to live with their mother, and not with their father. The father proved that he had property in Central America adequate to the maintenance of the children. The mother proved that since they were abandoned to her in 1881 she had maintained and educated them, and could still do so. The court gave the custody of all of the children to the husband by an order taking immediate effect. Article 2871 of our Revised Statutes reads: "The courts aforesaid shall have power in all cases of separation between man and wife to give the custody and education of the children to either father or mother, as to the said court shall seem right and proper, having regard to the prudence and ability of the parents, and the age and sex of the child or children, to be determined and decided on the petition of either party, and in the mean time to issue an injunction, or make any order that the safety and well-being of any such children may require." No more sacred trust or graver responsibility can be devolved upon a court than the duty of determining which one of two contending parents shall have control of their minor children. It is a question of the welfare of the child rather than of outrage to the affections of a mother, and one that should be solved by all the circumstances and conditions surrounding the parties at the time the final order shall be made. Notwithstanding we are not able to see that these children should have been forced away from the mother, who alone, but willingly, had for the past six years maintained and protected them, and bestowed upon a father who during all of these years had abandoned and neglected them, it still may be that under conditions that will exist at the final trial of this cause it may be obvious to the court that it should be done. The judgment is reversed, and cause remanded.

#### MELTON v. LEWIS et al.

(Supreme Court of Texas. June 21, 1889.)

##### ANSWER BY GARNISHEE—INJUNCTION.

1. An answer by a garnishee that he was not indebted to either of the debtors, and did not know any one who was, is insufficient, and a judgment against the garnishee is properly rendered.

2. Plaintiff, in a suit to restrain a sale under a judgment against him as garnishee, alleged that he requested one of the judgment creditors to write his answer to the garnishee summons, as he would be absent from the term of court at which it was returnable, but he refused to do so; that he then employed a justice of the peace, stating all the facts, under which a sufficient answer could have been made, who drew an insufficient answer; that judgment was rendered against him during his absence from court, of which he had no notice for about five months. *Held*, that the failure to make a good defense as shown by the petition was due to plaintiff's negligence, or that of his agents, and cannot be made a ground for injunction.

Appeal from district court, Coleman county.

Bill in equity filed October 22, 1887, by O.



C. Melton against W. B. Lewis and others, to restrain the execution of a judgment against him as garnishee, and the sale of his land levied upon by virtue of an execution issued thereon. A writ of injunction was granted. Defendants, on March 23, 1888, moved to dissolve the same and dismiss the suit for want of equity, but the motion to dissolve was overruled, and the case continued until March 9, 1889, at which time the demurrer to the bill was sustained and plaintiff appeals.

*J. P. Leadbetter*, for appellant. *Sims & Snodgrass*, for appellees.

STAYTON, C. J. Snodgrass and Woodward, having recovered a judgment against M. M. and P. M. Whittington, about June 16, 1887, caused a writ of garnishment to be served on appellant, requiring him to answer as to his indebtedness to either of the Whittingtons, and as to all other matters as provided by statute in such cases.

Appellant alleges that he requested Snodgrass to write his answer, which he refused to do; and that at same time he informed Snodgrass "that he did not have any effects of the said Whittingtons, or either of them, in his possession, and that he did not know of any other person who did have any effects or credits of said parties in their possession;" and that he informed Snodgrass he would be absent at the next term of court at which he would be required to answer. From the averments it may be inferred that Snodgrass at one time may have agreed to write the answer, but it is expressly averred that he subsequently refused to do so, and informed appellant that he could write the answer himself, and told him what he thought would be a sufficient answer. Appellant, however, alleges that not being a lawyer himself, and doubting his ability to make a proper answer, on the same day Snodgrass refused to write it, he employed another lawyer and a justice of the peace to assist him to make out his answer, and that he made a full statement to the justice of the facts, under which a sufficient answer might have been drawn; that the justice drew his answer, which he signed, made affidavit to, and filed, believing it to be sufficient. The answer was: "I am not indebted to the above named M. M. Whittington or P. M. Whittington, nor do I know of any one who is indebted to them." This answer being insufficient, on the 27th June, 1887, a judgment was rendered against him, he not being present at that term, and of this he alleges he had no notice until the 4th day of October following. The petition contains averments of fact which, if true and set up in the answer, would have relieved appellant from liability as garnishee. An execution having issued against him, and been levied on his property, the purpose of this proceeding is to enjoin a sale under the levy made. On March 24, 1888, the court overruled a motion to dissolve the injunction that had been granted, but on March 9, 1889, sustained a

general demurrer to the bill, and, appellant declining to amend, the injunction was dissolved, and the bill dismissed, and from that ruling this appeal is prosecuted.

It is insisted that the court erred in acting on a general demurrer at a term subsequent to that at which it had refused to dissolve the injunction on motion. There was no error in this. If the bill stated no grounds on which the relief sought could be legally rendered, it would have been folly for the court to have heard proof upon them. The answer to the writ of garnishment was insufficient, and a judgment was properly rendered against appellant on it. Appellant shows that he might truly have made an answer that would have protected him, but his failure to do so is attributable to his own want of proper care and diligence, or to such failure on the part of the persons employed by him. He was not misled by the opposite parties, nor in any manner induced by them to omit the doing of that which the writ commanded him to do.

That he did not rely upon Snodgrass is made clear by the fact that he expressly avers that he refused, and that he employed another attorney and a justice of the peace to prepare his answer. No provision was made nor ground for belief given that the hearing on his answer would be postponed until his return, and after his return, so far as the record shows, he gave no further attention to the matter until after more than one term of the court had passed after the judgment was rendered against him. It is not enough that he may have had a good defense to the garnishment proceeding; but it was incumbent on him to present it, and having failed to do so, without fault of appellees, or the existence of some fact which prevented his so doing, he cannot make his own negligence a ground for injunction. There is no error in the judgment, and it will be affirmed.

#### DIMMITT v. ROBBINS.

(Supreme Court of Texas. June 25, 1889.)

DURESS—EVIDENCE—INSTRUCTIONS—CHANGE OF VENUE.

1. Plaintiff having received money out of which he had promised to pay a debt to defendant, persuaded the latter to accompany him to a certain place, and persisted, against defendant's wishes, in going by a particular route which was much further than by the direct road. He opposed defendant's son's going, but finally assented thereto. He also opposed defendant's taking his pistol, which was in good condition, but defendant took it. Plaintiff testified that he took the money, which was in an envelope, at defendant's suggestion, but defendant denied this, and disclaimed all knowledge that plaintiff took the money. In the evening defendant endeavored to overtake two men in the road, but they disappeared, and defendant expressed apprehension at their conduct. Plaintiff then asked defendant if he knew that one J. had written a letter to one S. that he (J.) "would get him," (defendant.) After camping two armed men rode up, when defendant went to the hack to get his pistol, and found it out of order. Plaintiff had just before this been at the hack for some moments. One of the men then demanded \$5,000 from defendant, saying that he had swindled J., and that they



would kill him unless he paid that sum. Plaintiff then whispered to defendant, "Here is that money, and if you want to use it do so." He testified that defendant told him to bring it; that he brought the envelope containing it; which was seized simultaneously by both defendant and the robber. Defendant then insisted that the money should be counted, but the robbers refused, took it, and rode away. It appeared that J. had no ill-will towards defendant, had not written the letter mentioned, and had authorized no one to demand \$5,000 from defendant. S. testified that he had not told plaintiff that he had received such a letter from J. The camp was selected by plaintiff, against defendant's wishes. *Held*, that the circumstances showed such a participation by plaintiff in the restraint practiced on defendant as to preclude recovery for the money alleged to have been loaned.

2. Plaintiff testified that the envelope originally contained \$2,688.28, and that he had previously paid out of it \$150 to defendant. He had also paid to others \$55 on the morning he started, but he testified that there was exactly \$2,500 in the envelope. He admitted that defendant could not have known how much there was. *Held*, that a verdict for plaintiff for \$2,500 could not be sustained, because it did not sufficiently appear that he loaned defendant that sum.

3. In an action for the money alleged to have been loaned, the issue being as to whether it was so loaned, and that defendant incurred the obligation while under duress caused by plaintiff, evidence to contradict irrelevant statements made by plaintiff on cross-examination as to whether he had stated out of court that no person knew prior to the alleged duress that he had the money with him except himself and wife, is inadmissible to impeach him.

4. In such case it was proper to charge that if plaintiff participated in the assault on defendant, or previously knew of the contemplated assault, and entered into a conspiracy to have the assault committed, with a view of extorting money from defendant, he could not recover, and to refuse to charge that if the obligation was incurred by defendant while under duress it was void, regardless of plaintiff's participation therein.

5. The fact that an order changing the place of venue to another court recites that the motion for change was made by one party, when it was actually made by the other, does not affect the latter court's jurisdiction.

Commissioners' decision. Appeal from district court, Travis county.

Action by J. R. Robbins against the estate of J. J. Dimmitt, deceased, on a money demand. Judgment for plaintiff, and defendant appeals.

*Sneed & Terrell and Hughes & Key*, for appellant. *Walton, Hill & Walton*, for appellee.

**HOBBS, J.** We have been unable to find in our researches among the great multitude of reported civil causes any case which in its facts is similar to this. The suit was brought by the appellee, plaintiff below, on the 9th of August, 1877, against J. J. Dimmitt, to recover \$2,500 alleged to have been loaned by appellee to Dimmitt. Dimmitt denied the indebtedness, and alleged that if he ever agreed or promised to pay said sum he was in duress at the time, and held in unlawful custody, and in great fear of serious bodily injury, and of losing his life, by two men to him unknown, who, armed with deadly weapons, were threatening to kill him, and were making an unlawful and violent assault upon him; that by reason of such duress,

threats, and violence he was put in great fear of personal injury and of death, and his will and volition destroyed, and he rendered incapable of entering into a valid contract or making a binding promise; (2) that if he ever undertook, promised, or agreed to pay plaintiff any money, which is denied, he was at the time in duress, and held in unlawful custody, and in great fear of losing his life, by two men to defendant unknown and by plaintiff; that with the knowledge, consent, and approval of plaintiff, and by his procurement, and at his instigation, said two men, to defendant unknown, made an assault upon him with deadly weapons, and threatened to take his life unless he paid them a large sum of money, and put him in duress, and great fear of losing his life, and of serious bodily injury; that, while said two men were assaulting defendant and holding him in duress and unlawful custody, plaintiff handed them an envelope or package, pretending that it contained \$2,500 in money, and pretending that he was paying it as a ransom to secure the release of defendant, when in truth and in fact it did not contain any such sum of money, and was not in good faith given by plaintiff as a ransom for defendant, but was given to plaintiff's confederates and co-conspirators, who were assisting plaintiff in his wrongful and fraudulent efforts to impose upon and deceive defendant and make him believe that he had been attacked by robbers, unknown to plaintiff, and that plaintiff had actually and through proper motives given them \$2,500 as a ransom for defendant's life; that the said acts of plaintiff and his confederates, the said two men to defendant unknown, were done and committed by previous agreement and understanding entered into by and between them for the wicked, wrongful, and fraudulent purpose of imposing upon and deceiving defendant, and causing it to appear, and him to believe, that he had in fact been assailed by robbers, without the knowledge and consent of plaintiff, and that plaintiff had paid \$2,500 to ransom him, and thereby to enable plaintiff to demand and receive from defendant said sum of \$2,500. Wherefore defendant says that plaintiff, being a confederate of and a conspirator with said two unknown men and pretended robbers, is not entitled to recover upon any promise, direct or implied, which defendant may then and there have made. The plaintiff Robbins filed a motion for a change of venue on July 19, 1881, sworn to in December, 1881, upon the ground that there existed so great a prejudice against him in Williamson county that he could not obtain a fair trial of the cause, etc. The cause was transferred to Travis county by order of the court, the order reciting that it was made on motion of the defendant. On April 15, 1884, a motion was filed in the district court of Travis county to strike the cause from the docket, because it appeared to have been changed from Williamson to Travis, on motion of defendant, when in fact no such

motion was made by him. This motion was accompanied by affidavits verifying the fact stated in the motion. On March 16, 1885, plaintiff filed first amended original petition, alleging the death of defendant J. J. Dimmitt, and that Mrs. M. L. Dimmitt was his surviving wife, and had qualified to administer the community estate of said J. J. Dimmitt and herself, and making her a party defendant herein, and in addition to the prayer of the original petition prayed for judgment against said community estate, and for interest after demand, and for general and special relief. Mrs. M. L. Dimmitt answered by general denial, and by adopting the answer of J. J. Dimmitt. She also pleaded the statute of limitations, by exception and plea, to any recovery of interest for more than two years prior to the filing of the amended petition. The district judge being disqualified, and also the special judge, who had been previously appointed, Hon. A. H. Graham was duly appointed, and qualified as special judge to try the cause, and on the 25th, 26th, 27th, 28th, and 30th March, 1885, the cause was tried, which resulted in a verdict and judgment for plaintiff Robbins for the sum of \$2,500 principal, and \$1,528.21 interest thereon from August 9, 1877, aggregating the sum of \$4,028.21, with interest from the date of judgment at 8 per cent., which was decreed to be a valid claim against the community estate of J. J. Dimmitt. From this judgment this appeal is prosecuted, upon 15 assignments of error which we do not think it necessary to consider *seriatim*.

The first and second assignments complain of the refusal of the court to strike the cause from the docket of the district court of Travis county, because it appeared that the order of the district court of Williamson county, reciting that the change of venue was made on motion of the defendant, was not true in fact, the defendant not having made such motion. The order of the district court of Williamson county, changing the venue, clothed the district court of Travis county with jurisdiction, unless it appeared that this order was not predicated upon some one or more of the statutory grounds authorizing the change to be made. The recital in the order of the court, that it was upon motion of the defendant, might have been stricken out, and still the district court of Travis county would have had jurisdiction. The original papers transferred, disclosed the fact that its jurisdiction attached upon the motion of the plaintiff, supported by proper affidavit, as provided by the statute. If there was no power in the district court of Williamson county to make the order, it is not shown by the motion, or the assignments, or any bill of exceptions taken at the time to the order changing the venue.

During the progress of the trial Robbins was asked, upon cross-examination by defendant's counsel, if he had not stated out of court to one David McFaddin and one J. N. McFaddin "that no person knew prior to the

robbery that you had the \$2,500 in money along with you except you and your wife;" to which the witness replied that "he did not tell McFaddin that nobody knew he had this money but himself and wife, and knew exactly what he told McFaddin," etc. He was also asked if he had not made a similar statement to John McFaddin, to which he replied that if he said anything to said John McFaddin "it was likely that he had told him that no one else except his wife knew that he had taken the money along with him." The depositions of three parties were then offered by the defendant, to the effect that "Robbins had about 10 days or two weeks after the robbery said to them that he had about \$2,500 with him on the trip; that no person knew prior to the robbery that he had the money with him except his wife." To the introduction of this evidence by the defendant the plaintiff's counsel objected, on the ground that the matter of fact involved in the supposed contradiction was immaterial, and that plaintiff's testimony could not be impeached in the manner indicated. The objection was sustained, and defendant assigns the ruling as error. Applying the strict rules of law regulating the cross-examination of a witness, we cannot say that the court erred in the exclusion of the testimony offered. It seems to be a well-settled principle that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting the witness. 1 Greenl. Ev. § 449, and cases cited. The issue to be tried in this case was whether Robbins loaned the sum of \$2,500 to Dimmitt as claimed by him, and whether, as alleged, Robbins was in any manner connected with, or instrumental in, putting Dimmitt in a state of duress and illegal constraint, and in which condition Dimmitt contracted the obligation as pleaded in the answer. The fact that Robbins did or did not state to David McFaddin and J. N. McFaddin that no one except his wife knew that he had the money along with him would not have contributed in any degree to prove or disprove either of these issues, and consequently it was a fact collateral and irrelevant to the issue being tried.

The charge of the court, we think, contained a correct presentation of the law applicable to the facts of the case, and it is not justly obnoxious to the many criticisms presented for our consideration in the several assignments relied upon. Duress was correctly defined by the court to be "an actual or threatened violence, or illegal restraint of a man's person, to compel him to enter into a contract, or to do some act which, in the absence of such violence or restraint, might be valid or legally effective." The jury were then instructed that "if Dimmitt was assaulted by armed men, who by a display of weapons, and by threats and other acts, such as would naturally operate on a person of ordinary firmness to inspire apprehension of great bodily injury, and was thus intimidated

and coerced to comply with the illegal demands, he (D.) was, under such circumstances, in duress, and as to any one responsible in any degree for such acts of violence and illegal restraint, or engaged in aiding and abetting in such intimidation and coercion, he was deprived of all power to make any valid, binding contract, or incur any legal obligation by his agreement or acts." This was followed by the instruction "that if Dimmitt was in such a state of duress, and called on Robbins to advance for him the money to meet the demands of his assailants, or accepted or authorized plaintiff's offer of money for that purpose, and that plaintiff did advance the money, and the jury found that plaintiff had previous knowledge of the contemplated attack on D., or had any share or complicity in it, or aided or abetted the assailants at or before the time, they would find for the defendant." The jury were also told "if they believed plaintiff had, prior to the time of the assault upon D., entered into any conspiracy or understanding with others for the purpose of having D. assaulted, and putting him in fear of great bodily injury or death, with a view to extorting money from him, and that in pursuance thereof D. was so assaulted, etc., and plaintiff furnished D. with the \$2,500, or any sum, to pay the assailants, and D. accepted it under the belief that it was necessary to save his life, or to prevent serious bodily injury, then, in that event, plaintiff could not recover." The effect of the proposition contended for by the appellant is that if the obligation was contracted by D. while assailed by parties threatening to do him serious bodily injury, or to take his life, that he was incapable of exercising his free agency, his power of withholding his assent was destroyed, and the obligation contracted was void, regardless of the fact of any participation in or knowledge of the circumstances upon the part of the plaintiff which resulted in this condition or state of duress.

In treating of the elementary rules governing contracts, and discussing one of the essential elements in a contract or obligation, that of the consent of the party, or his want of liberty, it is said by Pothier, *Obligations*, (volume 1, p. 115, side page 21:) "When the violence is committed by the person with whom I contract, or by his participation, the agreement is not binding, either by the civil law or even by the law of nature; for, supposing that there resulted any obligation from me to you in consequence of my consent extorted by violence, the injustice committed by you in exercising that violence obliges you to indemnify me for the injury which I suffer by it, and that indemnity consists in discharging me from the obligation which you have obliged me to contract." Continuing, he says: "When the violence is exercised against me by a third person without the participation of him with whom the contract is made, the civil law does not on that account withhold that assistance from me; it rescinds all obligations contracted by violence, from whom-

soever the violence may proceed." And he quotes Grotius as maintaining that in the case last cited it is only by the authority of the civil law that a rescission can be had of that which by the rules of the natural law would be binding. On the other hand, Puffendorf and Brabence he cites as holding that even by the rules of natural law, when a contract is the result of violence, it is not obligatory, though the other party was not concerned in the violence. But an exception to the rule, that consent extorted by violence is not sufficient to support a valid obligation of giving or doing anything we promise, is mentioned in the case "where an obligation, though contracted under the impression of fear, arising from violence, is, notwithstanding, valid; that is, when I promise something to a person for coming to my assistance and delivering me from the violence which is exercised against me. For instance, if, being attacked by robbers, I desery a person to whom I promise a sum of money for delivering me out of their hands. This obligation, though contracted under an impression of the fear of death, is valid." Such we understand to be the correct rule, and we are of opinion that the instructions requested were properly refused, and those given by the court embodied the correct principles of law applicable to the facts of the case.

The facts of the case show that on July 2, 1877, Robbins was and had been indebted to Dimmitt in the sum of \$2,500; that Dimmitt was urging a settlement of this debt; that R. had given D. to understand that when he realized money from the sale of some cattle he would settle it. Robbins received the money he was expecting from this source, and it was paid to him at Austin, (the sum of \$2,688.25.) With this amount he returned to his home near Georgetown, where both parties lived. Robbins was residing upon a place owned by Dimmitt, for which he was paying him rent. This place was formerly owned by one Jim Smith. It appears to have been sold at forced sale, and Dimmitt became the purchaser. The parties had been contemplating a trip to Coryell county for the purpose of examining a tract of land there owned by Dimmitt, for which Robbins was expecting to exchange land owned by him in Williamson county. When Robbins returned from Austin with the money referred to, which was on the Saturday preceding the Monday they were to start on the trip, he went to Dimmitt's place on the opposite side of the town, and urged that they should start on the trip to Coryell county on the next Monday. To this proposition Dimmitt objected, because his wife was absent, and it would require some time to get some person to remain with his children and take charge of his house. Robbins insisted that if they did not start on Monday he would not go at all. Dimmitt finally agreed to go. There was some controversy between them as to the route to be traveled, Dimmitt desiring to go by Liberty Hill to see a tract of land

owned by him, and Robbins insisted on going by a place known as "Youngsport," assigning as a reason that he desired to see a Dr. Runnels at that point for the purpose of obtaining some eye-water, he being afflicted with some affection of the eye. He was also then just recovering from pneumonia, and not physically robust. Just before starting from Georgetown on Monday morning, July 2, 1877, Dimmitt's son, a boy 12 or 15 years old, insisted on being allowed to go on the trip. Robbins was rather opposed to his going, but finally assented. It was discovered by Dimmitt at this juncture that he had left his pistol and shotgun at home, and he proposed to send his son back for them. Robbins expressed the opinion that there was no occasion to take arms with them. Dimmitt, however, sent for and obtained his pistol, which the evidence shows had been long used about his place for the purpose of killing stock, and was in excellent and reliable condition. Before starting Dimmitt told Robbins he must have \$150 to make a payment to some one then pressing him for that amount. Robbins, it appears, then went back to his house, and, as he says, got from the envelope containing the money, \$2,688.28, he had received at Austin, the sum of \$150, which he paid to Dimmitt. It is also in proof that just before starting Robbins also paid Rucker and Hodges, to whom he was indebted the sum of \$55. Robbins says this money brought from Austin was all the money he had with him. He says that upon paying D. the \$150 Dimmitt suggested that it would be unsafe to leave the money he had collected at Austin at home, whereupon he returned again home, and got the envelope which he testifies then contained exactly \$2,500 after the payment of \$150 to D., and he put it in the hack.

There is a conflict in the evidence here between Dimmitt and Robbins, the former denying that he had any knowledge whatever of the fact that Robbins had \$2,500 in the hack. The road traveled by the parties was in opposition to the wishes of Dimmitt. Robbins insisted upon it, and Dimmitt acceded. It was shown by the evidence to be seven or eight miles further by the route traveled to Youngsport, the locality Robbins insisted upon going to, than by the direct public road to the same point. In the evening, and a short time before reaching the place where the parties camped, two men were seen by Dimmitt, who was driving, some distance off, and near a deserted house. When D. saw them, being uncertain as to the road they were in, he attempted, by driving faster, to overtake them, but the men, who were dismounted, hurriedly saddled, and mounted their horses, and disappeared. Dimmitt referred to the peculiar conduct of the men, and expressed to Robbins his apprehensions as to their meaning. At this juncture Robbins asked D. "if he knew that Jim Smith had written a letter to one Joel Sterling, at Georgetown, stating that he would

get him, (D.)" Dimmitt replied that he had not, and asked Robbins "when he had heard it;" to which the latter said, "About six months since." After the parties had camped that night two armed men rode up. Dimmitt became uneasy and went to the hack to get his pistol, which he found was for the first time, as far as the evidence shows, in many years, out of order, and that it could not be used. Just before this, it seems, Robbins had gone to the hack, and remained some moments. He testified he was transferring the money he had put in his saddle-bags to the hack-box, at D.'s suggestion. The witness Clide (D.'s son) states that "Robbins had asked D. if he could put his things in the hack-box," and that Robbins went to the hack and dropped an envelope in the hack-box. He did not see R. put anything else in the box. Dimmitt referred the men who had ridden up and requested supper to a house a short distance off, but they declined to go. About that time Robbins proposed to make some coffee for them. These men then hitched their horses, and, as Robbins and Dimmitt's son were preparing the supper, the smaller of the two men, with an oath, commanded Dimmitt to throw up his hands, and demanded \$5,000 from him, saying that he (D.) had swindled Jim Smith, and that unless he paid that sum they would kill him. D. told them he did not have it. R. told them he and D. did not have it, but the small robber replied to D. that they would take his life if he did not pay that amount. Dimmitt told them he had only about \$35, and drew his purse and handed it to the robber, who threw it upon the ground and told him that \$5,000 was what they wanted. Robbins, in the mean time, started towards Dimmitt, and told the robbers (so he testifies) that D. had no money. They cursed him, and told him to "Stand back;" that "they did not know him, and did not want to." Robbins then asked to be allowed to speak to his friend D., which was granted. He then went up to D. and said to D., "Come here;" and says he "may have taken D. by the hand." At this point the attacking party interfered, and said, "No, you can't take him away from here." Then Robbins requested that he be permitted to whisper to Dimmitt, and this privilege was permitted. He then whispered, in the presence of and in close proximity to the robber, to Dimmitt, "Here is that money, and if you want to use it do so." Robbins states that D. told him to bring the money, and he went to the hack, got it, and handed the envelope to D. or the robber, and it was seized simultaneously by the two, Dimmitt taking it between his thumb and fingers. The robber took the envelope from D., the latter insisting that the money should be counted. But the robber replied that "it was no time to count money," and the two men then rode off. Robbins testifies that the money in the envelope amounted to \$2,500, and was in five, ten, and twenty dollar bills. The proof was not disputed

that Jim Smith, the party in whose behalf the robbers had interested themselves, was then living in the state of Colorado; that he entertained no ill will towards Dimmitt; that he had written no such letter to Joe Sterling as that mentioned by Robbins; that he never authorized any one to demand \$5,000 from Dimmitt. It was also proven by Sterling that he had never told Robbins that he had received such letter. From the testimony of Dimmitt it appears that he did not want to camp at the place. He desired to stop at the house a mile or two from there, occupied by Blalock. This, he states, was opposed by Robbins. When they reached the camp ground D. insisted on going on to Youngsfort, about four miles distant, but Robbins urged that they should camp there. This is denied by Robbins. The thirteenth, fourteenth, and fifteenth assignments present for our consideration the sufficiency of the foregoing facts to support the judgment in this cause.

In cases of this character, where suit is brought for money loaned and advanced, there should be no reasonable doubt arising from the testimony as to the amount of the defendant's indebtedness. The burden of establishing this fact the law casts upon the plaintiff, and it should be made to appear by such evidence as is reasonably sufficient to satisfy the mind. In other words, we do not think the mind should be left in perplexity and doubt as to what sum, if any, was, as claimed by the plaintiff, advanced for the benefit or at the instance and request of the defendant, and actually received by him. The only evidence of what amount was in the envelope is that of Robbins. He states that it contained \$2,688.28, the sum he had received at Austin. He states that before starting for Georgetown he paid Dimmitt out of it \$150. This would leave \$2,538.28. It is not controverted that he also paid the firm of Rucker & Hodges, to whom he seems to have been indebted, on the same morning before starting, the sum of \$55. Still Robbins says there was \$2,500, exactly, in the envelope, which could not have been so unless he paid Rucker & Hodges out of some other money, which is not shown by the evidence. On the contrary, he says this was all the money he had with him. Robbins might have recovered a less amount than that sued for, or than was contained in the envelope; but this does not affect the question of the sufficiency of the evidence to establish the fact that he had advanced the sum of \$2,500 to Dimmitt. This was a material fact to be established. Robbins' evidence shows that the amount he claimed to have advanced was never ascertained. It was not counted when demanded by Dimmitt. Although he states that D. said there was \$2,500 in the envelope, he admits that D. could not have known that fact, and did not believe or accept it as containing that sum. There should be some evidence tending to show that D. knew, or had the opportunity

of knowing, what was the character and amount of the obligation he had contracted. If the verdict could be sustained otherwise, we do not think it is supported by any evidence satisfactorily showing that the sum of \$2,500 was loaned by the plaintiff to the defendant Dimmitt at the latter's request. Independently of this, we think that the verdict is manifestly against the great weight of the testimony, in this: that the entire evidence shows a knowledge of and participation in the restraint by appellee exercised upon Dimmitt which rendered void any contract or obligation such as is contended for in this case entered into by Dimmitt with appellee. The evidence is wholly inconsistent with any other conclusion, and we are of opinion that because the evidence does not support the judgment the cause should be reversed and remanded.

ACKER, P. J., not sitting in this case.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment reversed, and cause remanded.

#### STATE *ex rel.* CLEMENTS v. HUMPHREYS.

(*Supreme Court of Texas. June 25, 1889.*)

OFFICE AND OFFICER—ELECTION—BRIBERY.

1. Under Const. Tex. art. 16, §§ 1, 5, which provide that every officer, before assuming the duties of his office, shall take an oath that he has not given or offered any inducement to procure votes at his election, and that every person shall be disqualified from holding office upon conviction for such offense, merely holding out a promise, in case of his election, to serve for less compensation than the lawful fees, does not disqualify one from holding office, unless he had been actually convicted for such offense.

2. Nor does such promise disqualify him at common law, unless the number of voters influenced thereby is sufficient to change the result of the election.

Appeal from district court, Mills county. *Geo. Whitaker, Co. Atty., J. L. Lewis, and Dan H. Triplett, for appellants. Uvalde Burns and J. R. Cowles, for appellee.*

GAINES, J. This was an information in the nature of a *quo warranto*, filed in the name of the state upon the relation of P. H. Clements, for the purpose of ousting the appellee from the office of the clerk of the county court of Mills county. It was alleged and proved that at the general election, held in the county named on the 6th of November, 1888, relator, the respondent, and one J. A. Price were candidates for the office of county clerk, and that afterwards, on the 12th day of the same month, the commissioners' court of the county, sitting as a returning board, canvassed the returns and declared the result as follows: That relator had received 349 votes, respondent had received 367 votes, and that Price had received 92 votes. It was also alleged and proved that in order to influence the voters of the county in his favor, the respondent, before

the election, caused to be printed and circulated among them a document, a copy of which is as follows: "To the voters of Mills county: As I have been unable to make such a canvass as was necessary to inform you in person of my views on the question of *ex officio* services, I beg leave by this method to say that, if elected to the office of county clerk, I will serve for the fees of the office, and without *ex officio* pay. [Signed] M. C. HUMPHREYS." It was also alleged that 27 voters, whose names are given, were influenced by the promises contained in the circular to vote for respondent. The jury found the facts as alleged, except that they found that only six voters were influenced by the circular to vote for respondent, which was not a sufficient number to have changed the result. The court gave a judgment upon the verdict for respondent.

Does the fact that the respondent held out a promise to the voters of the county to serve, in case of election, for a less compensation than the lawful fees of the office, disqualify him for holding it? Section 1, art. 16, of our constitution, requires every officer, before he enters upon the duties of his office, to take an oath or affirmation which embraces the following language: "And I furthermore solemnly swear (or affirm) that I have not directly nor indirectly paid, offered, or promised to pay, contributed, nor promised to contribute, any money or valuable thing, or promised any office or employment, as a reward for the giving or withholding a vote at the election at which I was elected." It may be that an offer by a candidate for county clerk to remit, in case of his election, his fees for *ex officio* services, should be deemed an offer to contribute to each taxpayer his proportion of the taxes necessary to raise the sum so remitted. In *Carrothers v. Russell* 53 Iowa, 346, 6 N. W. Rep. 499, the supreme court of Iowa held such a promise virtually an offer to bribe the voters, and it seems to be within the spirit, if not the letter, of the constitutional provision above quoted. But it does not follow that, in the absence of some other constitutional or statutory provision, that a candidate who has made such promise, and has received the highest number of votes, and has taken the required oath, can be removed from office, by the mere proof of the fact in the proceeding in which he is sought to be ousted. The case of *Com. v. Jones*, 10 Bush, 725, is an authority bearing upon the question. The constitution of Kentucky requires every person before accepting office to take an oath that he has not fought a duel, or sent or accepted a challenge to fight a duel. In this respect the oath is practically the same as that required by our constitution. Like ours, that constitution also contained the further provision, which declared that any one who had fought a duel, or sent or accepted a challenge, should be disqualified from holding office. In the case cited, it was held that a party who had been elected

to an office, and had qualified by taking the prescribed oath, could not be deprived of his office until he had been legally convicted of the offense of having sent a challenge, in a proper criminal proceeding, upon an indictment charging him with that offense. From the rule so established, it would follow that if section 1, art 16, stood as the only provision upon this subject, and if it should be construed to embrace within its terms the act complained of in this proceeding, the respondent could not be deprived of his office upon this ground until he had been lawfully indicted and convicted of the offense. But we need not go so far. The constitution has another provision upon this matter. Section 5 of the article already cited provides that "every person shall be disqualified from holding any office of profit or trust in this state, who shall have been convicted of having given or offered a bribe to procure his election or appointment." If, therefore, it should be held that the act of the respondent was, within the meaning of the law, an offer to bribe the voters, it follows, from the section quoted, that he could not be deprived of the office until he had been convicted of the offense in a court of competent jurisdiction, and in a proceeding instituted and prosecuted according to the provisions of our Code of Criminal Procedure. We conclude that our constitution does not warrant the removal of the respondent from office for the act charged against him in a proceeding of this character, before a legal conviction of the offense.

We come, then, to the question whether or not the election in this case should be held void at common law. In *Greenhood on Public Policy* (page 341) it is said: "So far has the doctrine which prohibits anything that might influence the selection of public officers from other considerations than that of personal merit been carried that an election secured by a promise on the part of a candidate to perform the duties of the office to which he aspires, if elected, for less than the legal fees or salary, is void." The same doctrine is recognized in *McCrary on Elections*. See 3d Ed. § 181. If the learned authors mean to assert that an election so procured is void without reference to the question whether or not a sufficient number of voters were induced, by the promise, to vote for the successful candidate, to have changed the result, they are not supported by the authorities which they cite. In *Carrothers v. Russell*, supra, the Iowa court held that a promise by a candidate to pay into the treasury, if elected, all the fees of his office in excess of \$1,000, rendered him ineligible; but the decision is expressly based upon the provisions of a statute of that state. In *State v. Purdy*, 36 Wis. 213, it was decided merely that the votes which were procured by a similar promise should be rejected. To the same effect was *State v. Olin*, 23 Wis. 327. In *State v. Collier*, 72 Mo. 13, the information charged that a like provision had been made,

and that a sufficient number of votes had been influenced thereby to change the result. The court held that a demurrer to the information was improperly sustained, but it did not hold either that the election was void, or that the candidate was disqualified. In *Tucker v. Aiken*, 7 N. H. 118, the selectmen of a town had put up the office of collector of taxes to the lowest bidder, and his right to the office was collaterally brought into question in the suit. It was held that the question could not be determined in a collateral proceeding. In *Hall v. Gavitt*, 18 Ind. 390, it was decided that the sale by a sheriff of the office of deputy was void; and that a bond given as a part of the bargain, by the deputy to the sheriff for the faithful performance of his duties, was also void. There are some other cases cited, but these approach more nearly the question; and it is clear that none of them hold that an election procured by a promise such as is alleged in the information in this case is void, or that in the absence of a written law the incumbent so elected can be ousted for that reason alone. We are constrained therefore to hold that neither under our constitution, nor by the common law, can the respondent be deprived of the office he holds, under the allegations and proof made in this case.

In so deciding we declare what we think the law to be, and not what we think it ought to be. It is a matter for the legislature to fix the fees and emoluments of all officers, to the end that honest, capable, and efficient persons may aspire to and be chosen to fill them. To permit a candidate, in order to influence the voters, to hold out a promise that he will serve in case of election for less than the fees or salary fixed by law, is to thwart the will of the legislature, and to defeat the object of the law. It is unjust to honest aspirants who rely upon their merits for political preferment, and tends to degrade the public service by making the offices not the reward of official capacity and honorable conduct, but the prey of those who, by reason of incapacity to earn a livelihood in the common pursuits of life, are willing to undertake the duties of public service for a less sum than the legislature has deemed an adequate compensation for the work. It puts up the offices of the state to the lowest bidder, and conduces to influence the voters to lose sight of the personal fitness of the respective candidates, and to be governed by considerations of a false economy. It is a gratifying consideration that this practice has been of such infrequent occurrence in our state that the legislature has not felt called upon to pass a statute in aid of the constitution more effectually to remedy the evil. Since the constitution only executes itself in so far as it appeals to the conscience of the candidate, and subjects him to the chances of an indictment for perjury by requiring of him an official oath, it would seem that additional legislation upon this matter is called for, to the extent at least of making the is-

suing of a circular such as is shown in this case to be disqualification to hold the office to which the candidate aspires.

Since it appears by the verdict of the jury in the case before us that only six voters were influenced by the circular in question to vote for respondent,—not enough to have changed the result,—it is unnecessary for us to decide whether such votes should have been rejected or not. Some of the authorities heretofore cited hold that they should be rejected. But it occurs to us that it may be a dangerous rule, which, in any case, permits one or more voters to change the result of an election by testifying to a matter which rests solely in their own breasts, and which from its very nature hardly admits of any rebutting proof. But we give no opinion upon the question. What we have said in condemnation of the practice resorted to by the respondent in the election is not aimed at at him personally. His motives may have been conscientious, and for what he conceived to be for the public good. That the voters of the county so regarded them, is indicated by the fact that a plurality, uninfluenced by his circular, gave him their suffrage.

There is an assignment of error predicated upon the court's ruling on an exception to the answer, but we think it not well taken. There is no error in the judgment, and it is affirmed.

#### NATIONAL BANK OF JEFFERSON v. TEXAS INVESTMENT Co. *et al.*

(Supreme Court of Texas. June 21, 1889.)

#### EQUITY PLEADING—INCORPORATION—LIABILITY OF DIRECTORS—DEBT.

1. In an action on a corporation note, indorsed by its members, and subsequently indorsed by one of the partners of the firm to which it was payable, in his own name, and that of another firm to plaintiff, a petition which alleges that the note was a corporate act, and made by a *de facto* corporation, and attaches a copy of the articles of incorporation, making them part of the petition, and asks judgment either against the members of the company as partners or against the company as such, if legally incorporated, and also alleges that after the debt was created a new corporation was formed, and that the old company, being insolvent, transferred its assets to the new, which assumed all its liabilities, but that the assets were not applied to the payment of its debts, although held in trust for that purpose, but diverted by the managers and directors of the new company to other objects, and seeks to recover against the trust company, and also against the managers for misapplication of the assets, and others who received and appropriated a portion thereof, is not multifarious, and the causes of action as against all the parties were properly joined in one suit.

2. A corporation formed for "buying, selling, and dealing in real estate, live-stock, bonds, securities, and other properties of all kinds, on its own account and for commission," may be incorporated under Rev. St. Tex. art. 666, providing that a corporation may be created for the purposes therein enumerated, and (subdivision 27) "for any other purpose intended for mutual profit or benefit not otherwise specially provided for," and consistent with the constitution and laws of the state.

3. There is no provision in the Texas statutes making the incorporation of a company dependent



upon the subscription to its stock and payment therefor. Rev. St. art. 570, expressly declares that its existence shall date from the filing of its charter in the office of the secretary of state, which is required by article 567 to state only the amount of the capital stock, and the number of shares into which it is divided.

4. Where a demurrer to the petition is sustained and the petition is amended and a verdict is subsequently rendered in favor of plaintiff, as prayed for, the ruling of the court upon the demurrer, if error, becomes thereby immaterial.

5. The directors of a company, holding property of an insolvent company in trust, who misapply such assets, are individually liable to the creditors of the insolvent company to the extent of the assets so misapplied.

6. Allegations that the insolvent company owned the property of a publishing company, and transferred it in trust to another company for benefit of creditors, which company issued certain stock to certain persons to enable them to become directors of the publishing company, who issued bonds of the publishing company which were pledged to and sold by one of the defendant banks, show no liability of the bank to plaintiff or the creditors of the insolvent corporation.

7. Where the petition alleged that the insolvent corporation transferred its assets to another company, which agreed to pay its debts; that among the assets were 238 shares of corporate stock in a cattle company, which certain defendants had acquired with full notice of the facts; that by reason thereof said defendants were trustees for the creditors of the insolvent corporation; but had transferred the stock and misapplied the proceeds, —a demurrer thereto was improperly sustained.

8. Where the capital stock of a corporation is not paid, but directors represent that it is fully paid up, and plaintiff, relying on such representation, purchased the note of such corporation, the liability of the directors must be determined in an action of deceit, and they cannot be joined as defendants in an action to recover of the makers and indorsers of the note and others liable for its payment.

Appeal from district court, Tarrant county.

*Assumpsit* by the National Bank of Jefferson against the Texas Investment Company, Limited, W. A. Garner, B. B. Paddock, George B. Loving, Fore, Morphy & Henderson, a firm composed of Walker Fore, W. J. Morphy, and R. M. Henderson, J. W. Dabbs & Co., a firm composed of J. W. Dabbs, A. A. Henderson, R. M. Henderson, and Samuel T. Tomlinson, upon a promissory note. Several demurrers were interposed and a plea of *non est factum*. From a judgment for some of the defendants plaintiff appeals.

*Carter & Wynne*, for appellant. *Hunter & Stewart, Ball & McCart*, and *Hogsett & Greene*, for appellees.

**GAINES, J.** This suit is founded upon a promissory note for \$10,000, executed by the Texas Investment Company through its general manager, and payable to the firm of Fore, Morphy & Henderson. The note was indorsed by W. A. Garner, B. B. Paddock, and George B. Loving, and delivered to the payees, and was subsequently indorsed by the latter and by R. M. Henderson, both in his own name and that of J. W. Dabbs & Co., and was delivered to plaintiff. The petition shows that in executing the note the maker, the Texas Investment Company, acted as a corporation; but it is averred that in fact

the company was not legally incorporated—*First*, because its charter filed under the general law is not such as was authorized by the statute; and, *second*, because the capital stock was never subscribed and paid for. The petition, therefore, sought a recovery against the members composing the company, as being merely partners in the enterprise, and individually liable for the debts of the concern. A copy of the articles of the incorporation are, however, annexed to the petition, and made a part of it, and it is prayed in the alternative that in the event that it should be held that the company was legally incorporated, the plaintiff have judgment against it as such. It is also averred in the petition that, after the debt sued upon was created, a new corporation was attempted to be formed, known as the "Texas Investment Company, Limited;" that the old company, being insolvent, transferred all its assets to the new; and that in consideration of such transfer the Texas Investment Company, Limited, assumed and promised to pay all the liabilities of the former company. It is also averred that the assets of the old company were not applied to the payment of its debts, but were diverted by the managers and directors of the new company to other objects. It is claimed in the petition that by reason of the facts so averred the new company held the assets of the old in trust for the payment of the debts of the latter, and on that ground a recovery is sought, not only against the new company on its *assumpsit*, but also against its directors for the misapplication of these assets, and against sundry individuals and incorporations who are alleged to have received and appropriated portions of the assets, having knowledge of the trust.

This brief statement of the case suggests several difficult questions which lie at the foundation of the action against several of the defendants, but we will first consider certain exceptions interposed to the petition by defendants on the grounds of multifariousness and inconsistency of allegation. Is the petition multifarious? "Multifariousness in equity pleading is the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill." Whart. Law Dict. The suit here, in the main, is for the recovery of one debt only, and a judgment is sought against several parties, who have, as is alleged, made themselves successively liable for its payment. It is true, as urged by counsel for appellees, that numerous issues are presented, and that the labors of the court in disposing of the litigation are thereby greatly increased. We do not understand that this is an objection which can be successfully urged under our system of practice. From an early day our



courts have encouraged the bringing of all parties interested in the subject-matter of a litigation before the court, and determining their rights in one action. *Clegg v. Varnell*, 18 Tex. 294. We are of opinion, therefore, that as to the maker and the indorsers of the note, the Texas Investment Company, Limited, the directors of that company, and all parties who are alleged to have participated in the misapplication of the funds of the old company with a knowledge of the facts, the causes of action were properly joined in one suit. So far the suit is to collect a debt, and to hold liable for its payment those who have converted property held in trust for its security. But, on the other hand, we think that so much of the petition as seeks a recovery against the directors of the old corporation, on the ground that they were falsely and fraudulently held out to the public; that the capital stock of the corporation had been fully paid; and that thereby plaintiff was induced to discount the note sued on,—presents a distinct cause of action. It is not a suit to collect the debt, but to recover damages for having been wrongfully induced to purchase the obligation. This matter will be again referred to in another part of this opinion. We are also of opinion that it is permissible for a plaintiff in our courts to state the facts upon which he relies for a recovery, and to pray for alternative relief. [In this case the plaintiff alleges the manner in which the Texas Investment Company was organized, and claims as a matter of law that the attempted incorporation was not in compliance with the statute, and that therefore it remained a mere partnership, and prays for judgment against its stockholders as individuals.] But the petitioner prays that in the event that it is mistaken in its legal conclusion, then that it have judgment against the company as a corporation. The pleader must state the issuable facts upon which he relies for a recovery. It being the duty of the court to draw the legal conclusion, he is not bound by his averment of the law deducible from the facts as pleaded by him. This case is distinguishable from that of *Oglesby's Sureties v. State*, 11 S. W. Rep. 873, (decided at the present term.) That was an action upon two successive bonds of a tax collector with different sureties, and the petition alleged that there had been a default upon either the one or the other bond, but did not allege an unconditional default upon either. It was there held that the pleading was bad, and that, there being no privity between the sureties upon the two bonds, the two causes of action should not have been joined. The petition did not aver the facts which showed the unconditional liability of the obligors on either bond. It did not allege that the default had occurred either during the first or the second term of office, but did aver that there had been a default, and that if it did not occur during the one term it occurred during the other. The pleading failed to allege positively and directly the facts upon which a recovery was

sought, and in that respect was essentially different from the case now before us.

This brings us to the question whether the Texas Investment Company was legally incorporated or not. The copies of its charter and amended charter, which are made a part of the petition, show that they were duly filed in the office of the secretary of state. At the time the note sued on was executed the company was acting under the amended charter, which stated the purpose of its organization as follows: "This corporation is formed for the purpose of buying, selling, and dealing in real estate, live-stock, bonds, securities, and other properties of all kinds, on its own account and for commission, in the United States and elsewhere." This charter was filed in the office of the secretary of state on the 18th day of May, 1883. At that time the original article 566 of the Revised Statutes, which defined the purposes for which corporations could be formed under title 20, was in force. That article, after enumerating 26 special purposes for which corporations could be organized, contained a twenty-seventh subdivision, which read as follows: "For any other purpose intended for mutual profit or benefit not otherwise specially provided for, and not inconsistent with the constitution and laws of this state." It seems to us that the provision is sufficiently comprehensive to embrace the purpose designated in the charter of the company. It was evidently intended that the business of this corporation was to be carried on for the mutual profit and benefit of its shareholders, and we know of no provision of the constitution which prohibits the formation of a corporation for the purpose named. It is not inconsistent with any law of the state then existing, unless it be some provision of the same article of the Revised Statutes. We find no inconsistency between the purpose expressed in the charter and the special purposes provided for in the previous subdivision of that article. It cannot be claimed that all purposes for which a corporation could be formed were designated in the first 26 subdivisions. We must presume that the language of the twenty-seventh subdivision was intended to mean something, and we think it should be construed to mean what it says, and to authorize a corporation for carrying on any business intended for profit which was not expressly or impliedly prohibited by the constitution or some other law. The evident intent was to attract capital and to encourage its combination for the pursuit of any lawful business. Counsel for appellant cite the case of *Navigation Co. v. Galveston Co.*, 45 Tex. 272, in opposition to the view we have expressed. We confess that to our minds the principle upon which that case was decided does not very clearly appear in the opinion. We understand, however, that it is held that since "canals, for the purpose of irrigation and manufacturing purposes," were mentioned in the next preceding section of the article, it indicated an in-

tention that a corporation should not be formed for the construction and operation of a canal for the purpose of navigation. If, as some expressions in the opinion would seem to indicate, it was intended to hold that corporations could not be organized except for the special objects mentioned, and hence that section 27 meant nothing, we should feel constrained to withhold our assent to the doctrine.

But it is also insisted that the company was never legally incorporated, because the capital stock was not subscribed and paid for by the promoters of the enterprise. That the legislature contemplated that corporations organized under the statute under consideration should be conducted as stock companies, having their capital stock divided into shares, we think there can be no doubt. The law requires that the articles of incorporation shall show "the amount of \* \* \* capital stock, if any, and the number of shares into which it is divided." Rev. St. art. 567. See, also, article 590 et seq. Article 591 provides that the stock subscribed for shall be paid in such manner and in such installments as the board of directors may order. But we find no provision in the law making the existence of the corporation dependent upon the subscription to its stock or the payments therefor. On the contrary, it is expressly provided that "the existence of the corporation shall date from the filing of the charter in the office of the secretary of state." Rev. St. art. 570. It follows, we think, that when the company filed its articles of incorporation with the secretary of state it became a corporation in law, and that the owners of the stock and the managers of its business cannot be held liable as partners for debts contracted by it. This ruling is supported by authority. *Powder Co. v. Sinsheimer*, 46 Md. 315; *Society Perun v. Cleveland*, 43 Ohio St. 481, 8 N.E. Rep. 357; *Bank v. Almy*, 117 Mass. 476. It may be doubted whether the plaintiff is in a position to question the existence of the corporation, if in fact it did not legally exist. Its allegations show that in discounting the note sued on it relied upon the representation that it was a corporation with a paid-up capital of \$100,000. But that question we need not determine.

We come next to the question of the effect of the alleged transfer of the property of the Texas Investment Company to the new corporation, known as the "Texas Investment Company, Limited." It is alleged that the former company, being insolvent, transferred to the latter all its property, the latter agreeing, in consideration of the transfer, to pay the former's debts. That by such an agreement the Texas Investment Company, Limited, became bound to pay the debt of plaintiff, there can be no doubt. According to the rule in American courts, where one person for a valuable consideration agrees to pay a sum due from the second to the third, the third party can sue directly upon the promise. 2 Whart. Cont. § 785 et seq.

But did the latter corporation take the property of the former, charged with a trust in favor of the former's creditors? In support of the affirmative of the proposition we are cited to the case of *Wallis v. Beauchamp*, 15 Tex. 304. There a father conveyed to his son certain property, upon consideration of the latter's promise to support his father and mother and pay his father's just debts. It was held a trust existed upon the property conveyed in favor of the father's creditors. While this may be good law as applied to the facts of that case, we do not think it can be affirmed as a general principle that when a party purchases personal property of another, and in consideration of the sale agrees to pay the latter's debts, a trust exists upon the property in favor of the creditor in the absence of an agreement to that effect. The doctrine is, however, reasserted in the case of *Montgomery v. Culton*, 18 Tex. 736. That was a case in which the holder of an allowed and approved claim against an estate brought suit against the heir, who had received the property at the hands of the executor, and had promised to hold him harmless against the debts of the estate. This statement is sufficient to show that the question was not necessarily involved in that case. But this is a case of a transfer by an insolvent corporation of all its property to another, which assumes to pay its debts. In *Sawyer v. Hoag*, 17 Wall. 620, Mr. Justice MILLER says: "Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation; and when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen. The principle is fully asserted in two recent cases in this court, namely, *Burke v. Smith*, 16 Wall. 390, and in *New Albany v. Burke*, 11 Wall. 96." In *Sanger v. Upton*, 91 U. S. 60, Mr. Justice SWAYNE uses this language: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration, and without notice. It is publicly pledged to those who deal with the corporation for their security. Unpaid stock is as much a part of the pledge and as much a part of the assets of the com-

pany as the cash which has been paid in upon it." To the same effect are the following cases: *Clapp v. Peterson*, 104 Ill. 26; *Hastings v. Drew*, 76 N. Y. 9; *Bartlett v. Drew*, 57 N. Y. 587; *Gill v. Balis*, 72 Mo. 424. In the cases from which we have quoted, and in many of those cited, the effect was to recover of stockholders unpaid subscriptions upon stock or to recover property which had been withdrawn by stockholders in exchange for stock already paid. It cannot be claimed that the creditors have any lien upon the property of a solvent corporation which it disposes of in the usual course of its business; but when one corporation transfers all its assets to another corporation, and thus practically ceases to exist, without having paid its debts, the latter corporation takes the property subject to a lien in favor of the creditors of the old company. This doctrine is distinctly asserted in *1 Jones, Liens*, § 85 et seq., and is supported by the following cases: *Brum v. Insurance Co.*, 16 Fed. Rep. 140; *Insurance Co. v. Transportation Co.*, 13 Fed. Rep. 516; *Harrison v. Railway Co.*, Id. 522; *Heman v. Britton*, 88 Mo. 549; *Blair v. Railway Co.*, 24 Fed. Rep. 148; *Fogg v. Railroad Co.*, 17 Fed. Rep. 871. The principle seems to have been recognized, in part at least, in the old English case of *Curson v. African Co.*, 1 Vern. 121, which is similar to the case under consideration. There a corporation, known as the "Old African Company," became insolvent, being indebted to plaintiff. A new African company was formed for the purpose of carrying on the same business pursued by the old. The old corporation, without being formally dissolved, transferred its assets to the new, the latter agreeing to apply the purchase money to the debts of the former. The suit was by a creditor against the new company only, and a question was raised whether or not the old company should not have been made a party. An agreed decree was rendered in favor of the plaintiff, and it seems not to have been questioned but that for want of proper parties the suit was properly brought. When it is remembered that by the rule of decision in the English courts a third party, for whose benefit a contract has been made by two others, and to which he has not agreed, cannot sue alone for it either at law or equity, it will be seen that the case recognizes the existence of a trust. See *Pol. Cont.* 200 et seq.; also, *In re Engineering Co.*, L. R. 16 Ch. Div. 125.

We next proceed to apply the principles announced to the assignments of error in the order in which they are presented in appellant's brief. We will dispose of the questions separately, as presented in the propositions under the assignments. First it is insisted that the court erred in sustaining the demurrer of the Texas Investment Company, Limited. It appears, however, that after the demurrer was sustained to the plaintiff's petition it filed a trial amendment, alleging that that company was duly incorporated;

and it also appears that upon this amendment a final judgment was given against it. Consequently the ruling of the court in this particular could not have operated to the prejudice of appellant. It is next complained that the court erred in sustaining the demurrers of the Traders' National Bank and of H. C. Edrington. In so far we think the assignment is well taken. The petition averred that the Texas Investment Company, being insolvent, transferred its assets to the Texas Investment Company, Limited; that, in consideration thereof, the latter agreed to pay the debts of the former; that among the assets so transferred were 228 shares of the capital stock of the New Mexico Land & Cattle Company, and that the Traders' National Bank and Edrington, with a full knowledge of the facts, had possessed themselves of said property, and that it had been pledged to the bank for borrowed money; that by reason of the premises the bank had made itself a trustee of the stock for the benefit of the creditors of the Texas Investment Company; and that with the assistance of Edrington it had made some kind of transfer of the stock without applying the proceeds to the purposes of the trust. It follows from what we have heretofore said that if these facts be true Edrington and the bank have made themselves liable to account to the creditors of the Texas Investment Company for the value of the shares so appropriated.

As to the City National Bank, we think the demurrer was properly sustained. It is alleged that the Texas Investment Company became the owner of the property of the Fort Worth Publishing Company, and that this was transferred to the Texas Investment Company, Limited; that the latter company caused shares of stock to be issued to certain persons to enable them to become directors of the publishing company, and had them elected as such directors; that the directors so elected issued bonds of the last-named company, which were pledged to the City National Bank; and that the bank caused the mortgaged property to be sold in satisfaction of the indebtedness for which they were so pledged. We do not think these allegations show any liability of the bank to this plaintiff, or to other creditors of the Texas Investment Company.

We are of opinion that if, as alleged, the directors of the Texas Investment Company, Limited, misapplied the assets conveyed to it by the old company, they rendered themselves individually liable to the creditors of the latter to the extent of the assets so misapplied. It follows that the demurrer should not have been sustained as to Boaz, Martin, Brown, and Huffman. We also think that the court erred in sustaining the defendant Britton's third, fourth, and sixth exceptions to the petition. The fifth, we think, was properly sustained. We have already determined that the Texas Investment Company was legally incorporated by its amended charter filed May 18, 1883, in the office

of the secretary of state. It follows that the court did not err in charging that the members of that company were not personally liable for its debts. Nor did the court err in refusing to charge the jury that the charter of the Texas Investment Company, Limited, was insufficient to create a private corporation under the laws of Texas. The plaintiff, after a demurrer was sustained to its third amended original petition, filed a trial amendment, in which it was distinctly alleged that that company was legally incorporated. Under this pleading it would have been clearly erroneous to have given the charge. By the trial amendment the plaintiff abandoned all its previous allegations by which it sought to charge as partners the persons composing the company. If it desired to revise the court's ruling upon the sufficiency of the allegations to hold them individually liable for the company's debt, the plaintiff should have stood upon its pleadings, and excepted to the ruling of the court. Its trial amendment was in effect the voluntary abandonment of all previous pleadings inconsistent therewith.

The last assignment presented in appellant's brief is that the court erred in refusing to give the following instruction: "You are instructed that persons cannot enter into or form a corporation, and go forward and do business, unless they have in good faith subscribed the amount of the capital provided for by their charter. In this case the capital provided for by the charter of the Texas Investment Company was one hundred thousand dollars, and before said parties, who composed said firm, could lawfully do business, the said capital should have been subscribed in good faith; and if you believe that said capital was not so subscribed, then you are instructed that the persons who composed said company had no authority to pretend to act as a corporation; and if you believe from the evidence that said George B. Loving, A. M. Britton, B. B. Paddock, J. W. Zook, Jerome Harris, and W. A. Garner, or either of them, on the 25th day of July, 1888, at the time of the execution of the note sued upon, so held themselves out as being stockholders in and possessed of franchises for the corporation known as the 'Texas Investment Company,' with a paid-up capital stock of \$100,000, and so pretended to act as a corporation, executed the note sued upon, and that said capital stock had never in fact been subscribed, and no part thereof, and that said pretension upon the part of the said defendants was fraudulent, and intended to deceive the public; and if you further believe that it did deceive the said Fore, Morphy & Henderson, and the said plaintiff in this case, and induced the said Fore, Morphy & Henderson and the said plaintiff to accept the said note, —then you will find a verdict for plaintiff for the full amount of said note, interest, and attorneys' fees as against the said persons so connected with said company, and who so pretended to act for said company; and par-

ticipated in the purchase of said cattle, pretending that said company was a corporation with a paid-up capital of \$100,000."

We have already expressed the opinion that neither the subscription nor the payment of the capital stock of an association is essential to call into existence a corporation under our general laws. If the capital stock of the corporation was not paid, and if the directors held out to the world that it was operating upon a full-paid capital stock of \$100,000, and if plaintiff relied upon such representation when it purchased the note of the corporation, then it may be that the directors rendered themselves liable to respond in damages for any loss that was thereby occasioned; but, if so, they were liable in an action of deceit, sounding purely in damages, that is to say, not in an action for a breach of a contract, but in an action for fraudulent representations by which the plaintiff was induced to make the contract. This was a distinct cause of action, and should not, we think, have been joined in a suit to recover of the makers and indorsers of the note, and of others who had rendered themselves liable for its payment by misappropriating property upon which the holder of the obligation had a lien for its payment. In so far as a recovery was sought for the alleged fraud of the directors of the old corporation in representing that its capital had been previously paid, we think, as has been previously intimated, that the petition was subject to exception for multifariousness. It follows that appellant was not prejudiced by the refusal of the court to give the instruction requested. For the errors pointed out the judgment is reversed, and the cause remanded.

HENRY, J., did not sit.

#### HUNNICUTT v. STATE *ex rel.* WITT.

(Supreme Court of Texas. June 25, 1889.)

#### QUO WARRANTO—AGAINST OFFICERS—ELECTIONS—EVIDENCE.

1. An affidavit in an information in the nature of *quo warranto* to try title to an office, which is as direct and positive as the nature of the case permits in stating the facts on which the information is based, is not objectionable because not stating that those facts are true within the knowledge of the affiant, as the object of such an affidavit is simply to inform the judge by whose permission the information is filed, that the facts exist which make its filing proper, and not for use on the trial.

2. Where such an affidavit is first made before one officer, a second affidavit, made before another officer, and stating no new facts, and made because there might be a question as to authority of the first officer to administer the oath, is not objectionable as amended swearing.

3. Refusal to strike out a supplemental information, filed by the county attorney without the concurrence of the relator in the original information, which sets up no new cause of action, but simply makes the prayer for relief broader and more specific, is not reversible error, where it is not shown that it prejudiced defendant.

4. The filing of the supplemental information does not operate as an abandonment of the original, on the ground that the original was filed on relation, while the other was not.

5. Where it becomes necessary on the trial to

open certain ballot-boxes, the fact that others than those opened are produced in court by their proper custodian, and placed in view of the jury, is not prejudicial to defendant, and it is not error afterwards to refuse to permit him to show all the boxes in evidence in order to prove from the condition of some that those opened, and from which ballots were counted without objection, had not been securely kept, where no question had been raised as to the ballots in the boxes not opened.

6. Testimony that the officer appointed by the court to hold the election refused to act; that witness was selected by the voters present to preside; that the officer appointed by the court to preside administered to witness the proper oath; that witness then administered it to other officers of the election; that the election was fairly held; all legal ballots received and placed in a box, the identity of which is uncontroverted; and that such box was delivered to the proper officer,—sufficiently shows that the officers were legally selected and sworn, and that the election was fairly held.

7. In such a case, where the ballot-box comes from the proper custody, the ballots contained in it cannot be excluded from evidence until facts are proved which cast suspicion on them.

8. Where the information avers that there was a specified vote in a certain precinct, but there is a discrepancy between the tally-list and the return, it is proper to allow the ballot-box from that precinct, which is identified and free from suspicion, to be opened, and the ballots counted, though the declaration of the result of the vote in that precinct is not attacked.

9. Where the parties have agreed to a tabulated statement of the vote in such precinct, which statement is rendered certain by the count in court, it is proper to charge that they have so agreed, and to attach the statement to the charge, and the return, which conflicts with all other evidence, cannot be considered.

10. Defendant cannot object to the exclusion of testimony that a witness saw certain illegal voters vote for relator at a certain precinct, when defendant has declined to receive the ballot-box of that precinct in evidence, as the latter is better evidence than the former.

11. Where uncontradicted evidence shows a valid election in a certain precinct, it is not error to assume that such election was valid in the charge.

12. Where there is no evidence that a ballot-box used on the trial had not been securely kept, a charge with reference to its custody is properly refused.

13. In view of the evident intent of the statute that actions to try title to offices shall be speedily tried, it is not an abuse of discretion to advance such a cause on the docket, where there is no application to postpone it, and an application for continuance, based on the absence of witnesses, is not such as the law requires.

Appeal from district court, Dallas county.  
*Seay, Crosby & Lauderdale*, for appellant.  
*Kearby, McCoy & Hayter*, for appellee.

STAYTON, C. J. This proceeding was instituted by the county attorney for Dallas county on relation of John T. Witt, and is an information in the nature of *quo warranto* to test the right of appellant to the office of assessor of taxes. Appellant and relator were opposing candidates for the office at the last general election, and, a certificate of election having been issued to the former, the latter claims that this was wrongful, and that in fact he was elected to the office, his right to which he now seeks to establish. The information alleges that relator received seven votes more than were received by appellant, and that the votes at all the election precincts were correctly estimated by the county commissioners' court, except the vote cast at pre-

cinct 58, which, it is alleged, was not estimated at all, on account of defective returns. It is alleged that at that precinct relator received seven more votes than did his opponent; which, if true, elected him, if the votes of other precincts, as estimated, were legal votes. The value of the office was alleged to be \$5,000, and the uncontroverted evidence was that the office was worth from four to five thousand dollars. Appellant answered by exceptions, general and special, general denial, and specially averred that there was a failure to legally hold an election in precinct No. 58, irregularities in precincts numbered 4 and 5, and that designated persons not legal voters had voted for relator. The information was filed November 29, 1888, and the original answer on December 19th following. On January 8, 1889, the county attorney, at his own instance, filed a supplemental information, in which he alleged that certain votes cast for appellant were illegal, and that the commissioners' court had not made a proper count of the votes cast at precinct No. 52. Subsequently appellant filed a supplemental answer, which contained general and special exceptions and a general denial, and on March 11th filed a motion to strike out the supplemental information. The grounds of this motion were that the supplement was not filed on relation, but solely at the instance of the county attorney; that it set up new matter, and was in effect a new proceeding. On March 12th appellant filed a motion to dismiss the original information, on the ground of supposed conflicts between that and the supplement as to parties and subject-matter, and on the further ground that the filing of the supplement was an abandonment of the original information. These motions were overruled. The original information was sworn to by the relator before the county attorney, and, on presentation to the district judge, was by him directed to be filed. The relation and information, afterwards filed, were again sworn to by the relator before the clerk of the district court. On December 28, 1888, this cause was called in the lower court, and by the court set down for trial, January 15, 1889, over the objections and exceptions of the respondent. On January 16, 1889, the cause was called for trial, and respondent made his application for continuance, which the court overruled, and again set the case for trial, January 28, 1889, over the objections and exceptions of respondent to both actions of the court. On the 29th of January, 1889, the cause was again called for trial, and the court again set it down for trial, February 18, 1889. On February 18, 1889, the court again called the cause for trial, and again postponed and set the case for trial, March 11, 1889, the first day of next term. When called on March 11th, another application for continuance, based on the absence of witnesses, and denying the right of the court to take the case up out of its order, was filed and overruled. The application on account of the absence of wit-

nesses was not such as the statute requires on second application, and in view of the character of the proceeding, and the evident intent of the statute that such cases shall be speedily tried, we cannot say that the court abused its discretion in placing the case in advance of the 550 civil cases preceding it on the docket. There was no application to postpone the case until some later day of the term, when the witnesses resident in the county might have been had by the exercise of that diligence and process which appellant might have used, and to have refused to try the case out of its order would probably have defeated the purpose of the proceeding, and have enabled appellant to hold the office without right for the full term.

It is urged that the affidavit of the relator could not be made before the county attorney, that it could not be made after the proceeding was instituted, and that it was insufficient in that it did not state that the facts alleged were positively true within the knowledge of the affiant. Such relations or informations should be sworn to. Although this is not made necessary by the terms of the statute, it has been the practice under similar statutes. If, as seems to be true, the purpose of the affidavit is to give to the judge, whose permission to file the information must be had, reasonable assurance that facts exist which make its filing necessary or proper, then it ought to be held, where such consent is given, that no further inquiry as to the service of his information could be made. The filing of the information establishes no facts on which the merit of the controversy rests; these must be established by evidence on final trial. The state's officer might file his information without relation, and in that case it would seem that his official statement, unsworn, would be sufficient to authorize a judge to direct an information to be filed. If the purpose of the affidavit was not that stated, then the second affidavit would not be subject to the objection to amended swearing, for it states no additional facts, and was made in view of the fact that there might be a question as to the authority of the county attorney to administer the oath in the first instance. The facts on which the information was based could not be known to the relator to be positively true, for, as the record manifests, it became necessary to open some of the ballot-boxes and count the votes in order to ascertain what the true result of the election was. The relator's affidavit was as direct and positive as in the nature of things he could conscientiously make it, and for the purpose for which the affidavit is required we are of opinion was sufficient.

The office was alleged to be of the value of \$5,000, and there can be no question of the jurisdiction of the court below under the averments. *State v. Owens*, 63 Tex. 261; *McAllen v. Rhodes*, 65 Tex. 351. There was no plea that the averment was fraudulently made for the purpose of giving the court jurisdiction.

It is urged that the court erred in refusing to strike from the file what is termed the "supplemental information," because it was not made on relation, as was the original. It was the right of the state, at any time after the information was filed, with or without the concurrence of the relator, by amended or supplementary pleadings, to allege any fact bearing on the question of respondent's right to hold the office, and no new cause of action was set up, though the prayer for relief may have been more specific, and even broader, than was the prayer in the original information. Some of the matters set up in the pleading termed "supplemental" were such as would have been proper in an amendment, but others were in reply to the answer, and proper in a supplementary information, and under this state of facts the court below did not err in overruling appellant's exception referred to in the thirteenth additional assignment. At most, the manner of pleading was but an irregularity not affecting the merits of the controversy, and if the court below erred in this respect this would not furnish sufficient ground for reversal of the judgment, where it is not shown that it in any manner operated injuriously to appellant.

It is claimed that the filing of the supplemental information operated as an abandonment of the original, upon the theory that the latter was filed upon relation, and the former not. We do not see that any such result follows from the facts, and there is nothing to show any intention to abandon the original information.

During the trial it became necessary to open some of the ballot-boxes, only nine of which, however, were opened, and when these were brought into court by the county clerk, their proper custodian, he brought fourteen others, and all were placed on a table in the court room, but neither the latter nor their contents were introduced in evidence, and it is now urged that it was error for the court to permit them thus to be exhibited to the jury. We do not see how this could have injured appellant, who further complains that the court erred in refusing subsequently to permit him to introduce before the jury all the boxes so brought into court, for the purpose of showing from the condition of some of the boxes that they had not been securely kept. No question was raised, by pleading or otherwise, as to the ballots in 14 of the boxes, some of which appear at some time to have contained ballots cast at some former election; and the fact that some of the 23 boxes, not opened, may not have been in such condition as would have authorized the ballots in them to be read, furnished no reason for their introduction for the purpose of showing that the boxes opened, and from which ballots were counted without objection, which were proved to have been properly deposited and securely kept, were not thus kept.

The controlling matter of controversy was as to the election held and vote cast at pre-

inct No. 58, and it is claimed that the court erred in permitting the ballots cast at that election precinct to be counted. The objections urged to the introduction of the ballots from that precinct were (1) that it had not been proved that the presiding and other officers at that precinct had been selected and sworn and the election held in accordance with the law; (2) that the ballot-box from that precinct had not been identified; (3) that it had not been proved "that the ballot-box has been preserved by the proper officers as required by law, and has not been exposed to the reach of unauthorized persons, so as to afford a reasonable possibility of not having been changed or tampered with." But one witness was introduced, who testified as to the selection and qualification of the officers, and manner in which the election was conducted. That person stated that the presiding officer, appointed by the commissioners' court, attended, but refused to act, whereupon the witness was selected as presiding officer by the voters present; that the officer appointed by the court to preside administered to him the proper oath; and that he administered to the other officers of the election the oath; that the election was fairly held at the place designated; he gave the names of the officers; that they received the votes of all qualified voters who appeared and offered to vote; made out returns of the election and tally-sheet, but did not sign them, intending to sign them afterwards, and was always willing to sign them; that the ballots were placed in a box, of the identity of which there is no controversy, and this delivered to the county clerk. This evidence shows that the officers of the election had been selected and sworn as the law prescribed, and that the election was fairly held; but if it had been shown that the selection of the officers was irregular, that they had not been sworn at all, but that the election was fairly held, we are not prepared to hold that the vote should not have been counted. "In the courts of the country the ruling has been uniform, and the validity of the acts of officers of election, who are such *de facto* only, so far as they affect third persons and the public, is nowhere questioned. The doctrine that whole communities of electors may be disfranchised for the time being, and a minority candidate forced into an office, because one or more of the judges of election have not been duly sworn, or were not duly chosen, or do not possess all the qualifications requisite for the office, finds no support in the decisions of our judicial tribunals." McCrary, Elect. § 216. This author here cites the cases bearing on this question.

Under the evidence, no controversy arose as to the identity of the box, nor the genuineness of the ballots it contained; nor was there evidence fairly tending to show, or even to raise suspicion, that it had been tampered with. It came from the proper custody, and was free from suspicion, and could not be excluded, even upon proof that it would have

been possible while in possession of the county clerk for some person to have tampered with it. Before papers coming from such a custody can be excluded, facts which throw suspicion upon them must be proved.

Neither party in their pleadings attacked the vote at precinct No. 56, known as the "Embree Precinct," and the amount of the information in regard to the vote cast at all precincts in the county to which no specific objection was made, was, in effect, that the votes therein had been correctly estimated by the county commissioners' court. To arrive at the true result of the election, with consent of both parties, in the absence of the jury, the return from all precincts except nine, the ballots of which were counted in the same manner, were estimated and agreed to be correctly estimated; but when it came to the Embree precinct there was a conflict between the poll and tally lists and the return, the former showing that relator had received thirteen votes at that precinct, and respondent nine, while the return showed that relator had received five votes, and the respondent nine. The commissioners' court gave to the relator, it seems, thirteen votes, and to respondent nine votes. In this state of the evidence the court directed the ballot-box from that precinct, which was identified and came free from suspicion, to be opened, and the ballots counted, and this gave to the relator twelve votes, and to respondent nine votes. The parties having agreed to the correct estimate on the returns and counting of ballots, and having made a tabulated statement thereof, on which appeared, for the Embree precinct, the vote for each party as ascertained by the count of ballots, the court instructed the jury to regard that, in so far, a correct estimate of the vote, and in the charge only submitted to the jury contested ballots, and special issues as to whether the votes of named persons, claimed by the one or the other to be illegal, were so or not, and for whom each of the persons named voted. It is claimed that the court erred in permitting the count of the ballots from the Embree precinct, on the ground that there was no pleading which authorized this; but we are of opinion that this proposition cannot be maintained, for the effect of the information was to aver that relator there received thirteen votes, and respondent nine, and, with the conflict of other evidence as to the true vote there received by each, the court properly permitted the ballots to be counted in order to ascertain what the truth was.

It is further urged that the court erred in instructing the jury that the parties had agreed to the count contained in the tabulated statement, which was attached to the charge, in so far as the vote from the Embree precinct was concerned. Unless the bill of exceptions is incorrect, such an agreement was made, and the court did not err in so instructing the jury. It was contended by appellant that the ballots from that precinct should not be counted, and that the return alone



should be looked to, to determine the vote of that precinct, and he never did agree to the contrary; but he did not at any time deny that the true count of the ballots showed the vote to be as stated in the tabulated statement. His contention was that he was entitled to have the vote estimated from the return, which was in conflict with all other evidence, and he did steadily resist the manifestation of the true vote, which was rendered certain by the count of the ballots, which we have already said was correct, under the circumstances and the pleadings. There was no evidence which raised an issue of fact in reference to the validity of the election in that precinct, as to the identity of the ballot-box, or as to the fact of its delivery to the county clerk, and his preservation of it in the condition in which it was when he received it; and, if otherwise the charge would have been upon the weight of evidence, it was relieved from this by the agreement of the parties as to the true count made under the direction of the court.

The information alleged that J. S. or J. L. Crenshaw was an illegal voter, and voted for respondent, and it is urged that it was error to admit proof which showed that "T. L. Crenshaw" voted for respondent. The witness stated that his name was T. L. Crenshaw, but that he was called "Joe;" and it may be that the evidence was admissible, but whether so becomes unimportant, for the jury found that he was a legal voter, and voted for respondent.

It was alleged by respondent that John Cates and J. W. Morrison cast illegal votes for relator, in that they voted at a precinct other than the one in which they resided, and, for the purpose of proving that they voted at a box named, offered to introduce the evidence of a witness to the effect that he saw those persons make out and cast their ballots for relator. This evidence was excluded, but the bill of exceptions does not show what the objection to the evidence was; and, besides, the ballot-box of that precinct was tendered as better evidence thus accessible, but respondent declined to have it opened, and the ballots examined. Having declined the better evidence, if the objection really made was not tenable, respondent cannot complain. Like evidence was offered as to two other voters, and excluded, but the objection made to its introduction is not given, and it is probably true that the court was of the opinion that there was not such evidence of their non-residence in the precinct in which it was claimed they voted as to justify evidence of the fact that they voted for the one or the other; but, however this may be, it could not have changed the result had it been shown that they voted in a precinct other than that in which they resided, and for relator.

It is urged that the court erred in refusing to give a charge requested by appellant, in reference to the custody of the ballot-box from precinct No. 58, and further erred in

giving charges which assumed that the election there held was valid. There was no conflict in the evidence as to the manner in which the election was held, and that introduced showed a valid election, and it was not error to assume that fact. It would have been erroneous to have given a charge which would have authorized the jury to believe that there was an issue of fact as to the proper custody of the ballot-box, when there was no evidence tending to show that it had not been securely kept, all the evidence showing to the contrary.

The averments of the information as to the eligibility of relator were sufficient, and sustained by the evidence. The case seems to have been fairly tried, and the evidence shows that relator received a majority of the votes cast. The judgment will be affirmed.

### SANDERS *et al.* v. CITY NAT. BANK.

(Supreme Court of Texas. June 28, 1899.)

#### SERVICE OF SUMMONS—JUDGMENT.

1. Service on an indorser of a note alleged to be a resident of H. county, made in M. county by process directed to the sheriff of M. county, is a proper service.

2. Service of a citation in an action on a note on one of several indorsers indorsed, "Came to hand the 17 day of March, A. D. 1888, at 6 o'clock P. M., and executed the 7 day of April, 1888, by delivering to the within-named defendant in person a true copy of this writ, together with a certified copy of plaintiff's original complaint," shows proper service, under Rev. St. Tex. arts. 1816, 1820, providing that each defendant, if without the county in which the action is brought, shall be served with a certified copy of the petition accompanying the citation.

3. A judgment rendered by default in *assumpsit* on a note, upon a petition which asserts a claim for protest fees, and citations, unaccompanied with certified copies of such petition, which informed defendants of the fact that protest had been made, is not erroneous.

4. Where the petition on a note sets out the note fully, alleges the sum paid for protest fees, and prays judgment for the amount of the note, interest, and attorney's fees as agreed on, it is proper to render judgment for plaintiff for \$4,192.88, the amount of such items, though the petition only alleges \$4,000 damages for non-payment.

Error from district court, Mitchell county.

*Assumpsit* by the City National Bank of Dallas against Van Sanders as principal, and Will Sanders, G. H. Brigman, and John Hensley as indorsers on a promissory note executed by Van Sanders on October 30, 1886, for \$3,150, payable to the order of G. H. Brigman, and due November 1, 1887, and for \$4,000 damages for non-payment thereof; also to foreclose a mortgage upon 1,200 head of cattle belonging to said Van Sanders. The petition alleges that Van Sanders resided in Lubbock county, Tex., but was temporarily in Mitchell county, Tex.; that Will Sanders resided in Crosby county, Tex.; and that G. H. Brigman resided in Hill county, Tex., but was temporarily in Grant county, territory of New Mexico. Citation was issued and served on Van Sanders on the 26th day of November, 1887, to Will Sanders, and was served on him by the sheriff of Crosby county,



Tex. Citation was issued for G. H. Brigman to the sheriff of Mitchell county in the first instance, without having issued citation either to Hill county, Tex., or Grant county, territory of New Mexico, and was served on him by the sheriff of Mitchell county, Tex., by delivering to him a copy of the writ only. On December 1, 1888, judgment was taken by default against Van Sanders, Will Sanders, and G. H. Brigman as principals on said note for the sum of \$4,192.83, foreclosing their lien on the said stock of cattle, and defendants bring error.

*St. Stark*, for plaintiffs in error. *Crawford & Crawford*, for defendant in error.

STAYTON, C. J. This is an action against the maker and three indorsers of a promissory note. Service on one of the indorsers alleged to be a resident of Hill county was made in Mitchell county by service of process directed to the sheriff of that county. It has long been settled that such service was proper. It is claimed that the sheriff's return made on another defendant was insufficient. The return was: "Came to hand the 17th day of March, A. D. 1888, at 6 o'clock P. M., and executed the 7th day of April, 1888, by delivering to Will Sanders, the within-named defendant, in person, a true copy of this writ, together with a certified copy of plaintiff's original petition. FELIX S. FRANKLIN, Sheriff Crosby County, Texas." This return showed proper service.<sup>1</sup>

The petition asserted a claim for protest fees, and the citations, which were not accompanied with certified copies of the petition, informed the defendants of the fact that protest had been made.

Only one of the defendants appeared, and he answered by a general demurrer, on which no action was asked, a general denial, and special plea, alleging that he indorsed the note, after it was executed, for the accommodation of the other parties to it, on which he sought relief against them. Judgment was rendered for plaintiffs for \$4,192.83, which is the sum of principal and interest, attorney's fees as by the note provided, and protest fees, and it is made to bear the same interest contracted for in the note. There was no error in this. *Washington v. Bank*, 64 Tex. 7. The petition set out the note fully, and alleged the sum paid as protest fees, and asked judgment for amount of note, interest, attorney fees as agreed, and sum paid as protest fees, and costs of suit, and the judgment follows the averments and prayer. There was an additional averment that, by reason of the failure of defendants to pay the sum due, he had been damaged \$4,000, and it is insisted that this controlled the prayer of the petition, but this view cannot be sustained. Appellee suggests delay, and it appears to us, looking to the entire record, that this was the pur-

pose of the writ of error, and the judgment will be affirmed, with damages equal to 10 per cent. on the sum adjudged to appellee by the court below. It is so ordered.

### BROWN v. WHEELOCK.

(*Supreme Court of Texas*. May 3, 1889.)<sup>2</sup>

#### INFANCY—REMOVAL OF DISABILITY—JUDGMENT—CONCLUSIVENESS.

1. § 3 Sayles' St. Tex. art. 8861a, § 2, provides a procedure for the removal of the disabilities of a minor by filing a petition which may be heard by the court in term-time or vacation, and, if it shall appear to the court that it is advisable, or will be advantageous to the minor, to have his disabilities removed, the court shall enter a decree removing the same. *Held* that, as the proceeding is an *ex parte* one, and acts only on the *status* of the minor, it cannot be deemed a judicial proceeding, but merely as the act of the judge, and hence there are no presumptions to be indulged in favor of the final order.

2. Section 4 provides that "if the father of the minor be not living, a copy of the petition shall be served upon the county judge of the county in which the proceeding is instituted, and in all such cases the court hearing the application shall appoint a special guardian, whose duty it shall be, in connection with the county judge, to represent the true interests of the minor, as they shall understand it, in aiding or resisting the application of the minor." *Held*, that a copy of the petition should be served upon the county judge, but he may accept service and waive the copy; nor is it essential that he should appear upon the hearing, that being a matter within his own discretion.

Appeal from district court, Dallas county. Bill in equity by W. K. Wheelock against M. Randa Brown, administratrix of the estate of Brisco B. Smith, deceased, to enforce specific performance of a contract made by said Smith with complainant. Judgment for plaintiff, and defendant appeals.

*Wright & Wright*, for appellant. *Morgan & Freeman*, for appellee.

GAINES, J. The appellant having been appointed administratrix of the estate of Brisco B. Smith, deceased, by the county court of Dallas county, and having qualified as such administratrix, and entered upon the execution of her trust, this suit was instituted by appellee against her in said court under article 2096 of the Revised Statutes, to enforce the specific performance of a contract entered into between her intestate and appellee, by which the former agreed to convey to the latter a certain lot in the city of Dallas. There was a trial and judgment in the county court, and an appeal to the district court. From a judgment in the latter court this appeal is taken. The petition alleged that the consideration for the sale of the lot was \$1,000, of which \$345 had been paid, and made the contract signed by Smith an exhibit. The order for specific performance was resisted upon two grounds: *First*, that Smith at the time of the execution of the contract was a minor, and that his disabilities had not been legally removed; and, *second*, that at

<sup>1</sup> Rev. St. Tex. arts. 1216, 1220, provide that a defendant, if without the county where the action is brought, shall be served with a certified copy of the petition accompanying the citation.

<sup>2</sup> Publication delayed through failure to receive copy of opinion at time of its delivery.

the time his intellect had been so impaired by the use of intoxicating liquor that he was not capable of dealing with appellee upon equal terms, and that by reason of his incapacity he was overreached in the transaction. The contract of sale recited that the disabilities of minority of the vendor had been removed, and it was shown by the testimony that at the time it was executed he was under 21 years of age. The orders of the district court upon his application for the removal of his disabilities were read in evidence, and consisted first of an entry appointing an attorney to represent him as guardian *ad litem*, and then of the final order of emancipation. The only recitals in the latter were that the applicant, his attorney, and the guardian *ad litem* appeared, and announced themselves ready for trial, and that it appeared to the court "that it is advisable and will be advantageous to the minor, Brisco B. Smith, to have his disabilities as a minor removed." The court charged the jury "that the judgment or decree of the district court of Dallas county removing the disabilities of Brisco Smith is conclusive, and cannot be attacked or inquired into in this suit." This charge is assigned as error. The instruction puts the order in question upon the same footing as the judgment of a court of general jurisdiction, and we are of opinion that this position cannot be maintained. Can an order which, under the statute, removes the disabilities of a minor, be deemed in strict language the judgment of a court? We think not. It fixes no right; it settles no dispute. It acts merely upon the *status* of the applicant, enlarges his capacity as a free agent, and, as to all matters not political, places him upon the plane of persons who have attained their majority. If the proceeding should be deemed judicial we should be compelled to hold the statute in conflict with the constitution, for the reason that it attempts to confer upon the district courts a jurisdiction not embraced in these courts as defined by the constitution. This court has repeatedly held that the jurisdiction of these courts is strictly limited to the suits mentioned in section 8, art. 5, of our constitution. *Harrell v. Lynch*, 65 Tex. 146; *Ex parte Towles*, 48 Tex. 413; *Williamson v. Lane*, 52 Tex. 344; *State v. De Gress*, 11 S. W. Rep. 1029, (Tyler Term, 1888.) We think, however, that the function that is devolved upon the courts by the statute in question is not strictly judicial, and that the power conferred is one which was within the authority of the legislature to grant. At what age the disabilities of minority shall cease is clearly a matter within legislative discretion, and we see no reason why it is not within the law-making power to fix the period of minority by general law, and also to provide for the removal of such disabilities in special cases at a shorter period. There is nothing in our constitution to prohibit this; on the contrary, that provision of section 56, art. 3, which forbids the passage of any special law "declar-

ing any named person of age," indicates that it was contemplated that there might be general legislation providing for that object. We think the power given by the statute must be regarded as an authority conferred upon the district judge as a commissioner, to be exercised while holding the sessions of his court, and not upon the court itself. He could hardly be compelled to exercise the function; it could hardly be deemed an official duty. Though he should be regarded as acting merely in deference to the will of the legislature, and as a matter of comity, his action in removing the disabilities of minority in any particular case, when done in conformity to the provisions of the law, should be deemed valid, and conclusive of the question of the power of the minor thereafter to contract as a person of full age. The legislature having provided that his action upon certain conditions shall be effectual to confer the rights of majority, except as to political matters, upon certain conditions, we see no good reason why his order should not have effect, when made in accordance with the provisions of the statute. State courts confer the rights of citizenship by virtue of the naturalization laws of the United States, although they are constituted for purposes wholly different. It is held in California that the judge of a court may by authority of law perform ministerial acts, (*People v. Provines*, 34 Cal. 520,) but that, "when performed, they do not become judicial acts because performed by a judicial officer," (*People v. Bush*, 40 Cal. 344.) It is true that in the proceeding under consideration the judge should hear evidence, and exercise a discretion whether to grant the application or not. The proceeding is *ex parte*, and the interest of the applicant alone is to be affected or to be considered. Even the public has no interest as against his interest. He has no adversary.

It follows, from what we have said, that we are of opinion that no presumptions are to be indulged in favor of the regularity of the order in question. In the language of an eminent English judge: "However high the authority to whom a special statutory power is delegated, we must take care that in the exercise of it the facts giving jurisdiction plainly appear, and that the terms of the statute are complied with. This rule applies equally to an order of the lord chancellor as to any order of petty sessions." *COLERIDGE, J.*, in *Christie v. Unwin*, 8 Perry & D. 208. We take it the evidence upon which the judge has acted need not be shown. When it is made to appear that the statute has been complied with, then the order should be deemed conclusive. The preliminary steps were not shown in this case, nor did they appear upon the face of the order. We conclude, therefore, that the court erred in the charge complained of, and that for this error the judgment should be reversed.

In order to show affirmatively that the statute had not been followed, the defendant offered to prove by a witness who held the of-

fice of county judge at the time the order was made that no copy of the application was served upon him, but that he waived the service in writing, and was not present at the hearing. The testimony was excluded, and its exclusion is assigned as error. We think there was no error to the prejudice of appellant. It was incumbent upon appellee to show that the statute had been followed, and not upon defendant to show the contrary. But the assignment presents a question which will probably arise upon another trial, and we have felt it our duty to consider it. Is it absolutely necessary that the county judge shall be served with a copy of the application, or may he waive the service? We think the statute must be substantially followed, but that a literal compliance is not necessary. We understand the statute to impose the duty upon the county judge, when he is served with an application in such a case, to inquire into the facts, and to oppose the application if he should think it not to the minor's interest that it should be granted. On the other hand, if he should think the contrary, he may favor the application. 2 Sayles' St. art. 3361a, § 4.<sup>1</sup> The policy is, in the event the father be dead, to give notice to the officer most likely to know the minor's character, capacities, and surroundings, to the end that his disabilities may not be improvidently removed. We think a copy of the petition should be served upon him, but that, if a petition be presented to him, and he examines it, and accepts notice in writing, and waives the copy, this should be held equivalent to actual service. It is as fully calculated to subserve all the purposes of the law as if the copy were delivered to him. Nor do we think it essential to the validity of the proceeding that the county judge should appear upon the hearing. It may be that he knows no reason either why the application should or should not be granted. We think his appearance is a matter within his own discretion. If it had been intended that his appearance at the hearing was necessary, it would seem that the law would not peremptorily have required the appointment of a guardian *ad litem*. The statute says that it shall be the duty of the guardian *ad litem*, "in connection with the county judge, to represent the true interest of the minor, as they understand it, in aiding or resisting the application;" but we presume that this means

<sup>1</sup> Article 3361a, § 4. "In all proceedings under this act a copy of the petition shall be served upon the father of the minor, if living within the state, and, if he be dead, that fact shall be mentioned in the petition. If the father of the minor be not living, then a copy of the petition shall be served upon the county judge of the county in which the proceeding is instituted; and in all such cases the court hearing the application shall appoint a special guardian, whose duty it shall be, in connection with the county judge, to represent the true interests of the minor, as they shall understand it, in aiding or resisting the application of the minor. An allowance shall be made by the district judge presiding, to the special guardian, which shall be paid out of the estate of the minor."

that both may act in the event the county judge is in attendance.

The other assignments of error raise questions bearing upon the second ground of defense, and, since they may not arise upon another trial, will not be considered. For the error of the court which has been pointed out the judgment is reversed, and the cause remanded.

### SMITH v. TRADERS' NAT. BANK.

(Supreme Court of Texas. June 25, 1889.)

#### IMPEACHMENT OF WITNESS—GARNISHMENT.

1. Where a cashier of a bank testifies that the bank had not disposed of certain collaterals held by it to secure a note of one A., as alleged by defendant, in violation of its agreement with him, the sworn answer of the bank by the cashier in a garnishment suit against A., that at the time alleged it held none of his property or effects, is admissible to impeach the witness.

2. Stock held as collateral security is property and effects subject to garnishment under Rev. St. Tex. art. 208, which provides that where the garnishee is an incorporated company, and the defendant is or was, when the writ of garnishment was served, the owner of any shares of stock in such company, or any interest therein, the court shall render a decree ordering the sale, under execution in favor of the plaintiff against the defendant, of such shares.

Commissioners' decision. Appeal from district court, Tarrant county.

Action by the Traders' National Bank against Walker Fore, W. J. Morphy, R. M. Henderson, and J. P. Smith, upon a promissory note. Verdict and judgment for plaintiff against Smith and Morphy for \$9,625, and for Fore, Morphy, and Henderson, on their plea of *non est factum*. Smith appeals.

Rev. St. Tex. art. 208, provides that where the garnishee is an incorporated company, and the defendant is, or was when the writ of garnishment was served, the owner of any shares of stock in such company, or any interest therein, the court shall render a decree ordering the sale, under execution in favor of the plaintiff against the defendant, of such shares.

Carter, Wynne & De Berry, for plaintiff in error. Hogsett & Greene, for defendant in error.

HOBBY, J. The Traders' National Bank of Fort Worth, Tex., brought suit on October 2, 1884, against Walker Fore, W. J. Morphy, R. M. Henderson, and appellant, J. P. Smith, on a promissory note executed by the parties named for the sum of \$7,000 to the order of the Texas Investment Company, Limited, with 12 per cent. interest from maturity, and 10 per cent. upon principal and interest, if collected by law, and transferred by said Texas Investment Company to appellee. Fore and Henderson, who were alleged to be a copartnership, and whose names as such were signed to the note, pleaded *non est factum*, and denied the authority of any person to sign the same for them. The pleadings of appellant were extended, but presented substantially the following defenses: That

he was an accommodation maker of the note, which fact was known to appellee when it received the same; that appellee, when it received the note, held as collateral security for a debt of \$12,500 due appellee by the Texas Investment Company, 287 shares, worth about \$28,700, in the New Mexico Land & Cattle Company, which it agreed with appellant to also hold as security for the note sued on; that subsequently appellee materially altered this agreement by assenting to a transfer of said stock, together with other collaterals then held by appellee, belonging to said investment company, to Edrington & Lewis and to J. P. Smith, to secure other debts, and authorized said Edrington to sell said collateral securities, and apply the proceeds in accordance with said agreement made on August 15, 1884; that this change was made in the original contract by appellee, Edrington, and W. J. Morphy, president of said investment company, without the knowledge or consent of said Smith; that appellee had received several other notes as collateral security for the note sued on, from said investment company, and had collected of said notes so received the sum of \$12,650, which should have been applied to the payment of the note sued on. In reply to the above defenses pleaded by Smith appellee alleged that it never took, or in any manner held, the stock or notes as set forth in appellant's answer, and also alleged that the note sued on was in renewal of one formerly executed by the same parties. Appellee admitted that at the time of the execution of the note sued upon it held the stock of the New Mexico Land & Cattle Company to secure another debt then due it by said investment company for the sum of \$12,500, evidenced by a note of June 22, 1884, due 30 days after date; that at the maturity of this note it was renewed by the investment company giving a note dated July 25, 1884, for \$12,500, payable 30 days after date, with interest at 12 per cent., etc; that this note was not paid by the investment company or any other person; that after its maturity and the institution of this suit, appellee sold said stock at public sale, by its cashier, after giving notice, and purchased the same through its president; that it still held said stock, and had received no payment of said indebtedness of \$12,500 except by the said sale, and offered, if allowed by the court, to deliver said stock to appellant upon his payment of said \$12,500. There was evidence in support of the pleas of *non est factum* filed by Fore and Henderson, and a finding in their favor. There was a verdict in favor of appellee against appellant and W. J. Morphy for the sum of \$9,623, principal and interest. Judgment was rendered thereon, from which appellant Smith appeals.

The proof on the trial was substantially as follows: The note, as described in the petition, being in evidence, appellant, J. P. Smith, testified that he signed the note sued upon, which was in renewal of a former note for same amount, signed by same parties,

dated either April or May, 1884, being either a 60 or 90 day note; that the former note was also payable to the Texas Investment Company, Limited; that he signed the former note at the request of W. J. Morphy, for the accommodation of the Texas Investment Company, Limited, to raise money upon; that he received no consideration himself for signing said note, and did not know whether the other makers did or not; that this note fell due, and the note sued upon was executed in the place of the former to take it up; that at the time of making the note sued upon, witness and W. J. Morphy went to the Traders' National Bank, and had a talk with H. C. Edrington, the cashier, about it, and that Edrington admitted he knew that the former note was an accommodation on the part of Smith; that it was there talked between witness, Edrington, and Morphy that the bank held \$28,700 of the capital stock of the New Mexico Land & Cattle Company belonging to the Texas Investment Company, Limited, to secure a note of said company to said bank for \$12,500, and Edrington agreed to hold said stock to secure the note sued upon as well as the \$12,500 note.

H. C. Edrington, the cashier, testified he remembered the transaction when the note sued upon was delivered to plaintiff; that it was a renewal of a former note; and if J. P. Smith or any of the makers were accommodation makers he had no knowledge of the fact at the time the note sued upon was given. When the note was received by the bank, defendant, Smith, was not present. It was received July 22, 1884. That W. J. Morphy brought the note to the bank already signed and indorsed, and took up the former note. That there was nothing said at that time about holding the stock as collateral for the note sued upon, as well as the \$12,500. That he (witness) did not at said time, or at any other time, agree on the part of the bank to hold the stock as collateral for the note sued on, or for the former note of \$7,000, and never knew of any such agreement being made by any one representing the bank, and that the bank held no collateral to secure either of said \$7,000 notes. Witness produced a deposit slip or memorandum made by him at the time of receiving the latter \$7,000 note, and stated that at the same time he received a note for \$3,300, signed by Fore, Morphy, and Henderson, and both notes were entered on same slip; and he also received a note of Britton for \$4,000 as collateral for a \$3,300 note and a balance of another note. That these transactions occurred at the same time, and at the cashier's window, and that Boaz, the president of the bank, was present. That the handwriting filling blanks in note was that of the book-keeper of Texas Investment Company, Limited. That the first knowledge he had that Smith was accommodation maker of the note was August 15, 1884, when Morphy told him at the time he wrote paper of that date.

W. J. Boaz, the president of plaintiff, tes-

tified that he was present when the note was received, and to substantially the same facts stated by Edrington. That he did not know Smith was accommodation maker. Might have thought so, but there was nothing said about it; and that the stock was held by the bank alone to secure the \$12,500 debt. That a few days after the note fell due he went to defendant Smith, and asked payment, and Smith asked him to bring suit, and said nothing about collateral being held for the note. That it was a year after this before he knew or heard of Smith claiming that note sued on was secured by the stock.

Such is the testimony in support of and denying the alleged agreement set up by defendant Smith between appellant and appellee at the time of the delivery of the note to the latter.

In support of appellant's plea, that there was a material change made in the contract entered into at the time of the delivery of the note, by an assignment of the collateral security to Edrington for other debts, and a sale of the same, and that the bank ceased to hold said collaterals, as agreed upon, appellant introduced in evidence the following paper: "Fort Worth, Texas, Aug. 15th, 1884. The Texas Investment Co., Limited, hereby assigns all surplus collateral held by the Traders' National Bank over and above the amount due said bank on discounts made for said Investment Company, Limited, to Edrington & Lewis and J. P. Smith, to secure them *pro rata* on Texas Investment Co., Limited, indorsements to Edrington & Lewis for \$5,000, dated August 11th, 1884, and J. P. Smith and others' accommodation indorsements for said Texas Investment Company, Limited, for \$7,000. H. C. Edrington is hereby authorized to realize on said collateral, and apply as set forth aforesaid, and any surplus to be applied to Smith & Huffman's note to said bank for \$6,500.00. [Signed] TEXAS INVESTMENT CO., Limited. W. J. MORPHY, President." Edrington testified that this instrument was signed by Morphy for the Texas Investment Company. That he gave notice that the New Mexico Land & Cattle Company stock would be sold on March 6, 1885; and in accordance with this notice he sold to Boaz, the president of appellee bank, who was the highest bidder, said stock for the sum of \$8,000. Smith testified that he never gave his consent to said instrument being made, and had no knowledge of its having been made, for some time after. Edrington stated that in the transaction of August 15, 1884, he acted for the firm of Edrington & Lewis,—a firm composed of witness and one Lewis,—and not for the bank; that none of the collaterals then held by the bank were ever turned over to him to dispose of under said agreement, but that the bank still retained possession and control of them; that the bank had nothing to do with the making of the instrument of August 15, 1884. Defendant Smith's attorney then asked the witness if he, as cashier of plaintiff's bank,

did not make and file for plaintiff a sworn answer in a certain garnishment proceeding wherein the National Bank of Jefferson was plaintiff and the Traders' National Bank was garnishee, wherein he swore, among other things, that the plaintiff bank did not have in its possession any of the effects belonging to the Texas Investment Company, Limited, on the 29th day of August, 1884. This was objected to by plaintiff, because immaterial, and not in contradiction of any evidence given by said witness. The court sustained the objection, and the defendant was not permitted in this connection to introduce the sworn answer of Edrington, made in the garnishment proceedings referred to, which it appears from the bill of exceptions was offered to contradict the witness' statement that the bank had always retained possession and control of said stock after it was deposited with plaintiff, and to sustain defendants' plea that said bank had delivered said stock to said Edrington to sell under the agreement between him and the Texas Investment Company already in evidence. This ruling of the court, excluding the proffered evidence, is assigned as error. The leading purpose of the testimony offered was manifestly to impeach the witness by showing that he had made contradictory statements with respect to the control and possession by the bank of the shares of stock in the New Mexico Land & Cattle Company.

It is claimed by appellee that the stock held as collateral security was not property or effects subject to garnishment, and hence, if the witness had answered to the writ of garnishment that the bank did not have any property or effects of the Texas Investment Company in its possession, this would be no contradiction of his statement that it held the stock as collateral security. The statute, however, does make such stock subject to garnishment. Rev. St. art. 208; Baker v. Wasson, 53 Tex. 156. Until the passage of the act of March 15, 1875, (Gen. Laws, 2d Sess. 102,) shares of stock in incorporated companies were not subject to execution, and therefore not liable to garnishment. Price v. Brady, 21 Tex. 619. The effect of the opinion cited has been destroyed by the act referred to, now substantially embraced in articles 208-210, Rev. St. Article 2297, taken from the same statute, also subjects such stock to execution in the same manner as other personal property. Independently of this, however, upon the plainest principles of the elementary rules of evidence regulating the examination of a witness, we think the testimony was admissible. Edrington had testified that the bank still held the stock deposited with it by the Texas Investment Company to secure the note for \$12,500; that none of the collaterals held by the bank were ever turned over to him to dispose of under the agreement of August 15, 1884; that it still retained possession and control of the same. His testimony was also distinct and emphatic to the effect that no

such agreement to hold the stock as collateral security for the note, as contended by appellant, was ever made. His evidence related to, and was destructive of, the material defenses set up by Smith; was necessarily, to a great extent, relied upon by the jury, and exerted a controlling influence upon the verdict. Hence the importance to the defendant of the right attempted to be exercised by him to discredit it under the rules of evidence by showing, if he could, that he had made contradictory statements as to the possession by the bank of the stock. Again, Smith had alleged that the bank had, in violation of its agreement, parted with and ceased to hold this stock. The sworn answer of Edrington, that the bank did not in August, 1884, have possession of any property or effects of the Texas Investment Company, tended to sustain this averment. We are of opinion, therefore, that the evidence excluded should have been admitted, and that the court erred in sustaining the objections of the plaintiff thereto, and that the error is such as requires a reversal of the judgment.

The remaining assignments specifying supposed defects in the charge, and error in refusing the special instruction requested by appellant, require some notice. The witness Edrington had testified that the note in suit was in renewal of a former note for same amount, which matured about July 10, 1884; that the bank never held any collateral security for the note sued upon; that the stock in the New Mexico Land & Cattle Company was held as collateral security for a note of \$12,500 due plaintiff by the Texas Investment Company, which matured July 25, 1884, and which was renewed for a like amount, to become due 30 days after date. The stock was still held to secure the debt. The price for which the stock sold (\$8,000) was credited on it. Witness produced the certificates for 287 shares of said stock, being 14 for 20 shares each, and 1 for 7 shares. These certificates all bore date July 31, 1884, and were issued to and in the name of H. C. Edrington. Edrington testified that when the bank first received the stock it was in one certificate; that some time in the latter part of July, 1884, W. J. Morphy, the president of the Texas Investment Company, Limited, requested him, if he could find, to find a purchaser for said stock, and that it was thought best to have it reissued in small certificates; that, as cashier of the plaintiff, he sent the certificate to the Hanover National Bank of New York, correspondent of plaintiff, with request to forward to Boston, where the president of the company resided, and have the stock reissued, and, if it could be done, find a purchaser for it; that the stock was reissued, but no purchaser found, and stock was returned to witness, who called the attention of W. J. Boaz, the president of the plaintiff bank, to the fact that the stock was issued to witness, without stating to him as cashier. They were placed with the securities belonging to the bank, and kept there, and were

held in witness' name for said bank, and not otherwise.

J. P. Smith testified that in a stockholders' meeting of the Texas Investment Company, Limited, on the 19th of July, 1884, when W. J. Boaz was present, that he then called attention to the fact that he was on a note for said company for \$7,000 as accommodation maker, which was then held by plaintiff; that he had no knowledge until since this trial that the original certificate of stock of the New Mexico Land & Cattle Company had been returned and new certificates issued to H. C. Edrington, and never consented thereto, or to the sale made by Edrington.

Under the foregoing evidence, in connection with the proof first referred to in the opinion, the court charged, among other things, as follows: "If you believe from the evidence that said note was executed by the defendants, or either of them, without consideration, and for the benefit simply of the Texas Investment Company, you will then inquire whether or not, at or before the time of the making of the note sued upon, there was any agreement between the plaintiff and the investment company or either of the defendants that the plaintiff should hold as collateral security for the payment of said note any stock of the New Mexico Land & Cattle Company, and the burden is upon the defense to show by a preponderance of evidence that there was such an agreement; and, unless you find from the evidence that there was such an agreement, you will find for plaintiff the amount of the note sued upon, including interest as before directed, and ten per cent. on such amount against all the defendants you may believe, under the instructions given, are liable on said note. If \* \* \* the defendants, or either of them, signed the note sued on as accommodation makers, as hereinbefore explained, and if you believe from the evidence that at the time of the delivery to the plaintiff of the note sued upon the plaintiff had in its possession the certificates of stock of the New Mexico Land & Cattle Company mentioned, \* \* \* and that the same belonged to the investment company, and was held by the plaintiff bank as collateral security for another debt due to the plaintiff by said investment company; and if you believe from the evidence that at the time of the delivery of the note sued upon the plaintiff, by its officers, accepted said note, and agreed with the defendants, or either of them, to hold said stock as collateral security for the note sued upon; and if you further believe that the plaintiff, without the consent of the defendant, did permit or cause said stock to be surrendered, and other certificates issued to one H. C. Edrington for a different purpose than the security of the debts for the payment of which it was so agreed that said stock should be held,—then, and in that event, the defendants, if accommodation makers of said note, and not consenting thereto, would be released, and you should find for them or such or them as you may believe from the

evidence were in fact accommodation makers, and who did not consent to such disposition of said stock. You are instructed that where shares of stock in a corporation are pledged as collateral security for the payment of a debt that the pledgee or person holding such stock has the right to surrender the certificate pledged, and have other certificates for the same number of shares issued in his name; and, where the pledgee is a bank, the certificate may be issued to and held by its cashier. If, therefore, you believe from the evidence that there was an agreement between the plaintiff and the defendants, or either of them, that said shares of stock should be held by the plaintiff as collateral for the payment of the note sued upon, and if you further believe that the same were by the plaintiff surrendered and other certificates issued to one H. C. Edrington, yet, if you believe he intended thereby to hold said stock, and did hold the same under said agreement, if any, then the change in the certificates so made would not be in law an alteration or change of the contract, and would be no defense to the makers of the note for which such security was held." The complaint made of this charge is that the jury were in effect told that, if plaintiff agreed with defendant to hold the shares of stock to secure the note, and did not, this would be a violation of the contract, and would release the sureties, instead of instructing them that the alteration of the agreement to hold the stock, made by Edrington and the Texas Investment Company, assented to by plaintiff, would release the makers of the note if known to plaintiff to be accommodation makers; and it failed to submit the issue of an alteration of the agreement.

The special charge requested by appellant, after stating the defenses set up in his answer, was as follows: "If you believe that the makers of the note sued on were such accommodation makers, and that this was known to the cashier or president of the plaintiff bank, at and before the bank received said note; and if you also further believe from the evidence that at and before said note was delivered to plaintiff it had the shares of stock, as claimed by Smith, and that at and before Smith signed said note the plaintiff, through its cashier, agreed with Smith and the president of the Texas Investment Company, Limited, for said company to hold such shares also as security for the note sued upon, and, after so doing, if it was done, the Texas Investment Company, Limited, by and through its president, W. J. Morphy, made the instrument read in evidence to you, dated 15th August, A. D. 1884, without the knowledge or consent of Smith, and that afterwards H. C. Edrington, acting under said agreement, and being cashier of said bank, possessed said shares of stock, sold or attempted to sell under said writing, dated the 15th day of August, 1884,—then and in that event you should find for the defendant Smith; but if you should not so find,

then, as to this branch of the case, you will disregard said defense." It will be noticed that the jury were plainly and properly instructed that, if they found that no such agreement to hold the stock as security for the note sued on, as claimed by Smith, was entered into, they would find for plaintiff. Under the facts, as they were authorized to do, the jury found that no such agreement was made; consequently the defenses relied on by appellant of a violation and alteration of the contract or agreement which were involved in the foregoing instructions become unimportant. There could be no violation or change of an agreement which the verdict of the jury necessarily implied, never existed. The failure, therefore, to submit the issue contained in the special instruction is immaterial upon this appeal, and would not authorize, we think, a reversal. But as the error referred to under the first assignment considered, requires a reversal, and as it cannot be known what the verdict may be upon another trial, it is proper to say that the issue embodied in the special instruction should, under similar facts, be presented to the jury. In all other respects we think the charge given is a correct presentation of the law of the case. For the error mentioned under the first assignment, in excluding the evidence offered by defendant, we think the judgment should be reversed, and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

#### MAYO *et al.* v. TUDOR'S HEIRS.

(Supreme Court of Texas. June 28, 1889.)

#### TRESPASS TO TRY TITLE—RES ADJUDICATA—INSTRUCTIONS.

1. A decree of partition of the land of a testatrix, and confirmation of the commissioner's report, made by a court of probate in Texas, do not estop a devisee, who is a party to the proceedings, to set up a claim to the land otherwise derived, as the probate court has no authority to determine title to land.

2. A husband devised community property of himself and wife to his wife for life, remainder to his son. The wife survived him, and devised the entire property as her own, one-half being devised to the only child of the son, he being dead. In trespass to try title to another portion of the land, by persons claiming under the wife's will against persons claiming under the husband's will, *held*, that a charge that if the wife did not receive under the will any benefit inconsistent with her claim to one-half of the community property, and if by her claiming such half the son did not receive less than he would have received had the father made no will, the verdict should be for plaintiffs, was not error prejudicial to defendants.

3. A charge that the fact that the wife permitted the husband's property, other than the community property, to be divided among his legatees and devisees, would not itself show that she elected to take under the will, was erroneous, as being on the weight of the evidence, as the question whether she elected to surrender her right to the community property was for the jury.

4. A charge that, to render the husband's will effective, the wife must have elected to take under it, and that such election must be shown by evi-



dence that she accepted some benefit under the will inconsistent with her claim to one-half the estate, was proper, as a husband cannot devise his wife's interest in community property.

Commissioners' decision. Appeal from district court, Lamar county.

Action of trespass to try title by the heirs of K. L. Tudor, deceased, against R. P. Mayo and Julia A. Mayo, his wife. Judgment for plaintiffs. Defendants appeal.

*Mazey, Lightfoot & Denton and V. W. Hale*, for appellants. *W. B. Wright*, for appellees.

MALTBIE, J. The 200 acres of land in controversy is a part of a 640-acre tract situated in Lamar county, and was the community homestead of Isaiah Davis and his wife, Eunice. Isaiah Davis died testate in 1854, devising, together with other things, the 640-acre homestead tract of land to his wife, Eunice, for life, remainder to their son Virgil. Virgil died in 1857, leaving him surviving a widow, Julia A. Davis, who afterwards intermarried with the appellant R. P. Mayo, and an infant, Mary E. Davis, now Mary E. Connor, one of the appellants. Eunice Davis moved to Hunt county some years after the death of her husband, and there died testate in the year 1868, undertaking to dispose of the above-mentioned 640 acres of land. By her will 320 acres of it is devised to Virgil Davis' daughter Mary E., and the balance to the children of Isaiah and Eunice Davis. The will was proven up, and the estate of Eunice Davis partitioned in the district court of Hunt county, acting and assuming to act only as a court of probate. Mary E. Davis, then a minor, was made a party to the proceeding, and was represented by a guardian *ad litem*. Three hundred and twenty acres of the land were allotted to her, and the balance regularly sold for partition; K. L. Tudor becoming the purchaser of the 200 acres in controversy. In this suit appellees claim title to the land under the will of Eunice Davis, while appellants claim under the will of Isaiah Davis. In the partition of the estate of Eunice Davis, the title to the 640 acres of land that was divided was not held to be in Mrs. Davis, nor did the court in this proceeding, sitting as a court of probate, have jurisdiction to determine the question of the title to the land; that power being then a part, as it always had been, and now is, of the ordinary jurisdiction of the district court. The probate jurisdiction was a special power conferred by the constitution and laws of 1870, and district courts, in the exercise of probate jurisdiction, had no authority, except that specially conferred in reference to this particular subject, and, when acting as a court of probate, could exercise no additional authority by virtue of its general common-law and equity powers. The effect of the partition is to settle the interests of the parties to it, as allotted by the court, so far as the same depends on the title of Mrs. Eunice Davis, and each participant is bound to

warrant the title to every other to the extent of the interest derived by him from Mrs. Davis, but no further. If the title of Mrs. Davis was invalid, and any of the participants in the partition had at the time a title derived from another source, the partition could not have the effect to invalidate the other title, and the fact that such person participated in the partition could not estop him from asserting his other title. There can be no objection to a person acquiring several titles to the same piece of land either by purchase or otherwise; and, clearly, the judgment of a court, without jurisdiction of the subject-matter, could not work an estoppel against a party to it. The district court of Hunt county having no authority and not having assumed to determine whether the title derived through the will of Isaiah Davis, or that derived through the will of Eunice Davis, is the superior, it follows that the court erred in charging the jury that the decree of partition and confirmation of the report of the commissioner by the district court of Hunt county estopped Mary E. Connor from setting up her claim to the land under the will of Isaiah Davis.

The property in controversy being of the community, Isaiah Davis had no right to devise his wife's interest, and there was no error in that part of the charge to the effect that, in order to render such will effective, she must have elected to take under it; and, in order to constitute an election by her, it must appear from the evidence that she accepted some benefit under the will inconsistent with her claim to one-half of the whole estate. *Philleo v. Holliday*, 24 Tex. 45, and authorities there cited; *Little v. Birdwell*, 27 Tex. 691; *Morrison v. Bowman*, 29 Cal. 347 et seq.; 4 Kent, Comm. 58.

Nor is there any error of which appellants can complain in a subsequent part of the charge, to the effect that "if Mrs. Eunice Davis did not receive under the will any benefit inconsistent with her claim to one-half of the community property, and by her claiming one-half of the 640-acre tract Virgil Davis did not receive a less amount in value of property than he would have received had his father made no will, you will find for the plaintiffs," for if Mrs. Davis received no benefit under the will inconsistent with her right to claim one-half of the 640 acres, the heirs of Virgil Davis cannot complain whether he received a full share of his father's estate or not, the father having the right to make such disposition of his own property by will as he might have seen proper.

But whether Mrs. Eunice Davis elected to surrender her right to the community property of herself and her deceased husband was a question of fact to be determined by the jury; and a charge that the fact that Eunice Davis permitted the property, other than the homestead, to be divided out by the executors among the legatees and devisees of her husband, would not itself show that she elected to take under the will, is on the weight of



the evidence, and therefore erroneous, and it can make no difference whether the proposition announced is correct in point of fact or not. The inhibition is against any intimation as to the weight of any part of the evidence. On account of the errors indicated we are of opinion that the judgment should be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, approved, and judgment reversed and cause remanded.

*MILLER et al. v. FOSTER et al.*

(Supreme Court of Texas. June 28, 1889.)

RES ADJUDICATA—PARTIES—CONTINGENT REMAINDER-MEN.

Testator devised his estate to his wife for 21 years, after which it was to be owned by his children; but if the wife should die without children by him, it was to go to plaintiffs. Upon the death of testator's children, the wife was to have the property for life. Testator died, leaving an only child, a son, who died in infancy; but prior to the death of the son, the widow had the will set aside, making the son and the executor parties defendant in the suit. *Held*, that as the son, who was entitled to the first estate of inheritance, and the widow, who was a tenant for life and for years, were both parties to the suit, plaintiffs became parties by the rule of virtual representation, and were bound by the judgment, though not actual parties to the suit.

Commissioners' decision. Appeal from district court, Gonzales county.

Action by Thomas H. Miller, W. A. H. Miller, and Mary F. Nichols, joined by her husband, A. J. Nichols, against William L. Foster, James C. Foster, Phillip Foster, Jr., and Minnie Foster, to try the title to an undivided one-half interest in a quarter of a league of land in Gonzales county. Defendants answered, amending their original answer, and pleaded not guilty, and the three, five, and ten years statutes of limitation; and alleged that if plaintiffs ever had any cause of action for the land in controversy, the same was derived through a certain will, purporting to have been executed by Thomas P. Rutledge, who was the first husband of Mrs. Eliza A. Foster, deceased, wife of W. L. Foster, and the mother of the other defendants; that said will was executed June 7, 1848, at which time the said Rutledge had a small amount of property, and no children; that afterwards a child was born to him in lawful wedlock before his death, named William M. Rutledge, who survived him several years; that Thomas P. Rutledge died January 10, 1850; that in 1852, in a certain suit, wherein W. L. Foster and wife, Eliza A., (formerly Rutledge,) were plaintiffs, and Alsey S. Miller, the executor named in the will, (and father of plaintiffs herein,) and William M. Rutledge, were defendants, the said will of Thomas P. Rutledge was declared null and void, and the same was set aside; and it was ordered by the court that the said Eliza A. Foster, as relict of said Rutledge, deceased, and the said William M. Rutledge, his minor child, be entitled to take all the

property of said deceased, jointly between them as his heirs at law, which said judgment still remains in full force and effect; that the land in controversy was the community property of Thomas P. Rutledge and his wife, Eliza A., afterwards the wife of Foster. Plaintiffs filed their first supplemental petition July 7, 1887, demurring to each separate part of defendants' answer, and moving to strike out several matters pleaded in offset and reconvention by defendants, and pleaded in reply to defendants' answer: A general denial; a plea of the two and four years statutes of limitation against defendants' pleas in reconvention and offset; and that the property in controversy was the community property of Thomas P. Rutledge and his wife, Eliza A. Rutledge, at the time of Rutledge's death, January 10, 1850; that he left a last will and testament, a copy of which is attached, dated June 7, 1848; that his wife was *enceinte* by said Rutledge when the will was made, and a child was born July 23, 1848, and died July 14, 1854; that plaintiffs are the children of Alsey S. Miller, to whom Rutledge devised his property under the contingencies mentioned in the will; that said will was duly probated on the 29th day of April, 1850; that the judgment annulling the will was not binding on plaintiffs as devisees, because they were not parties to the suit brought to contest the will, and that the functions of the executor, who alone was sued, had terminated before said suit was instituted; that the minor, William M. Rutledge, the only offspring of Thomas P. Rutledge, and for whom the will made provision, was not made a party to the suit, or jurisdiction obtained over him; that said will, as probated, was not subject to a collateral attack under the law of forced heirship; that on the death of William Rutledge, July 14, 1854, Eliza A. Rutledge (then Eliza A. Foster) became vested of a life-estate in Thomas P. Rutledge's one-half community interest in said land, and that these plaintiffs then took a vested remainder until the death of Eliza A. Foster, February 25, 1881, when plaintiffs became vested of all title to said undivided one-half interest; that they are not barred by the statutes of limitation, because they had no cause of action for possession until the death of Eliza A. Foster, on the 25th day of February, 1881; that after that time defendants' claim of title was sufficient to support the three-years statute of limitation; and, further, that defendants were rightfully in possession as co-tenants with plaintiffs, and were tenants at sufferance to plaintiffs, as to their undivided interest, which defendants rightfully and lawfully held possession of until February 25, 1881, and that since that time defendants have not manifested in any manner, or notified plaintiffs of an intention to hold adversely to plaintiffs. The coverture of the plaintiff, Mary F. Nichols, was pleaded as against any adverse holding since the beginning of the year. Defendants filed their first supple-

mental answer, demurring and excepting to and answering plaintiffs' first supplemental petition, which had then been superseded by their first amended supplemental petition. Defendants in this pleading again set forth the validity and binding effect on plaintiffs of the decree annulling Rutledge's will, and further pleaded the renunciation by Eliza A. Foster of the provisions of the will, and set up her adverse holding of the property ever since the will was annulled. The cause was tried before the court without a jury, and judgment rendered for defendants for the land in controversy, from which judgment plaintiffs appeal.

*F. G. Morris*, for appellants. *Harwood & Harwood*, for appellees.

**HOBBS, J.** This is an action of trespass to try title, brought by the appellants on the 13th day of January, 1886, against the appellees, to recover an undivided one-half interest in 1,107 acres of land granted to Darwin M. Stapp. The appellants deraign title to the land from and under the will of Thomas P. Rutledge, executed on January 7, 1848, and probated on April 29, 1850. It was provided by the clause of the will under which appellants claim title that all property, real or personal, owned by the testator should vest first in Eliza Rutledge, his wife, for the period of 21 years from his death, at the expiration of which time it should go to any child or children of the testator he might have by his said wife. In the event of the death of his offspring by his said wife, the property was to vest in her for life. In the event of the death of his wife, Eliza, without offspring by him surviving her, his property should be owned equally by the children of Alsey S. Miller who survived the testator, and which he might have by his present wife. Such are the appellees in this case. It was admitted that the land involved was the community property of Thomas P. and his wife Eliza Rutledge, on the 7th day of June, 1848, and continued so to be until the death of said Thomas P. That they were married on June 25, 1846, and resided in Gonzales county; that one child, W. M. Rutledge, was born July 23, 1848, the issue of that marriage; that Thomas P. Rutledge died in January, 1850, leaving, as his only surviving heirs at law, said wife and child; that his will was executed June 7, 1848, appointing Alsey S. Miller (father of plaintiffs) executor; that the mother of plaintiffs (and wife of said Miller) was the sister of said Eliza; that in July, 1850, Eliza Rutledge married W. L. Foster, one of the defendants, and the other defendants are the children of this union; that said Eliza died on 25th February, 1881; that W. M. Rutledge died July 14, 1854; that the plaintiff T. H. Miller was born March 18, 1848, W. A. H. Miller, January 1, 1846, and Mrs. M. F. Nicholls, March 1, 1843. The latter married W. V. Ramsey July 21, 1861, who died November 1, 1869, and she married A. J. Nich-

olls, plaintiff, October 26, 1871. None of the plaintiffs were under disability in March, 1870. Foster testified that the defendants had been in possession of the land since 1850 as a homestead, when he married Eliza Rutledge, and had paid the taxes on the same, except, perhaps, the first year, when they were paid by Miller, the executor; that A. S. Miller lived about five miles from the land and raised his family there. The plaintiffs were born there, and lived there until they attained their majority. Plaintiff, Mrs. Nicholls, up to the time of her marriage to Ramsey, lived at defendant's place about as much as at her father's. Defendant Foster lived at Miller's place when he married said Eliza. The families were intimate, Alsey S. Miller's wife and Eliza Rutledge being sisters. "The matter of the judgment vacating the will was often discussed between us," and plaintiffs knew all about it, he supposed. A copy of the judgment was at his house. On the 19th of April, 1852, Eliza Foster, formerly the wife of Thomas P. Rutledge, joined by her husband, W. L. Foster, filed a petition in the district court of Gonzales county, where the parties resided, against the executor under the will, to set aside and declare the same null and void.

The petition alleged that she was the relict of said Thomas P. Rutledge; the execution of the will on June 7, 1848, at which time he had a small amount of property, and no children; "that afterwards he had a child born to him, who is now living, named William M. Rutledge; that said deceased, late in 1849, and long after the birth of his child, left on a visit to Tennessee, and died on his return passage on January 10, 1850; and Alsey Miller, with whom his business was left, and the will found amongst his papers, felt it his duty to have the probate thereof made, and the same was done in Gonzales county, on the 29th April, 1850, and he was appointed executor thereon. Your petitioners allege that all the property of the deceased was community property; that said will was made without reference to the contingency which took place, or, at least, before the birth of the child, which was born some months afterwards; that the disposition made by the will of all the property is contrary to law, and is trammelled with conditions illegal and embarrassing to said Eliza Ann and the child, and should be set aside as void and contrary to law, and your petitioner, Eliza Ann, and the child have distribution under the statute. Petitioners set forth that the executor, Alsey S. Miller, has faithfully performed his trust, and has paid all debts, and has closed, or is ready to close, said estate; and it now becomes the duty of your petitioners to pray your honor to hear such proof as may be necessary; that the will be examined by your honor, and that the same be declared null and void; and that an order of distribution be made by your honor, regardless thereof; and that the property in the hands of the executor, now of

right belonging to the estate, be divided between the said Eliza Ann and W. M. Rutledge, as heirs at law; and that the said heirs take according to law. Said Eliza Ann also prays for an order of your honor's court that she may have the benefits of the allowance made to widows, having received none heretofore. Your petitioner prays that Alsey S. Miller be made defendant hereto; that he be required to appear and answer this petition, and show cause, if any he have, why the prayer hereof shall not be granted; and that he be ordered to obey the decree of the court hereon. Your petitioners make profert of the will, and order of the court hereon, and the letters of executorship to said Miller;" closing with a prayer for general relief. An answer was filed by the executor and S. B. Conley, guardian *ad litem* for the minor, W. M. Rutledge. The answer of the executor, Alsey S. Miller, admitted the truth of the material facts set forth in the petition. The minor and heir, W. M. Rutledge, through his guardian *ad litem*, answered in effect, neither admitting nor denying the allegations, and submitted the matters to the court. The following judgment was rendered by the court: "Foster and wife vs. Miller, Executor. (253.) Saturday, October 23, 1852. Came all the parties by their attorneys, and S. B. Conley, Esq., guardian *ad litem* for the minor, William M. Rutledge, and the matters and things being all before the court, by the pleadings and record evidence therein, the same was submitted to the court, and, being heard, it is ordered, adjudged, and decreed by the court that the will of the deceased, Thomas P. Rutledge, made on June 7, 1848, and admitted to probate on April 29, 1850, be, and the same is hereby declared to be, null, void, and of no effect, and that the same be in all things set aside and held for naught. It is further ordered, adjudged, and decreed that the said Eliza Ann Foster, as relict of said Rutledge, deceased, and the said William M. Rutledge, minor, be entitled to take, receive, and hold all the property of said deceased jointly between them as heirs at law, be the same real, personal, or mixed, and subject to the action of the county court of Gonzales county, as to distribution after the debts are paid, and estate closed by the report of the executor, whose acts under the will are not impaired by the decree; and that said court is required to make the yearly allowance to the said Eliza Ann Foster, in accordance with law and the order of said county court. It is further ordered and adjudged that the executor, out of the funds of the estate, pay the costs herein expended, and that this decree be duly certified to the county court for observance."

We do not deem it necessary to consider each of the assignments presented, or to comment upon the many authorities cited in the elaborate briefs in support of the propositions respectively contended for by appellants and appellees, but shall confine our examination of the questions raised to those we believe to

be decisive. There are three controlling propositions involved in this case, and the law of each we believe upon principle and authority to be settled adversely to appellants. If the law is so settled in either one of them, it precludes a recovery by appellants. It is earnestly contended that the appellants were not parties to the suit in which the judgment vacating the will was rendered; that it is not, therefore, binding on them, and is subject to be impeached in this action; that they were necessary parties to the suit, and that it was not such a proceeding *in rem* as would be, for that reason, conclusive as to them. Before determining whether this judgment is conclusive as to appellants upon the principle that a proceeding to probate or vacate a will is one *in rem*, and binding upon the world, it may be well to ascertain whether the objection to the judgment, upon the ground that plaintiffs were not parties to it, has any foundation in fact. And whether they were parties to it depends upon the character of and legal consequences attached to the estate created by the will in favor of plaintiffs, and the relation established by law between such estate and other estates created by the same instrument in favor of other devisees who were parties to the judgment sought to be impeached. The will of Thomas P. Rutledge bequeathed to his wife, Eliza Rutledge, all of his estate, real and personal, for and during the period of 21 years from and after his death. After the expiration of said 21 years, it was provided that his estate should be "owned and enjoyed by my offspring or child or children by my said wife. In the event of the death of my said wife without offspring by me at her death which may survive her, I direct that all of my estate, real and personal, shall be owned equally by the children of Alsey S. Miller which may survive me, which he may have by his present wife. In event of the death of the offspring which I may have by my said wife, I direct that my said wife shall have all my estate, real and personal, for and during her life," etc. Such are the estates created by the will. And applying to the estate created in favor of plaintiffs, upon the contingencies stated, the description given, by the learned writers on this intricate branch of the law, of a contingent remainder, it would seem to belong to that class of estates. It was contingent upon an interest, first, of 21 years in favor of Eliza Rutledge, and again dependent on a life-estate granted to her, in the event of the death of the testator's offspring by her. It was contingent, further, upon the death of W. M. Rutledge, to whom an inheritable estate was devised before it became vested in the appellants. Tested, then, by the definition of a remainder, that was an estate limited to an uncertain person, or to a certain person and a certain event, but not vesting in possession until the termination of the preceding estates. Wig. Wills, p. 139.

The remainder in fee to plaintiffs was con-

tingent upon W. M. Rutledge's death, but did not take effect in possession because of the estate for years and the estate for life in Eliza Rutledge, unless, after it vested in plaintiffs, her estate failed or was renounced, in which event it would vest in possession as fully as if her estate had terminated under the will. Such being the estate of appellants, the next inquiry is, how far and to what extent they would be represented by those to whom other estates were devised, in a suit to which such other devisees were parties. After discussing the rule, "that all persons having an interest in the subject-matter should, under all circumstances, be before the court as parties," Judge Story says: "On the contrary, there are cases in which certain parties before the court are entitled to be deemed the full representatives of all other persons, or, at least, so far as to bind their interests under the decrees, although they are not or cannot be made parties." Story, Eq. Pl. § 142. Citing examples in support of the rule, he says: "Upon similar grounds of a virtual representation of all the proper interests, where there is real estate in controversy which is subject to an entail, it is generally sufficient (all the parties having antecedent estates being before the court) to make the first tenant in tail *in esse*, in whom an estate of inheritance is vested, a party with those claiming the prior interests, without making any persons parties who may claim in remainder or reversion, after such vested estate of inheritance." The tenant in tail "in each case is equally the representative of the subsequent estates and interests. And a decree for or against such first tenant in tail will generally bind those in remainder or reversion, although, by the failure of all the previous estates, the estates in remainder or reversion may afterwards vest in possession." Id. § 144. "If there be no such tenant in tail in being, the first person in being entitled to the inheritance should be made a party; and if there be no such person in being, then the tenant for life; and in such a case, the decree made will bind the other persons not in being." Id. § 145. So "where a bill is brought by a tenant in tail, or by any other person having the first estate of inheritance, other persons having a subsequent vested or contingent interest will generally be bound by the decree, and will be entitled to the benefits as well as the disadvantages thereof." Id. § 146. An exception to this rule of virtual representation is said to exist "where a person is in being claiming under a limitation by way of executory devise, not subject to any preceding vested estate of inheritance." Id. § 147.

The rule on this subject is also stated by Mr. Freeman as follows: "If several remainders are limited by the same deed, this creates a privity between the person in remainder, and all those who may come after him; and a judgment for or against the former may be given in evidence for or against any of the latter."

So where lands were conveyed to be held—*First*, for S. P. C. for life; "*second*, remainder to the heirs of his body; *third*, remainder to R. C. for life; *fourth*, remainder to the heirs of R. C.'s body; *fifth*, remainder in fee to the children of S. C. In an action against the trustees, this deed was set aside. S. P. C. and R. C. afterwards dying, the children of S. C. commenced suit to obtain their remainder in fee. But it was held that the decree setting aside the deed was binding on them; that the contingent remainders depended on the legal fee and the equitable estate in S. P. C. intermediate, and was liable to be destroyed by anything which defeated those estates. \* \* \* It is sufficient to bring before the court the first tenant in tail in being, and if there be no tenant in tail in being, the first person entitled to the inheritance, and if no such person, then the tenant for life." Freem. Judgm. § 172, and cases cited.

Applying these principles to this case, we do not find appellants claiming "under a limitation by way of executory devise, not subject to any preceding vested estate of inheritance," and therefore an exception to the rule of virtual representation, because it was subject to the preceding estate of inheritance of W. M. Rutledge. But we do find several remainders limited by the same instrument, and that of appellants dependent on the estate of W. M. Rutledge, the vested estate of 21 years in Eliza Rutledge, and the contingency of a life-estate in her.

We find, also, that when the judgment vacating the will was rendered in 1852, the person entitled to the first estate of inheritance, as also the tenant for life and for years, were parties to the suit. These estates were destroyed by this judgment, and if the principle be correct that the estate in remainder is subject to destruction by anything which defeats the preceding inheritable estate, it necessarily follows that such was the effect upon the estate of appellants. If the doctrine of virtual representation, as announced in the authorities cited, applies where the tenant for life is made a party, when there is no person in existence having an estate of inheritance, by stronger reason would it apply, and include as a party the appellants, when the person having the inheritable estate was in existence, and a party, as well also as the tenant for life. It is to be observed in this connection that the executor, the trustee for the devisees under the will, was also a party to the judgment. *Anderson v. Stewart*, 15 Tex. 289; *Hollis v. Dashiell*, 52 Tex. 187. Upon the doctrine of virtual representation, it would seem that in the absence of fraud, at least, a decree rendered to which persons possessing the interests in the subject-matter of the decree were parties, as above explained, would be binding upon the contingent estates, dependent on those interests. A judgment affecting the invalidity of a testament is an exception to the rule that only parties to the same, or their successors, are bound. *Bigelow*, Estop. 12. The statute

(Pasch. Dig. art. 1262) under which the will was vacated did not declare who should be parties to the suit. And it has been repeatedly held in this state that in suits involving the title to land, (and the suit to vacate the will involved the title to land,) it is not necessary to make the heirs parties with the executor. *Gunter v. Fox*, 51 Tex. 383; *Zacharie v. Waldrom*, 56 Tex. 117; *Guilford v. Love*, 49 Tex. 715. If, however, the appellants were necessary parties, we think, under the authorities cited, they were represented by the persons made parties owning the estate of inheritance and the life estate, together with the executor under the will, who was also a party. The suit to set aside the will was instituted under article 1262, Pasch. Dig., the law then in force. This article, after providing the manner in which a will shall be probated, provides that "any person interested in any such will may, within four years after it is admitted to probate, institute suit in the district court to contest its validity." Infants, *femes covert*, and persons *non compos mentis*, are allowed the same period after the removal of their respective disabilities within which to institute such suit, etc. There can be no doubt that in October, 1852, the district court was clothed with the jurisdiction to determine any contest with respect to the validity of a will. This question was settled in the early case of *Parker v. Parker*, 10 Tex. 86, which has been repeatedly since cited with approval, in which case it was held that independently of its general and enlarged powers to entertain such a suit, it was expressly conferred by the statute. *Vickery v. Hobbs*, 21 Tex. 576. The transfer of this jurisdiction, under the provision of the present constitution, was explained in *Franks v. Chapman*, 60 Tex. 46.

If the appellants' position be correct, that they were necessary parties to the suit in which the will was vacated, and that the doctrine of virtual representation has no application, the question then presented is, whether the proceeding to vacate Rutledge's will was one *in rem* or not, and if so, what was its effect upon the appellants. The authorities are uniform to the effect that a proceeding to probate a will is a proceeding *in rem*. Upon this point there appears to be no diversity of opinion. Such proceeding is said to be an adjudication, upon the *status* of some subject-matter, which, whenever binding upon any person, is upon all persons. A careful consideration of the question in the case of *Steele v. Renn*, 50 Tex. 481, resulted in the conclusion that an application for the probate of a will is a proceeding *in rem*, and that a judgment of the court thereupon is binding upon all the world, until revoked. See, also, *Freem. Judgm.* § 607; *Zacharie v. Waldrom*, *supra*; *Wells, Res Adj.* § 426; *Scott v. Calvit*, 3 How. (Miss.) 159.

If any distinction exists in this respect between a proceeding to probate a will and one to vacate or set aside a will so probated, it

will be found fully explained in the case of *Franks v. Chapman*, 61 Tex. 579. In that case, discussing the features characterizing these proceedings, it is said: "A proceeding to contest the validity, as a will, of a paper which has been admitted to probate as such, is no less a probate proceeding than is one instituted to have a paper probated as a will. The inquiry in each case is the same; the subject-matter is the same; and the jurisdictional power exercised in declaring a paper already probated to be invalid as a will is co-extensive with that exercised in refusing to declare by the act of probate that the paper offered is the valid will of the deceased. The actors in one case assume the burden of establishing a proposition negative in its character, while in the other they assume the burden of an affirmative. This is practically all the difference in the two procedures." If, then, the only practical difference between the proceeding to probate and that to annul the will relates to the burden of proof, it follows, necessarily, that in all other respects they are similar. If so, a suit under our statutes to set aside and declare invalid a will admitted to probate, being a proceeding *in rem*, the judgment therein is as conclusive as would be the judgment admitting it to probate, about which there seems to be no diversity of opinion whatever. From the views expressed, it follows that we are of opinion that appellants were not necessary parties to the suit; that the estate in remainder created by the will in favor of plaintiffs was represented in the suit to set aside the will in the estate of inheritance, and that for 21 years, and for life, respectively, vested in W. M. Rutledge and Eliza Rutledge, who, with the executor, Alsey S. Miller, as trustee for the legatees, under the will were made parties; that if the plaintiffs were not so virtually represented by those holding these estates, still, upon principle and authority, the proceeding to vacate the will was *in rem*, affecting the *status* of the property and binding upon all parties as before explained.

In addition to the reasons already stated which would preclude a recovery by appellants, there is another made manifest by the record, which, in our opinion, is fatal to the action. The estate in fee, granted to W. M. Rutledge by the will, vested in the appellants upon his death, and awaited only the determination of the life-estate of Eliza Rutledge to take effect in possession under the will. W. M. Rutledge died in 1854. The estate in fee vested in appellants immediately; not the right of possession, however, against Eliza Rutledge, if she held under the will. But the will and the life-estate conveyed to her were renounced by her in October, 1852. She severed the connection between these estates; destroyed the trust relation existing by reason thereof between herself and appellants; entered into possession adversely to the will in her own right, and so openly held until her death in 1881, which possession was continued by defendants until the institution of

this suit in January, 1886. That her claim and possession were in her own right, and adverse to appellants, was a notorious act, repudiating the trust relations and renouncing title under the will, is unmistakably evidenced by the decree of 1852 vacating it.

In *Anderson v. Stewart*, 15 Tex. 290, the possession by an administrator for nine years was held to be sufficient to bar the suit of a former wife of the testator, who claimed one-half of the property which the testator had disposed of by will. In the case cited, the plaintiff resided in another state. It was held that limitation would begin to run when the trust relation was repudiated by some notorious act, and reference was made to an example of such notorious act in the case of *Winburn v. Cochran*, 9 Tex. 123, where it was said that the inventory of a slave was such an act. The judgment of the district court setting aside the will, would certainly be an act more notorious and public in its assertion of an adverse claim than the inventory of the property in the one case, and equally as notorious an act of adverse claim as the possession and administration of the estate by the executor in the other. In addition to this, the proof was that defendants had been in possession from 1852 to 1886, paying taxes and occupying it as a homestead; that plaintiffs resided within a few miles of the land; the families were related and intimate, and the judgment vacating the will a frequent topic of conversation between them. Including the time from the death of W. M. Rutledge in 1854 to March 30, 1870, appellants, although having the estate in fee vested in them, were under disabilities. But on March 30, 1870, their right of action accrued, and they were then, by such legal proceeding as would accomplish that end, entitled to protection, and could assert their rights against any act to injure or destroy their estate in fee or to place them in possession under the remainder. Mrs. Rutledge's renunciation under the will, and repudiation of any possession for or inuring to appellants, her open, adverse assertion of title and possession in her own right, put the statute of limitation in motion against appellants, as would the repudiation by a trustee of his relations to and an adverse assertion of claim against his *cestui que trust*.

It is contended that although the estate in fee vested in appellants upon the death of W. M. Rutledge in 1854, no right of action accrued until the death of the life-tenant, Mrs. Rutledge, in 1881, and therefore no limitation ran against them until that time, because the remainder did not take effect in possession until then. This would be true, and appellants would not, by virtue of the estate in remainder vested in them, upon W. M. Rutledge's death, be entitled to the possession as long as the life-tenant held as such. But upon the renunciation of the will, and the estate thereunder, and the assertion of claim, coupled with adverse possession in her own right, the right of action accrued, because

by virtue of this renunciation they were entitled to possession. The authorities are to the effect that where the estate in remainder is dependent upon the life-estate of the widow of the testator, and she waives the provisions of the will and takes under the statute, the estate in remainder vests immediately upon the determination of the widow's estate or interest. 2 Redf. Wills, p. 257, par. 66.

In *Wood's Adm'r v. Wood's Devises*, 1 Metc. (Ky.) 512, it was said that, "as a general rule, where real or personal estate is devised to one for life, with an ulterior devise to another, the ulterior devise vests absolutely upon the death of the testator, and takes effect in possession whenever the prior devise from any cause ceases or fails." In that case there was a devise of all of his estate to the wife during her life, and devises over to others; the widow renounced the provisions of the will, and it was held that the ulterior devisees took effect upon the widow's renunciation of the will as they would have done upon her death. So in the case of *Fox v. Rumery*, 68 Me. 121, where the wife waived the provisions of the will and accepted dower instead; it was held that the effect was to accelerate the devise over. See, also, 2 Jarm. Wills, 374.

In the case under discussion, there was a devise for life to Mrs. Rutledge, remainder over to appellants; she waived the devise,—declined to accept it; therefore the devise or remainder over took effect at once, as if no prior life-estate had been created. The remainder to appellants vested upon W. M. Rutledge's death in 1854. The right to possession took effect upon the renunciation by the life-tenant, Mrs. Rutledge, of the estate granted her under the will, which, although in 1852, could not affect appellants until the right of action accrued in 1854, when W. M. Rutledge died, and, in this case, did not put the statute in motion until March, 1870, because they were under disability. But from March, 1870, to January 13, 1886, nearly 16 years after the right to possession of the land and the right of action, against the life-tenant, or whoever might be in possession, the appellants have instituted no proceedings, and, as before stated, if no other cause existed which precludes a recovery this would be fatal to the action. If there had been a conveyance by Eliza Rutledge of the land, and possession thereunder for 16 years adversely, and in the right of the purchaser, the statute of limitation would have been available against appellants. Such conveyance and possession could not have been more adverse to them than her renunciation of title under the will, and her possession in her own right during that time.

We are of opinion that there is no error in the judgment, and that it should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, and, without passing on other questions discussed in the report, we approve so much of the opinion as holds that

the necessary parties were before the court when the decree annulling the probate of the will of Thomas P. Rutledge was entered to give validity to that decree, and the judgment will be affirmed.

*PERRILL et al. v. KAUFFMAN et al.*

(*Supreme Court of Texas. Dec. 4, 1888.*)<sup>1</sup>

**ATTACHMENT—AFFIDAVIT.**

Under the Texas statute requiring parties suing out an attachment to make oath that it is not for the purpose of injuring or harassing either of the defendants named therein, an affidavit that "this attachment is not sued out for the purpose of injuring or harassing the defendant," where there are two defendants, is insufficient.

**Appeal from district court, Hill county.**

Kauffman & Runge, under their firm name, brought action on a promissory note, executed by defendants in their firm name, and sued out attachment against the property of W. M. Perrill and P. F. Fox, composing the firm of Perrill & Fox. Before trial a motion to quash the attachment was overruled, and defendant appeals.

*A. P. McKinnon and J. S. Abney, for appellants. Tarlton & Jordan, for appellees.*

**GAINES, J.** The appellees brought this suit against appellants on a promissory note executed by them in their firm name, and at the time of the filing of the petition they sued out a writ of attachment. The writ commanded the sheriff to attach "the property of W. M. Perrill and P. F. Fox, composing the firm of Perrill & Fox." Before entering upon a trial of the cause, appellants presented a motion to quash the attachment, which was overruled by the court. The ruling of the court on the motion was excepted to, and is now assigned as error. The ground of the motion was that the affidavit was insufficient because the affiant did not aver that the attachment was not sued out for the purpose of injuring or harassing the defendants. The language of the affidavit is: "And that this attachment is not sued out for the purpose of injuring or harassing the defendant."

Our courts have never applied the rule that a literal compliance with the terms of the statute is required in the proceedings preliminary to the issue of a writ of attachment. It has therefore been held under our former laws, which required the petition to be sworn to, that proper averments in the affidavit would supply the want of an affidavit to the petition, (*Schrimpf v. McArdle*, 13 Tex. 868;) and, under the Revised Statutes, that an attachment was good when affidavits were made by two different attorneys, one swearing to the fact of the indebtedness, and the other to the grounds otherwise required in order to authorize the writ, provided they were made very near the same time, and for the purpose of obtaining the process. *Lewis v. Stewart*, 62 Tex. 352. But, on the other

hand, this court has uniformly held that a substantial compliance with all the requirements of the statute is required, and that no presumptions can be indulged to support an affidavit defective in any substantial particular. *Bank v. Flippen*, 66 Tex. 610, 1 S. W. Rep. 897; *Focke v. Hardeman*, 67 Tex. 178, 2 S. W. Rep. 363; *Moody v. Levy*, 58 Tex. 532. In *Bank v. Flippen*, supra, the defect was the omission of the word "is" before the words "justly indebted." Hardly any other omission could have left the intention of the affiant more obvious, and yet the affidavit was held bad. The statute allows a writ of attachment to issue in certain cases when necessary to secure the collection of debts; but, in order to secure debtors against an improvident or malicious use of the process, a bond and affidavit are required in every case. The object of the affidavit is to protect the debtor both by an appeal to the conscience of the affiant, and by holding up before him the penalties of perjury. Therefore, we are not permitted to resort to presumptions as to what the affiant intended to swear, but must be governed by what he has sworn, as shown by the language employed. Applying this rule, the affidavit under consideration is insufficient. There were two defendants. Before the plaintiffs were entitled to an attachment, they were required to make oath that it was not sued out for the purpose of injuring or harassing either of them. If it had said "defendants," it would have been reasonably certain that it was meant the attachment was sued out to injure or harass neither; but having said "defendant," it means one and not the other. Could the affiant be prosecuted for perjury if it could be shown that the purpose of the affidavit was to injure Perrill, or that it was to harass Fox only? Might not the affiant have sworn, as he has sworn, with a good conscience, although it was his purpose to injure or harass the one and not the other? We think the court erred in overruling the motion to quash the attachment.

The other assignments of error are to the action of the court upon other matters affecting the attachment proceedings, and need not, in view of the foregoing ruling, be considered. The judgment will be here reversed and reformed so as to dissolve the attachment, and set aside the proceedings thereunder, at the costs of the appellees; appellees paying the costs of the appeal.

*LINDHEIM et al. v. MUSCHAMP et al.*

(*Supreme Court of Texas. Oct. 30, 1888.*)<sup>2</sup>

**VENUE—RESIDENCE OF DEFENDANTS.**

A bond to secure performance of a contract payable at no specified place, cannot be sued on in the county in which the contract was to be performed, where the principal and sureties are non-residents thereof.

<sup>1</sup> Publication delayed by failure to receive copy of opinion.

<sup>2</sup> Publication delayed by failure to receive copy of opinion.



Appeal from district court, Val Verde county; WINCHESTER KELSO, Judge.

Action by Max Lindhelm & Bro., on a bond executed by Ben Muschamp as principal, and James Connell and A. L. Coffin as sureties. Judgment for defendants. Plaintiffs appeal.

*Ware & Tugwell* and *Jones & Jones*, for appellants. *Clamp & Clamp*, for appellees.

ACKER, J. Ben Muschamp entered into a written contract with Max Lindhelm & Bro. to build a house for them in the town of Del Rio. To secure to Max Lindhelm & Bro. the payment of such damage as might result to them should Muschamp fail to perform the contract, Muschamp executed bonds in the sum of \$2,000, payable to Lindhelm & Bro., with James Connell and A. L. Coffin as sureties thereon, conditioned that Muschamp should well and truly perform his contract, which was referred to in the condition of the bond.

This suit was brought in the district court of Val Verde county against Muschamp and the sureties on his bond, to recover the amount of the bond as liquidated damages for alleged breaches in the condition of the bond, or, in the alternative, to recover the sum of about \$600 damages, which it was alleged had been sustained by appellants in consequence of Muschamp's failure to construct the building in compliance with the terms of his contract. The petition alleged that Muschamp and the sureties on his bond resided in the county of Kinney. Appellees pleaded in abatement their personal privilege of being sued in the county of their residence. The plea was sustained, and the suit dismissed. From this judgment Lindhelm & Bro. have appealed, and assign error upon the ruling of the court sustaining the plea in abatement, and dismissing the suit. The sureties on the bond were liable only upon condition that their principal failed to perform his contract, and the bond is not made payable in any particular place. The engagement entered into by Muschamp to construct the building was one contract, and the bond was another, each separate and distinct from the other. The liability upon the latter was dependent entirely upon the performance or non-performance of the former.

In order to give jurisdiction to the court in which this suit was brought the bond must have been made payable in Val Verde county. To entitle a plaintiff to sue in a county other than the residence of the defendant he must bring his case clearly within some exception named in the statute. *Cohen v. Munson*, 59 Tex. 237. The fact that Muschamp's individual contract to construct the building was to be performed in Val Verde county did not give the court of that county jurisdiction of the suit brought upon the bond, payable at no specified place, and executed by persons residing in Kinney county at the time the suit was brought. We are of opinion that there is no error in the judgment of the court below, and that it should be affirmed.

# STATE v. HAWS.

(*Supreme Court of Missouri*. April Term, 1889.)

For majority opinion, see 11 S. W. Rep. 574.

BARCLAY, J., (*dissenting*.) It appears to me that instruction No. 1, accurately quoted in the foregoing decision, (11 S. W. Rep. 574,) is, at best, a departure from our law which invests the jury with the power to determine the weight and sufficiency of testimony, and expressly forbids the court, in any criminal case, to "comment upon the evidence, or charge the jury as to matter of fact, unless requested so to do by the prosecuting attorney and the defendant or his counsel." Rev. St. 1879, § 1920. Defendant saved exception to it at the time. No suggestion has been made of any waiver or other act weakening the effect of his objection. If there was error in giving the instruction, a new trial should be granted, unless the court is satisfied that it was harmless. It may have been, but what has been said to that effect does not appear convincing to me. It would probably serve no useful purpose to go further, even did time permit, than to file this mere memorandum of the reason for my dissent from the conclusion announced by my able and faithful associate.

## REED v. BOTT et al.

(*Supreme Court of Missouri*. April 18, 1890.)

For majority opinion, see *post*, 347.

BARCLAY, J., (*dissenting*.) With the greatest respect for the views expressed in the opinion of the court in this cause, they yet seem to me to fall short of being convincing. The point on which the result is found to turn is one of pleading. It is ruled by the majority of the court that a general allegation of fraud is not sufficient, in such a case as this, to support a finding, after a trial of that issue, and a decree thereon in the circuit court. This ruling necessarily involves the general construction to be placed upon our statute of amendments, (Rev. St. 1879, c. 59, art. 6,) and seems to me of such importance as justifies a brief expression of the reasons for my dissent from the conclusion reached by my brethren.

It is declared by section 3569 of that chapter (Rev. St. 1879) that "the court shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Now, it seems to me that, though a general allegation of fraud in a petition might properly be challenged, by timely motion, as too vague to inform the adverse party of the precise nature of the case to be met, it ought to be regarded by the courts as sufficient, after verdict, where the adverse party has put it in issue, and has treated it at the trial as amply informative for him.



In the case before us, the defendants (now making the objection in question here) submitted evidence on the issue of fraud, and the court at their instance gave several instructions presenting various phases of the facts to the jury with special reference to that issue. It appears to me that, in such state of the record, the generality of the allegation of fraud, assuming it defective, could not have materially affected "the substantial rights" of the defendants upon the merits, and should therefore be viewed now as sufficient for the purposes of this case. While it is true, as a general proposition, that the pleadings must definitely outline the issues in each case, it is also undeniable that in many instances the action of the parties in the conduct of a civil action in the trial court may supply omissions or cure defects of that nature. Thus, in a recent case, where the circuit court, during a trial, gave leave to amend the petition, introducing a new party plaintiff, but the amendment was not actually made, though the trial proceeded as if it had been, this court held that there was no error in the omission, and construed the record as though the amendment had been formally filed. *Merrill v. City of St. Louis*, (1884,) 83 Mo. 244. A like view was expressed in *Young v. Glascock*, (1888,) 79 Mo. 574, involving the same principle applied in the *Merrill Case*. It has also been repeatedly ruled by this court that, where a reply is necessary to put in issue affirmative new matter in the answer, its omission will not be ground of reversal where the parties have tried the case as though a reply were on file, ignoring its absence. *Howell v. Reynolds Co.*, (1872,) 51 Mo. 154; *Smith v. City of St. Joseph*, (1870,) 45 Mo. 449; *Heath v. Goslin*, (1883,) 80 Mo. 310. We further find that in actions at law, as distinguished from suits involving equitable rights, it has been frequently declared that a general allegation of fraud is sufficient to support a verdict. *Montgomery v. Tipton*, (1824,) 1 Mo. 446; *Pemberton v. Staples*, (1839,) 6 Mo. 59; *Edgell v. Sigerson*, (1855,) 20 Mo. 495; *Fox v. Webster*, (1870,) 46 Mo. 181. It seems to me that that rule should be applicable to proceedings such as that now before us, at least when the issue of fraud has been met and submitted in the trial court by the party who on appeal seeks to assert that it was not raised by a sufficiently specific allegation of facts in the first instance. The case appears to me to fall within the control of the principle that parties are bound on appeal by the positions taken by them in the trial court. Therefore my dissent is respectfully entered to the conclusion announced by my able associates.

#### HUNT v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 1, 1889.)

#### CRIMINAL LAW—APPEAL—REVIEW—NEW TRIAL.

1. On a trial for murder, objections that the jury were allowed to separate during the trial, or

that after they were sworn they visited the locality of the alleged murder without any order of court, and in the absence of the prisoner and his counsel, where made for the first time after verdict, cannot, under Carroll's Code Ky. § 281, be considered by the court of appeals.

2. Where affidavits in support of a motion for a new trial are opposed by affidavits denying the grounds relied on, the trial judge, after making full inquiry as to the truth of such grounds, cannot be held to have abused his discretion in overruling such motion.

Appeal from circuit court, Bourbon county; J. R. MORTON, Judge.

"Not to be officially reported."

T. C. Lyng and Wm. Purnell, for appellant. P. W. Hardin, Atty. Gen., for the Commonwealth.

PRYOR, J. This appeal is from a judgment imposing the death penalty on the accused for the murder of one Abner. Upon a careful consideration of this record, we find no error to the prejudice of the accused, and in fact no question has been raised by counsel that would require a reversal, if the errors relied on were found in the record. We are prompted to respond to the arguments of counsel for the reason only of the severity of the punishment inflicted upon his client, and the deep interest he has manifested in his behalf.

One of the grounds for a new trial relied on in the court below was that the sheriff had permitted the jury to separate after the case had been submitted, or during the progress of the trial. Another, that the jury, or a part of them, had, after they were accepted and sworn, viewed the ground or locality in which the murder is alleged to have been committed, without any order of court, and in the absence of the prisoner and his counsel. This court has repeatedly held that the decision of the court below, overruling a motion for a new trial, was not the subject of an exception, if made for the first time after the verdict, and only on the motion for a new trial. Such exceptions as are available are made, and required to be made, during the progress of the trial; and causes arising after the verdict, or that were not excepted to during the trial, may be heard by the trial court, but cannot be considered by this court, as provided by section 281, Carroll's Code. The objection to a juror for want of statutory qualification, an error in not keeping the jury together, and other like objections that are made for the first time after verdict, are errors over which the trial court is supreme, and their consideration is taken from this court by the section of the Code cited. Besides, if this court could revise such errors, it is apparent from this record that the errors complained of, and supported by certain affidavits, did not really exist. Counter-affidavits were filed of the sheriffs in charge of the jury, and of several of the jurors, who state that they did not view the ground or premises where the killing took place, and that no separation of the jury took place; that the jurors were in charge of the sheriff or his dep-

uties, under the instructions of the court, from the inception of the trial until its termination; and the trial judge, in overruling the motion for a new trial, after making, as the record shows, full inquiry as to the action of the jurors, could not be said to have abused his discretion, even if this court had the power to revise his action.

There are no objections to the instructions, nor was there any ground for an exception. The man killed had been an important witness for the commonwealth in a prosecution against the wife of the accused, who stood charged with taking the life of one Thomas by shooting him with a pistol. She was convicted, and sent to the state-prison. This was the only motive causing the accused to take Abner's life, so far as this record shows. The accused and Abner, the dead man, were together in a grocery in the town of Paris on Sunday night. The accused had first entered the grocery, and had been there for some time with others who have testified in this case. Abner, the man killed, came into the grocery while the accused was there, and purchased some cigarettes, treating the crowd. In a few minutes the accused left the grocery, and in a moment or two Abner left. After a short interval pistol shots were heard, and a witness (a woman) heard some one cry out about that time: "I am a dead man, Hunt. What did you do that for?" Another woman (colored) states that she saw the man running, and recognized Hunt, the accused, as the man firing at him. He was some 10 or 12 steps behind his victim. Hunt, who was examined as a witness, denies the shooting, and attempts to explain away the circumstantial testimony against him. The positive proof of his actual presence, and his firing the shots that took Abner's life, is attempted to be overthrown by proof of conflicting statements made by the witness, and other circumstances that it is argued should destroy the effect of her testimony. Such arguments were properly addressed to the jurors who tried the issue between the commonwealth and the accused, and it is not for this court to determine that the witnesses for the state were not to be believed, or that facts and circumstances existed that rendered their statements incredible. In fact, the testimony sustains the verdict rendered; and if guilty of the murder of Abner, as the evidence indicates, the punishment is commensurate with the crime. Judgment affirmed.

#### KOENING'S ADM'R v. COVINGTON.

(Court of Appeals of Kentucky. June 21, 1889.)\*

##### DEATH BY WRONGFUL ACT—PARTIES.

Under Gen. St. Ky. c. 57, § 3, giving the "widow, heir, or personal representative" of a person alleged to have been negligently killed the right to sue therefor, where such a decedent leaves neither widow nor child, his personal representative cannot sue for his killing.

\*Publication delayed through failure to receive copy.

Appeal from circuit court, Kenton county. "Not to be officially reported."

Action under Gen. St. Ky. c. 57, § 3, providing that, if a person is lost or destroyed through the willful neglect of another person, company, or corporation, the widow, heir, or personal representative of the deceased shall have the right to sue therefor.

James P. Tarvin, for appellant. W. A. Byrne and L. J. Blakely, for appellee.

LEWIS, C. J. Appellant, administrator of Edward Koenig, brought this action to recover damages for destruction of the life of his intestate, who was an infant, by the alleged willful neglect of appellee in failing to keep the bridge, whereon he lost his life, in a safe condition.

In the case of Henderson's Adm'r v. Railroad Co., 5 S. W. Rep. 875, decided in December, 1887, it was held that the widow and children only of a person whose life is destroyed by willful neglect are entitled to what may be recovered in an action authorized by section 3, c. 57, Gen. St.; that the alternative right of the personal representative to sue can be exercised alone for their use and benefit, and consequently, if there be neither widow nor children, he cannot maintain the action. The same question has been passed on and decided at the present term in the case of Jordan's Adm'r v. Railroad Co., 11 S. W. Rep. 1013.

It appears the intestate in this case left neither wife nor children, and, that fact having been pleaded and relied on as a defense, the question of appellant's right to maintain the action was directly presented and passed on by the lower court; and, as the court did not err in dismissing the action, the judgment must be affirmed.

#### WHAYNE'S EX'R v. MORGAN et al.

(Court of Appeals of Kentucky. June 21, 1889.)\*

##### FRAUDULENT CONVEYANCES—PARTIES—REMAIN-DER-MEN—HOMESTEAD.

1. In a suit to set aside as fraudulent a deed from a man to his wife, conveying property to her with power to mortgage or sell during his lifetime, but, if not so mortgaged or sold, to go, after the death of both, to his children, such children are necessary parties.

2. Where a man conveys to his wife property in which he is entitled to a homestead, and the value of the property conveyed is less than the amount he is entitled to hold under the homestead law, such conveyance, even though made with fraudulent intent, is no injury to the grantor's creditors, and will not be set aside at their instance.

Appeal from circuit court, Daviess county. "Not to be officially reported."

Wilfred Carrico, for appellant. Haycraft & Slack, for appellees.

HOLT, J. A judgment creditor, after obtaining a return of *nulla bona*, seeks to set aside a deed from J. H. Morgan to his wife as fraudulent, and to subject the land to the

\*Publication delayed through failure to receive copy.

payment of his debt. The only parties to the conveyance are the husband and wife. The recited consideration is love and affection, and the future payment by the grantee to two mortgagees of "the amount due them upon a note of \$810, with 10 per cent. interest from April 17, 1878, till paid, secured by mortgage upon the land." The *habendum* is: "To have and to hold by said second party, [the wife,] with the privilege of selling or mortgaging it during the life of said first party, [the husband,] and with his written consent; but if not so sold or mortgaged, then to hold it during her natural life, and at her death and the death of said first party to go to his children and to her children by him." The court, over the objection of the appellant, compelled him to make the children defendants. The deed was executed and recorded on August 22, 1881. More than five years,—the statutory limitation period against an action for relief upon the ground of fraud,—had elapsed before they were made such parties by an amended petition on November 22, 1886. They relied upon the limitation, and it is urged that it was error to require the appellant to make them parties. He insists that the grantor and the grantee are *quasi* trustees for the remainder-men, and if the deed was fraudulent the chancellor should compel them to exercise the power of transfer named in the deed, thus divesting the children of title and undoing the fraud, and that the latter are not necessary parties. It is true their interest in the property is, by the terms of the deed, liable to be defeated by a sale in conformity thereto, but yet they are interested parties to this controversy. It is proposed by this suit to divest them of their contingent interest. They are proper parties, and the court, therefore, properly required the appellant to bring them before it.

If this were not so, yet the appellant could not succeed upon this appeal. The grantor was entitled to a homestead in the 96 acres of land embraced by the deed. Not only is the life-interest, which the grantor must be regarded as having under the deed, unquestionably worth less than the \$1,000 homestead right, but while three witnesses for the appellant testify that the absolute right in it is worth about \$1,900, and a brother-in-law of the appellant says \$2,500, yet one of his witnesses fixes the value, when the deed was made, at from \$11 to \$12 per acre, and four witnesses for the defense say \$10 per acre; another says from \$10 to \$10.50, while another names \$11 per acre as its fair value when the husband conveyed to the wife. The lower court dismissed the petition. The judgment does not show the reason. The chancellor, upon this state of proofs, may very well have done so upon the ground that, conceding there was a fraudulent purpose in making the conveyance, yet the absolute right to the land was not worth more than the homestead right; and that the creditor was not, therefore, prejudiced by the convey-

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ance, and cannot complain. The value was a question of fact, and we are not authorized upon the record as presented to say that such a conclusion of the lower court as that just suggested is not sustained by it.

A sale by a debtor of his property without sufficient motive is, of course, a badge of fraud. If it be to one of his family it is regarded with suspicion. If the consideration recited be a false one, he should furnish a satisfactory explanation. In this instance the mortgage debt of \$810 had been created, but prior to the making of the deed to the wife it had, upon settlement, been found that but \$248.75 was still owing, and for this sum a new note had been executed. This much was, in fact, owing, however, when the deed to the wife was made, and it does not recite that she is to pay \$810 or the \$810 note, but "the amount due them" upon it. If, however, the consideration recited were altogether false, and the conveyance unquestionably fraudulent, yet if in fact the property could not have been subjected by the creditor, and is, by the exemption law, beyond his reach, then he is in no worse fix than he was before the transfer, and cannot complain. The balance of this mortgage debt was a lien upon the land when it was conveyed to the wife. It had for years been the homestead of the parties to the deed. She has since the transfer paid a portion of the debt. The satisfaction of the balance owing upon it out of the property would have left less to satisfy the homestead claim. The evidence tends strongly to show, however, that the entire 96 acres was not worth more than \$1,000 when the deed was made, and the judgment is therefore affirmed.

#### WOODHEAD v. FOULDS *et al.*

(Court of Appeals of Kentucky. June 21, 1889.)<sup>1</sup>

##### ADVERSE POSSESSION.

Complainant bought land, and had uninterrupted possession for 28 years, without knowledge of any rightful claimant, though notices warning unknown heirs had been published. She also had an indemnity bond from the vendor. *Held* that, on foreclosure of the purchase-money mortgage by vendor, she was not entitled to have the sale enjoined until the vendor perfected his title.

Appeal from chancery court, Pendleton county; J. W. MENZIES, Chancellor.

"Not to be officially reported."

Bill by Ann Woodhead and husband, Joshua Woodhead, against Thomas H. Foulds, George P. Goulding and others. Complainant Ann had bought land of Goulding, which the latter had purchased from Foulds, executing a mortgage for the unpaid purchase price. Foulds foreclosed the mortgage, and obtained judgment for sale of the land. This bill was filed to enjoin the sale, and to require Foulds to perfect his title. The trial court held that complainant's title was in no danger, and dissolved the injunction. Ann Woodhead appeals.

<sup>1</sup> Publication delayed by failure to receive copy of opinion.

*C. H. Lee*, for appellant. *Collins & Fenley*, for appellees.

**BENNETT, J.** Casper Sharp died in 1859, the owner of one-third of the land in controversy. In 1860, Thomas H. Foulds, being the owner of the other two-thirds, and believing that Sharp died without heirs, except his wife, bought Sharp's third interest from her. He thereafter, as did those claiming under him, held the entire land as his own until 1866, when the appellant bought the same, and has held it as her own ever since. Sharp never had any children. At his death he was 55 years old. At one time he had brothers and sisters, all of whom were older than he was, and were married. The proof fails to show whether or not they were living at the time of Sharp's death. If they were dead at the time of Sharp's death, leaving children, all of whom were infants, time enough has elapsed to bar the right of the youngest one of the children. If the brothers and sisters were all living at the time of the death of Sharp, time has certainly barred the right of all of them, except, perhaps, the sisters, if married at the time, and have continued in coverture ever since. If this be so, they are now over 85 years old; but the facts that they have been warned as unknown heirs for years, and have never asserted any claim to the land, and have never been heard from, although this case has been on the docket ever since 1870, and the improbability of their living to such extreme old age, create a strong presumption that they died long ago. These facts make it reasonably certain that time has completed the appellant's title to said land, which, together with the bond of indemnity executed to the appellant, authorized the chancellor to decide that the appellant's right to said third interest in said land was protected. The judgment is affirmed.

**HARRISON COUNTY COURT *et al.* v. WALL *et al.***

(Court of Appeals of Kentucky. June 18, 1889.)<sup>1</sup>

COUNTIES—NUISANCE—PLEADING.

1. In an action to enjoin a county from erecting hitching racks for horses around a public square in a city, on the ground that the city has control of the streets and squares, it is error to sustain a demurrer to an answer which avers that the city council gave the county permission to erect the racks at the places where they were proceeding to erect them, though the manner in which the permit was given was not alleged, as the fact was admitted by the demurrer.

2. It cannot be held as a matter of law that the erection of hitching racks on the sides of a public square in a city is the creation of a nuisance.

Appeal from chancery court, Harrison county; J. W. MENZIES, Chancellor.

"Not to be officially reported."

Suit by W. S. Wall and others against the Harrison County Court and others for an injunction to prevent defendants from erecting

certain "hitching racks" for horses on the streets of Cynthiana, on the north and south sides of the public square therein. Plaintiffs are citizens of said town and owners of dwellings and store-houses fronting on the streets along which defendants were proposing to build said hitching racks, and claimed the right to prevent said contemplated act, because (1) by its charter the town of Cynthiana was given the exclusive right to repair and control said streets, and Harrison county, it was alleged, had no interest in the same, and the expenditure of the county's revenue in erecting said hitching racks was therefore an illegal appropriation of said funds, and an illegal attempt to indirectly control or obstruct said streets; (2) the erection of said racks on said streets, and immediately in front of plaintiffs' property, was alleged to be *per se* the commission of a public nuisance. At the December term, 1886, of the trial court, time was given defendants until January, 1887, to file their answer. Said answer was filed, without objection, at the May term, 1887. Defendants claimed that hitching racks had been first erected on the east side of the public square in 1839; that in 1860 the town of Cynthiana had removed said racks, and built other racks on the north, south, and west sides of the public square; that in 1885 said town had torn down these racks, but had afterwards "granted the county court permission to erect a hitching rack on the south side and one on the north side of the public square," which said county court was beginning to do, when they were enjoined by plaintiffs. Demurrer to this answer was sustained, and the injunction perpetuated. Defendants appeal.

*W. P. D. Bush, M. C. Swinford, and Lucius Desha, Jr.*, for appellants. *J. T. Simon*, for appellees.

**PRYOR, J.** In the absence of any other order apparent from the record than the one submitting the cause, we must conclude that the submission was on the demurrer to the answer, and for no other purpose. The order reads: "Came the plaintiffs by attorney and demurred to the defendants' answer, and the cause is submitted." The answer had been filed at that term of the court, and the statements of the answer should have been taken as true if submitted in chief; and while the appellants, if prejudiced by the judgment, should have moved to set it aside, and their failure to do so is persuasive that the submission was in chief, still we are not inclined to adjudge that the answer presented no defense to the action. It is averred that the trustees of the town of Cynthiana removed the racks from the one square to the other, or from the east side of the public square to the north, south, and west sides, and that after this removal "the board of councilmen gave the county court permission to erect a hitching rack on the south and north sides of the public square," which is the nuisance complained of. While the manner in which this permit

<sup>1</sup>Publication delayed by failure to receive copy of opinion.

was given is not alleged, still the averment is made that the council authorized the erection of the racks; and, this fact being admitted by the demurrer, there was a defense to the action, unless the fact of the construction of these racks at the places mentioned created a nuisance as a matter of law, and this we cannot adjudge. While the answer was not in time, still the defendants were not placed on terms as to its filing; and, the defense being made without objection, the averments of the petition stood denied, without proof to sustain them. The judgment is reversed and remanded, with directions to allow the defense to make more specific the manner in which the permit was granted by the trustees to the county court to erect these racks, and time then given to reply, with further time to take proof after the issues are made up.

#### GREENWADE v. COMMONWEALTH.

(*Court of Appeals of Kentucky.* Sept. 26, 1889.)

##### CRIMINAL LAW—CONFESSIONS.

Crim. Code Ky. § 240, provides that a "confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such an offense was committed." Defendant confessed out of court to having stolen a horse, and stated where it might be found. *Held*, that evidence that the owner had been deprived of his property, together with the confession and the finding of the horse at the place designated, authorized a conviction.

Appeal from circuit court, Montgomery county; J. H. HAZELRIGG, Special Judge.

"Not to be officially reported."

Conviction on an indictment against Floyd Greenwade for horse-stealing. Defendant appeals. The section of the Criminal Code of Kentucky (section 240) on which defendant relies is as follows: "A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such an offense was committed."

*H. Clay McKee*, for appellant. *P. W. Hardin*, Atty. Gen., for the Commonwealth.

**PRYOR, J.** We understand from the facts of this case that the horse of Stephens had been stolen,—taken from his stable in Montgomery county; and the accused, on being arrested, confessed that he was the wrongdoer, and told the owner that he had left his horse in the county of Fayette. The property was reclaimed in the county to which the accused had taken it. It is urged that under section 240 of the Code a confession will not authorize a conviction, unless there is other proof showing that such an offense had been committed. That the horse was taken from the possession of the owner by some one is proven; and the confession by the accused that he was the guilty party, and the horse found where he said he had taken it, makes the offense complete. If there had been no evidence showing that the owner had been deprived of his property, then the confession would not have authorized a conviction. Judgment affirmed.

#### HAYWOOD v. COMMONWEALTH.

(*Court of Appeals of Kentucky.* Oct. 1, 1889.)

##### CONTINUANCE.

An affidavit for a continuance on account of absent witnesses, which states that it could be shown that at the time of the alleged larceny the stolen property was owned by one M., and afterwards that it was the property of one W., who hired defendant to take it to a city to sell, is so contradictory and unreasonable that the continuance should be denied.

Appeal from circuit court, Boyd county; JOHN M. RICE, Judge.

"Not to be officially reported."

*F. H. Bruning*, for appellant. *P. W. Hardin*, Atty. Gen., for the Commonwealth.

**LEWIS, J.** The charge in the indictment against appellant is grand larceny, committed by feloniously stealing a cow, the personal property of Boon Frily, of greater value than \$10. In view of the fact that the indictment was returned, and the case called for trial, within less than one month after the time the alleged offense was committed, and the accused had been deprived of a reasonable opportunity to prepare his defense on account of being confined in jail, the application for a continuance should have been sustained, if the grounds he undertook to set out in his affidavit had been sufficient; but if the absent witnesses had been present, and made the statements the accused alleged they would make, they would not have availed as a defense. He stated in his affidavit he could prove by Morarity the cow was at the time of the alleged larceny his (Morarity's) property; yet in another part of his affidavit he stated the cow was the property of one Webb, and he was hired by Webb to take the cow to the city of Ashland, and sell her, for which Webb was to pay him the sum of five dollars. It could not be true the cow was the property of both Morarity and Webb; and a fatal defect in the affidavit is that, although he swears each of them would state the cow was his, which could not be the case, he does not swear that either statement would be true when made. If the cow was the property of Morarity, still, in the absence of any statement, in his affidavit for a continuance, that he was authorized to take the cow to Ashland, and sell her, which it appears he did attempt to do under an assumed name, that fact would not, under section 264, Crim. Code, have availed; and, if the cow was really the property of Webb, he could and would have had Webb present at the trial, for it was only about two and a half miles from the jail where appellant was confined nearly a month before the trial, to the place where he says he got the cow from Webb, and where the latter resided. It seems to us the affidavit for a continuance was so contradictory and unreasonable as to make it manifest appellant had no good grounds for further postponement of the trial, nor defense to the charge. Judgment affirmed.

## COMMONWEALTH v. REYNOLDS.

(Court of Appeals of Kentucky. Sept. 26, 1889.)

## INTOXICATING LIQUORS—ILLEGAL SALES.

A special act of Kentucky makes it "unlawful for any person or persons to sell spirituous, vinous, or malt liquors in any quantity within the county of Fleming," with certain exceptions, one of which applies to "a regular practicing physician, who in good faith prescribes the same as medicine to his patient." *Held*, that under such act it is lawful for a druggist in that county to sell whisky upon a physician's prescription, to be used as medicine.

Appeal from circuit court, Fleming county;  
A. E. COLE, Judge.

"To be officially reported."

P. W. Hardin, Atty. Gen., J. H. Powers,  
and Cochran & Son, for the Commonwealth.  
Wadsworth & Son, for appellee.

PRYOR, J. The appellee, John J. Reynolds, was indicted in the Fleming circuit court, under an act of the legislature entitled "An act to prohibit the sale of vinous, spirituous, and malt liquors in Fleming county, with certain penalties annexed," etc. The sale of the whisky is conceded, and the defense maintained on the ground that at the time the defendant was a pharmacist and druggist residing in Flemingsburg, and sold the pint of whisky on the prescription of a regular practicing physician, to be used as a medicine by the wife of one Hall, who was then sick in bed, and required the liquor as a medicine. It was sold in good faith, and with no purpose to violate the law. Such are the facts of the case. A verdict having been rendered for the appellee, the commonwealth is prosecuting this appeal, insisting that a *bona fide* druggist, under the provisions of this special act, has no right to sell whisky as a medicine on the prescription of a regular practicing physician. On the other hand, it is argued that if such is the construction to be given the act it is unconstitutional. We deem it unnecessary to discuss the constitutional question, as the legislature may as well prohibit the sale of whisky by a druggist as by a grocer or merchant; but the important inquiry arises: Is the prohibition of such a sale within the spirit and meaning of the act in question? If we follow the letter of the act, this question might be answered in the affirmative; but, when looking to the legislative intent, there is little difficulty in determining the point raised. That which is within the letter of a statute, but not within the intention of the law-maker, should be excluded when we come to construe the law. We have a statute prohibiting any one from selling or giving vinous or spirituous liquors to an infant, and imposing a penalty for its violation. It will not be contended that the giving of wine to an infant for sacramental purposes, or by a physician as a medicine, when done in good faith, would be a violation of that statute, or that such was the legislative intent. The special act under consideration makes it unlawful for any person or persons to sell, barter, give,

loan, or traffic in spirituous, vinous, or malt liquors in any quantity within the county of Fleming, with certain exceptions. One of the exceptions applies "to a regular, resident practicing physician, who in good faith prescribes the same as a medicine to his patient." It was intended by the plain meaning of the act that liquor should be furnished as a medicine under the prescription of the physician, and whether filled by the druggist or by the physician is immaterial. The physician prescribes the medicine to be used, and the druggist fills the prescription. Under the construction contended for by the commonwealth, the physician must not only prescribe the medicine, but must furnish it to the patient. If he had gone to the druggist and called for the whisky, the husband of the invalid woman paying for it, it could still be argued that it was a sale to the husband, and not the physician; that the physician must pay the druggist, and the patient pay the physician. The latter has the right to purchase it as a medicine; and when making a prescription, and requiring the patient to pay for the liquor, it is in effect its use by the physician. It comes within the legislative meaning, and the abuse of this right by physicians who act in bad faith, and aid in evading the law, affords no argument for imposing the penalty in a case like this. If there had been no exception in the act as to the use of wine for sacramental purposes, it will not be insisted that the minister of the gospel who pours out the wine could be indicted and punished for giving it to the members of his church. The settled policy of the state in the effort to control the liquor traffic has been to confine the sale in small quantities to druggists and physicians to be used as a medicine; and the spirit and intent of this statute does not authorize a court to subject the druggist who acts in good faith to the penalties of the law. Judgment affirmed.

## COLLEY v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 28, 1889.)

## MURDER—EVIDENCE—APPEAL—REQUISITES.

1. On a trial for murder it appeared that defendant and his brother were within the inclosure surrounding the dinner tables at a barbecue under the direction of the deceased. That the brother was cursing and using indecent language; and deceased, having several times asked him to be quiet, in a quiet and kindly manner led him outside the inclosure, defendant at the same time drawing his pistol, and telling him he should not take his brother out, and if he did so he would kill him. Deceased immediately returned to the table opposite defendant, stretched out his arms towards the latter, and, calling him an offensive name, with an oath told him in effect to shoot if he was ready, which defendant did, killing deceased. There was testimony that deceased after he was shot fired at defendant, and also wounded him with a knife. There existed a grudge between the parties; and during the evening, after the shooting, defendant remarked repeatedly that he had done what he came to the barbecue to do, did not regret it, and, if it were to be done over, would do it again. *Held*, that a verdict of manslaughter was authorized.

2. It appears from such evidence, and from the fact that whatever was said or done by either

brother was in the presence and hearing of the other, that defendant and his brother were acting in concert, and evidence of the acts or words of either is admissible as part of the *res gestæ*.

3. Under Crim. Code Ky. § 841, providing that a judgment shall not be reversed for error in instructing or refusing to instruct the jury, unless the bill of exceptions contain all the instructions given, the court of appeals cannot consider instructions, unless they are made part of the record by a bill of exceptions.

Appeal from circuit court, Calloway county;  
C. L. RANDLE, Judge.

"Not to be officially reported."

J. G. Gilbert, Campbell & Coleman, G. A. C. Holt & Son, and Wm. Reed, for appellant.  
P. W. Hardin, Atty. Gen., for the Commonwealth.

HOLT, J. The killing of John Dore by the appellant, Frank Colley, was witnessed by many persons. It was at a public gathering, and, as might therefore be expected, the testimony is somewhat conflicting as to the circumstances of it. It is substantially shown, however, that the appellant and his brother, William Colley, were at a barbecue gotten up by and under the control of Dore and two other persons. The dinner tables were inclosed by a wire, and the two brothers had gone within it to get their dinner. Dore was also there. William Colley was drinking, quarrelsome, and abusive. He was not only cursing, but using indecent language. Women as well as men were present. Dore went to him in a kind manner several times, and asked him to be quiet, and he as often promised to do so. Failing to comply, however, Dore at last told him he must go outside of the table inclosure, and proceeded in a quiet and kindly manner to lead him out. As he did so, however, the appellant told him in substance that he could not take his brother out, and if he did so he would kill him, at the same time drawing his pistol. Dore took William out at the entrance through the wire inclosure, however, and there left him, returning at once to the table, and immediately opposite the appellant. Arriving there he stretched out his hands towards the appellant, and, calling him an offensive name, with an oath told him in substance to shoot if he was ready, and thereupon appellant did so, from the effect of which Dore soon after died. There is testimony tending to show that the latter, after he was shot, also fired at the appellant, and also wounded him with a knife. An old grudge existed between the parties, the character of which is not disclosed; and during the evening of the shooting the appellant repeatedly said that he had done what he came to the barbecue to do, did not regret it, and, if it were to do over, he would do it again. He has appealed from a conviction for manslaughter for the act.

The evidence is sufficient to support the verdict, and will not be further noticed, save so far as it may be necessary in considering such legal questions as we deem important.

It is urged that the lower court permitted

the introduction of incompetent evidence. Just as Dore left William Colley, after taking him outside of the wire, and when the latter was within probably 10 feet of the appellant, William called out: "Shoot the damned son of a bitch." It is claimed that it was error to permit this to be proven by the commonwealth, and also to prove his boisterous conduct and bad language just prior to his being taken from the dinner table. We do not think so. All was within hearing distance of the appellant. He was present. It was all a part of the *res gestæ* and of one continued transaction. It is true, the statement of a by-stander in no way acting in concert with either of the parties to a transaction does not constitute a part of the *res gestæ*. But if what is said during the transaction proceed from either of the parties engaged in it, or from one acting in concert with them, then it is a part of it, and may be proven to show the character or quality of the transaction. *Bradshaw v. Com.*, 10 Bush, 576. It cannot be said, however, in view of the evidence presented, that the two brothers were not co-operating with each other. When the deceased started to take William Colley out, the appellant, in the presence and hearing of his brother, told Dore that he should not do so, and if he did he would kill him, at the same time drawing his pistol. This he did just after witnessing and hearing the bad conduct and language of his brother; and the latter, in almost a moment after hearing what the appellant said to Dore, and when within a few feet of them, called out: "Shoot the damned son of a bitch." The brothers were certainly acting in concert; they were participants in fact and in law in the transaction; and it was therefore competent for the state to prove their conduct, or what either of them said while it was in progress.

We cannot consider the instructions which it is claimed were given and refused, because they are not made a part of the record by a bill of exceptions. They are not even spoken of in it in any way. It is true, there is an order copied in the record which recites that "the court gave instructions Nos. 1, 2, 3, 4, and 5 to the jury. To the giving of instructions 1, 2, 4, and 5 the defendant, by attorney, excepted. The court, at the instance of the defendant, gave instruction No. 6, to the giving of which the attorney for the commonwealth excepted. The defendant, by attorney, offered instructions A, B, C, D, and E, which were refused by the court, to which the defendant excepted. The defendant moved the court to instruct the jury as to the whole law of the case, but the court refused to further instruct, to which the defendant excepted." The clerk then copies what he by a note says were the instructions given and refused. It is not necessary that it shall be expressly stated in a bill of exceptions that no other instructions were given or refused than those named in it. This is not essential to make the bill complete. If it purports to give those asked by the one party, and



then those asked by the other party, and those given, then it should, in the interest of justice, be presumed that the bill contains all that were given or asked, unless it appear affirmatively otherwise. Section 341 of the Criminal Code, however, provides: "A judgment shall not be reversed for an error of the court in instructing or refusing to instruct the jury, unless the bill of exceptions contain all the instructions given by the court to the jury, and unless it shall thereupon appear that the law applicable to the case was not correctly and fairly given to the jury." The statute has in express terms provided how it shall be shown to this court what instructions were given. The legislature has seen fit to say in what way they shall be identified. That this shall be done in some certain way is of course highly necessary, and, a mode having been expressly pointed out and provided by the law-making power, it must be followed, or they cannot be considered by this court. *Mitchell v. Com.*, 78 Ky. 204; *Garrott v. Ratliff*, 83 Ky. 384. Perceiving no reversible error after a consideration of all the objections presented by the appellant, the judgment is affirmed.

**CHRISTIAN COUNTY COURT v. SMITH et al.**  
(Court of Appeals of Kentucky. June 21, 1889.)<sup>1</sup>  
**TAXATION—MUNICIPAL AID TO RAILROADS—ELECTION.**

1. Act Ky. March 17, 1870, prohibits more than one question for taxation to be submitted to the voters at any one election, and declares that, if more than one such question is voted upon at any one election, such tax shall be null and void. *Held*, that an election upon subscriptions to the capital stock of two different railroad companies, held at the same time, was null and void.

2. Said act is not repealed by Gen. St. Ky. art. 17, c. 28, § 2, providing for the manner in which a proposition to take stock in a company is to be submitted, as such statute, by its terms, has no retrospective operation.

3. The election on the subscription to one of the roads being void, does not validate the subscription to the other.

Appeal from circuit court, Christian county.

"Not to be officially reported."

*Landes & Clark, Hunter Wood, Arthur Carey, (E. P. Campbell, of counsel,)* for appellant. *John Feland and Joseph McCarroll*, for appellees.

**PRYOR, J.** The issue made in this case involves the validity of a subscription made by the county of Christian of \$200,000 to the capital stock of the Ohio Valley Railway Company. By its act of incorporation, the question of subscription was submitted to the popular vote; the day on which the vote was taken being the 10th of November, 1888. The proposition was favored by a majority; and the tax-payers who have filed this petition, regarding the election under the charter as null and void, asked for an injunction re-

straining the county judge, or those authorized to do so, from issuing the bonds of the county, and applying the proceeds to the payment of the stock subscription. The chancellor, upon the final hearing, perpetuated the injunction, from which this appeal is prosecuted. This vote was ordered to be taken by the county judge without having the justices of the peace associated with him; and, the act being mandatory in its character, the judge, having no discretion on the subject, properly submitted the question to the popular vote, as was held by this court in the case of *Railroad Co. v. County Court*, reported in 10 Bush, 604; and, if no other objection is available to the proceedings, the judgment below cannot be sustained. It appears that on the 17th of October, 1888, the county judge, and the magistrates assembled with him, submitted a like proposition in favor of the Cairo & Tennessee River Railroad Company to the popular vote, and by the orders of the county court the vote on each proposition was taken on the 10th of November following, the same day, and a subscription of \$200,000 voted to each road. There was only one election, and two propositions voted for at the same time, and on the same day, and at the same election. It is therefore maintained by the appellees, and so adjudged by the court below, that the election was void by reason of the act entitled "An act in relation to submitting questions of taxation to the vote of the people." That act reads: (1) "That it shall be unlawful for any county judge, county court police judge, justice of the peace, or any incorporated company in this commonwealth, to submit more than one question for taxation, direct or indirect, to the voters of a county, city, or town, or part thereof, at any one election held therein." By a subsequent section, any tax or subscription at which more than one such question was voted upon shall be null and void. The act was approved March 17, 1870. There can be no doubt as to the proper construction and meaning of this act; and there being two questions of taxation voted on at the same election, and on the same day, the entire proceeding by which the popular vote was ascertained is void, and the rights of the parties exist as if no such submission had been made. The purpose of the act was to prevent a combination of influences upon the popular sentiment causing the imposition of such burdens, by the exchange of votes for benefits to be received; in other words, "I will vote for your proposition if you will vote for mine." With such influences, connected with others that powerful corporations ordinarily bring to bear in such contests, there is but little difficulty in creating a public sentiment entirely regardless of the rights of those who have to discharge these heavy burdens; and an election cannot be said to express fairly public sentiment when held under such circumstances.

It is insisted by counsel for the appellant that the act of March 17, 1870, was repealed

<sup>1</sup>Publication delayed by failure to receive copy of opinion.



by the act adopting the General Statutes; and the case of *Broaddus' Devises v. Broaddus' Heirs*, reported in 10 Bush, 299, is relied on as settling the question. That case has not been departed from since its delivery, and to hold otherwise would place our statute laws in such confusion that no judge or lawyer could well determine what statutes are really in force. In that case it was said: "The General Statutes must be regarded as containing a complete system of laws, and in so far as it considers and treats of any general law it must be considered as all the law indicated by the title, and, if defective, the legislature can alone apply the remedy." It is said that the subject-matter of this controversy is found in a provision of the General Statutes, under the title of "Courts," section 2, art. 17, c. 28. That section is: "If, under the provisions of any law hereafter enacted, it is required of the county court to submit to the qualified voters of the county \* \* \* the proposition to take stock in any company," it shall be the duty of the county judge to associate the justices with him, etc. The subject of the statute of 1870 "is the submitting questions of taxation to the popular vote;" and it may therefore well be argued, by reasoning unanswerable, that as to those affected by the provisions of the act found in the General Statutes the former law, whether of March, 1870, or prior thereto, stands repealed. But suppose the enactment itself provides that this is not to affect corporations or companies brought into existence before the statute went into effect. In that event the law applicable to such corporations exists as it did, in this particular, prior to the adoption of the General Statutes. They do not repeal such laws, because the law enacted and found in the General Statutes has no application. The statute under which it is claimed the act of March, 1870, was repealed has no retrospective operation, and applies to laws thereafter enacted, where the question of taxation is to be submitted, and not to corporations where the power to submit had been given prior to their adoption. Now, by what law are these previous corporations to be governed in this particular? Not by the existing law, because it is expressly said it is not to apply; and although the General Statutes, or the laws embodied in them, cannot be held to be merely cumulative, when by an express enactment the law changing the former law is not to apply to laws creating corporations previously enacted, it is in effect saying, not by mere implication, but in express terms, that the previous law is to apply. The act of 1870 is not repugnant to the General Statutes, unless you attempt to apply it to legislation subsequent to their adoption. Suppose the act incorporating this railroad company had said nothing about submitting the question to the popular vote by the county court, and there had been a general law, in existence prior to the adoption of the General Statutes, requiring the county judge to submit such questions where

the vote was to be taken, and the act of incorporation is silent as to who shall submit the question. Then the General Statutes would not affect this corporation, because they look to future legislation creating corporations, and expressly apply to such laws as hereafter require the vote to be taken. Besides, it is manifest that the provisions of the act of 1870 apply alone to the submission of questions of taxation to the voters of counties, cities, and towns, or parts thereof. It is an act general in its character, but special in its application, and is found in nearly every railroad charter, but when omitted in the charter can be resorted to for the particular purpose; and for that reason the framers of the General Statutes, regarding the act of 1870 more as a local than general law, made the provision in reference to the voting on questions of taxation apply alone to future corporations, or to future laws authorizing such a vote. How often do we find the legislature of the state, in order to avoid what may be termed "special legislation," enacting a general law, and particularly in reference to corporations that enter into and form part of the corporate existence. Now, when subsequently enacting other laws that are repugnant to, or in seeming conflict with, such laws enacted for a special purpose, if such laws are only applicable to corporations thereafter created, is not that in effect saying that the previous laws as to existing corporations are still in force? Such legislation does not, expressly or by implication, repeal the previous laws only as to corporations thereafter created.

It is further maintained by the appellant that as the subscription to the Cairo & Tennessee Railroad Company is void, and the proceeding ordering the vote on that question being also void, that fact in some way validates the election in favor of the Ohio Valley Railway Company. The act of March 17, 1870, being applicable to these corporations, the wrong intended to be avoided has been committed by the vote on the two propositions at the same time. The voters were not informed that the vote as to the one railroad was void; and the vote in favor of the subscription shows that the voters were acting in good faith. There were two candidates in the field asking the people for this money. Both were elected, and a donation made of \$200,000 to each corporation. The combined influence of the two candidates and the friends of each must have accomplished the result. It was a mutual undertaking for the benefit of both, and, while no two propositions were submitted by the one company, the proposition by each company to tax the people of Christian was a palpable violation of the provisions of the act of 1870, and the result is no fair index to public sentiment on the subject. While public policy would dictate that burdens should not be imposed under such circumstances, such a question being more properly addressed to a legislative than a judicial tribunal, we are

not disposed to base the opinion on this idea, because the act of 1870 shows the policy of the state with reference to these corporations, and by that act this court is to be governed. The judgment of the chancellor, for the reasons indicated, is affirmed.

#### SANDERSON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 26, 1889.)

LARCENY — INDICTMENT — EVIDENCE — INSTRUCTIONS.

1. A count in an indictment for larceny, which charges that defendant was an accessory before the fact,—that is, that he procured certain others to commit the larceny for his benefit,—is not prejudicial to defendant, as such charge is embraced in a count for larceny.

2. In Kentucky a count for receiving stolen goods may be joined with a count for larceny.

3. Where one partner, without his copartner's knowledge, receives stolen goods, knowing them to be stolen, and his copartner, afterwards learning of the theft, takes charge of the stolen goods, both are guilty of receiving stolen goods.

4. An instruction that if the person who stole the property placed it in defendant's house for him, and defendant knowing it to be stolen, and placed there for him, took control of it to fraudulently deprive the owner of his property, this was in law a felonious receiving of the property, is correct.

5. Where it appears that defendant paid a witness for the commonwealth to leave the county, and also paid half of a sum afterwards demanded by the witness in a letter to defendant's partner, who was also concerned in receiving the stolen property, the letter is admissible to show why the money was advanced.

Appeal from circuit court, Graves county;  
C. L. RANDLE, Judge.

"Not to be officially reported."

W. J. Sanderson, jointly with another, was indicted for grand larceny. He was convicted, and appeals.

D. G. Park and Jas. Campbell, for appellant. P. W. Hardin, Atty. Gen., for the Commonwealth.

PRYOR, J. The accused, Sanderson, and one Brisendine were indicted in the Graves circuit court for grand larceny, the charge being a felonious taking of one hogshead of tobacco, the property of Matthews & Son. There was a demurrer to the indictment as a whole, and also a demurrer to each count in the indictment, and the demurrers were overruled. It is not necessary to allude to the demurrer filed to the entire pleading, as it is in the usual form for grand larceny, and the defense was properly required to plead to it. It is insisted that the second count was defective, because it charged that the accused was, as is alleged, an accessory before the fact; that is, that he advised and procured two others named in the indictment to commit the larceny complained of. While this count may be defective, it was evidently intended by the pleader to present the case where the parties actually taking the property were advised and procured to take it for the benefit of the accused and his partner, and if they did commit the larceny, and deliver the property to the accused under such

an arrangement, accused was as much guilty of larceny as the parties who took it from the warehouse. The first count for grand larceny embraced the charge in the second count, if the facts alleged have been established, and the failure to sustain the demurrer to the second count in no wise prejudiced the accused. It was in fact a statement only of how the larceny was committed. The third count in the indictment is for receiving stolen property knowing it to have been stolen, and was properly held good on demurrer. It may be joined with an indictment for larceny, as is expressly provided by the Code. The testimony in this case conduces to show that Wilkerson and England took the hogshead of tobacco at the procurement of Brisendine, the partner of Sanderson. That the two were partners in handling this product, and the tobacco of Matthews found its way into their possession, is a fact clearly established. Counsel for Sanderson maintains that, as the proof shows Brisendine received the stolen property, the fact that Sanderson, who was his partner, afterwards took charge of it, knowing it to have been stolen, does not constitute guilt on the part of Sanderson. We cannot concur in such a conclusion. These men were partners, and, assuming that Sanderson had no knowledge of the original taking by Wilkerson and England, but that his partner, Brisendine, received the property from them knowing it to have been stolen, and Sanderson, with a full knowledge of that fact, assumed control of the stolen property with a view of depriving the owner of its use, it is plain that both would be guilty of receiving the stolen goods, and a conviction must necessarily follow.

The argument of counsel is that, as the indictment alleges a joint reception of the stolen goods, and the proof showing the tobacco to have been first received by Brisendine and then by Sanderson, it is such a variance between the charge and the testimony as defeats the prosecution. While one partner cannot commit crime for which his copartner, who is innocent, can be held criminally responsible, we cannot well see why one partner may not be guilty of receiving stolen goods where his copartner has first received them with a guilty knowledge, and then they are controlled and used by both with the guilty design and purpose on the part of both to deprive the owner of his property. Nor do we think the fact of their being partners determines the legal question; for, if not partners, the use and appropriation of the goods by Sanderson with a knowledge that Brisendine had purchased them knowing them to have been stolen, and the fact of the theft, also known to Sanderson, would have made the latter guilty under the third count.

While there may not be sufficient testimony in the record to convict Sanderson of the larceny, the evidence in relation to his guilty knowledge after the tobacco was delivered to his partner is very conclusive, and the instructions on that branch of the case

are unobjectionable. Instruction No. 3 of which counsel complain, was properly given. By that instruction the jury was told that if Wilkerson and England committed the larceny, and placed the tobacco in the house of the defendant and Brisendine for them, and the defendant, knowing it to be stolen property, and placed there for them, did take control of it to fraudulently deprive the owner of his property, in law this was a felonious receiving of the tobacco, etc.

We think, on the facts of this case, it was proper that the jury should have been enlightened as to what constituted guilty knowledge, and by this instruction the jury had to believe that the tobacco was stolen and placed in the warehouse of defendant for them, and the defendant, knowing it was stolen and placed there for them, (the partners,) took charge of it for the purpose of depriving the owner of his property. It was as favorable to defendant as it should have been, and afforded the jury every opportunity to acquit the accused if they disbelieved the testimony of the witnesses for the prosecution. While the defendant protests his innocence, it is shown that he paid the commonwealth's witness to leave the county, and contributed means after he left in order to keep him from testifying. The letters of the witness to Brisendine showed the demand of the witness for more money, a part of which was furnished by the defendant, and, being connected with the removal of the witness, the letters to Brisendine were competent to show the action and conduct of both partners with reference to the pending prosecution. They had paid the witness \$50 to leave, and when gone the witness demanded more money in this letter to Brisendine, and the accused gave one-half of the amount demanded, and the letter was permitted to be read to show why the money was advanced.

The statements made by Sanderson before the grand jury were competent; at least we see no reason for excluding them. They had reference to these transactions, and in his statement was no confession of guilt. There are other exceptions taken to testimony that could not have prejudiced the accused.

The instructions asked by the defense were properly rejected, because they were all based on the idea that, if Brisendine received the stolen goods without the knowledge of Sanderson, the latter is not guilty if he afterwards appropriated them with a like guilty knowledge, and, further, when the charge is made against two, one may be convicted, but both cannot, unless the receiving was joint. This seems to have been the common-law rule as laid down by Wharton and Bishop. This rule, however, was changed by the English statute, and as said in the Crown Cases, in the case of *Queen v. Reardon*, L. R. 1 Cr. Cas. 31, for the purpose of removing certain technical objections that at the time prevailed.

We think it absurd to hold that on a joint indictment against A. and B. for receiving

stolen property, upon proof that A. received the goods with a guilty knowledge, and then let B. have them with the same guilty knowledge, only one can be convicted.

We are not disposed to follow such a technical rule; and here the purchasing of Matthews' tobacco from the thief by Brisendine with a full knowledge of the theft, and its appropriation and use by Sanderson and Brisendine jointly, with the fraudulent purpose of depriving Matthews of his property, both knowing it was stolen, makes the offense complete; and, being found in the joint possession of the parties, this court will not inquire whether the one received the property in the first instance without the guilty knowledge of the other. They are both equally guilty. *Queen v. Reardon*, L. R. 1 Cr. Cas. 32. Judgment affirmed.

#### MULLINS v. COMMONWEALTH.

(*Court of Appeals of Kentucky*. Sept. 26, 1890.)

##### LARCENY—EVIDENCE.

Evidence that the whisky charged in the indictment to have been stolen was found near defendant's house; that it had been opened in defendant's house; that, when charged with the larceny, defendant said to one B., from whom he insisted that he received the whisky, "We will have to give it up," and that both went to the spot where it was concealed, with one L., who returned with the whisky,—is sufficient to sustain a verdict of guilty of larceny, and does not show that defendant was only guilty of receiving stolen goods.

Appeal from circuit court, Laurel county; ROBERT BOYD, Judge.

"Not to be officially reported."

Joint indictment against John Mullins and one Barrett for grand larceny. Mullins was convicted, and appeals.

*H. C. Eversole*, for appellant. *P. W. Hardin*, Atty. Gen., for the Commonwealth.

PRYOR, J. The only question in this case arises from the evidence, and, if the facts conduce to establish guilt on the part of the accused, the verdict must stand. The accused and one Barrett were jointly indicted for stealing a keg of whisky of a value exceeding \$10. The defense on the part of the accused is that, if guilty at all, he is guilty of having received the whisky from Barrett or some other person after it was stolen, knowing that it was the property of another; and, as he was not indicted for receiving stolen goods, a new trial should have been granted. The whisky was stolen from the railroad depot, and found secreted near Mullins' residence, and in fact had been opened in his house, and, when charged with having the whisky, Barrett said to Mullins, "We will have to give it up," and both went with a man by the name of Lee to the spot where it was secreted, and Lee returned with the whisky. There are other circumstances in this case showing guilt on the part of Mullins, and the jury, from the facts, were authorized to say that Mullins was guilty of the larceny, and not of receiving the stolen prop-

erty. That the indictment alleges the whiskey to have been the property of Frank Elliott, when it belonged to Elliott and others jointly, is immaterial. Elliott had an interest in it, the property was stolen from the custody of the depot agent, and the proof authorized the verdict against the accused.

Judgment affirmed.

#### COMMONWEALTH v. JARBOE.

(Court of Appeals of Kentucky. Sept. 26, 1889.)

##### PERJURY—VARIANCE.

An indictment for perjury averred that defendant took his "corporal oath, and was then duly sworn" in the mode common to the courts. The evidence showed that he was sworn with uplifted right hand. *Held*, that the averment that witness took his corporal oath was unnecessary, and that there was no variance between the indictment and the proof.

Appeal from circuit court, Taylor county; W. E. RUSSELL, Judge.

"To be officially reported."

P. W. Hardin, Atty. Gen., for the Commonwealth.

HOLT, J. The averment in this indictment for perjury is that "the said Robert Jarboe did then before the court aforesaid take his corporal oath, and was then duly sworn by the said court and clerk thereof, that the evidence be, the said Robert Jarboe, should give to the court and jury sworn between the parties aforesaid touching the matters in question in the said issue should be the truth, the whole truth, and nothing but the truth." Upon the trial it was proven by the clerk, who administered the oath, that the accused was with uplifted right hand sworn by him: "You do solemnly swear that the evidence you give in the case now on trial shall be the truth, the whole truth, and nothing but the truth, so help you God;" to which the witness responded affirmatively. The lower court held that this was not a corporal oath, as charged in the indictment, and at the conclusion of the testimony for the state instructed the jury peremptorily to acquit the accused, which they did, and the commonwealth now asks the ruling of this court that the law may in the future be properly administered.

The objection that the oath, as shown to have been taken, was not a corporal one would, if true, be hypertechnical. If so, yet there was no material variance between the averment in the indictment and the evidence, because it was not only stated in it that the witness took his corporal oath, but that he was sworn in the mode common to our courts. It is true, the material averments of an indictment must be proven substantially as charged; but the reason for this is that the accused may have notice and opportunity to prepare his defense. When, however, the reason of a rule fails, it must also fail. The averment that the accused took his corporal oath, and was sworn to tell the truth, the whole truth, and nothing but the truth, cer-

tainly notified him that upon the trial the commonwealth would attempt to prove that he was sworn to tell the truth; and the statement that he took "his corporal oath" was unnecessary and immaterial. The taking of a corporal oath, as anciently understood, was unnecessary to the commission of the offense. It was complete as stated in the indictment without it. If an indictment for unlawful shooting merely were to charge that it was done maliciously, it would be unnecessary to prove any malice to support the indictment, because it is not necessary to constitute the offense. It is complete without it. The charge of malice would be merely surplusage. So was the charge that the witness took his corporal oath, it being averred that he was sworn in the usual form. The manner of taking an oath is not material, in the absence of express statute. All authorities agree that a witness is to be sworn in such form as he considers binding on his conscience. What is termed a "corporal oath" was anciently administered by touching the cloth that covered the consecrated elements, or, as some suppose, from the fact that the party taking it was required to lay his hand upon the Bible; but a corporal oath, as latterly understood, means merely a solemn oath, although the name is derived from the ancient usage just mentioned. In *Jackson v. State*, 1 Ind. 184, it was held that the terms "corporal oath" and "solemn oath" are now to be understood as synonymous. Wharton says: "The oath must be solemnly administered. \* \* \* It is immaterial in what form it is given, if the party at the time professes such form to be binding on his conscience. \* \* \* 'Corporal oath' and 'solemn oath' are equivalent, and either is sustained by proof of swearing with uplifted hands." 2 Whart. Crim. Law, (9th Ed.) § 1251, and note. Our statute does not provide any particular form of oath. It, however, plainly recognizes the view above taken, and the modern liberal and reasonable rule, which requires that the mode of swearing shall conform to the conscience of the party by providing: "The word 'oath' shall be construed to include an affirmation in all cases in which an affirmation may be substituted for an oath, and in the like cases the word 'sworn' shall be construed to include the word 'affirm.'" Gen. St. c. 21, § 6. If a witness is sworn, without objection by him, in the way usual to a court, it should be presumed that the mode conforms to his conscience. He may point out the form, and, if he does, it must be followed, and he may be indicted for perjury upon it; but if he fails to make known his particular scruples of conscience, and is sworn in the ordinary and usual way, he must be regarded as making his election, and cannot thereafter plead his scruples as a defense to a charge of perjury. 2 Phil. Ev. 872. The averment that the witness took his corporal oath was unnecessary. The indictment in this respect was complete without it; but in any event it should be regarded as meaning merely that

he was solemnly sworn. The accused has been acquitted. He cannot, of course, be tried again; but it is ordered that this opinion be certified to the lower court as the law of the case.

**MOSES v. GATLIFF et al.**

(Court of Appeals of Kentucky. Oct. 8, 1889.)

**QUIETING TITLE—ADVERSE POSSESSION.**

1. An action to quiet title by one out of possession will not lie against one in occupancy of the land in dispute, who has been asserting his right for many years.

2. Where one has a patent to all unappropriated lands within a certain patent boundary, possession of certain detached parcels of unappropriated land, separated from the land in dispute by land already appropriated, is not such possession as would extend over all lands unappropriated when the patent issued.

Appeal from circuit court, Whitley county.  
"Not to be officially reported."

A. Gatliff and others sued Elias M. Moses to quiet title to certain land. Judgment for plaintiffs, and defendant appeals.

N. A. Richardson, for appellant. C. W. Lester and Hargis & Eastin, for appellees.

PRYOR, J. It is manifest that if the appellees are entitled to recover, it is by virtue of the patent to O'Bannon, Morgan & Co., under whom they claim. That patent was issued in the year 1852, and is for 8,000 acres, described by metes and bounds, that embrace in all 44,000 acres, the patent containing this clause: "Platting out of the above boundary all the lands previously surveyed, estimated at 86,000 acres." In the year 1884 the appellant obtained a patent to the land in controversy, and the appellees attempted to obtain a title by an entry and patent to one Gatliff, both of these patents being subordinate to older entries and patents. The appellant, Moses, is claiming 50 acres of land that, from the testimony, is included within the boundary of the patent to O'Bannon, Morgan & Co. The appellant swears that he cleared a part of this land 80 years before he was called to testify; that he paid the taxes nearly all the time, and had it surveyed in 1863. Coddell states that the defendant deadened timber on this land 30 years ago, and a part of the improvements were made 15 years before the witness testified. The actual occupancy of this land was by the defendant, Moses, and his claim had been asserted by many acts of ownership long before this action was brought. It is not pretended by the appellees that they are in the possession of this land; and, while it is averred that the plaintiffs are the owners, it is only a petition to quiet title, based on this patent to O'Bannon, Morgan & Co., that is alleged to embrace the land in dispute. The plaintiffs, to maintain an ejectment, or to obtain relief in a case like this, must show as against an actual occupant that the exclusions mentioned in his patent do not any of them embrace or include the land in the possession of the defendant. The presumption of right, after such a lapse

of time before title is asserted by the patentee, should be in favor of the defendant. Here the defendant has been asserting his right for many years, and whether under a paper title or not is immaterial. The title by occupancy may be all he can establish; still it is incumbent on the plaintiffs in this case to show title, by placing themselves outside of the excluded territory, and in the possession of such of the patented land as covers the land in controversy. Possession of detached parcels of unappropriated land within the patent boundary, but separated from the land in dispute by land already appropriated, is not such a possession as would extend over all the unappropriated land at the time the patent issued. We have not discussed, nor do we propose to determine, the question raised as to the right of recovery by the appellees in an action of ejectment; still, under the proof in this case, we perceive no reason for going into a court of equity; and, while no objection was made to the proceeding below, we find no such possession of this land in the plaintiffs, or right of possession, as would authorize a judgment depriving appellant of his possessory right. The proposition by the appellant to buy his peace of Vanwinkle, who was the vendee from Morgan & O'Bannon, and the vendor of the appellees, cannot affect the rights of the appellant. In fact Vanwinkle has no recollection of selling the land to the appellant by parol or otherwise. The judgment must be reversed, with directions to dismiss the case without prejudice. The parties, if they see proper, can bring their action at law.

**MUDD et ux. v. GREEN.**

(Court of Appeals of Kentucky. Oct. 8, 1889.)

**ESCROW—EVIDENCE.**

In an action on a mortgage and notes secured thereby defendant testified that the instruments were delivered to a third person in escrow, to be delivered to plaintiff when defendant's counsel had examined them and so directed. Plaintiff testified that they were to be delivered upon his dismissing a certain suit, and six days after such dismissal they were so delivered. Upon this point there was no other testimony. It appeared that the third person, before delivering the instruments, asked defendant's attorney if he should do so, but received no directions; that defendant had before executed mortgages; and that the instruments in question were of plain import, and could hardly have been misunderstood by her. Before they were delivered to plaintiff, she made no effort to consult her attorney, though she had ample time; and it did not appear that when she learned of such delivery she made any objection thereto. It appeared that said notes and mortgage were executed in settlement of the debt sued for. *Held*, that a conclusion that the condition had been performed before the writings were delivered was warranted.

Appeal from circuit court, Washington county.

"To be officially reported."

John W. Lewis, for appellants. W. C. McChord, for appellee.

HOLT, J. The appellants, W. C. Mudd and his wife, Alice L. Mudd, on January 1,

1876, executed to the appellee, James Green, a note for \$500, and secured its payment by a mortgage upon the 92 acres of land then and yet occupied by them, together with their children, as a homestead. This land mainly belonged to Mrs. Mudd. She and her husband had previously mortgaged it to one Fields for about \$400. The husband also owed the appellee about \$100, due by note with personal security. The appellants wished to pay the Fields debt. The appellee agreed to and did loan the money for this purpose, and it, together with his \$100 debt, constituted the consideration for the \$500 note and mortgage. June 23, 1877, a payment of \$45 was made upon it; and on February 1, 1881, the appellee brought suit to recover the remainder of the debt, and to enforce the mortgage. Various defenses were set up by Mrs. Mudd; and while the litigation was in progress, C. B. Mudd, the brother of her husband, advised and urged her to compromise the matter upon certain terms, which he suggested. She consented. He then saw the appellee, and he consented also. Mrs. Mudd, in testifying, said at first that C. B. Mudd was acting for her in the matter, but upon suggestive questions from her attorney testified in substance that her brother-in-law voluntarily came to her, professing to be acting for the appellee, and that he acted for both of them. It is certain, however, from the testimony of both C. B. Mudd and the appellee that the former did not go to Mrs. Mudd at the instance of or as the agent of the appellee. It is evident that he voluntarily took upon himself the character of peace-maker between the parties. Several efforts were made to close the matter up by the execution of new notes and a mortgage upon the land. Finally, on March 15, 1882, several notes were executed by the appellants for the debt; the appellee making concessions as to thus dividing it, and thereby extending the time of payment, and also as to interest. A mortgage was also then executed by the appellants upon the same land to secure the payment of these notes, and all of the papers thus executed were delivered to C. B. Mudd. He retained them until after the appellee's suit upon the \$500 note was dismissed, which was done six days after the execution of the notes, and then delivered them to the appellee without solicitation from the latter to do so. This action was thereafter brought upon some of them, and for an enforcement of the mortgage.

The defense is that they were delivered to C. B. Mudd as an escrow, and were not to be delivered by him to the appellee until Mrs. Mudd's attorney had an opportunity to examine them, and then only upon her direction, or that of her attorney. Mrs. Mudd testifies that such was the agreement; and it is urged that she is sustained in her version of the matter by the fact that C. B. Mudd, before he did deliver them to the appellee, inquired of her attorney if he should do so, but received no direction either the one way

or the other. An escrow, as now interpreted, is a writing delivered to a third party to hold until the happening of some event, as until it is signed by another party, or until a suit be dismissed; and until the event happens, or the condition be performed, it can have no effect. The appellee, upon the other hand, testifies that the writings were delivered to C. B. Mudd, to be held by him until the suit upon the \$500 note should be dismissed, and that no other condition was mentioned. C. B. Mudd says that he does not remember what the objection was to their being delivered at the time of the execution, and there is no testimony upon this point save that of the parties to the suit, who directly antagonize each other. We therefore turn to attending circumstances to enable us to reach a satisfactory conclusion.

Whether the condition upon which the writings were to be delivered was the dismissal of the pending suit, or an examination of them by Mrs. Mudd's attorney, and a direction from either her or him to deliver them, it was natural that C. B. Mudd should ask the attorney if he should turn them over to the appellee. It is true that ordinarily a party in settling a court controversy wishes the sanction of the attorney, who has been conducting it, before the settlement becomes final. The one in this instance, however, was not of a complicated character. Mrs. Mudd had joined in previous mortgages, and appears from her deposition to be a lady of ordinary, if not superior, intelligence. The notes and mortgage were couched in plain terms, and their import and effect could not well have been misunderstood by her. The settlement was made on March 15, 1882, and the appellee dismissed the suit six days thereafter; and the appellants are asserting in the pleadings of this suit that the dismissal was an absolute and final one, by way of defeating a resort by appellee to his rights therein asserted in case the notes and mortgage now sued upon are declared invalid. It is unreasonable to suppose the appellee would have done this unless he was, as the result of it, to get the notes and mortgage given upon the settlement. Mrs. Mudd made no effort, after the papers were placed in C. B. Mudd's hands, to consult her attorney. She says she had no opportunity to do so, but does not say what prevented it. The holder of them does not fix the exact time when he delivered them to the appellee, but his evidence tends to show that it was about 20 days after their execution. This certainly afforded her ample time to do so. Moreover, she does not prove, when she finally learned from C. B. Mudd that he had delivered them to the appellee, that she made any objection. The lower court has passed upon this question of fact. The circumstances proven support the conclusion there reached that the condition had been performed, and that the settlement became a binding one, and the writings effective for that purpose when they came to the hands of the appellee. The ap-

pellants, to succeed, should show with reasonable certainty what they assert. Their defense to the notes cannot be maintained save upon the strict rule of law, because the equity of the cause is against them. The appellee's debt is unquestionably a just one. It for the most part is for money loaned them to discharge a mortgage lien upon the very land now in contest, and to which mortgage Mrs. Mudd was a party. In our opinion they have failed to show that the notes and mortgage now in question never became binding upon them, and the judgment is affirmed.

#### CRUTCHER v. COMMONWEALTH.

(*Court of Appeals of Kentucky.* June 15, 1889.)<sup>1</sup>

INTERSTATE COMMERCE—EXPRESS COMPANIES—LICENSE FEES.

Act Ky. March, 1860, as amended by act of 1866, which requires the agents of foreign express companies doing business in that state to take out a license, and to pay a fee of five dollars for issuing the license, is not unconstitutional, as placing a burden upon interstate commerce. *Woodward v. Com.*, 7 S. W. Rep. 613, followed.

Appeal from circuit court, Franklin county; W. MONTFORT, Judge.

"To be officially reported."

Indictment against O. R. Crutcher for carrying on the business of agent for a foreign express company without a license. Appeal from a conviction.

*Harmon, Colston, Goldsmith & Hoadley and Ira Julian*, for appellant. *Jas. P. Helm*, for the Commonwealth.

PRYOR, J. It seems to us that the case of *Woodward v. Com.*, 7 S. W. Rep. 613, in which the statute appears in full, (decided by this court at its last term,) determines the question now presented. Counsel for the appellant now claims that the statute of this state is invalid, as its effect is to regulate commerce among the several states. The agent of the express company was fined for not paying to the auditor a fee of five dollars, or, rather, for failing to take out a license required by the act regulating the agencies of foreign express companies, passed in March, 1860, and amended by the act of 1866. That the company of which the appellant is agent is a corporation created by the laws of New York, doing business in this state as a carrier of goods, wares, and merchandise, is conceded; and that it transports goods, etc., out of the state into other states, and all other species of property usually incident to such transportation, is admitted. It appears that at least 50 per cent. of the business done by this agent consists in the carrying of goods from the place of his agency (Frankfort) to other states. That the carrying and transportation of goods from one state to another is a branch of interstate commerce is not controverted; but it is claimed that there is nothing in the legislation imposing on those

who desire to act as the agents of this foreign corporation the burden of paying to the auditor the fee of five dollars for recording his agency, or, rather, for issuing him his license to act as such. The statute was enacted for the benefit of the citizens of the state under which the auditor is required to have satisfactory evidence of the ability and solvency of the corporation to do that which it has undertaken to do by virtue of its act of incorporation. Those who intrust to its custody the transportation of their property, are entitled to some security that its undertaking will be performed, and we find no law of congress, or any constitutional provision, that would deny to the state the right to impose such a burden upon those who undertake the discharge of such responsible duties. There is no discrimination made between corporations doing a like business; and the state, although the appellant's company is a foreign corporation, has the right to license the business and calling of this agent as it would that of the lawyer or merchant whose business is confined to the state alone. In the case of *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. Rep. 564, where the train of cars or the main line of road extended from the one state into the other, and passengers and freight are constantly transported over the entire line, the supreme court held that a statute of Alabama requiring the locomotive engineers to be examined and licensed by a board appointed for that purpose before attempting a discharge of their duties was constitutional, and no impediment to the free transaction of commerce among the states. See, also, *Railway Co. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. Rep. 28. We cannot perceive how any burden has been placed by the state upon the interstate commerce by the provisions of the enactment in question, and must therefore affirm the judgment.

#### MARRS v. MARRS.

(*Court of Appeals of Kentucky.* Oct. 3, 1889.)

VENDOR AND VENDEE—PAROL EVIDENCE TO VARY WRITING.

1. In an action by a father to enforce his lien for the purchase money of land sold his son, for which he held the latter's notes, payable at stipulated times, the son alleged mistake in the execution of the contract, and failure to embody its terms in the deed and notes, and that there was a parol agreement by which he was to pay only the interest during the father's life-time, the principal to be devised by the latter to his children, with the privilege to defendant to pay them their shares at any time; that he had made such payments, and had paid the interest. There was evidence that after the sale plaintiff made a will containing devises as alleged, and stated that it was in accordance with the agreement made between him and defendant when the sale was made, which will, it was insisted, became part of the original agreement when executed. *Held* that, this agreement being inconsistent with the written contract, and amounting to a distribution of the father's estate during his life, plaintiff was entitled to judgment.

2. Defendant should be credited with money paid to plaintiff's children, to be credited on his notes, pursuant to such agreement, at plaintiff's instance.

<sup>1</sup>Publication delayed by failure to obtain copy of opinion.



Appeal from circuit court, Pike county.

"Not to be officially reported."

*J. M. York and R. T. Burns*, for appellant. *A. J. Auxier, W. M. Connolly, and R. M. Ferrell*, for appellee.

PRYOR, J. This controversy is between the father and son. The appellant, Thomas Marrs, sold and conveyed to his son, L. D. Marrs, a tract of land in the county of Pike, for \$3,000, the deed reciting the consideration and the amount of the purchase money. The price was \$3,000, for which the appellee executed his notes, payable at stipulated periods, and bearing interest, all but the first, from the 24th of February, 1880. The first note was for \$500, and due the 1st of March, 1880. The appellant was advanced in years, and, being desirous of living with the appellee, induced the latter to purchase his land. After the sale had been consummated, he lived with his son for several years, when some trouble originated between the appellant and his son's wife, resulting in the old man's leaving the home of his son, and living with his other children. After leaving, the appellant wanted his purchase money, or a part of it, and, the appellee refusing to pay, this action was instituted to enforce his lien. The appellee, in defense of the action, alleged a mistake in the execution of the contract, and a failure to embody its terms in the deed or the notes that had been executed by the parties. He alleges that he was only to pay the interest on the purchase money during the life of his father, and that the latter agreed to execute a will by which he was to devise to the appellee \$1,000 of the principal sum, and the balance to be paid to the remaining son and daughters of the appellant, with the privilege on the part of the appellee to pay at any time to the other children their part of the money in the proportion that he had agreed to devise it. The appellee also alleges payments to these children under this arrangement, and that, having paid the interest, the father, under the contract, had no right to recover any part of the principal. He also sets up a claim for board against his father, and claims, in an account rendered, pay for services rendered him from time to time during the period his father lived with him. The answer denies the alleged mistake, and also most all of the items set forth in this account; claims that no agreement existed for the payment of board, and, if so, that his labor for the son was equal to the value of his board. He denies the authority from him to the appellee to pay his other children any money, or that such was the contract when the land was sold.

Much testimony has been taken in the case, and proof conducing to show that a will was made by the appellant some 12 months or longer after the sale and conveyance, containing the devises to the children as the appellee alleges, and that he stated it was in accordance with the agreement between the two when the sale of the land was made;

while, on the other hand, the testimony of the appellant and that of his other children, as well as that of the draughtsman of the deed and notes would indicate that those writings contained the entire contract between them. There is no charge of fraud in the answer, and no pretense that the land was of less value than the price agreed on when the deed was executed; and the question arises whether or not the appellant can be compelled to execute his will under the alleged agreement, or is precluded from collecting any of the purchase money except the interest during his life, upon the facts here presented. It is certain that the chancellor has no power to require the execution of such a contract, and, when clearly proven, it might afford grounds for a rescission, if asked for. Without, however, determining the legal effect of such an agreement, or the equitable rights of the parties under it, it is manifest that the appellant was entitled to a judgment. If the theory of the appellee is to prevail, the appellant has divested himself of his whole estate except the interest, with the power on the part of the son to make such disposition of it at any time he pleases, if in so doing he carries out the intention of the appellant. It is a plain case of an administration on and distribution of the father's estate by the children before the old man's death, under an alleged parol agreement made before any writing was entered into in regard to the sale of this land, and in direct conflict with the deed and notes that were executed when the sale was perfected. The notes for the land specify definitely when the notes were executed, and when payable. The first note was due the 1st of March, 1880; the second note, 1st of March, 1881; and the third note, 1st of March, 1882; with a deed reserving to the appellant a one-half acre of the land, embracing the grave-yard. The appellee, as the draughtsman of these papers says, stated at the time to his father that it was useless to insert a clause about the reserved ground, and the old man replied that he wanted the entire contract set out, and insisted on having it embraced by the writing. Now, it is insisted that it was a part of the contract that the old man was to give all of his estate away in the proportions and to the children mentioned in the answer, and to his son, the appellee, \$1,000, and still no part of it was reduced to writing, and, when proven, is inconsistent with the terms of the written contract. That the father intended to make such a disposition of his estate is no doubt true, and long after this may have written a will to that effect, that is now insisted became a part of the original agreement when executed. It is evident that he told his son that he would not want this principal, and would not call on him for any part of it during his life, but still he held the obligations of his son for the money by which he agreed to pay certain sums at stipulated periods; and there is no reason, under the proof in this case, or any rule of law, equity, or jus-



tice that could deprive the old man of his estate upon the character of case made out by the defense. If fraud was practiced, and inducements held out that were not complied with, equity might afford some relief, but not to the extent of distributing the estate of the father before his death.

The claim for board in this case is without merit. The services of the father were equal in value to his board. There are some items in the account of the appellee that should be allowed. If he has paid any money to the children of the appellant, to be credited on these notes, at appellant's instance, he should be credited by the amounts paid; and is also entitled to credit by what interest he has paid. These matters can be determined by the court below, or his commissioner. We perceive no defense whatever to the small note executed for otherland. The judgment below is reversed, and remanded for proceedings consistent with this opinion.

#### MASONIC TEMPLE CO. v. COMMONWEALTH.

(*Court of Appeals of Kentucky.* Oct. 5, 1889.)

##### DISMISSAL OF APPEAL—RES JUDICATA.

Where plaintiff sues to enjoin the collection of taxes on the ground that the property taxed is exempt, and his claim is decided adversely in the appellate court, and his suit dismissed, and at the same time he appeals from the judgment on the tax information, the latter appeal, involving the same substantial question, will be dismissed without inquiring into the action of the court below in some particulars.

Appeal from Louisville law and equity court.

"Not to be officially reported."

*Goodloe & Roberts, William Lindsay, and H. M. Lane*, for appellant. *Helm & Bruce*, for appellee.

**HOLT, J.** The Jefferson county court, upon an information filed by the auditor's agent, assessed for taxation a lot of land in the city of Louisville, belonging to the appellant, the Masonic Temple Company, and also adjudged the costs of the proceeding against it. An appeal was taken by it to the law and equity court, where it was held that it did not lie, because the action of the county court was ministerial, and not judicial; and the company has appealed to this court from the order of dismissal. It is urged in its behalf that the action of the county court was judicial; but, even if ministerial, that this court has recognized appeals from such action, and that the legislature has in numerous instances authorized them. The act of the legislature of May 9, 1884, is relied upon as authorizing appeals from all actions of a county court where \$25 or more is involved. 1 Laws 1883-84, p. 179. Upon the other hand, it is urged that the act should be construed as relating only to the judicial, and not the ministerial, action of a county court; and that, if this be not so, then it is claimed, upon the authority of *Pennington v. Woolfolk*, 79 Ky. 18, that the act is unconstitutional. This

court will not, however, under the circumstances, decide these questions. It will not do an idle work, and which must necessarily be barren of result. After the assessment by the county court, and the receipt of the list by the sheriff for collection, the appellant brought an action in the Louisville chancery court to enjoin their collection by levy and sale of its property. The ground upon which the injunction was obtained was the same upon which it resisted the assessment by the county court, and whose action it now seeks to have reviewed upon appeal by the Louisville law and equity court. In each proceeding it claimed that the property was exempt from taxation by virtue of a legislative act. The injunction was perpetuated in the chancery court, but upon appeal to this court its judgment was reversed, and the cause remanded, with an order to dissolve the injunction and dismiss the action, this court holding that the company was liable for the taxes. *Com. v. Masonic Temple Co.*, 87 Ky. —, 8 S. W. Rep. 699. All this is known to this court from its record and its own action. If it were to sustain this appeal, and send the case back to the law and equity court, it would be merely to try a question which it knows has already been fully and finally determined between these parties. This court did not direct a dissolution of the injunction upon the ground that the action of the county court was judicial, but upon a consideration of the merits of the case; and it is now asked to reverse a ruling of the law and equity court in order that it may hear and determine the very question which this court has already determined between these parties. The power of this court cannot be invoked for such a purpose. It would be an idle ceremony. If a party is in doubt as to the proper form of remedy, as was doubtless the case in this instance, and out of safety prosecutes two at the same time, he will not, after the merits of the litigation have been fully and finally determined in one of them by the highest tribunal, be heard in the same court in the other proceeding, asking a reversal on account of some action of the lower court. The reason is that the end has already been reached. If his claim to a reversal were granted it would end in nothing; and this appeal is therefore dismissed.

#### YARBROUGH et al. v. COMMONWEALTH.

(*Court of Appeals of Kentucky.* Oct. 1, 1889.)

##### BAIL—CRIMINAL LAW—DISCHARGE OF JURY.

1. When one released on a bail-bond goes into another state, and is there confined in the penitentiary for another crime, whereby his bond is forfeited, his bail are not exonerated.

2. In such case, under *Crim. Code Ky.* § 98, "if, before judgment is entered against the bail, the defendant is surrendered or arrested, the court may, at its discretion, remit the whole or part of the sum specified in the bail-bond," the discretion of the court is not abused when judgment is entered for two-thirds of the amount specified, though the accused was surrendered by his bail when he was released from the penitentiary.

8. When the jury, after remaining out some time, have informed the court that there is no probability of their agreeing on a verdict, their discharge, while the accused is absent in jail, is harmless error.

Appeal from circuit court, Daviess county.  
"To be officially reported."

*Weir, Weir & Walker, R. W. Slack, and R. S. Todd*, for appellants. *P. W. Hardin*, Atty. Gen., for the Commonwealth.

HOLT, J. Thomas Lockard was put upon trial for house-breaking. The case was fully heard. The jury, after considering it for some time, came into court, and, in the enforced absence of the accused in jail upon the charge, reported that they could not agree, whereupon they were discharged. Thereafter the appellants became his bail, and, upon being released, he went to Indiana, where he committed an offense for which he was sent to the penitentiary of that state, and was there confined, when the bail-bond executed by the appellants was forfeited on account of his non-appearance. They resisted a judgment against them for the amount of the bond upon two grounds: *First*, that Lockard, without their knowledge, had gone to Indiana, and was there confined in the penitentiary under a judgment for crime when the bond was forfeited, and could not therefore appear here in court, or be produced for trial in this state in discharge of the bond; *second*, that, by the mistrial above mentioned, Lockard had been put in jeopardy; that the discharge of the jury, without his consent, and while he was absent in jail, upon the charge, was equivalent in law to an acquittal; and that the appellants were not, therefore, liable upon the bond, because, if he had appeared when it was forfeited, there was no prosecution pending against him upon which he could have been tried and convicted.

The appellants rely upon the case of *Com. v. Overby*, 80 Ky. 208, to support the first point. That case, however, is not analogous to this one. There Overby executed a bond for the appearance of the accused in the state court to answer a charge of passing counterfeit United States treasury notes. The next day he was arrested by the United States authorities for the same offense, and was thereafter tried in the United States court for Kentucky, and sentenced to the penitentiary. This court held that this exonerated the bail in the state court. The offense was the same. The United States court had jurisdiction. The accused had not voluntarily left the state, and been convicted of a different crime in another jurisdiction, as is the case here. The object in requiring bail is to insure the attendance of the accused to answer the charge, and the orders and judgment of the court in reference to it; and our statute provides that the bail may, at any time before the forfeiture, exonerate themselves by surrendering him to the jailer of the county where the prosecution is pending, and one of the modes provided for doing so is through the aid of the peace-officers of the state.

There is, therefore, an implied obligation upon the part of the commonwealth that the bail shall not be hindered in doing so by any authority within the limits of the state. This is the ground upon which the rule in the *Overby* Case rests, and is entirely unlike a case where the bail, who have the friendly custody of the accused, and may prevent his departure from the state by a surrender of him at any time, permits him to leave the commonwealth, and he is then arrested elsewhere for other crime. *Withrow v. Com.*, 1 Bush, 17.

It is unnecessary to determine whether the bail can, where the prosecution has, in effect, been wiped out by the former jeopardy of the accused, avail themselves of it as a defense to the forfeiture of their undertaking, that he shall at all times answer to the charge and the orders of the court. The state of case presented does not raise the question. One trial, and only one, is an elementary principle in criminal law. Any other rule would be tyranny in a free country. It therefore has constitutional sanction. Exceptions exist, from necessity, to the rule, but they should be few, and strictly guarded. They arise most frequently in cases where trials are begun, but not ended. Undoubtedly jeopardy may attach without waiting for a verdict. In a combat intended to be deadly, it cannot well be said one is not in danger until he is hit. If, however, a necessity exists for the discharge of the jury before the finding of a verdict, then the proper administration of justice requires that this should constitute an exception to the general rule. To allow one charged with crime, however heinous, to go free because the jury had to be discharged by reason of the illness of a member of it, or the sudden sickness of the judge, would be a defeat of the end sought, at the expense of reason. This necessity may arise in various forms. One is a mistrial from a failure of the jury to agree. An arbitrary discharge of the jury without any cause would be a bar. In this case, however, the jury, after considering the case for some time, reported that they could not agree, and were then discharged. It is true this was done in the absence of the accused, and while he was in jail. Properly he should have been in court. He had a right to be there. Our constitution, in substance, so provides, as well as section 183 of our Criminal Code. If he had been there, however, he could not have prevented the discharge of the jury. Under the circumstances, it was a matter altogether within the discretion of the trial judge. An exception by the accused, if he had been present, would have been unavailing; and this court, were he now here making the question, would answer it by saying that it was a matter discretionary with the lower court, and we will not therefore interfere.

In addition to this it substantially appears affirmatively that the accused was not prejudiced by the court's action. The jury considered the case for some time. They then

reported their disagreement to the court. He inquired of them as to the probability of their reaching an agreement, and was informed that there was none. They were then discharged. We fail to see why the accused is to be regarded as having been in jeopardy, and the mistrial at an end, virtually, of the prosecution, or as equivalent to an acquittal, because he was not present when the jury were discharged, any more than it would have been if he had been present. It was still merely a mistrial by the failure of the jury to agree. Moreover, he was not prejudiced by the disregard of his constitutional right to be present at every stage of his trial, and in such case this court will not reverse the judgment. *Meece v. Com.*, 78 Ky. 586. It follows, if the action complained of would not have been available to Lockard, neither is it to the appellants.

After the forfeiture of the bond, but before the rendition of the judgment against the appellants, they surrendered Lockard to the lower court, he having been discharged from the Indiana penitentiary. In consideration of this the court rendered judgment against them for but two-thirds of the bond. It is now urged that it should have remitted it entirely, and that it was an abuse of discretion not to do so. Section 98 of the Criminal Code provides: "If before judgment is entered against the bail the defendant be surrendered or arrested, the court may, at its discretion, remit the whole or part of the sum specified in the bail-bond." The discretion named is, of course, a judicial, and not an arbitrary, one, but its exercise will not be controlled by this court unless flagrantly abused, and that has not been done in this instance. Judgment affirmed.

#### WARD v. COFFEY.

(Court of Appeals of Kentucky. Oct. 3, 1889.)

##### VENDOR'S LIEN.

In an action to enforce a vendor's lien, under Code Civil Proc. Ky. § 694, subd. 3, which provides that all lienholders must be brought before the court, but if all the liens be held by the same party the court may order a sale of enough of the property to pay the debts due, unless it appear that it is not susceptible of advantageous division, or for some other reason the interest of defendant would be seriously prejudiced, an allegation that plaintiff executed a deed for certain land to defendant, who in consideration delivered his three promissory notes to plaintiff; that the notes are unpaid; and that the land can be divided without materially impairing its value,—shows a sufficient cause of action, though it is not alleged that plaintiff had not sold the notes to third persons, and that defendant had promised to pay the notes.

Appeal from circuit court, Rockcastle county.

"To be officially reported."

Action by Wiley Coffey against Thomas Ward. Judgment was rendered for plaintiff, and defendant appeals.

W. O. Bradley, for appellant. McClure & Williams and J. W. Alcorn, for appellee.

PRYOR, J. This was a proceeding to enforce a vendor's lien against the vendee, who at the institution of the action, and when the judgment was rendered, was a non-resident. A warning order was entered, a bond to the non-resident executed, a warning order attorney appointed, and all the requisites of the Code in such a proceeding complied with. The objection urged arises from the pleadings, as it is maintained no cause of action is alleged by the plaintiff. It is alleged that the plaintiff sold to the defendant a certain tract of land, describing it by metes and bounds, and executed to him a deed, and that defendant as a consideration executed and delivered to the plaintiff his three promissory notes, payable in one, two, and three years, giving the amounts, etc.; alleges a failure to pay, and that the land can be divided without materially impairing its value. It is insisted that, as there are several notes, and the Code requiring that all lienholders shall be brought before the court, and, if held by several persons, the court can order no sale until all the notes mature. Subsection 3, § 694, Code. If the liens be held by the same party, a sale may be made to pay the debts due, unless it appears that the land is not susceptible of advantageous division, or for some other reason a sale would cause a sacrifice, or seriously prejudice the interest of the defendant. It is alleged that the land can be divided without materially impairing its value, which we think is in substantial compliance with the provisions of the Code. It is alleged by the plaintiff that he sold the land, and as a consideration three notes were executed; and it is not necessary that an averment should be made negating the idea that he had parted with these notes, or any of them, to third parties. The legal presumption is that he is still the owner of the notes not due, and the statement that he had not disposed of them would have been surplusage. He may have sold them, as counsel argues; but, if so, it must appear as a matter of defense, for on the statement of the pleader it must be assumed that he is still the owner. On the authority of *Huffaker v. Bank*, 12 Bush, 287, it is maintained that the petition is defective, because it is nowhere alleged that the defendant agreed and promised to pay these notes. It is alleged that he (the defendant) executed and delivered these notes to the plaintiff, payable at a particular date, for this land. Here the consideration is fully expressed, and the passing of the title to this land from the plaintiff to the defendant. Now, this court will not assume that this was a donation of the tract of land by the plaintiff to the defendant; but will assume, as the plaintiff alleges, that the defendant was to pay the plaintiff for the land at the periods stipulated in the contract. Whether the exhibit aids a defective pleading or not, it is plainly averred that such was the consideration for this land, and whether it was a note, or bond, or verbal promise, after judgment the petition must be held to be good. Judgment affirmed.

**HAMLIN v. COMMONWEALTH.***(Court of Appeals of Kentucky. Sept. 28, 1889.)***RESISTING ARREST—HOMICIDE—INSTRUCTIONS.**

1. Under Crim. Code Ky. § 43, providing that no unnecessary force or violence shall be used in making an arrest; and section 89, providing that the person making the arrest shall inform the person about to be arrested of the intention to arrest him, and of the offense charged against him, and, if acting under a warrant of arrest, shall give information thereof,—a constable, who attempts to arrest a person by wounding him, and without informing him of the offense charged against him, or that there was a warrant for his arrest, may be lawfully resisted.

2. A person not duly summoned to aid in making an arrest may be lawfully resisted.

3. The clause, "unless you shall believe from the evidence beyond a reasonable doubt that the defendant voluntarily sought and brought on the difficulty for the purpose of inflicting loss of life or great bodily harm on deceased," in an instruction, is erroneous when there is no evidence of a hostile intent or purpose to bring on a conflict on the part of the accused.

Appeal from circuit court, Pulaski county;  
T. Z. MORROW, Judge.

"Not to be officially reported."

O. H. Waddle, W. A. Morrow, G. W. Shadoan, and Jas. T. May, for appellant.  
P. W. Hardin, Atty. Gen., for the Commonwealth.

LEWIS, C. J. It appears from the evidence in this case that about the last of June, 1888, a warrant of arrest against Andy Hamlin, about 17 years of age, upon the charge of seducing Mary E. Warmon, about 16 years old, was issued at the instance of her father, James R. Warmon, and placed in the hands of M. L. Vestal, a constable, to execute; but, although the accused did not try to evade the officer, there was no attempt to make the arrest until Sunday, August 12, 1888, at a meeting-house, where he and his brother, Elzie Hamlin, the appellant, had gone to attend church service. When Andy Hamlin saw the constable on that occasion he walked off around the meeting-house, and, refusing to stop when told to do so by the constable, left in company with his brother, Elzie Hamlin; but Alvin Warmon, coming out of the house about that time, directed the constable to take him, and with a drawn pistol, accompanied by the constable and others, started in pursuit of the two Hamlins, who, however, evaded them by hiding in the woods; but the constable and his party, urged by Alvin Warmon, who was cursing and threatening the Hamlins, continued the pursuit to the house of Evan Hamlin, another brother of Andy, and while there Vestal was assured by Evan Hamlin, and also by Elzie, who had arrived in the mean time, that if he would go alone, or with any other persons except the Warmon boys, Andy would surrender to him quietly. After remaining a while at the house of Evan Hamlin, Vestal and his party returned to the meeting-house, Elzie Hamlin also going back there; but some time afterwards Evan and Andy also went back towards the meeting-house, the latter stopping near the top of a hill, about 300 yards off,

while the former went on until he got near enough to be seen and heard by Elzie Hamlin, to whom he signaled and beckoned to come to him, which he did, and then the three brothers started towards their home; but they had gone but a short distance when Henry and Alvin Warmon started rapidly in pursuit of them, followed by Vestal, the constable, and one or two others, whom they urged to go on, saying, "They or we will take or kill him." When the party overtook the three Hamlin brothers, the two Warmons being in advance of the constable, a bloody fight occurred, which resulted in Andy Hamlin being shot in the arm by Vestal, the latter being also wounded by a return fire, Alvin Warmon being shot dead by Elzie Hamlin, and Henry Warmon stabbed to death by Evan Hamlin. The indictment in this case is against Elzie, Evan, and Andy Hamlin for the murder of Alvin Warmon, and the appeal is from a judgment of conviction for manslaughter against the first named, who was separately tried, and sentenced to confinement in the penitentiary two years.

While a peace-officer may, in making an arrest and when resisted, use reasonable force, or may summon as many persons as he deems necessary to aid him, for the security of the citizen, section 43, Crim. Code, expressly provides that no unnecessary force or violence shall be used, and section 89 prescribes the methods to be adopted, without which no arrest can be legal. The constable in this case did not, as required by law, inform Andy Hamlin of the offense charged against him, nor give information that he was acting under a warrant; nor were those who accompanied in the pursuit duly summoned, or the proper persons to summon, to aid him. On the contrary, there had for two or three years been a hostile feeling existing between the two families, and several conflicts between the members; and it was manifest from the conduct of the Warmons towards Andy Hamlin at the meeting-house, and their threatening language and hostile attitude, that their purpose was not really to legally and quietly arrest, but rather to bring on a conflict, and do violence to him. Yet, although the constable saw them start in advance of himself, and heard them use threats of violence, he not only without objection permitted Alvin and Henry Warmon to go in advance of him, with drawn pistols, rapidly pursuing the three Hamlins, but when his party came up with them he was the first to begin the fight by firing a pistol at and wounding Andy Hamlin, without any effort to arrest him in the legal mode. It seems to us clear that Andy Hamlin cannot, under the circumstances of this case, be regarded as having in legal contemplation resisted an arrest, nor had either of the three Hamlins placed themselves in such attitude as deprived them of the right of acting in self-defense. And the lower court, following the decision of this court in the case of *Wright v. Com.*, 2 S. W. Rep. 905, instruct-

ed the jury that if the deceased, though summoned, or acting with the constable in making the arrest, acted in such manner as to give appellant reasonable grounds to believe he was acting with the officer as a mere pretext for an opportunity to inflict violence on him or his brother, he (appellant) had the right to resist such arrest by deceased. The error of that instruction to the prejudice of appellant is in assuming the deceased had the right to act with the constable in making the arrest without being duly summoned.

There was an instruction authorizing the acquittal of appellant upon the grounds of self-defense, but the principal ground of complaint in the case is that the instruction was qualified as follows. "Unless you shall believe from the evidence beyond a reasonable doubt that the defendant voluntarily sought and brought on the difficulty for the purpose of inflicting loss of life or great bodily harm on deceased." As said in *Robinson v. Com.*, 11 S. W. Rep. 82, "such an instruction as the one under consideration is often misleading and prejudicial, because the jury is left in doubt about the meaning in law of commencing or bringing on a difficulty." In this case the jury was not instructed as to the manner in which the difficulty was or might have been sought or brought on by appellant, and must have understood that going back to the meeting-house was in effect seeking and bringing on the difficulty. It seems to us there was no evidence whatever to authorize the instruction qualified in the manner mentioned; for it does not appear that either of the Hamlins did or said anything indicating a hostile intent or purpose to bring on a difficulty. Appellant went back to the church, but there is no evidence he went for a hostile purpose, or behaved in any other than a peaceable manner; and when he and his two brothers were overtaken, they were going away from the meeting-house towards their home, with the evident purpose of avoiding a difficulty. It seems to us the qualification mentioned has no evidence to support it, and, being erroneous, and prejudicial to the substantial rights of the appellant, the judgment of conviction must be reversed for a new trial.

**BLACK *et al.* v. BLACK'S ADM'R *et al.***  
(*Court of Appeals of Kentucky.* Oct. 8, 1889.)

**HOMESTEAD—ABANDONMENT.**

Decedent removed from his town house to a farm about seven miles distant, in which his wife had an interest, and died there about a year afterwards. Several witnesses testified that decedent stated before, during, and after his removal that it was temporary, and that he intended to return to his town house. The widow testified that decedent would shortly have moved back if he had not died, and that some of his personalty was never moved from the town house. *Held*, that there was no abandonment by deceased of the homestead in his town house.

Appeal from circuit court, Crittenden county.

"To be officially reported."

*L. H. James*, for appellants. *J. R. Hewlett*, for appellees.

**LEWIS, C. J.** This is an action by the personal representative of N. R. Black, who died previous to November, 1881, when letters of administration were granted to settle the estate, and sell realty to pay debts against it, the personalty being insufficient for the purpose; and the claim of the widow for herself and infant children to a homestead right in a house and lot in the town of Marion having been refused, she has appealed to this court. It appears from the evidence that the deceased, who had for many years resided and practiced the profession of law in Marion, some time in 1880, probably the early part, removed with his family to a farm seven or eight miles in the country, in which his wife had an interest, and was residing there when he died. In the case of *Hansford v. Holdam*, 14 Bush, 210, it was held that where there has been an occupancy and a removal temporarily, with the intention to return and make the premises a home, there would be no forfeiture of the homestead. In the case of *Davis v. Prichard*, 7 S. W. Rep. 549, the contest was between the vendee of the debtor and his creditor, and it was held that, although not in actual occupancy of the homestead at the time of the sale, nevertheless the debtor, having occupied it for years, and left it, not permanently, but with the intention to return, had a right to sell and pass the title to the purchaser. But it was said that when one purchases land upon which he has never lived, with the intention of going upon it, he does not thereby alone acquire a homestead right to it. It has, however, been several times decided by this court, and may be considered settled, that, when a housekeeper with a family has been in the actual occupancy of premises as a homestead, a removal temporarily, and with the intention of returning, does not operate as an abandonment nor forfeiture; and the rule has been applied where the debtor has been away from the homestead a greater length of time than that between the removal of the decedent in this case from his homestead and his death.

The simple question, then, in this case, is whether N. R. Black left his residence in Marion temporarily, and with the continuous purpose of returning and occupying it as a homestead, or not. Several witnesses, four or five in number, testify that he stated before, during, and after his removal that it was temporary, and he intended to return, and no witness testifies that he expressed a different purpose in removing. His wife, who was a widow with four children when he married her, six or seven years previously, and by whom he had two, owned by inheritance and purchased several, if not all, the shares of her father's farm, to which the deceased removed; but her mother owned the dower right, and rent was paid to her for the place. In addition to the statement of several

witnesses that his announced purpose was to remove to the country to rest awhile, appellant, the widow, testifies that he would have in a short time moved back if he had not died, and that some of his personalty never was in fact taken from his homestead in Marion. It appears that after his removal he executed a mortgage on the homestead to secure a debt of about \$400, which, by the judgment appealed from, is to be enforced; but, as appellant did not unite in it, she is not prejudiced, nor can that fact be reasonably made inconsistent with his intention to return to his former residence.

It seems to us, as the declared intention and purpose of the deceased to return to his homestead was so fully and clearly shown, and no countervailing evidence that is competent was offered, or circumstances proved that are irreconcilable or inconsistent with such avowed purpose and intention, there is no way to escape application of the rule adopted by this court in such cases, and it must be decided that the removal of the deceased was temporary, and with the intention to return, and therefore not an abandonment and forfeiture of the homestead. As the lower court, in our opinion, erred in denying the right of appellant to the homestead for herself and the infant children, the judgment to that extent is reversed, and cause remanded for further proceedings consistent with this opinion.

**DAY et al. v. BURNHAM et ux.**

(Court of Appeals of Kentucky. Sept. 26, 1889.)

**REHEARING—LACHES.**

Where a case was submitted 14 months after the appeal was granted, and 8 months have elapsed since the delivery of the opinion, a rehearing will not be granted on the ground that the appeal has been prosecuted in the name of one of the alleged appellants without his consent.

On petition for rehearing.

"To be officially reported."

The petition alleged that R. M. Day had not authorized an appeal in his name, and that he and the appellees had compromised their controversy before the delivery of the opinion, and prayed for a rehearing and an affirmance. For former report, see 11 S. W. Rep. 807.

J. D. Jones and H. B. Gregory, for appellants. R. D. Davis, for appellees.

**PER CURIAM.** The appeal was granted in this case January 16, 1888, but not submitted until March, 1889, and consequently, if R. M. Day was not, certainly Burnham and wife were, informed long before the decision was rendered that the appeal was prosecuted in the name of Day as well as that of Shumate. It seems to us, therefore, September 2, 1889, was too late a date for appellees to ask that the opinion delivered June 6th be set aside, and the judgment of the lower court affirmed as to Day, because he had not authorized the appeal to be prosecuted in his name, whereby the rights of appellant Shu-

mate might be prejudiced, especially as the opinion of this court will not prevent the enforcement of any compromise and settlement that may have been made between Day and the appellees. Petition for rehearing overruled.

**McCLERNAND v. COMMONWEALTH.**

(Court of Appeals of Kentucky. Sept. 28, 1889.)

**SUMMONING JURY—HOMICIDE—INSTRUCTIONS.**

1. Gen. St. Ky. c. 62, art. 5, § 4, provides that in criminal cases, where the accused is entitled to more than three peremptory challenges, the clerk shall draw from his box twelve names, who shall compose the jury, unless some of them are challenged, in which event he shall draw as many more names as may be required, until a jury be obtained, or the panel exhausted, when the deficiency shall be made up from by-standers. *Held*, that when the court has furnished all the unoccupied jurors of the regular panel, it should be regarded as exhausted, and by-standers may then be summoned.

2. When certain questions detailing the expected testimony have been asked by the prosecuting attorney, and excluded on objections to the questions themselves, and not to the statements contained in them, it cannot be urged in the appellate court that the attorney was allowed to make prejudicial statements in the presence of the jury.

3. On trial for murder, where there is no evidence tending to reduce the offense charged to involuntary manslaughter, an instruction relative to involuntary manslaughter is properly refused.

4. When accused has by a proper instruction been given the benefit of the reasonable doubt on the entire case, he is not prejudiced by the omission of it from a clause in one of the instructions.

Appeal from circuit court, Whitley county;

ROBERT BOYD, Judge.

"Not to be officially reported."

R. S. Crauford, Thos. Adkins, and B. T. Hardin, for appellant. P. W. Hardin, Atty. Gen., for the Commonwealth.

**HOLT, J.** Robert Sutton was so brutally assaulted and beaten by Robert Brooks that his death resulted, as a jury have found, in a few hours. The appellant, John McClerland, was, as the jury have also found, and as the testimony shows, present, inciting the attack upon the unresisting victim. Upon the trial he claimed the right to first exhaust the regular *venire* or panel in the effort to get a jury. Twelve of the regular jurors were then in their room considering a case, and the court therefore declined to furnish the regular panel, but offered to have the sheriff summon a sufficient number of by-standers, who, together with the regular jurors not then engaged, would make a full panel; and the record recites that thus the court "proceeded in the regular order" with the selection of the jury. There was no error in so doing. The jurors, who at the time had a case under advisement, might have continued to consider it for a week; and if the claim of the appellant to an opportunity to select first from the regular *venire* had, under the circumstances, been well founded, then indefinite delay would have followed. The statute provides that in criminal cases, where the accused is entitled to more than three peremptory challenges, the clerk shall draw from

his box twelve names, who shall compose the jury, unless some of them are challenged, in which event he shall draw as many more names as may be required, until a jury be obtained, or the whole panel exhausted, and in the latter event the deficiency shall be made up from by-standers. Gen. St. c. 62, art. 5, § 4. When the court furnishes all the unoccupied jurors of the regular panel, it should be regarded as exhausted, and by-standers may then be summoned. Such a course is a substantial, and the only practical compliance with the statute.

It is urged that the attorney for the commonwealth was improperly permitted to make certain statements in the presence of the jury. An examination of the record shows that this objection is not well taken. Certain questions were asked, detailing the expected testimony. Objection was interposed by the defense, not upon the ground that the statements embraced in the questions were being made before the jury, but to the questions themselves, and sustained by the court.

We perceive no error in the admission of evidence. The statements of the appellant, proven by the witness Gorman, were competent evidence against him. They showed his intention and hostile feeling towards the deceased; and counsel are mistaken as to one of the statements, in saying that it does not appear whether it was made by Brooks or the appellant. They were together at the time, and the witness testified that they both made the statement, because, he says, "they said" so and so, going on to detail it. The offer to prove by the witness Duncan a certain conversation of the accused was properly refused. It would not have been a contradiction of Gorman, the witness for the commonwealth, because he had not testified to any such, but to other statements of the appellant.

There was no testimony tending in the slightest degree to show that the killing of the accused was involuntary manslaughter. Indeed, the contrary appears beyond all question, and therefore no instruction should have been given relative to it. He was sitting upon the railroad track, talking to another party. The appellant and Brooks came running up behind him, and suddenly, and without saying a word, the latter knocked him down, and kicked and beat him, being urged on at the time by the appellant, until the blood ran from his mouth and nose, and he became insensible.

By the sixth instruction the jury were told that, even if they believed beyond a reasonable doubt that Brooks maliciously, and not in his necessary or apparently necessary self-defense or that of the appellant, struck and wounded the deceased, and that the appellant was present and maliciously advised and aided it, yet, unless they believed from the evidence that the deceased died therefrom, or his death was thereby hastened, they must acquit the appellant. It is urged that the

reasonable doubt should have been inserted in the last clause of the instruction. In other words, that the jury should have been told to acquit unless they believed beyond a reasonable doubt from the evidence that the death was the result of the attack upon him. It is true, such a belief was necessary to a conviction, but the jury could not well have understood otherwise, when all of the instructions are considered together. The first two instructions, relative respectively to murder and manslaughter, told them distinctly that before they could convict the accused of either they must believe beyond a reasonable doubt that Brooks killed the deceased by kicking and striking him, and that he died therefrom. Moreover, the appellant was by a proper instruction given the benefit of the reasonable doubt upon the entire case. The trial appears to have been a fair one, conducted in conformity to the rules of law, and the judgment is affirmed.

#### ON PETITION FOR REHEARING.

HOLT, J. The ground of the defense was that the accused did not incite or aid Brooks in the killing. An unresisting man was beaten by the latter until death resulted. This being the state of case, no question of self-defense was in the least degree presented, and no instruction should have been given as to it. The accused could not, however, have been prejudiced by its being done. The fact that it was done served as an intimation to the jury from the trial judge that the accused had this ground to stand upon, however slight. The ground of defense really relied upon was submitted to the jury by proper instructions. They were told that before they could convict the accused of murder they must believe beyond a reasonable doubt that he maliciously aided or advised Brooks in the killing; and that before they could convict him of manslaughter they must have a like belief that he did so in sudden heat and passion. The instructions gave to the accused, by submitting to the jury the question of self-defense, a ground of defense to which he was not entitled, but of this he cannot, of course, be heard to complain.

The accused has a right, which is recognized both by statute and our constitution, to be present at any and all steps during his trial, and it does not end until the verdict is rendered. Thus the jury should not be instructed, or the case submitted to them, or their verdict received, in his absence. This question was fully considered in the case of *Allen v. Com.*, 86 Ky. 642, 6 S. W. Rep. 645. Complaint is now made, however, because the jury, while considering of their verdict, and upon one Sunday morning, came into court, and, without saying whether they could agree or not, asked to be released, and permitted to return home. The request was refused. The accused did not ask that they be discharged, or protest against or except to the judge's ruling; and if he had, it would have been unavailing, as it was a matter altogether



within the court's consideration. It is asserted that the accused was not then present. This is not shown by the record, but if it be true, as is no doubt the case, because counsel say so, yet it matters not, because the court merely exercised a discretionary power in holding the jury, and nothing was done which can well be regarded as a step in the trial. The remaining question now again urged was considered upon the original hearing, and the conclusion then reached is adhered to, and the petition for a rehearing is overruled.

### WHITEFIELD *et al.* v. HIPPLE.

(Court of Appeals of Kentucky. Oct. 10, 1889.)

#### STREET IMPROVEMENTS—LIEN—ACTION—APPEAL.

1. To make a gutter three feet wide instead of four feet wide, as required by the contract, is not non-performance of the contract, but only defective performance, and acceptance of it by the city council is conclusive on the abutting owners in an action by the contractor to enforce his lien for the street improvement.

2. Where one of the abutting owners constructs the gutter in front of his lot, in pursuance of a city ordinance, and the work so done was accepted by the council before the contract to construct the gutters on that street was closed, the fact that the gutter, as made by the owner, is defective is not available as a defense by the other owners in an action by the contractor to enforce his lien.

3. Where the record on appeal contains only part of the evidence adduced in the court below, the judgment will not be disturbed unless unwarranted by the pleadings.

Appeal from court of common pleas, McCracken county.

"To be officially reported."

*Husbands & Husbands*, for appellants. J. W. Bloomfield, for appellee.

HOLT, J. This is an action by the appellee, Fred Hipple, as the contractor, to enforce a lien for a street improvement in the city of Paducah against the abutting property of the appellants. The contract was for the improvement of Seventh street from Washington street to Jefferson street, a distance of three squares, by the building of new pavements and gutters upon both sides of the street. The sixty-seventh and sixty-eighth sections of the city charter provide that such work shall be done under the supervision of the mayor and city engineer, subject to the acceptance of the city council, and that when so received the liability of the abutting owner for his proportionate part of the cost, as fixed by the engineer, shall become fixed; and the sixty-ninth section provides: "The liens given for the purposes named in the last four sections may be enforced by filing a petition in equity in favor of the contractor or his assignee against any or all the persons liable for the cost of said work, and it shall only be necessary for the plaintiff in the action to file a copy of the ordinance of the council requiring the work to be done, a copy of the contract for doing the same, a copy of the engineer's report showing the respective liability of each person sued, a copy of the order or resolution of

the council receiving the work as done according to the contract, which shall be, together with corresponding allegations in the petition, *prima facie* evidence of the plaintiff's right of recovery; and in such cases the defendants shall not be allowed to make the defense that the work was not done according to contract as against said plaintiff in the action." The petition of the appellee fully conforms to all the above. This is not questioned. It contains all the averments necessary to the enforcement of the lien, and all the required exhibits were filed with it.

The only defense presented is that the work embraced by the contract was not in fact all done, and that, as held in the case of *City of Henderson v. Lambert*, 14 Bush, 24, an abutting lot-owner cannot be compelled to pay the cost of an improvement along his property if the whole work undertaken has not been done, although such part performance may be accepted *pro tanto* by the city council; in other words, that the appellee has not complied with his contract, and cannot therefore enforce any lien, and that the mayor, engineer, and council combined with the appellee to accept the work when they knew it had not been done, and to thus defraud the appellants. There is no common-law liability upon the part of the lot-owner to pay for the improvement of the adjacent street. It is the creature of the statute, and the law is to be construed most strictly against those asserting the claim. It has, however, been held that where a city council accepts an improvement such action, in the absence of fraud or collusion, is conclusive of the question whether the manner of its construction conforms to the contract. *Murray v. Tucker*, 10 Bush, 240; *Manley v. Trustees*, 7 Ky. Law Rep. 825. Here the charter expressly so provides. It is, however, urged that this rule does not apply in this instance, because it is claimed that the failure of the appellee to comply with the contract did not consist in a defective execution of the work, but in failing to do a part of the work; in other words, not in a defective performance, but in a non-performance of a part of it.

It is averred in the answer that upon a part of the improvement the gutter is but three feet wide, when, by the contract, it was to have been four, and that in front of one lot lying adjacent to the part of the street to be improved the appellee has made no improvement whatever, and that the curbing of the pavement thereof is not of sandstone as the contract required.

The reply avers that the gutter along appellants' property, and which is something less than four feet wide, was in fact made by the appellants and accepted by the city council; but in any event we think the alleged failure to make the gutter four feet wide, whether in front of appellants' lot or elsewhere, amounts only to a defective performance, and that the acceptance of it, as constructed by the council, was therefore con-



clusive upon the lot-owner. The reply also avers that the reason appellee did not do the work in front of the one lot is that it had been done by the owner in conformity to the city ordinance after its adoption, and received and accepted by the city before the contract was closed on August 5, 1886, with the appellee, and hence was not in fact embraced by it. The owner had the right to make the improvement himself, and, even if defectively done, as, for instance, with other than the material prescribed by the ordinance, yet, if accepted by the council, other lot-owners within the district to be improved cannot complain.

The judgment for the appellee must, as this record is presented, be tested by the pleadings only. If they support the judgment it must be sustained. The reason of this is that but one deposition, and it that of one of the appellants, is copied in the record for this appeal. The schedule made out by the appellants directs no other evidence to be copied. The judgment shows that other depositions were taken and considered upon the hearing of the case below. The appellants have brought up a partial record. This a party may do, but at his peril. There is no evidence supporting the averment of collusion between the city officials and the appellee or the charge of fraud; and, if there were, we could not consider it when the charge is denied, and but a part of the testimony used below is before us.

If the entire evidence were before us, we cannot assume that it would not present a sufficient reason or legal excuse for the alleged failures of the appellee. We must presume, in support of the judgment, that it would sustain the averments of the appellee's pleadings. The judgment was authorized by the pleadings, and must therefore be affirmed.

#### McCORMICK v. STOFER.

(Court of Appeals of Kentucky. Oct. 5, 1889.)

##### PARTNERSHIP CONTRACT.

In a suit for a partnership accounting, it appeared that defendant was to furnish the necessary money for mining coal, and that the profits were to extinguish the advancement made by him, and that he was to have one-half cent advantage in profit on each bushel of coal until the advances were paid, and then the profits were to be equally divided. Held that, on the business resulting in a loss, defendant was not entitled to contribution from plaintiff, the other partner.

Appeal from circuit court, Montgomery county.

"Not to be officially reported."

Action for a partnership accounting between N. A. McCormick and William Stofer. From a judgment for defendant, plaintiff appeals.

B. J. Peters, for appellant. M. S. Tyler and W. H. Holt, for appellee.

PRYOR, J. The sole question necessary to be considered in this case arises from the construction given the partnership contract

by the court below. The loss sustained by the appellee more than covers all the errors in his accounts alleged by the appellant to exist; but when scrutinized it will be found that there is nothing to complain of on the part of the appellant, except the judgment, by which she is made to share one-half of the loss sustained by the venture. The plaintiff (appellant) alleges that there was sold, in all, about 132,000 bushels of coal. The appellee responds by saying that it was only 123,116 bushels that this defendant sold; and in this he is sustained by the books kept of the partnership business. It is true that the appellee kept or made out two books of account that were not partnership books, but contained a statement of the partnership transactions, copied, no doubt, from the regular books; and while these books that were not partnership books could not be read as evidence, and while the accounts are in a confused condition, it is manifest that the firm lost about \$1,800, and that the appellee has accounted for all the coal sold by him as moneys received. The \$1,800 will at least more than cover all the errors complained of in that regard.

The question arises, who, under the contract, is to sustain this loss,—the appellee, or is it to be placed to the debit of the firm? The partnership was in mining and selling coal. The husband of the appellant superintended the mining, and the appellee sold the coal. The appellee was the moneyed partner, and advanced over \$15,000 in the enterprise. By the terms of the contract, the appellee "was to furnish the money [and did furnish it] to build a tramway from the coal road to the mines, and to advance the money for all expenses that is necessary for shipment of coal; for which advancements the appellant agrees that the profits on the coal shall go to extinguish the advancement made by the appellee, (Stofer); and she further agrees that Stofer shall have one-half cent advantage in profit on each bushel of coal sold, for said advancement of money, until the advancement made is extinguished by profits, and, after that, profits to be divided equally. Mrs. McCormick (appellant) agrees to have all the business attended to at or near the mines; and Stofer (appellee) to have all the business attended to at Mt. Sterling, to sell the coal mined by said firm, and to collect all moneys from sales of coal." No profits were made, but a loss sustained of about \$1,800. That the appellee was to be reimbursed out of the proceeds of the sale of the coal, to the extent of the principal advanced by him, is manifest; but if the proceeds failed to pay him, and there was no profit after paying expenses, etc., out of what fund, or to whom, could Stofer look to share with him the loss? He had agreed to look to the profits for the interest on his money advanced, that is, was to get one-half cent per bushel out of profits for interest on his money, and the profits were to go to extinguishing the principal sum advanced; and, as there

were no profits, all that Stofor can get is what is left of the principal sum. It may be, and appears to be, a hard bargain on the part of the appellee, but it was intended that his co-partner should bear none of the losses; and she says that her husband's experience in mining was the consideration for the undertaking on the part of the appellee. It appears that appellant had but little, if anything, to put into the concern; and this seems to furnish another argument in favor of the construction now given the contract. In fact, it appears that the appellant is not able to pay her proportion of the loss adjudged against her in the court below; and the appellee, being willing to risk his investment upon a contingency that might and did result in loss, must abide the terms of his agreement. We think a fair adjustment of these accounts is, on the return of the case, to dismiss the petition of the appellant, each party paying his own costs, and adjudge that neither is entitled to a judgment against the other. As it is to settle a partnership, it is proper that each should contribute. Judgment reversed, with directions to dismiss the petition as indicated.

HOLT, J., not sitting.

GREER v. GREER'S ADM'R *et al.*

(Court of Appeals of Kentucky. Oct. 8, 1889.)

SALE OF DECEDENT'S LAND—ESTOPPEL—PLEADING—SUMMONS.

1. Where, after a sale under order of court of a decedent's land to pay his debts, an heir makes a claim of ownership to one of the lots, and, on an application to set aside the order of sale, the issue of ownership is made and tried, the objection that no summons was issued on the amended petition, which asked for the sale of that lot, is waived.

2. So, where the executor and the other heirs make no objection to the claimant's effort to set aside the order, save by a denial by pleading of his ownership, they are estopped to urge that the order of sale became final when the term at which it was entered expired.

3. It appeared that property claimed by the claimant had been in fact paid for by the decedent, but owing to his financial difficulties the legal title was conveyed to claimant. The occupied portion of the property was occupied by decedent in his life-time, and rented by him, and during some of this time claimant collected the rent for decedent. Upon decedent's death, claimant, together with the other heirs, executed a written authority to the administrator to collect the rent, which he exercised until the property was destroyed by fire, when he collected the insurance. As to the unoccupied portion claimant only made a claim to a half interest, and offered to convey the other half to the administrator. When the administrator was preparing a list of decedent's property for the purpose of procuring an order of sale, which was known to claimant, the latter made no claim to any except the undivided interest in the unoccupied lots. *Held*, that he was estopped to claim any further interest in the property.

4. An order of the court allowing the claimant to amend his pleadings and proceed for one-half of the proceeds of those lots did not cure the error in refusing to set aside the sale upon ascertaining claimant's interest, as the court had no authority to order their sale unless they were shown to be indivisible.

Appeal from chancery court, Kenton county; J. W. MENZIES, Chancellor.

"Not to be officially reported."

*Simmons & Schmidt*, for appellant. *A. G. Simrall*, for appellees.

HOLT, J. A. L. Greer died intestate in 1884. He was then the owner of considerable real estate, a part of it being lots in the city of Covington. He was also heavily indebted. His administrator brought this action on January 23, 1885, for a settlement of the estate, a part of the relief sought being a sale of enough of the realty to pay the indebtedness. The appellant, James A. Greer, who, as a son of the decedent, is one of his heirs, was, together with the co-heirs, made a defendant to the suit, and properly summoned. The petition described to some extent some of the lots sought to be sold, but did not name those now in contest. February 4, 1885, an amended petition was filed, which sought the sale of certain lots, describing them, and among which are lots 10 and 11 in a certain city subdivision. February 17, 1886, another amendment was filed, which, among other parcels of property, asked the sale of these lots, (10 and 11,) and also of lots Nos. 12, 51, and another known as the "Scott-Street Lot." No summons was sued out upon either of these amended petitions against the appellant. February 23, 1886, an order was entered directing the sale of many parcels of property, and among them the five above named, save, as the record appears, only the south half of lot 51 was directed to be sold. It is probable that the judgment is miscopied as to the last-named lot, and that a sale of the entire lot was ordered; but we must consider the record as we find it, and really it matters not as to this appeal whether it was one way or the other. In April, 1886, some of the property was sold, but none of the lots above described. June 7, 1886, the appellant filed an answer, claiming to own all five of said lots, and asking that the order of sale, as to them, be set aside. A reply was filed controverting his right to them. The issue was fully made as to the ownership of them. Testimony was taken, and the case went to judgment; the chancellor refusing to set aside or modify the judgment of sale, but giving the appellant the right, if he saw fit, to amend his pleadings and claim one-half the proceeds that might arise from a sale of lots 10, 11, and 51.

As the pleadings are, the administrator claims that said lots belong entirely to the estate, while the appellant claims that he is the owner. It is urged upon the part of the appellant that he should have been summoned to answer the amended petitions, and that without this being done no judgment of sale was proper, as the original petition did not seek the sale of the lots in contest. He asserts in his pleadings that the administrator misled him by informing him that he need not employ any attorney, as he (the administrator) and his attorney would attend properly to the interest of the heirs. There is no evidence, however, to support this charge. The consideration of the question as to the

necessity of a summons upon the amended petitions is obviated by the fact that the appellant was subsequently permitted to set up his claim to the property by pleading and be heard as to it; and, for the reason that the appellees made no objection in any way to his doing so, and to his effort to set aside the order of sale, save by a denial by pleading of his ownership, they cannot now urge that the order of sale became final when the term at which it was entered expired, and could only be amended or modified upon one of the grounds enumerated in the Code of Practice.

The appellant had the legal title to the property, save lot 12. In need not be further considered than to say that while the appellant once had the legal title to it, yet on August 13, 1884, he conveyed it to his father, as is shown by a deed, made part of the record, and proven to have been executed by him. It is quite strange that in the face of the record he should claim it. The deeds to lots 10, 11, and 51 were made to him in 1865. The Scott-street lot, in a partition of some joint property, had been previously partitioned and laid off to him. It appears his father was, at one time, largely involved. How long this continued does not certainly appear; but it is shown that by reason of it both the appellant and the intestate's brother held property in their names which in fact belonged to A. L. Greer. This appears from the fact that during his life-time some property so held was sold, and the proceeds paid to him. The appellant relies, in support of his claim, upon the single fact that he has the legal title to the property. It is claimed upon the other hand that his father paid for it, and that he merely held it in trust for him, and that by reason of his conduct he is now equitably estopped to deny the ownership of the heirs of A. L. Greer, and the right of his personal representative to apply it in payment of the debts of the estate. As to the Scott-street lot, it is manifest that the deceased paid for it, and that his estate is equitably entitled to it. Ten years or more before the death of A. L. Greer he built a stable upon it, claimed the lot as his own when he was doing this, and after, and continued until his death to rent it and collect the rents. In fact the appellant, during that time, collected some of the rents in his father's name. After the death of A. L. Greer, his administrator, by virtue of written authority from the heirs to him to collect the rents of the estate, and in which the appellant united, continued to collect the rent of the stable until it was destroyed by fire, and then he collected the insurance. It also appears that after the death of the intestate an execution was issued against the appellant for a debt of his father's, and for which he was surety. He notified the administrator and his attorney that unless it was paid by the estate he would direct it to be levied upon the "Scott-street property," and thus the estate would really pay it, as that property in fact belonged to his father. The other lots were vacant. It does

not appear who had control of them. The father claimed them. It does appear, however, that after his father's death the appellant did not claim the lots in contest, save the undivided half of Nos. 10, 11, and 51; and that, subject to this interest, he promised both the administrator and his attorney to convey them to the estate. In fact, at his instance, a deed from him to the Scott-street property was prepared and delivered to him, but never executed; the sense of right, seemingly, having cringed to that of interest.

Before this suit was brought, the administrator, desiring to know what property belonged to his intestate, procured from the assessor a list of the property which was assessed in the name of A. L. Greer; also in the names of A. L. Greer and his brother; also in the names of A. L. Greer and the appellant; and also in the name of the latter alone. He submitted it to the appellant with the request that he designate what parcels belonged to the parties respectively, he knowing at the time that it was being done for the purpose of procuring a sale to pay the debts of the estate. He then informed the administrator that the Scott-street property belonged to his father, and that the other three lots, numbered 10, 11, and 51, belonged to him and his father jointly. He did not expressly direct the administrator to get a decree for their sale, but the latter proves he indicated the ownership, and the appellant has not seen fit to testify in the case, and the evidence of the administrator is uncontradicted. The appellant makes no effort to justify his subsequent course, and present claim to the entire property. His counsel say in argument that their client did not feel called upon, in view of the state of the record, to offer any evidence. If this were so in a legal view, yet a sense of right should have so far actuated him as to explain why, in the face of his repeated declarations, he is now claiming the entire property. He should not have been willing to be left in the attitude of claiming what beneficially and equitably belongs to his brothers and sisters because he happens to have the marked legal title. He asserts in his pleading that the stable was built under a certain agreement between his father and himself, but he offers no evidence to this effect. His conduct and conversation with the administrator has equitably estopped him from now claiming more than he then claimed. He induced the administrator to sue and get a judgment of sale. To defeat the claim of the estate to the property, he now relies upon the statute of frauds and the statute prohibiting remitting trusts, save where the title is taken to the party holding it, without the knowledge or against the will of the party furnishing the consideration, or the grantee makes the purchase in violation of a trust with the trust funds.

The doctrine of equitable estoppel has, however, been called into life to prevent injustice. It does not permit a party to mislead another to his prejudice, and then turn

around and assert the contrary. Especially is this so where, as in this case, it is manifest the equity and right of the matter is opposed to gain by such double-faced conduct. The appellant's conduct influenced the administrator to sue to sell this property, and he should be concluded by it. The administrator relied upon it. He had a right to do so under the circumstances, and the estate and heirs will be prejudiced if the appellant is now allowed to claim that his former statements and conduct were false. Moreover, the section of the statute immediately succeeding that relative to resulting trusts provides that where a deed is made to one person and the consideration paid by another the conveyance shall be void as against the creditors of the latter; and here the administrator, who represents them, is seeking to subject the property to the payment of their debts. Gen. St. c. 63, art. 1, §§ 19, 20.

The lower court erred, however, in not setting aside the order of sale as to lots 10, 11, and 51. The provision of the judgment that the appellant might amend his pleadings and proceed for one-half of the proceeds arising from their sale did not cure the error. His claim to a joint ownership in them is somewhat clouded by his also claiming property in which he clearly had no interest; but upon the testimony he is such joint owner. This being so, the court could not, without any showing that they were indivisible, order their sale, and compel the appellant to accept half the proceeds. If divisible, he could not be thus divested of the one-half of them. It rested upon the appellee to show that they were indivisible, if this be the case. If not, they should be partitioned. The judgment below is reversed, but only so far as it failed to set aside the order for the sale of lots 10, 11, and 51. Upon the return of the causes, steps may be taken to show that they cannot be divided without materially impairing their value, or for their partition, as the case may be, and for further proceedings consistent with this opinion.

#### MOYE *et ux.* v. LANE.

(Court of Appeals of Kentucky. June 13, 1890.)<sup>1</sup>

##### REFORMATION OF DEED.

Where a deed calls for a certain corner, and the testimony of the surveyor and others is clear and explicit that the corner is at a certain other point, and the location of the land is such as would negative the description in the deed, the deed will be reformed.

Appeal from circuit court, Simpson county; W. L. REEVES, Judge.

"Not to be officially reported."

John B. Smith, the original owner of a tract of land in Simpson county, devised said land to his widow for life, and at her death to his four children. The widow having died, the surviving children and the heirs of those that had died divided said land among themselves, jointly executing a deed of par-

tition therefor to each other. By the partition George A. Moye and wife were allotted a tract of land on the north side of the Fort Blunt road. On the south side of said road, and opposite to the Smith land, one Holland owned a farm which J. S. Lane purchased, his deed from Holland calling for the Fort Blunt road as his northern boundary. This was an action by George A. Moye and wife against J. S. Lane to recover a small strip of land lying on the south side of said road, and which Lane claimed and possessed, a hickory tree being the corner to the southern boundary of the strip in controversy. Judgment for defendant, and plaintiffs appeal. The deed of partition to Moye and wife, as originally written, fixed their boundary as beginning "at a stone corner; \* \* \* thence S., \* \* \* W., \* \* \* to a stake on the Fort Blunt road." But the deed was interlined so as to make said line run "to a hickory on the south side of the Fort Blunt road." Lane was an heir of J. B. Smith's, and signed this deed of partition; but claims that the interlineation was inserted therein by mistake, and was unknown to him when he signed the deed. He sought a correction of said deed in so far as it was interlined. This relief was granted him.

Geo. C. Harris, for appellants. I. H. Goodnight, for appellee.

PRYOR, J. The interlineation in the partition deed between Smith's heirs was made by the surveyor, I. H. Goodnight, and the work done at the instance of the plaintiffs in this action. If the hickory south of the Fort Blunt road is the corner of the plaintiffs' land, then Holland's line—now Lane's—cannot be at the center of the Fort Blunt road. This hickory is described or mentioned as the corner in the partition deed by which all the parties to this controversy are bound, unless the interlineation made by the surveyor was made by a mistake, or inadvertently, in the preparation of the partition deed. It is plain from the testimony that all the parties regarded this road as the southern boundary of the land claimed by the plaintiffs, and as the northern boundary of the land claimed and owned by Holland, and now owned by the defendant, Lane. It is equally apparent that the insertion of the hickory as a corner was made by the mistake of Goodnight, the draughtsman, because he swears that the road was the southern boundary of plaintiffs' land, and there is no dispute in regard to it. The dispute was as to the eastern boundary, the plaintiffs claiming that one Hatfield had sold adjoining land that conflicted in its boundary with the eastern line of the plaintiffs; that in running that line the distance by the calls of the title-papers ended at this road, although they crossed the road, and passed south to this hickory, that is now claimed is the true corner. D. C. Walker, a party selected, with Goodnight, to settle this eastern boundary, which was the line of the dower tract, and in conflict with the Hatfield

<sup>1</sup> Publication delayed by failure to receive copy.

line, corroborates Goodnight, and has a distinct recollection of running from the post oak south to the road, and from the spring to the road, and then with the road eastwardly to a point in the road opposite the hickory, now claimed as the real corner. He says there was no dispute as to the road being the southern line, and this seems to have been conceded by all. The geography of the territory in dispute would also indicate that this road was the southern boundary, as by running it from the hickory would throw the land into a singular shape, and give to the plaintiffs a small parcel of land, entirely cut off by the big road from their tract. The proof, however, on the subject is not only persuasive, but convincing, and the judgment below is affirmed.

**BENTON v. RAGAN'S ADM'RS.**

(Court of Appeals of Kentucky. Oct. 1, 1889.)

**ESTOPPEL—By RECORD.**

Certain trustees appointed by a will bought land of the father of one of the *cestuis que trustent*, and received a conveyance, with a reservation of an alien for the residue of the purchase money. Under a decree to which the beneficiaries were not parties, the land was sold for much less than its cost, and purchased by the grantor, who agreed to pay the beneficiaries, who were his daughter and her husband, for what interest they had therein; but before doing so he died. Pending a suit to partition the grantor's land, to which the *cestuis que trustent* were parties, some of the heirs agreed to reimburse them, but others refused to do so; upon which, said *cestuis que trustent* tendered a cross-petition, asking compensation for their interest in the land, but it was held to be offered too late, and rejected, and thereupon one of them brought suit for such compensation. Held, that plaintiff was not estopped from maintaining such a suit by the partition proceedings, since the heirs had falsely led him to expect compensation without litigation until too late to successfully make his claim therein.

On rehearing. For former opinion, see 11 S. W. Rep. 430.

*T. H. Hines and Irving Halsey*, for appellant. *H. L. Stone and Young, Mitchell & Young*, for appellees.

**PRYOR, J.** On a careful reconsideration of this case we perceive no reason for granting a rehearing, or modifying the opinion already rendered. We can look alone to the facts of the record before us, and it presents the naked case of the trustees of Benton and his family purchasing of his (Benton's) father-in-law a small tract of land for \$1,494, receiving \$1,200 in cash; and then the father-in-law, in a suit against the trustees, reinvesting himself with title, by purchasing the whole land for the balance of the purchase money. This is inequitable; and while, in the absence of all proof, the title would pass regardless of the inadequacy of price, there is proof in the record conducing to show that the father-in-law was not asserting such a claim to it as would deprive the beneficiaries of the payment made on this land. The witness testifying may have been of tender years at the time she heard what she details in regard to this mat-

ter, but we have no reason to disregard the testimony. The division of the real estate is not disturbed by the opinion and mandate in this case. It is, in fact, a controversy between Ragan's administrators and the appellant. The latter is entitled to the land or the money.

There was a warning order in the case against the non-residents, and an appearance of the administrators by counsel; and it is now too late to make the question that all the parties were not before the court. In fact, the heirs were not necessary parties to the claim against the administrators. The petition is overruled.

**WREN v. FOLLOWELL.**

(Supreme Court of Arkansas. Oct. 5, 1889.)

**ADVERSE POSSESSION—TRUSTEES.**

A trustee cannot acquire title by limitation as against his *cestui que trust* where there has been no disclaimer of the trust.

Appeal from circuit court, Fulton county; *R. H. POWELL*, Judge.

Suit by Francis Followell against S. H. Wren, for the possession of certain land alleged to be held in trust for plaintiff. Judgment for plaintiff, and defendant appeals.

*Sanders & Watkins* and *J. L. Abernethy*, for appellant.

**PER CURIAM.** The appellant held the land in controversy in trust for the appellee, and relies upon the statute of limitations as a defense to the appellee's action to recover possession; but, as there is no fact set forth in the abstract from which we can infer a disclaimer of the trust, there is nothing to show that the statute was ever set in motion. The judgment of recovery will be affirmed.

**GERMAN INS. CO. v. DAVIS.**

(Supreme Court of Arkansas. Oct. 5, 1889.)

**INSURANCE POLICY—RESCISSON.**

In an action on a note, executed in payment of premium on an insurance policy, it appeared that after the execution of the note, and the acceptance of the policy to take effect *in futuro*, it was returned to the company by its agent for correction; that thereafter defendant instructed the company to rescind the policy, and return his note; that the company refused, and forwarded the corrected policy, which defendant immediately returned; and that the company retained the policy before the risk began, without explanation. Held that a verdict for defendant was warranted.

Appeal from circuit court, Sebastian county; *J. S. LITTLE*, Judge.

Action by the German Insurance Company against Davis upon a promissory note, executed by him in payment of the premium on an insurance policy. The note was executed, and the policy issued and accepted, in the latter part of 1884, upon agreement that the policy should not take effect until January 22, 1885. After defendant had received the policy, plaintiff's agent, upon examination, discovered a mistake therein, whereupon,

with defendant's consent, he returned it to the company for correction. On the following day defendant, concluding that he did not want the new policy, had a letter written to the company instructing it to cancel the policy, and return his note. The company refused to accede, and forwarded the corrected policy to him, which he immediately returned. Judgment for costs against plaintiff in justice's court, and, upon trial in circuit court, judgment for defendant. Plaintiff appeals.

*Sanders & Watkins*, for appellant.

**PER CURIAM.** The return of the corrected policy to the insurance company by Davis, and the retention of it by the company before the risk began, without explanation, when Davis' action was known to be in pursuance of an offer to rescind the contract for insurance, was evidence tending to prove that the company acceded to the proposition to rescind. The verdict is therefore supported by evidence, and the judgment will be affirmed.

#### ST. LOUIS & S. F. RY. CO. v. BARGER.

(*Supreme Court of Arkansas*. Oct. 5, 1889.)

##### NEGLIGENCE—DECLARATIONS OF AGENT.

The statement of the station agent of a railroad company, made at the time plaintiff received injuries for which he sues, that the hole in the platform into which plaintiff fell "ought to have been fixed," is incompetent to show unreasonable delay on the part of the company in repairing the platform after the defect became known.

Appeal from circuit court, Washington county; J. M. PITTMAN, Judge.

C. M. Barger brought an action against the St. Louis & San Francisco Railway Company, for injuries received by reason of his falling into a hole in the platform of the depot in Springdale. At the trial, he and another witness testified that, at the time, the station agent, one Frost, said, "That hole ought to have been fixed." Defendant objected to evidence of the agent's declarations, but the objection was overruled; and the court instructed the jury that the knowledge of the agent, who was in charge of the buildings and platform, of a defect in the latter, was equivalent to knowledge by the company. Verdict for plaintiff, and defendant appeals.

*John O'Day*, *E. D. Kenna*, and *B. R. Davidson*, for appellant. *L. Gregg*, for appellee.

**PER CURIAM.** The admission of the testimony of Frost was error. The only object of the testimony was to prove unreasonable delay upon the part of the company in repairing the platform after the defect in it became known. The statement of the agent was incompetent for that purpose. *Story*, Ag. § 136; *Railroad Co. v. Fillmore*, 57 Ill. 265; *Railroad Co. v. Riddle*, 60 Ill. 534; *Flynn v. State*, 43 Ark. 289.

Reverse the judgment, and remand the cause for a new trial.

#### ROTAN'S HEIRS v. SPRINGER.

(*Supreme Court of Arkansas*. Oct. 5, 1889.)

##### JUDGMENT—INJUNCTION—COMPLAINT.

Where a bill to enjoin a judgment alleges no defense to the claim upon which such judgment was rendered it states no cause of action.

Appeal from circuit court, Chicot county; C. D. WOOD, Judge.

S. H. Springer obtained judgment against W. A. Rotan in his life-time, and after his death the cause was revived in the name of his administratrix, and judgment had against her. The heirs of Rotan filed a bill to enjoin this judgment as being void; but the bill alleged no defense whatever to the claim upon which the judgment was rendered. The court, upon defendant's demurrer, dismissed the bill, and plaintiffs appeal.

*Wm. B. Streett*, for appellants. *D. H. Reynolds*, for appellee.

**PER CURIAM.** The plaintiffs offered no suggestion of a defense to the claim upon which the judgment which they sought to enjoin was based. Their complaint, therefore, stated no cause of action, (*State v. Hill*, 50 Ark. 458, 8 S. W. Rep. 401,) and the court did not err in sustaining the demurrer. Affirm.

#### WORTHEN, Collector, v. QUINN *et al.*

(*Supreme Court of Arkansas*. Oct. 5, 1889.)

##### COLLECTION OF TAXES.

Where goods are sold by the person charged with the taxes, after the lien has attached, they are liable to seizure in the hands of the vendee; and, if he sells them, the collector, if he cannot otherwise realize the taxes, may sue the vendee in equity to charge the proceeds of such sale with the taxes, under Mansf. Dig. Ark. § 5757, authorizing the collector to collect the personal property tax by "sale of property or otherwise."

Appeal from chancery court, Pulaski county; D. W. CARROLL, Chancellor.

This is an action brought by R. W. Worthen, as collector, against Quinn & Gray, for the collection of \$984.38, taxes on a \$25,000 stock of goods, listed by Quinn Bros., who at the time of the assessment were doing business in the city of Little Rock, Ark. Subsequent to the assessment, but prior to the time for the payment of taxes, said stock of goods of Quinn Bros. was exposed to sale by virtue of a writ of execution issued out of the United States court for the eastern district of Arkansas, and was purchased by Quinn & Gray, who disposed of the same in the ordinary course of trade. Mansf. Dig. § 5757, provides that the collector may collect the personal tax by "sale of property or otherwise."

*W. L. Terry* and *T. E. Gibbon*, for appellant. *Caruth & Erb*, for appellees.

**PER CURIAM.** When a collector has exhausted his remedy by warrant for the distraint of taxes due on personal property, he may resort to his remedy by suit to collect them. Mansf. Dig. § 5757; *Murray v. Rap-*

ley, 80 Ark. 568; *State v. Hirsch*, 16 Lea, 40. If goods are sold by the person charged with the taxes after the lien attached, they are liable to seizure in the hands of the vendee for the satisfaction of the lien. (*Bridewell v. Morton*, 46 Ark. 73;) and if he sells them, and the collector cannot realize the taxes otherwise, he may maintain a suit in equity against the vendee to charge the proceeds of such sale with the payment of the taxes. (*Dickenson v. Harris*, 48 Ark. 355, 3 S. W. Rep. 58; *Anderson v. Bowles*, 44 Ark. 110; *Mitchell v. Badgett*, 33 Ark. 387.) The judgment of the chancery court will be reversed, and the cause remanded, with instructions to overrule the demurrer to the complaint.

#### SHINN v. COTTON.

(*Supreme Court of Arkansas*. Oct. 12, 1899.)

##### FERRY FERRY.

Where one runs a free skiff within a mile of a licensed ferry, as an inducement to trade at his store, he is not liable to pay the penalty imposed by Mansf. Dig. Ark. § 3335, for running a ferry for money or other valuable thing without obtaining a license, where there was no agreement to trade at defendant's store by the parties ferried, and no money paid by them.

Appeal from circuit court, Johnson county; G. S. CUNNINGHAM, Judge.

Mansf. Dig. Ark. § 3335. "If any person shall keep any ferry over any navigable stream, for which he shall charge any person any money or any other valuable thing, without complying with the provisions of law in relation to obtaining license, he shall forfeit and pay to every other person having a licensed ferry on the same stream or lake, in the same county, five dollars for every person so ferried, and the same sum for every wagon or other article so transported, which may be the subject of separate charge, to be sued for and recovered by civil action, founded on this statute, with costs of prosecution."

G. W. Shinn, for appellant.

PER CURIAM. This is a suit for a statutory penalty under section 3335, Mansf. Dig. The proof showed the running of a free skiff within a mile of plaintiff's licensed ferry, by the defendant, as an inducement to persons to trade at his store. The agreed statement of facts is to the effect that the persons so carried did not agree to buy anything of defendant, and that the defendant made no charge in money or other valuable thing for ferriage. Plaintiff's right to damages for an injury done him, had he sought such remedy, would have been clear under the authorities cited by him; but the statutory penalty is not recoverable against one who runs a free ferry. The agreed statement of facts excludes a recovery. Affirmed.

#### CITY OF FORT SMITH v. YORK et al.

(*Supreme Court of Arkansas*. Oct. 5, 1899.)

##### DEFECTIVE STREETS.

Though it is the duty of municipal corporations in Arkansas to keep their streets in repair,

yet, in the absence of a statute, they are not liable to persons injured by failure to repair. Following *City of Arkadelphia v. Windham*, 4 S. W. Rep. 450.

Appeal from circuit court, Sebastian county; J. S. LITTLE, Judge.

C. M. Cooke, for appellant. E. E. Bryant and Sanders & Watkins, for appellees.

HEMINGWAY, J. This is an action by the appellees, as next of kin of N. H. York, to recover of the appellant damages for an injury to him, resulting in his death. The appellant had constructed a culvert in one of its streets. After its construction, a hole was made in its covering, into which the deceased stepped, thereby receiving the injury. It is conceded that the culvert was constructed with care and skill, but claimed that the appellant was negligent in not repaving it. The appellant contends that the facts alleged constitute no cause of action against it; and relies upon the decision of this court in the case of *Arkadelphia v. Windham*, 49 Ark. 139, 4 S. W. Rep. 450, as conclusive of its contention. The contention of the appellees is—*First*, that the facts of this case do not bring it within the rule announced in that decision; *second*, that, if this case comes within the rule controlling the case referred to, its holdings were erroneous, and it should be reconsidered and overruled. In the consideration of the questions presented, the court has been greatly aided by the labors of counsel upon either side, which we cheerfully commend for thoroughness of research, and clearness and accuracy in the analysis of adjudged cases.

In attempting to distinguish the facts of this case from those considered in the cases referred to, it is contended that, as the injury complained of in this case resulted from a failure to repair a street fallen out of repair, while the injury complained of in that case was occasioned by a failure to put a street in good condition, the cases should be governed by different rules. This distinction is not sustained by the authorities upon which the court relied in that case, but is opposed to their reasoning. That it is a duty owing by municipal corporations to the public to make good streets, and to repair defects in them as they occur, is plain. Mansf. Dig. § 737. But an inspection of the statute discloses that the measure of the duty to repair a street fallen out of repair is not greater than, but the same as, the duty to put it in good condition originally. We have carefully examined the cases relied upon to maintain the distinction. Most of them, we think, fail to do it. One was subsequently overruled by the learned judge who delivered the opinion; and another, in its reasoning, antagonizes principles sustained by undoubted authority, and approved by this court. We cannot distinguish the cases. The question, then, involved, is one upon which the earlier authorities agree, in sustaining the view heretofore taken by this court. If later authorities sustain the contrary view, they have done no more than



effect a division; and it cannot be claimed safely that the weight, as respects numbers or learning, is against the view first taken. The former decision of this court was made after a careful and exhaustive examination of adjudged cases. It would be unwise to reconsider the conclusion there reached, unless we were clearly satisfied that it was wrong in principle, and mischievous in its operation. We do not reach that conclusion. The judgment is reversed, and the cause remanded for further proceedings according to law.

**CRESSWELL et al. v. MATHEWS et al.**

(Supreme Court of Arkansas. Oct. 5, 1889.)

**PROBATE COURT—JURISDICTION—CERTIORARI.**

The judgment of a probate court against a guardian for goods furnished to the mother of his wards for their benefit is void, and will be set aside on *certiorari*.

Appeal from circuit court, Izard county; B. H. POWELL, Judge.

*J. L. Abernethy and Sanders & Watkins*, for appellants. *Robert Neill*, for appellees.

**HUGHES, J.** William Wood died in Izard county in 1878, leaving him surviving Sarah Wood, his widow, and seven minor children, some of whom intermarried with some of the plaintiffs below, appellants here. The appellee T. J. Mathews, having intermarried with Mollie Wood, one of said minors, became the probate guardian of the others. Sarah Wood, the mother of these children, died intestate in January, 1880, and there was administration upon her estate. While a widow, in 1879, Mrs. Sarah Wood bought merchandise, goods, and wares of the firm of R. C. Mathews & Son, amounting to \$169.69. On the 11th day of November, 1880, Mathews & Son made affidavit to the correctness and justice of the account; and on the 18th day of November, 1880, the same was indorsed: "Examined and approved this, the 18th day of November, 1880. Notice waived;" and signed, "T. J. MATHEWS, Guardian Wm. Wood Heirs." This account was thereafter presented to the probate court of Izard county, and a judgment for the amount thereof was rendered by said court against T. J. Mathews, as guardian of the minor heirs of William Wood, deceased, in which judgment it is recited that the court found that Mrs. Sarah Wood was the mother and natural guardian of the heirs, and that the goods were purchased by her for the benefit of said heirs. It does not appear that this judgment was ever paid by, or that credit for the same was ever allowed, the guardian, in any settlement of his in the probate court. In February, 1886, appellants obtained a writ of *certiorari* from the judge of the third judicial district to have the proceedings referred to in the probate court certified up to the March term of the Izard circuit court, and filed their petition charging that said judgment was void for the want of jurisdiction of the sub-

ject-matter and of the minor heirs, who were not served with process, and praying that the judgment be quashed. Appellees answered, and demurred to the petition, on the grounds that it did not state facts sufficient to constitute a cause of action. The demurrer to the petition was sustained by the circuit court. Appellants excepted and appealed.

The mode of reviewing a judgment of the probate court is usually by appeal; but, when the probate court exceeds its jurisdiction, the judgment may be examined into and quashed upon *certiorari*. It appears to this court too clear for argument that the probate court had no jurisdiction to entertain an action, suit, or proceeding of this kind. We are of opinion that the proceedings in the probate court, in allowing said claims, were *coram non iudice* and void, and that said agreement of said court ought to be quashed and held for naught. A guardian cannot be sued in the probate court. It is the duty of the probate court, from time to time, to make the necessary appropriations of money or personal estate for the maintenance and education of minors; and, when these are insufficient, it may, upon application, order a sale of the minors' real estate. Sections 3501, 3502, Mansf. Dig. A guardian is not responsible, either personally or in his fiduciary capacity, for necessities furnished his ward without his consent, express or implied. *Overton v. Beavers*, 19 Ark. 623. In such case the infant may be, and, if so, an action lies against the infant in the proper tribunal, and he may defend by his guardian; and, if a judgment is obtained, it should be against the infant, and not the guardian. *Id.* The judgment is reversed, with direction to the court below to overrule the demurrer to appellants' petition.

**BIRDSONG v. TUTTLE.**

(Supreme Court of Arkansas. Oct. 12, 1889.)

**EXEMPTIONS.**

One temporarily residing in another state, who has a domicile in Arkansas, may claim his exemption from sale of personal property, allowed under Const. Ark. 1874, art. 9, § 1, to residents of the state.

Appeal from circuit court, Miller county; C. E. MITCHELL, Judge.

Const. Ark. 1874, art. 9, § 1, provides that certain "personal property of any resident of this state" shall be exempt from execution.

*Vaughn & Leary*, for appellant. *Scott & Jones*, for appellee.

**PER CURIAM.** A person temporarily residing in another state, who has a domicile in this state, may claim his exemption of personal property from sale under process, under section 1, art. 9, of the constitution of 1874. The provision is remedial, and should be liberally construed. *Railway Co. v. Hart*, 38 Ark. 112. The word "resident" should be accepted in its broader sense. The act of November 27, 1875, gives no right not



granted by this clause, and is constitutional. *Winter v. Simpson*, 42 Ark. 410. The judgment is affirmed.

**THORN v. WEATHERLY.**

(*Supreme Court of Arkansas*. Oct. 12, 1889.)

**EXECUTION SALE.**

A purchaser at execution sale of the interest of the equitable owner of an undivided one-half interest in land is entitled to a decree vesting the title in him, and also to half the money received from the sale of timber cut from the land.

Appeal from circuit court, Green county; F. P. McGOVERN, Special Judge.

S. L. Mack, for appellant.

**PER CURIAM.** The testimony shows that David Thorn was the equitable owner of a one-half undivided interest in the lands in controversy. His interest was sold under execution upon the O'Bar judgment, and purchased by the appellant, Thomas Thorn. The latter is therefore entitled to a decree vesting title in him to David Thorn's interest, and also to one-half the money received from Rosengrant for timber cut upon the land. The decree is reversed, and the cause remanded, with instructions to enter a decree in accordance with these directions.

**BOGAN v. CLEVELAND et al.**

(*Supreme Court of Arkansas*. Oct. 12, 1889.)

**FRAUDULENT CONVEYANCE.**

A conveyance of a homestead, which is not subject to a lien of a judgment, nor to sale under execution, though made with a bad motive, is not fraudulent as to creditors.

Appeal from circuit court, Washington county; J. M. PITTMAN, Judge.

A. M. Wilson, for appellant. C. R. Buckner, S. H. West, and B. R. Davidson, for appellees.

**PER CURIAM.** The appellees, judgment creditors of one Bryant, brought this suit seeking to cancel for fraud a conveyance of land from him to the appellant. The land constituted the homestead of the debtor when the conveyance was made. It was not subject to the lien of a judgment, or to sale under execution. Creditors could not be injured by the conveyance. The debtor may have executed the conveyance with a bad motive, but it deprived his creditors of no right, and was therefore not fraudulent. *Bump*, Fraud. Conv. 245; *Wait*, Fraud. Conv. 71; *Carmack v. Lovett*, 44 Ark. 180. The judgment is reversed, and cause remanded, with instructions to dismiss the bill.

**WERNER et al. v. CITY OF GALVESTON et al.**

(*Supreme Court of Texas*. May 29, 1888.)<sup>1</sup>

**FREE PUBLIC SCHOOLS—CONSTITUTIONAL LAW.**

1. Act Tex. April 8, 1879, authorizing municipal corporations to take control of the public schools

<sup>1</sup> Publication delayed by failure to receive copy of opinion.

within their respective limits, and to levy a tax to support the schools as free schools, is not unconstitutional. 7 S. W. Rep. 726, affirmed.

2. The taxation of property for the support of free public schools, in accordance with the constitution and laws of a state, is not a taking of property without due process of law, within the meaning of Const. U. S., 14th amend.

On motion for rehearing. For former opinion, see 7 S. W. Rep. 726.

L. E. Trezevant, for the motion.

**GAINES, J.** Having carefully considered the motion for a rehearing in this case, we are of opinion that it should be overruled. The grounds upon which we maintain the validity under our state constitution of the laws called in question by this appeal are stated in the opinion already delivered, (7 S. W. Rep. 726,) and we think any further discussion of the same questions unprofitable. It is, however, submitted in this motion that the laws authorizing the tax complained of are contrary to that clause of the fourteenth amendment of the constitution of the United States which provides that no state "shall deprive any person of life, liberty, or property without due process of law." We have endeavored to show in the former opinion that the tax was levied in accordance with the constitution and laws of this state. If we are correct, it follows that the collection of the tax was in due course of law, unless it should be broadly held that taxation for the purpose of maintaining free schools is not within the powers of a state government. But we know of no authority which holds this. On the contrary, so far as we are aware, the power of the state to maintain schools at the public expense, though rarely questioned in the courts, has been uniformly upheld. *Com. v. Hartman*, 17 Pa. St. 118; *Stuart v. School-Dist.*, 30 Mich. 69; *Richards v. Raymond*, 92 Ill. 612; *Briggs v. Johnson County*, 4 Dill. 148. Taking property under the taxing power is due process of law. *High v. Shoemaker*, 22 Cal. 363; *Davidson v. New Orleans*, 96 U. S. 97. The rehearing is refused.

**WOLF v. BRASS.**

(*Supreme Court of Texas*. Nov. 27, 1888.)<sup>1</sup>

**DEDICATION—WAYS—EASEMENTS—NEW TRIAL.**

1. Evidence that the owner of land platted it and conveyed the lots with reference to an alley, and that subsequent conveyances of the lots were executed, designating and referring to such alley, is sufficient to show a dedication of the land occupied by the alley, as between subsequent grantees of the lots, whether or not there has been a dedication to public use.

2. The fact that a witness testifies differently on the trial from what he had previously told the defeated party he would testify is not cause for new trial on the ground of surprise, where the legal effect of his testimony is the same.

Commissioners' decision. Appeal from district court, Travis county; A. S. WALKER, Judge.

<sup>1</sup> Publication delayed by failure to receive copy of opinion.

*Sneed, Pendexter & Burleson*, for appellant. *Rector, Moore & Thomson*, for appellee.

**ACKER, J.** Prior to 1872 John T. McArthur owned lots 4, 5, and 6, constituting the S. E.  $\frac{1}{4}$  of block 58, in the city of Austin. These lots lay north and south between an alley running east and west through the block on the north, and Pine street on the south. Trinity street lay east of the lots. In 1872 McArthur cut the lots into tenements, running east and west, fronting on Trinity street, and extending back west 120 feet to an alley 18 feet wide, taken off of the west side of lot 4, extending from the alley running east and west through the block, south to Pine street. It does not appear that McArthur executed a formal deed of dedication for this alley, but it does appear that in 1872 he sold three of the four tenements, and in his deeds of conveyance therefor expressly referred to and designated the alley. One of the tenements so conveyed was sold and conveyed to appellee by Bartholomew, McArthur's vendee, in April, 1886, the deed to him also referring to and designating the alley. In February, 1874, McArthur conveyed to appellant's vendor the deed expressly referring to and designating the alley. The deed to appellant does not mention the alley, but conveys only 120 feet back from Trinity street. In January, 1872, McArthur conveyed to Robinson the north tenement next to the alley running east and west through the block, expressly referring to and designating the alley taken off of the west side of lot 4. In August, 1882, Robinson conveyed this tenement to the Milburn Wagon Company, the alley on the west being expressly referred to and designated in the deed. Appellee owned the tenement between the Milburn Wagon Company's tenement on the north, and appellant's tenement on the south. In 1875 or 1876 appellant inclosed the alley back of his tenement, and some time thereafter the Milburn Wagon Company inclosed the alley back of its tenement. Appellee, Brass, brought this suit July 5, 1886, against the Milburn Wagon Company and appellant, Wolf, for the purpose of compelling defendants to remove fencing and obstructions from the alley, and for an injunction restraining them from ever closing the alley, or using it for any purpose except that of a public alley.

Defendants answered not guilty of the trespass charged, and pleaded the 10-years statute of limitation. The trial was by the court without a jury, and judgment rendered on December 2, 1886, to the following effect: "That the alley was dedicated to the public in 1872; that appellee owned the tenement described in his petition; that appellant and the Milburn Wagon Company had fenced up and obstructed the alley; that the alley be opened, and all obstructions removed therefrom by the sheriff; and that defendants pay all costs." Defendant Wolf alone appealed.

"Under the third, fourth, and fifth assignments of error it is contended that the judg-

ment of the court below is against the preponderance of the evidence, both on the question of the dedication of the alley and on the question of limitation of 10 years. We think the fact of dedication was abundantly proved. To constitute a dedication so as to estop the proprietor and his privies there need not be a formal grant by deed, nor is it necessary that use by the public should be continued for so long a time as to raise the presumption of a grant. It is sufficient if there has been some act or declaration upon the part of the owner of the fee, indicating unequivocally his purpose to dedicate, and the public has used the property for the purposes to which the act or declaration of the proprietor indicates it was his intention to dedicate it. That this alley is a part of the land to which McArthur owned the fee, there is no controversy. In 1872 he executed several deeds expressly referring to the alley. There is no pretense that it was ever closed against the public until in 1875 or 1876. McArthur conveyed to appellant's vendor only 120 feet west from Trinity street, and it is clear that the land embraced in the alley was not included in this conveyance. Under the facts of this case we think it wholly immaterial whether there was a dedication of this alley to the use of the public or not. Technically speaking, a dedication can be made to public uses only; but, if the proprietor of the fee sells and conveys lots with reference to an alley or street not then opened on land owned by him, the individual purchasers thereunder acquire an easement in the land designated as an alley or street, and such alley or street becomes charged with the servitude incident to such easement. Such purchasers have, by virtue of the easement thus acquired, the right to have such street or alley kept open, whether the public has or not accepted the dedication by some acts of user. *Oswald v. Grenet*, 22 Tex. 94; *Washb. Easem.* 181.

On the question of limitation it is sufficient to say that the evidence was conflicting. It was proved with reasonable certainty that Walker and Evans inclosed their lot, across this alley from appellant's lot, in the spring of 1875; and it was testified by several witnesses that appellant inclosed the alley within a few weeks thereafter. On the other hand, quite as many witnesses testified positively that the alley was not inclosed until in August or September, 1876. One of these witnesses, Bartholomew, having owned one of the tenements abutting on this alley, first noticed that the alley had been inclosed on September 11, 1876, and made a memorandum of the fact in his diary. This witness testified that the alley had been inclosed within a week preceding the date of the entry. In case of such conflict in the evidence this court will not disturb the judgment upon the conclusions of fact. We think the conclusion of the trial judge on this question is supported by the weight of the evidence.

The sixth assignment is: "The court erred in overruling defendant Wolf's motion for

new trial on the ground of surprise as to the testimony of the witness E. C. Bartholomew, and on the ground of newly-discovered evidence, as shown in the motion of defendant Wolf for a new trial, and in the affidavits in support of such surprise and newly-discovered evidence." It appears from the affidavit of appellant that the alleged surprise grew out of the facts that some time before the trial he had a conversation with Bartholomew in regard to his testimony as to the time when the alley was inclosed, and that the witness then told him that he would testify that the inclosure was made not more than six or seven years before suit brought, but that the witness did not inform him that he had made a memorandum in his diary of the time when the inclosure was made. Bartholomew testified that at the time of the conversation with appellant he had no recollection of the diary entry, and that, if he had not found the entry, he would have testified that the alley had not been inclosed more than six or seven years. The legal effect of the testimony of this witness was the same, whether he testified that the inclosure had been made six or seven years, or nine years and ten months, before suit brought, and we think it could not occasion surprise that would entitle appellant to a new trial on that ground.

Some of the parties who made affidavits in support of the motion for new trial on the ground of newly-discovered evidence made quite as strong affidavits in support of appellee's opposition to the motion upon that ground. In support of his opposition to the motion for new trial on the ground of newly-discovered evidence, appellee read quite as many affidavits going to show that the alley was not inclosed until August or September, 1876, as appellant had offered tending to prove that the inclosure was made in the spring of 1875.

We do not think that the showing for new trial was sufficient. We find no error in the judgment, and are of opinion that it should be affirmed.

PER CURIAM. Report of commission of appeals examined, and their opinion adopted.

#### SCOTT v. PETTIGREW *et al.*

(*Supreme Court of Texas.* Dec. 18, 1888.)<sup>1</sup>

##### BOUNDARIES—EVIDENCE—INSTRUCTIONS.

1. An instruction making the importance of an established north-east corner, in locating the north and west lines of a survey, dependent upon the jury's belief that such western line was not run, is erroneous, as such corner has the same weight for the purpose in question, whether the western line was run or not.

2. Where a grant of a tract of land declares its area to be 11 leagues, and there is nothing to indicate an intent to grant a greater area, and no older surveys are called for, and the "footsteps" of the surveyor are found on a part only of the boundaries of the grant, upon an issue as to the location of one of the lines of such tract, an instruction that

any excess over the area granted is immaterial if the jury can fix its boundaries in harmony with the calls of the original survey is erroneous, the effect of such excess in determining the unidentified boundaries, in connection with the other evidence, being a question for the jury.

3. Where the beginning corner of a survey is the south-west, but the south-east corner is equally well identified, a charge limiting the jury to finding the unidentified north-east corner by the first and second lines from the south-west corner is erroneous, as the south-east corner is of equal importance, unless the line from the former corner was actually run and measured, and that from the latter not.

4. In an action to try title to land, where the title depends upon the location of a line, an instruction that the burden of fixing such line was upon defendant, and that it must be fixed with reasonable certainty, is erroneous, as the burden of proof is upon the plaintiff; and also because the words "reasonable certainty" require proof beyond a reasonable doubt, which is not necessary.

Commissioners' decision. Appeal from district court, Bell county; W. A. BLACKBURN, Judge.

Action of trespass to try title to land, brought by James L. Scott against T. L. Pettigrew and others. Judgment for defendants, and plaintiff appeals.

A. J. Harris, for appellant. C. L. Cleveland, for appellees.

ACKER, J. Appellant brought this suit in the usual form of trespass to try title to 320 acres of land claimed as a part of the J. M. Harvey survey. It was admitted that appellant owned the land described in his petition, and that appellees had a complete chain of title under the Maximo Morena 11-league grant. The Harvey survey was located north of and adjoining the Morena survey, and the real question involved is one of boundary between the two surveys. The Morena grant was located and surveyed in 1833, and the Harvey at a later date, but when, does not appear. If the north boundary line of the Morena is located where appellant contends that it is, then the land sued for is a part of the Harvey; otherwise it is part of the Morena grant. The north boundary line of the Morena survey has given rise to much contention. The question of its location has been involved in several suits heretofore before this court, and in one suit before the supreme court of the United States. The field-notes of the Morena survey, as given in the grant, are as follows: "Situated on the left margin of the river San Andres, below the point where the creek called 'Lampasas' enters said river on its opposite margin, and it has the lines, limits, boundaries, and landmarks following, to-wit: Beginning the survey at a pecan (*nogal*) fronting the mouth of the aforesaid creek, which pecan serves as a landmark for the first corner, and from which 14 *varas* to the north, 59 degrees west, there is a hackberry, 24 inches in diameter, and 15 *varas* to the south, 34 degrees west, there is an elm, 12 inches in diameter. A line was run to the north, 22 degrees east, 22,960 *varas*, and planted a stake in the prairie for the second corner. Thence another line was run to the south, 70 degrees east, at 8,000

<sup>1</sup>Publication delayed by failure to receive copy of opinion.

*varas* crossed a branch of the creek called 'Cow Creek,' at 10,600 *varas* crossed the principal branch of said creek, and at 12,580 *varas* two small hackberries serve as landmark for the third corner. Thence another line was run to the south, 20 degrees west, and at 3,520 *varas* crossed the said Cow creek, and at 26,400 *varas* to a tree (*palo*) on the aforesaid margin of the river San Andres, which tree is called, in English, 'box elder,' from which 7 *varas* to the south, 28 degrees west, there is a cottonwood with two trunks, and 16 *varas* to the south, 11 degrees east, there is an elm, 15 inches in diameter. Thence follow the river by its meanders to the beginning point, and comprising a plane area of eleven leagues of land, or 275 millions of square *varas*."

It is certain that it was the intention of both the grantor and grantee that the Morena survey should contain "a plane area of eleven leagues, or 275 millions of square *varas*." No other surveys are called for in the field-notes, and the early date at which the location was made renders it quite probable that there were no older surveys contiguous to the territory embraced in the Morena grant. The pecan (*nogal*) fronting the mouth of the Lampasas creek was found, with bearings corresponding to those described in the field-notes, except that they were located in opposite directions from the calls in the field-notes. Beginning the survey at this point, and following course and distance for the north-west corner, as called for in the field-notes, the line runs much of the way through heavy timber, but no marks are found indicating that the first, or west, line was actually surveyed when the location was made. This line would cross and recross the San Andres or Leon river, a stream of such dimensions as surveyors were forbidden by law to cross or include in locating surveys. At the point where the distance called for would fix the second, or north-west, corner, which is located by the field-notes at "a stake in the prairie," there is timber sufficiently near to have served as bearings for the identification of this corner, but no bearings are called for. The south-east, or lower river, corner is certainly identified, and found upon the ground. Beginning at this corner, reversing the calls, and running course and distance to the north-east corner, Cow creek is crossed at approximately the distance called for in the field-notes; and, at or near the point where the distance given as the length of the east line is exhausted, two hackberries, corresponding with those called for in the field-notes, were found and identified in 1855 by witnesses, who testified at the trial. It satisfactorily appears that the east line is identified by marks on timber most of the distance between the marked and identified south-east corner and the point where the hackberries were found and identified in 1855. Running on reversed calls, following course and distance from the point where the hackberries

were found, and treating that point as the north-east corner, the distance given as the length of the north line gives out several hundred *varas* short of the point of intersection with the west line run on course and distance given in the first call of the field-notes; and the north line, run from the point where the hackberries were found on the reversed course, called for in the field-notes, would intersect the west line run on course and distance from the point "fronting the mouth of the Lampasas creek" at a point 3,500 or 4,000 *varas* south of the point where the north-west corner would be, following course and distance from the beginning corner as called for in the field-notes. Running the north line south, 70 degrees east, from the point where course and distance from the beginning corner locate the north-west corner, the grant contains an excess of several leagues. Running the north line on reversed calls, course followed from the point where the hackberries were found and identified in 1855 to the point of intersection with the west line, run on course called for from the beginning corner, the grant still contains considerable excess.

Under this state of facts the court gave the following charge, which is assigned as error: "If from the evidence you believe the first, or western, line was not run and measured, and that the eastern line was run no further than the two hackberries, and that they were marked and established as the north-east corner, then the position of the north line, and the length of the first line, running from the beginning corner, would be controlled and fixed by said hackberries, or north-east corner." The fair and reasonable, if not necessary, construction to be placed upon this charge makes the weight and importance of the established and identified north-east corner, in locating the north and west lines, dependent upon the jury's belief that the first, or west, line was not run and measured. We think, if the hackberries were identified as the north-east corner, and there were marks found upon the ground indicating where the western line was located by the surveyor who made the original survey, this corner would be entitled to the same weight and effect in determining the position of the north line and the length of the west line running from the beginning corner as if the jury believed that the first, or western, line was not run and measured when the location was made. The south-west and south-east corners upon the river appear to have been satisfactorily identified, and if the jury believed that the place where the two hackberries were found was the true north-east corner, and they could not find from the evidence the locality of the north and west lines as run by the original surveyor, being satisfied from the evidence of the localities of these three corners, the court should have instructed them to locate the north and west lines, and construct the survey by following course from the beginning, or south-west, corner, and following course on the reversed call

from the north-east corner to the point of intersection of the two lines so run, without regard to whether or not the first, or western, line was run and measured at the time the original survey was made.

The court gave the following charge: "If from the proof before you, and under the instructions herein given you, you can fix the lines of the survey in harmony with its calls and the known corners, the fact, if you find it to be a fact, that said lines would include more than eleven leagues, becomes wholly immaterial, and you will in such case not consider the extent of the area further than as a circumstance to aid you, in connection with all the evidence in the case, in following the footsteps of the original surveyor, and fixing the true boundaries of said grant." This charge is complained of as error. If the grant was for land located between older surveys, having marked and identified boundaries, and these older surveys were called for in the field-notes of the grant, and the "footsteps" of the surveyor who located the grant could not be found upon the ground, then excess in area would be of no consequence, because the intent to grant the land between the marked boundaries of the older surveys would be clear. *Bigham v. McDowell*, 69 Tex. 100, 7 S. W. Rep. 315. But where no older surveys are called for in the grant, and there is nothing indicating an intent to embrace in the grant land not included in the area named, and the "footsteps" of the surveyor who made the location are found upon a part only of the boundaries of the grant, we think the jury should not be instructed to fix the unmarked and undefined boundaries regardless of the fact of excess. The fact of excess in area should have been left to the jury, to be considered in connection with all other evidence, without suggestion from the court as to what weight it was entitled to in determining so much of the boundaries as were not identified by marks and objects upon the ground.

It is contended that the court erred in the following charge: "If the testimony does not satisfy you that the two hackberries called for in the grant are identified as the north-east corner of the survey, and if you cannot from the testimony fix said north-east corner, nor the back line of said Morena survey by any other marks or monuments, then, if you find the beginning corner is established and identified, you will fix the said north-east corner by the courses and distances of the first and second lines called for in the Morena survey, except that the second line should be extended so as to meet the east line, if you find it was marked and extended beyond the hackberries, and the second line thus run will be the true north line of the Morena grant." It is well settled that the beginning corner of a survey is of no greater weight or importance in determining its boundaries than any other corner, if other corners are as well established and identified as the beginning corner. There seems to be no doubt as to

the localities of the two corners on the river, —the south-east and the south-west; both appear to have been well identified upon the ground. This being so, one was entitled to as much weight as the other in determining the locality of the north, or back, line, unless the jury should believe from the evidence that the line from one of these corners was actually run and measured, and not from the other. In that event the corner from which the line was run would be of greater importance, because of the certainty of the locality of the line so run. If the jury could not determine from the evidence the locality of either the north-west or the north-east corner, and they could not from testimony fix the north or back line by any other marks or monuments, then they should have been permitted by the charge to locate the north, or back, line from either or both of the two identified corners on the river, under the guidance of all the evidence and connecting circumstances, including the question of area.

The fourth subdivision of the charge given is as follows: "The burden of fixing this north line is on the defendants, and unless they have so established said line so as to include or cover the plaintiff's land with reasonable certainty, and by a preponderance of credible evidence, you must find for the plaintiff." In view of another trial, we think it proper to say that this charge was error for which we would have reversed the judgment had it been in favor of appellant. The burden of proof was upon the appellant (plaintiff below) throughout. *Clark v. Hills*, 67 Tex. 148 et seq., 2 S. W. Rep. 356. We think, too, that the words "reasonable certainty" mean substantially the same as "beyond a reasonable doubt." We do not understand the law to require that a jury in a civil case must believe beyond a reasonable doubt to authorize their verdict, but we understand the rule to be that the verdict should be in accordance with the preponderance of the evidence. For the errors indicated we think the judgment of the court below should be reversed, and the cause remanded.

PER CURIAM. Report of commission of appeals examined and approved.

#### LANCASTER v. AYERS et al.

(*Supreme Court of Texas*. May 14, 1889.)<sup>1</sup>

##### BOUNDARIES—EVIDENCE.

Where the beginning corner of a survey is the south-west, and the first line runs north, but the south-east corner is equally as well identified, a charge limiting the jury to finding the unidentified north-east corner by the first and second lines from the south-west corner is error, as the south-east corner is of equal importance, unless the line from the former was actually run and measured, and that from the latter not. Following *Scott v. Pettigrew*, ante, 161.

Commissioners' decision. Appeal from district court, Bell county.

<sup>1</sup> Publication delayed by failure to receive copy of opinion.

Trespass to try title, by C. P. Lancaster against F. H. Ayers and others. Judgment for defendants, and plaintiff appeals.

*Goodrich & Clarkson*, for appellant. *C. L. Cleaveland*, for appellees.

ACKER, J. Appellant brought this suit in the usual form of trespass to try title to the Peterson 320-acres survey. It was admitted that she owned the certificate by virtue of which the Peterson survey was made. It was also admitted that appellees had a complete chain of title under the Maximo Mareno grant of 11 leagues. The Mareno grant was located and surveyed in 1833, and the Peterson was located north of and adjoining it at a later date. The trial was by jury, and there was verdict and judgment for appellees. If the north line of the Mareno is located as far north as is contended for by appellees, the Mareno includes the 320 acres in controversy. If this line is located as is contended for by appellant, the Mareno would still contain considerable excess, but would not include the Peterson survey.

This is a companion case to the case of *Scott v. Pettigrew*, ante, 161, (appealed from the same court, and decided at the Tyler term, 1888.) There is no material difference in the facts of the two cases, and the question in the two cases is the same; viz., as to the true location of the north boundary line of the Maximo Mareno grant. The field-notes of the Mareno survey call to begin at the south-west corner, at a pecan on the bank of the San Andre river, opposite the mouth of Lampasas creek; thence north, 22 east, 22,960 *varas*, to stake in the prairie; thence south, 70 east, at 8,000 *varas* crossed a branch of Cow creek, at 10,600 *varas* crossed the principal branch of said creek, and at 12,580 *varas* two small hackberries serve as landmark for the third corner; thence south, 20 west, at 3,520 *varas* crossed Cow creek, at 26,400 *varas* to a tree (*palo*) on the aforesaid margin of the San Andre river, which tree is called in English "Box Elder," (calls for several bearing trees;) thence follow the river by its meanders to the beginning point. The south-west and south-east corners on the river were found upon the ground, and clearly identified as called for in the field-notes. To construct the survey by beginning at the south-west corner, as called for in the field-notes, and following course and distance, as called for, for the north-west corner, the line runs much of the way through heavy timber; but no marks were found indicating that the first, or west, line was actually surveyed when the location was made. This line would cross and recross the San Andre river, a stream of such dimensions as surveyors were forbidden by law to cross in locating surveys. At the point where the distance called for would fix the north-west corner, which is located by the field-notes at a stake in the prairie, there was timber sufficiently near to have served as bearings for this

corner, but no bearings are called for. To construct the survey by beginning at the south-east corner, reversing the calls, and running course and distance to the north-east corner, Cow creek is crossed at, approximately, the distance called for in the field-notes; and at or near the point where the distance given as the length of the east line is exhausted, two hackberries, corresponding with those called for in the field-notes, were found and identified in 1855 by witnesses who testified at the trial. The east line was found and identified by marks on timber most of the distance from the marked and identified south-east corner to the point where the hackberries were found and identified in 1855. If the point where the hackberries were found is the true north-east corner of the Mareno survey, then that survey does not include the land in controversy.

Under this state of facts, the court charged the jury to the effect that if the evidence before them was not sufficient to identify the two hackberries as the north-east corner, and if they could not from the testimony fix the north-east corner, nor the back line of said Mareno grant, by any other marks or monuments, then they should fix said north-east corner by the courses and distances of the first and second lines called for in the Mareno survey, extending the second line a sufficient distance to reach the marked east line of said survey. This charge is assigned as error.

Substantially the same charge was given by the same trial court in the case of *Scott v. Pettigrew*, supra. In discussing this charge in that case, we said: "It is well settled that the beginning corner of a survey is of no greater weight or importance in determining its boundaries than any other corner, if other corners are as well established and identified as the beginning corner. There seems to be no doubt as to the localities of the two corners on the river,—the south-east and the south-west; both appear to have been well identified upon the ground. This being so, one was entitled to as much weight as the other in determining the locality of the north, or back, line, unless the jury should believe from the evidence that the line from one of these corners was actually run and measured, and not from the other. In that event the corner from which the line was run would be of greater importance, because of the certainty of the locality of the line so run. If the jury could not determine from the evidence the locality of either the north-west or the north-east corner, and they could not from the testimony fix the north, or back, line by any other marks or monuments, then they should have been permitted by the charge to locate the north, or back, line from either or both of the two identified corners on the river." We think the language quoted is as applicable to the charge in this case as to that in the *Scott v. Pettigrew* case.

We deem it unnecessary to consider other errors assigned, as they will probably not arise on another trial. For the error in the

charge we are of opinion that the judgment of the court below should be reversed, and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment reversed, and the cause remanded.

REYNOLDS LAND & CATTLE CO. v. McCABE  
*et al.*

(Supreme Court of Texas. Nov. 20, 1888.)<sup>1</sup>

SCHOOLS AND SCHOOL-DISTRICTS — CONSTRUCTION  
OF STATUTES—ELECTIONS.

1. Gen. Laws Tex. 18th Assem., Sp. Sess., p. 43, providing for a system of free schools, provides (section 29) that "it shall be the duty of the county commissioners' court of all counties not exempt from this section to subdivide their respective counties into convenient school-districts." *Held*, that the word "subdivide" is used with reference to the existing division of the state into counties.

2. Under section 81 of the act and Const. Tex. art. 7, § 3, which authorize special elections within school-districts upon the application of qualified tax-paying voters thereof, for the purposes of supplementing the school fund, or for the erection of school buildings, but fail to prescribe the form of notice of such election, the notice is sufficient if it appears therefrom that the election is to determine whether a tax shall be imposed for school purposes.

Appeal from district court, Throckmorton county; J. V. COCKRELL, Judge.

L. W. Campbell, for appellant. Miller & Carragan, for appellees.

GAINES, J. This suit was brought by appellant, a private corporation, against appellees, to restrain the collection of a special school tax of 15 cents on the \$100 worth of property, assessed and levied in school-district No. 1 of Throckmorton county. The legality of the tax is assailed on two grounds: *First*, that the commissioners' court exceeded their authority in dividing the county into school-districts; and, *second*, that the election for the special tax was not ordered in accordance with the law. The commissioners' court, in the exercise of their power to apportion the county into convenient school-districts, divided it into three,—No. 1, the district in question, containing about 400 square miles; No. 2 and No. 3 embracing each about 250 square miles. The twenty-ninth section of the "Act to establish and maintain a system of free schools," etc., passed at the special session of the eighteenth legislature, held in 1884, provides that "it shall be the duty of the county commissioners' court of all counties not exempted from this section to subdivide their respective counties into convenient school-districts." Gen. Laws 18th Leg., Sp. Sess., p. 43, § 29. And it is contended that this requires a division into four districts at least. The argument is that in order to make a subdivision the court must first make a division, and that this must necessarily result in the creation of more than three districts.

The argument is not sound. It is based upon a misconception of the language used in the act. The word "subdivide" is clearly used with reference to the existing division of the state into counties, and therefore the section must be read as if the legislature had said, "The state being already divided into counties, the commissioners' courts shall subdivide their respective counties," etc. If it had been intended that it should be the duty of the commissioners to create more than three districts, that purpose would have been directly expressed by saying that at least four districts should be created, or by the use of equivalent terms. It is unreasonable to presume that, in order to convey an idea that could have been so definitely and briefly expressed, they made use of language from which the purpose could only be arrived at by implication. Besides, we see no reason why the court should first divide and then subdivide. On the contrary, it seems to us the duty could be more satisfactorily performed by making one original division into such districts as should be deemed convenient and proper. We also fail to see any reason why at least four districts should be created. In many of the sparsely settled counties of the state a less number might be quite sufficient.

Whether the commissioners' court in this particular case have acted wisely or not is not for us to decide. The statute invests them with the power of laying off the districts, and the discretion of determining what is convenient in the premises, and their action cannot be reviewed in a proceeding of this character.

We pass on to the second ground upon which the tax in controversy is claimed to be illegal. The petition of the tax-payers prayed that an election should be ordered "in said school-district to determine whether or not a special tax be levied therein for the purpose of building school-houses, and supplementing the state school fund apportioned to said district." The order of the court upon the petition recites that a petition had been presented to them praying that "an election be held in said school-district No. 1 to determine whether or not a tax shall be levied for school purposes in said district," and proceeds to direct that the election should be held at a time and place therein specified. It is claimed that the court should have ordered the election for the specific purposes named in the petition, and that this was not done, and that the election is therefore void. When a statute which authorizes a special election for the imposition of a tax prescribes the form in which the question shall be submitted to the popular vote, we are of opinion that the statute should be strictly complied with; but, if the form is not prescribed, then we are of opinion that the language of the proposition submitted is not material, provided it substantially submits the question which the law authorizes with such definiteness and certainty that the voters are not mis-

<sup>1</sup>Publication delayed by failure to receive copy of opinion.



led. *City of Austin v. Gas-Light Co.*, 69 Tex. 180, 7 S. W. Rep. 200. The amended section 3, art. 7, of the constitution, empowers the legislature to authorize a special election within the school-districts "for the further maintenance of public free schools, and the erection of school buildings therein." 4 Sayles, Tex. Civil St. 552. The thirty-first section of the act above cited authorizes the commissioners' court to order the erection "whenever twenty or more qualified property-holding, tax-paying voters of any district wish, for the purpose of taxing themselves for building of school-houses, or supplementing the state school fund apportioned to said district," and shall make a written application signed by them; but it does not prescribe the form of the order, although section 32 does prescribe the form of the ballot. The constitution and statute allow the election but for two objects—*First*, to supplement the state school fund; and, *second*, for the erection of school buildings. The voters are presumed to know the law. It therefore seems to us that the order directing an election to determine whether a tax should be imposed for "school purposes" was sufficient to apprise them that the tax was proposed for the two objects provided by the laws and named in the petition for the election. The principles laid down in the case of *City of Austin v. Gas-Light Co.*, above cited, are decisive of the question before us in favor of the validity of the election.

We conclude, therefore, that there was no error in the judgment, and it is affirmed.

#### SAN ANTONIO WATER-WORKS CO. v. MAURY *et al.*

(*Supreme Court of Texas. Nov. 27, 1888.*)<sup>1</sup>

##### LIMITATION OF ACTIONS—EVIDENCE.

Rev. St. Tex. art. 3203, § 5, provides that "actions upon stated or open accounts other than such mutual and current accounts as concern the trade of merchandise between merchant and merchant, their factors or agents," must be commenced in two years. *Held*, that such statute was not a bar to an action upon an open account commenced more than two years after the date of the last article charged, where the undisputed evidence showed that the parties dealt in the same character of goods, and that the accounts were mutual and current between them, though the trial court did not expressly find the latter fact.

Commissioners' decision. Appeal from district court, Bexar county; GEORGE H. NOONAN, Judge.

Action by Maury & Co., upon an open account against the San Antonio Water-Works Company. Judgment for plaintiff. Defendant appeals. Rev. St. Tex. art. 3203, § 5, relied upon by defendant, is as follows: "Actions upon stated or open accounts other than such mutual and current accounts as concern the trade of merchandise between merchant and merchant, their factors or agents," must be commenced in two years.

A. Dittmar, for appellant. Otto Bergstrom, for appellee.

COLLARD, J. There is but one question raised by the assignment of error in this case. Plaintiff below sued defendant upon an open account. More than two years had elapsed from the date of the last article charged in the account to the filing of the suit. The defendant pleaded in bar the statute of limitation of two years. Plaintiff's original petition charged that defendant, in addition to its business of supplying water to the citizens of San Antonio, was also "engaged in plumbing, buying and selling plumbing supplies, pipe," etc. Plaintiff replied to defendant's answer setting up limitation of two years, that "said accounts are between merchant and merchant, as set out in plaintiff's original petition, and therefore not barred by limitation." Neither the original nor supplemental petition contained an allegation that there were mutual and current accounts between the parties. We are not called on to notice this defect in the petition, as the assignment of error relied on for a reversal of the case does not refer to it, nor does the proposition in appellant's brief under the assignment. The assignment substantially is, if the court found as a fact that plaintiff's account showed no credits for defendant, no mutual credits and charges, then the court should have found as a conclusion of law that the account was barred. The court's finding contained nothing upon the subject of mutual or current accounts. The court merely found that "the defendant company dealt in the same character of goods and sold the same, and in consequence thereof the statute of limitations could not avail the defendant." It was abundantly proved, and not denied by testimony, that there were mutual current accounts between the parties, and that during the time plaintiff dealt with defendant the latter was engaged in the business of selling to the public the same kind of wares kept and sold by plaintiff. This part of the business was closed out, Ulrich says, after he took control of defendant's business, but the proof shows that while the plaintiff sold to the company it was a regular dealer, and a merchant in fact. Plaintiff swears, and from other testimony it seems to be true, that defendant kept for sale a larger and better stock of such goods as are specified in the account than did the plaintiff himself. The defendant's own evidence indisputably showed that the accounts were mutual; that they were compared at the office of defendant, and extinguished each other, save a small balance in favor of the plaintiff, which the witness says was settled. The defendant's evidence shows, too, that its account against plaintiff covered several sheets of paper. There can be no doubt that there were mutual and current accounts between the parties, and such as concern the trade of merchandise between merchant and merchant, as provided in the statute. Rev. St. art.

<sup>1</sup>Publication delayed by failure to receive copy of opinion.



§203, subd. 5. Such being the undisputed evidence, the trial judge should have found the fact. His failure to do so in terms would not justify us in saying that his general conclusion that the two-years statute of limitations, as pleaded by defendant, did not apply, was incorrect. On the contrary, we should and do hold that his conclusion that two years' limitation did not apply was correct.

The failure of the trial judge to find upon the issue of a settlement was not excepted to, and is not assigned as error; nor is it claimed in this court that there was in fact such a settlement or extinguishment of mutual accounts, in whole or in part. There is no objection made to the finding of the court that the goods were purchased as charged in the account of plaintiff, that the prices charged therefor were reasonable, and that the account is unpaid. Defendant did not set up its account at all, except to show a settlement. Its agents refused to furnish plaintiff with a statement of its account, and plaintiff, not having kept a memorandum of it, and not knowing what the items were, could not, as he was willing to do, credit the same, except \$26.25. The accounts would extinguish each other *pro tanto*, but defendant did not ask for his credits in the court below, and does not and cannot here.

Appellant relies solely for a reversal upon the failure of the court to find that the accounts were mutual. The evidence leaves no doubt in our minds upon the subject. Our conclusion is that the judgment of the court below ought to be affirmed.

PER CURIAM. Report of commission of appeals examined, and opinion adopted.

#### MILLER v. MILLER.

(Supreme Court of Texas. Dec. 11, 1888.)<sup>1</sup>

##### DIVORCE—CRUELTY—EVIDENCE.

In a suit by a wife for divorce and custody of children, one witness testified that defendant struck plaintiff with his fist while she was trying to prevent his taking their child with him. Plaintiff's father testified that plaintiff and her children had lived with him for several years, defendant contributing nothing to their support, but that witness had no personal knowledge of his failure to support them theretofore. Plaintiff's mother testified that she knew of no neglect on the part of defendant towards his wife; but on one occasion defendant refused to procure medicine for her when she was sick. It also appeared that plaintiff and defendant had not lived as husband and wife, nor spoken to each other, for a year or more. *Held*, that a judgment for plaintiff would not be disturbed.

Commissioners' decision. Appeal from district court, McCulloch county; A. W. MOURNSON, Judge.

Suit by Emma H. Miller against John D. Miller for divorce, and for custody of the children by the marriage. There was a judgment for plaintiff, and defendant appeals.

F. G. Morris, for appellant. Fisher & Townes, for appellee.

HOBBY, J. This is a suit by the appellee, the wife, against her husband, the appellant, for divorce upon the ground of cruel treatment, and also for the custody of the children by the marriage. It was brought on the 18th day of November, 1886, in the district court of McCulloch county. Appellant answered on the 3d day of December, 1886, especially denying the charges contained in the petition, and claiming the right to the custody of the children in event a decree of divorce was rendered. The cause was tried by the court without a jury, and judgment was rendered granting a divorce upon the truth of the allegations in the petition, and awarding the custody of the children to the wife. Appellant excepted to the judgment, after his motion for a new trial was overruled, and prosecutes this appeal.

There is no assignment of errors in the record, but appellant's first proposition is that, "taking all the evidence against appellant to be true, and not overcome by the testimony in appellant's favor, the judgment is not supported by the evidence, because there were only two classes of cruel treatment alleged or attempted to be proved against him: *First*, such absolute failure to provide for appellee as rendered their living together insupportable; *second*, violence to the person of appellee; and the first was not proved, and in support of the second only one act of violence to the person of appellee was proved. And appellee is precluded from legally urging this act of violence as a ground for divorce, because it was inflicted in resisting unjustifiable personal violence used at the time by appellee upon appellant to prevent appellant from exercising the lawful right of taking his child with him about town." The evidence to support the charge in the petition of acts of personal violence upon the part of the defendant to the plaintiff was that of a witness, Miss Whitehead, who stated, in substance, "that in the month of July, 1886, the defendant started from the home of his wife and himself to the store, and one of their children, a daughter of the age of three years, was crying to go with him. The plaintiff told him not to take the child. He, however, took the child by the hand, and started, when the plaintiff caught the child by the hand to stop it, and pushed the defendant back with her left hand, when the defendant drew back with his clenched fist and struck the plaintiff on the shoulder, and knocked her against the wall, and tried to strike her in the face, and she ran back, and he went off to the store and did not take the child. He did not strike the plaintiff until she tried to take the child from him, and pushed him away from the child." The father-in-law of the appellant, H. B. Harvey, upon whose testimony, in connection with that of the witness first mentioned, the truth of the allegations of the petition was founded, testified that "plaintiff and defendant were married in Victoria county

<sup>1</sup> Publication delayed by failure to receive copy of opinion.

about twelve years prior to this suit. He lived within a mile or two of them. Did not know of his own knowledge that defendant failed to support his family in Victoria county. Defendant paid for the building of a house for his family to live in, but, not having paid for the lumber, it was sold. That plaintiff and her children, since 1881, have lived in witness' house in McCulloch county. Defendant has not contributed to the support of his family since living with witness. That witness sent defendant and wife to Concho county. They stopped at the town of Brady, where witness began merchandising. Defendant worked about the residence and the store, and has been clerking for witness for the past eighteen months. His services were not worth more than \$20 or \$25 per month. Witness requested defendant and his family to reside with him because they had no other home." Appellant's mother-in-law testified that "she knew of no neglect upon the part of the defendant towards his wife. On one occasion this witness thought the plaintiff required some medicine, and asked the defendant to go to a neighbor's house across the road and get it, which he would not do." Plaintiff "was then quite sick," and witness went for and obtained the medicine. It appears also from the statement of facts that "the plaintiff and defendant have resided in the same house, but in separate rooms, for twelve or eighteen months, and have not lived as husband and wife together, nor spoken to each other, during that period of time." While we are not prepared to say that we would have arrived at the same conclusion as that reached by the court in this case, still we cannot say that the evidence does not support the judgment, and it is therefore affirmed.

PER CURIAM. Report of commission of appeals examined, and opinion adopted.

GRIFFITH *et al.* v. RIFE *et al.*

(Supreme Court of Texas. Dec. 4, 1888.)

BOUNDARIES—EVIDENCE—ESTOPPEL.

1. In trespass to try title, an expert surveyor, who was present at the survey of the lands in controversy, may use a map in explaining his testimony, which would not be clearly intelligible without it, though the map is not shown to be correct or official.

2. It appeared that a certain road, constituting the dividing line between plaintiffs' and defendants' lands, could not be precisely located by physical evidences on the ground; that the meanders of such road were given by calls for courses and distances in the field-notes of the original, unauthorized survey of defendants' land only, and not in those of the survey of plaintiffs' land, which was made first, but was not shown to have been authorized; that neither of these sets of field-notes called for the other; that a re-survey of plaintiffs' land, upon which their patent was issued, was made subsequent to another survey of defendants' land, and the issue of their patent thereon; that the meanders of the road, as called for in the respective patents, were irreconcilable. *Held*, that the original survey of defendants' land was superseded by that upon which their patent was issued, and that

the latter will prevail over that of plaintiffs' junior patent.

3. Where neither the corners of plaintiffs' nor defendants' land are satisfactorily established, and there is a well-established and identified corner of another survey, from which, by following course and distance, defendants' survey can be constructed, such course should be followed, though the boundaries thus established include land within the boundaries of plaintiffs' junior survey.

4. Where the evidence as to the locality of the road is conflicting, a judgment for defendants will not be disturbed, even if their patent did not prevail over plaintiffs'.

5. The purchase and holding of adjacent land by one of the defendants, does not constitute such a recognition of the *locus* of the road as would operate as an estoppel, where plaintiffs were not induced thereby to change their position for the worse.

Commissioners' decision. Appeal from district court, Caldwell county; H. TEICHMUELLER, Judge.

Walton, Hill & Walton, for appellee Rife. Stringfellow & McNeal, for appellee Bunton.

ACKER, P. J. Appellants brought this suit in the usual form of trespass to try title, claiming the land in controversy as part of the Pablo Martinez league. Appellees were in possession, claiming the land as part of the A. M. Leavy league, and defended under the plea of "not guilty." The two leagues abut upon each other, the field-notes of each calling for the San Antonio road as the dividing line between them. In 1835, two surveyors, Sims and Shackelford, surveyed the land embraced in these two leagues, and the land embraced in several other surveys situated on each side of the San Antonio road, and returned the field-notes of the surveys so made to the general land-office; the field-notes of the land embraced in the Leavy survey being designated as "League No. 5," and the field-notes of the land embraced in the Martinez survey being designated as "League No. 9." The land covered by the Martinez certificate was surveyed January 15, 1835, and the land covered by the Leavy certificate was surveyed February 4, 1835. On February 26, 1838, the A. M. Leavy certificate was presented to Sims, who was then surveyor of Bastrop county, for location, and he made the following indorsement thereon: "Located of the within one league of land on league No. 5, on the west of the Colorado, on the north side of the San Antonio road, on Cedar creek. This February 26, 1838. B. SIMS, C. S., C. Bastrop." On May 3, 1838, the Pablo Martinez certificate was presented to said Sims for location, and he made the following indorsement thereon: "Located on league No. 9, San Antonio road, west of Colorado river. This May 3, 1838. B. SIMS, C. S., C. Bastrop." On the same day, the surveyor, Sims, returned to the general land-office a plat of league No. 9, and certified that it was surveyed according to law for Harratio Griffith, assignee of Pablo Martinez, the certificate containing the following language: "Reference to the general land-office for the field-notes of league No. 9." On August 22, 1845, the commis-

sioner of the general land-office made the following indorsement on the report and certificate of the survey made by Sims on May 8, 1838: "The surveyor of Bastrop county is hereby authorized to survey anew the land designated by the within plat. THOS. WM. WARD, Commissioner." On this authority league No. 9 was resurveyed by the surveyor of Bastrop county for Harratio Griffith, assignee of Pablo Martinez, on the 4th day of September, 1845, and a patent was issued on the field-notes of the resurvey on September 11, 1845. The survey under the location of the Leavy certificate was made March 20, 1839, and the patent issued thereon June 17, 1841. The case was tried by the court without a jury, and judgment rendered for appellees.

The first and second assignments of error relate to the rulings of the court in admitting in evidence a map marked "Z," and in permitting the witness Campbell to testify with reference to the locality of the several leagues and their lines, the locality of the roads, water-holes, etc., on said map. To the introduction of the map and the evidence of the witness relating thereto appellant objected, upon the grounds: "(1) Because it was not an official map; (2) because no one had testified that it was a correct map of the lands or meanderings of the road to which it relates; because it could serve no legal purpose, and only tended to confuse and mislead." The witness Campbell was introduced as an expert surveyor. He had testified about the lines and boundaries of the Leavy, Martinez, and other surveys adjacent, and that he was with Chapman, the surveyor, when he made the survey of the Leavy and Martinez surveys under an order of court in this case. Then, with the map "Z" before him, he proceeded to explain and illustrate his testimony by reference to the map, and by different colored lines drawn upon the map he illustrated where the boundary line between the two surveys would be located if course and distance were followed as given in the several field-notes of the two surveys from a known and established corner of another survey. We do not think the testimony of this witness could have been well understood without some illustration such as was made by the use of this map. It was offered in connection with and explanatory of his evidence. We think the first and second assignments of error are not well taken.

The third assignment of error is: "The court erred in the sixth and seventh findings of the facts in the case, and in being governed by the facts thus found if true." The sixth and seventh findings of fact are as follows: "(6) That the south-east corner of survey No. 4, made for James Montgomery, and which is the beginning point of the Leavy survey, can be identified by the corner of the adjacent Moore survey, which is known and well established. (7) That the construction of the Leavy survey from said beginning point, and following course and distance, covers the land described in the patent, and

embraces the land in controversy." There appears to be no controversy as to the true location of the corner of the Moore survey, from which the court, following course and distance, located the south-east corner of the Montgomery, which is identical with the beginning corner of the Leavy. The corners of neither the Leavy nor Martinez surveys are satisfactorily established by the evidence, and the Moore corner is the nearest known and satisfactorily identified corner to the surveys in controversy. The territory occupied by these and adjacent surveys is open prairie country. The precise locality of the San Antonio road, at the time these surveys were located, is not satisfactorily established by the evidence. Appellee Rife claimed that his land was situated on the south-east corner of the Leavy survey. The surveyor, Chapman, who had surveyed Rife's land for him, testified that he surveyed Rife's land, and located and established his south-east corner, which is also the south-east corner of the Leavy, before he made the survey under the order of the court. In making the survey for Rife, the field-notes which he used located the Moore corner one *vara* from its bearing tree, while it should have been 100 *varas*; that, beginning at one *vara* from the bearing tree, he then ran the meanders of the Montgomery by the field-notes of 1835, and, after reaching the end of the last call, he moved 100 *varas* further on the same course, (having discovered the error in the beginning corner,) at which point he made and established the south-east corner of the Leavy survey and the Rife tract. He located this south-east corner from the calls in the Leavy patent, and Rife built his fence a few *varas* inside of this line. The Montgomery survey No. 4 was surveyed in 1835, and patented on the field-notes then made, which are as follows: Begin at south corner of Moore one-quarter league from which a post oak stump bears north, 59 east, 100 *varas*; thence south, 85 west, 580 *varas*; south, 70 west, 330 *varas*; south, 76 west, 700 *varas*; south, 67 west, 240 *varas*; north, 77 west, 660 *varas*; north, 84 west, 595 *varas*, to a branch 30 *varas* below an old ford, 860 *varas* to the south corner. The field-notes of survey No. 5, (the Leavy,) as made in 1835, are as follows: Begin at a stake on the San Antonio road and south-west corner of No. 4, (Montgomery,) on the San Antonio road; thence along said road with its meanders north, 75 west, 760 *varas*; north, 62 west, 1,250 *varas*; north, 70 west, 1,050 *varas*; south, 80 west, 480 *varas*; west 410 *varas*; south, 82 west, 400 *varas*; south, 77 west, 170 *varas*, to a post and corner for south-west corner of this survey. The Leavy was patented in 1841, and a survey and field-notes made in 1839, calling for its front on the San Antonio road as follows: Begin at the south-east corner of survey No. 4, made for James S. Montgomery; thence, with the meanders of the San Antonio road, south, 80 west, 1,500 *varas*; south, 86 west, 1,600 *varas*; 3,100

*varas*, to the south-east corner of survey No. 6. The field-notes of 1835 for league No. 9 (Martinez) describe the survey as follows: Situated on the San Antonio road, beginning at a post and north-west corner of league No. 9; thence for the three sides of the survey to the last call, which is: "thence west with the meanders of the San Antonio road to the place of beginning." The field-notes of the Martinez, as contained in the patent issued in September, 1845, so much of them as relate to the dividing line between it and the Leavy, are as follows: Beginning at the north-west corner of Gideon Pace's League No. 8 at a stake; thence with the meanders of the road as follows: North, 70 west, 300 *varas*; north, 68 west, 384 *varas*; north, 60 west, 430 *varas*; north, 68 west, 955 *varas*; north, 82 west, 244 *varas*; north, 89 west, 1,090 *varas*; south, 84 west, 390 *varas*; north, 80 west, 510 *varas*; north, 87½ west, 455, a stake marked 9.

It is not claimed that the San Antonio road, as it existed at the time the surveys were made, could be traced and identified upon the ground by its track or impression at the time of the trial. If its locality had been thus identified, there would be no difficulty in determining the rights of the parties. Appellants claimed that at the time these surveys were located the road ran from the established and identified Moore corner, near by the Alligator water-hole, which would put the land in controversy within the boundaries of the Martinez. It devolved upon them to prove to the satisfaction of the trial court that the road did so run, to entitle them to recover against appellees, who were in possession under title to the land as part of the Leavy survey. It is insisted by appellants that the locality of the road should be determined by the field-notes of the surveys made in 1835, and that by these field-notes the dividing line would be located where they claim it to be. In the field-notes of 1835 for league No. 5 (Leavy) the meanders of the road are given by numerous calls for courses and distances. In the field-notes of that year for league No. 9 (Martinez) no meanders are given; the call is simply with the meanders of the road. The field-notes of neither of these surveys call for the other survey. The field-notes of 1835 of league No. 9 were made prior to those of the same year for league No. 5. If the then locality of the road cannot now be identified by physical evidences found upon the ground, its meanders could not be followed by the field-notes of league No. 9, made in 1835; for there is no call in them for courses and distances. But it is insisted that the calls for the meanders of the road, as given in the field-notes of 1835 of league No. 5, should control, and by them the road would be located where appellants claim it should be. We think a sufficient answer to this is that upon the location of the Leavy certificate upon league No. 5 in 1838, a survey was made in 1839, the field-notes of which superseded the field-notes of 1835, and the patent was issued for the Leavy upon the

field-notes of 1839, several years before any steps were taken under the location of the Martinez certificate to have the field-notes of 1835 of league No. 9 corrected so as to furnish the *data* necessary to identify the locality of the boundary line between the two surveys. The survey and field-notes under the location of the Martinez certificate were not made until 1845, in which the meanders of the road were given by calls for courses and distances. Nearly four years before this was done, and while there was nothing in the field-notes of 1835 for league No. 9 to indicate the meanders of the road by which it could be identified independent of the physical evidences of its locality, the state issued its patent for the Leavy, giving the meanders of the road by calls for courses and distances. The meanders of the road, as called for in the field-notes of the patents for the two surveys, are irreconcilable. The marks or evidences of its locality having been obliterated, we must look to the calls for courses and distances in the patents; and where there is irreconcilable conflict in these the junior must yield to the senior grant. If the corners and boundaries of the Leavy survey could not be identified by marks and objects upon the ground, and there was an established and identified corner of another survey, having such relation to the Leavy as that it could be constructed by following course and distance from such established and identified corner, the Leavy should be so constructed, even though the boundaries thus established should include land within the marked boundaries of a junior survey. The surveys and field-notes of 1835 appear to have been made without authority. The reports of the surveyors are in blank. They do not appear to have been made by virtue of certificates, or for any particular persons. They did not operate as appropriations of these lands, and there was no appropriation of them until the Leavy and Martinez certificates were located thereon. The indorsement by the surveyor upon these certificates, that he had located them, respectively, upon leagues 5 and 9, together with his reference to the field-notes made in 1835 of these surveys, then in the land-office, was sufficiently certain to designate what land was intended to be appropriated to each certificate. *Horton v. Pace*, 9 Tex. 82. If the field-notes referred to had been correct, and the patents had issued thereon, the rights of the parties would have been controlled and determined thereby. But the surveys made under the locations of the certificates superseded those of 1835, and have been adopted and ratified by the state in issuing patents thereon.

What has been said might well be regarded as sufficient to dispose of the case, but appellants press upon our attention other assignments, which we will now consider. The fourth assignment of error is: "The court erred in the first finding as to the law of the case, because the plaintiffs did establish with certainty the locality of the San Antonio

road by the production of abundant and competent evidence." The finding here referred to is: "That the plaintiffs have failed to establish the locality of the San Antonio road as the dividing line between the two surveys with that degree of certainty which would entitle them to recover." Appellants claimed that the old San Antonio road, the boundary line between the two surveys, ran from the Moore corner, according to the field-notes of 1835, near to and south of the Alligator water-hole. Appellees claimed that the old road ran from the Moore corner, near to and south of the Willow water-hole, over a mile south, 45 degrees east from the Alligator water-hole, according to the patented field-notes of the Leavy league. Chapinan shows by his report of the survey made by order of court in this case, and testified, that the meanderings of the road from Moore's corner, according to the field-notes of 1835, ran near the Alligator water-hole; and that the meanderings of the road, according to the patented field-notes of the Leavy, ran near the Willow water-hole. On both of these lines an old road was several times intersected or run with for a short distance. Thomas G. McGehee testified that he was with Sims and Shackelford in 1835 when they surveyed these leagues; that the road was then a plain road, and ran about 25 or 30 yards to the south of the Alligator water-hole; that he was captain of a spy company along this road from February 28, 1836, to the fall of the Alamo, and had traveled the road hundreds of times. J. H. Jenkins testified that he was one of the chainmen that resurveyed the Martinez in 1845; that the road was then plain, and appeared to be an old traveled road; that he first traveled the road between these surveys in 1837; that he knew the Alligator water-hole, it being but a short distance from the road, not more than 200 yards; that it had been the old San Antonio road ever since he had been in the county, and is the road that those leagues front on; that when they surveyed the Martinez in 1845 they found corners that had been made previous to that survey; that they found all of the corners. W. C. Walsh testified that Col. Andrew Neill, deceased, told him that at and prior to the Dawson massacre the old San Antonio road ran within 100 yards of the Alligator water-hole. Leavy Shackelford testified that he had known the San Antonio road since 1849, and that the old road passed about 100 yards south of the Alligator water-hole. That he was well acquainted with Col. Bunton, Capt. Billingsley, and old Mr. Wining. They were old stockmen, and lived near the old San Antonio road, on Cedar creek, when witness came to the country. They were old Texans, and are now all dead. They told him that the old San Antonio road ran by the Alligator water-hole. H. C. Harris testified that Col. Bunton and Capt. Billingsley told him the old road always ran by the Alligator water-hole. That he has known the road since 1850. Went with his father to live on the ranch 600 yards south of the

Alligator water-hole in 1854. The old road ran about 100 yards south of the Alligator water-hole. There was no road south of the Harris ranch. The only trail by the Willow water-hole was made by stock going down from his father's pens. H. C. Skaggs testified that he settled the Harris ranch in 1853 or 1854. That the old San Antonio road then ran near to the Alligator water-hole. There was no road running south of the ranch. There was a trail made by stock going to the Willow water-hole, which was afterwards traveled by wagons. R. P. Donahoe testified that he had known the country 32 years, and had lived on his place, south of the San Antonio road, 26 years, and knows of no road except that by the Alligator water-hole. James M. Patton testified that he had known the road since the spring of 1842. Saw the Alligator water-hole first in that year. The road ran south of the Alligator water-hole, as he recollects, between one and one and a half miles, passing near Cottonwood water-hole. He knew Bunton and Billingsley, and thinks they knew the road as well as he did. The old road ran by the Blalock place from 1842 to 1845. A portion of the travel went by the Alligator water-hole, and a portion by the Willow water-hole. Paul Deats testified that he first saw the road in 1842, and traveled it between 1842 and 1848. That he knew one trail running from the road to the Alligator water-hole. It ran north-west from the water-hole. George J. Neill testified that he traveled the old San Antonio road in 1831, and frequently between 1834 and 1845, and knew said water-holes. That the road ran from three-fourths to a mile south of the Alligator water-hole, and near by the Willow water-hole. From 1835 there were several trails running off from the main road at different points, leading to the water-holes. The Willow water-hole is about south-west from the Alligator water-hole. About 1837 the road was changed to run by the Alligator water-hole, and since that time it has been used generally by travelers as a camping place, and is north of the road.

The foregoing is a substantial statement of all the evidence bearing upon the question of the locality of the San Antonio road within the dates mentioned, from which it is apparent that there was very considerable conflict in the evidence. In such case it is well settled that this court will not disturb the judgment on the evidence. If the prior survey and appropriation of the land under the Leavy certificate did not preclude appellants' right of recovery, as we have decided that it did, and the question of the locality of the road was the only question in the case, without regard to the question of prior appropriation, we could not say that the judgment was without evidence to support it, or that it was clearly against the great preponderance of the evidence.

What we have already said disposes of the remaining assignments, except the ninth, which is as follows: "The court erred in the

sixth conclusion of law, because the boundary recognized by Bunton as the common corner between the Connell league and the Martinez league is a recognition of the road where plaintiffs claim it to be." The sixth conclusion referred to in this assignment was filed in response to the following question by appellants: "Does not the defendant Bunton claim and hold ninety acres of land in the north-east of the Sampson Connell league, by his purchase from Harris, and has he not by this purchase and holding recognized the locality of the San Antonio road to be at his said north-east corner, and to run thence by the Alligator water-hole, as claimed by plaintiffs?" The answer of the court was as follows: "The defendant Bunton's purchase and holding of said land does not constitute such recognition of the *locus* of the line in controversy as would operate as an estoppel. It does not establish said line, and does not affect the general result of the cause as indicated in the conclusions of the court." We fail to discover in the question propounded by appellants, in response to which the sixth conclusion was filed, or in the facts of the case, any of the elements of the doctrine of estoppel that could be applied to the appellee Bunton. In 2 Pom. Eq. Jur. § 804, the following definition of an estoppel *in pais* is given: "Equitable estoppel is the effect of the voluntary conduct of a party, whereby he is precluded, both at law and in equity, from asserting the rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has, in good faith, relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy." It does not appear that Bunton's purchase and holding of the 90 acres of land in the Connell survey has induced appellants to change their position for the worse. We think the court did not err in the conclusion here complained of. We find no error in the judgment, and are of opinion that it should be affirmed.

PER CURIAM. Report of commission of appeals examined, and opinion adopted.

GULF, C. & S. F. RY. CO. v. WILLIAMS.

(Supreme Court of Texas. Nov. 30, 1888.)<sup>1</sup>

MASTER AND SERVANT—ASSUMPTION OF RISKS.

In an action for personal injuries sustained by a railroad employe by reason of a hand-car jumping the track, plaintiff testified that the car upon which he was at the time jumped the track because it was too light, which fact was unknown to him before the accident occurred; that he had never seen the kind of car in question until two weeks before the accident, but was familiar with hand-cars, having worked on railroads for seven or eight years. His co-laborers testified to the lightness of the car, one of them saying that any one

could see that it was too light. As to the safety of the car the testimony was conflicting, but there was no evidence of any defect other than its being light. Held, that the lightness of the car, and the dangers, if any, arising therefrom, were such as plaintiff should have known, and a verdict for him was unwarranted.

Appeal from district court, Lampasas county; W. A. BLACKBURN, Judge.

Action by Ed. Williams against the Gulf, Colorado & Santa Fe Railway Company for injuries received by him while in defendant's employ. From a judgment for plaintiff, defendant appeals.

Matthews & Wood, for appellant. Acker & Abney and Smith & Walker, for appellee.

WALKER, J. This is an appeal from a judgment in favor of Williams for \$2,143 for personal injuries caused him by being thrown from a hand-car while working as a section hand for appellant. The petition alleges that plaintiff was thrown from the car on account of its being too light and frail for the purpose for which it was furnished; that the road where the accident was caused was rough; that the car was overloaded; that defendant knew the car was too light for the purpose for which it was furnished, and that plaintiff was ignorant of the fact. Defendant pleaded general denial, and that, if the car was too light, that plaintiff knew the fact, if it was a fact, before the injury; and that the car was thrown from the track by the negligent manner in which it was handled at the time by plaintiff and his co-laborers.

The only question raised is as to the sufficiency of the testimony to sustain the verdict. There is no controversy as to the condition of the track. All witnesses concur that it was in good condition when the accident occurred. Nor is there any dispute as to the condition of the particular car. It was not frail, nor out of repair in any respect whatever. It is insisted by appellee that the car was too light for the safety of the men using it, and that this fact was determined by the verdict.

The plaintiff testified: "I was a section hand in an extra gang of twenty-four men, employed by defendant in surfacing up and putting its new road in repair; and on returning to the section-house in the evening after the day's work the gang was using three light wooden-wheel hand-cars furnished by defendant, known as 'Sheffield Cars.' The men were about equally divided between the three cars. I have been rail-roading seven or eight years on track and bridge gangs, and during all that time have been accustomed to use and handle hand-cars. The car I was on jumped the track, and I was considerably bruised up, and had my arm broken. I never saw a hand-car like the Sheffield until about two weeks before the accident. The foreman was on the front car, I was on the middle car, and all were traveling about the same speed, about four or five rails apart. I was pumping on the right-hand side of the front lever. We

<sup>1</sup>Publication delayed by failure to receive copy of opinion.

had just reached the top of an up grade, on a curve of about thirty-six degrees. There was no racing. We were pumping the cars as usual when returning to supper after a day's work. The car ran off the track, and threw every one off. \* \* \* The car had only been in use there two days before the accident. I had never heard of any accidents from this car, and no one called my attention to the fact that the car was too light, and I was not competent to judge for myself. \* \* \* Nothing was the matter with the track. I could see no cause for the accident, unless the car was too light. I never knew it was too light before the accident occurred. I did not learn that the car was too light until the morning after the accident."

Pat Cullen testified: "I was on the rear of the three cars. Had never seen any like them before. They had been there from two weeks to a month. The car ran off the track because it was too light. \* \* \* As soon as we saw these new cars we thought them too light. As soon as we saw them we knew they were lighter than other hand-cars, and any one with any judgment could see them 'paper-wheeled cars,' as we called them, were too light. \* \* \* The heavier a car is the easier it is to stop."

Sam Moore testified: "I have been working on railroads about four years. These are the first cars of this kind I ever saw \* \* \* These were replaced by the old-fashioned, heavy, iron-wheel cars ten days after the accident. They took them away because they were too light. The hand-car jumped the track because it was too light, and had too much weight on it."

Higdon testified: "I have been railroading as a civil engineer since 1870. Never saw the wooden-wheel car, but from the description I have heard of them would say they were too light for eight or ten men. A car is more apt to jump the track on a curve than on straight track, and the lighter the car the greater the danger. Mr. Snyder, defendant's general manager, is a good man to run a railroad. \* \* \* The greater the weight put on a light car the safer it is. The weight placed on a car increases the traction. The more men put on a hand-car the less liable it is to jump the track. It increases the weight and makes it safer."

Dan Meagher, for defendant, testified: "When the hand-car and the track are both perfect these cars are liable to jump the track when pulling up or down grade, because of the light weight of the car, it being so light that two men can pick it up and put it on or off the track, while six men are required to put on or off the heavy cars. \* \* \* What caused the car to leave the track I am unable to say. I never saw one of this class of cars jump the track before, and have only seen one of them jump the track since, and that was at a frog."

Jim McGinnis, for defendant: "Have been railroading twenty-five years. Am in employ of defendant. Was on the front of the

three cars. \* \* \* The car jumped the track from awkward pumping, I suppose, as the track was in good condition. The wooden-wheeled Sheffield car is the safest car used."

Thomas Walthall, for defendant: "Have been working on railroads twenty years. Am familiar with different kinds of hand-cars. Have used various kinds, and have used the wooden-wheel, iron-rim hand-cars known as the 'Sheffield Cars.' \* \* \* I much prefer these lighter cars. They are more easily handled, and hence safer, especially in avoiding collisions. The heavier you load a hand-car the less liable it is to jump the track. \* \* \* The 'Sheffield' is an improvement on any other hand-car I ever worked with. It is lighter than the old iron-wheel car, and is more liable to jump the track, but this is lessened in proportion to the load that is on it."

W. Snyder testified: "Am general manager of the road of defendant. Am a railroad man by profession. Have been in the employ of various railway companies ever since 1856. \* \* \* The Sheffield car I consider one of the best now made or used anywhere, and one of the safest on any kind of road, rough or smooth. My reasons are, the car is much lighter in weight, while equally strong in construction as the ordinary car. To propel it does not require the power and consequent exertion and jerking that is necessary on a heavier car. Easier propulsion assures smoother running. Being lighter in weight, it is easier to remove from the track in case of danger, which is not an unusual occurrence, and easier to stop in the face of such danger. Smooth running carries less liability to jump the track." (Witness testified to their use on other roads.) "These cars have been in use on defendant's road about two years. It is the intention to discontinue the use of the old-style cars as they wear out, and replace them by the Sheffield or similar ones. \* \* \* The Sheffield cars are unquestionably safer than the heavy cars on rough, new road. They will safely carry 5,600 pounds, with men added. The floor space is somewhat less, but as many can ride safely on them as on the heavy hand-car."

J. W. Clark, for defendant: "Am in employ of defendant. Civil engineer and trackman by profession. So employed since 1876. \* \* \* I consider the Sheffield hand-car as the best hand-car made. It combines all the good qualities necessary in a hand-car,—safety, speed, easy to handle, and strong; is the best car for rough track, as it is propelled easy, runs smooth on a good track, and runs fast with safety when it becomes necessary in case of trouble to do so. \* \* \* They are now in use all over the road, without regard to condition of track, and are sent out to any and all sections where new hand-cars are needed."

J. W. Thorne: "Am purchasing agent for defendant. \* \* \* The Sheffield cars are built of good material, well braced, and are



thoroughly suitable for the purpose for which they were purchased. They were first used on defendant's road about last of August, 1885, and before being issued for service were examined by me personally. They were purchased at suggestion of Manager Snyder. \* \* \* The advantage of the light car is that it requires less force to run it over heavy grades, and it can be moved from the track more expeditiously than the heavy car. \* \* \* I never heard any one claim or state that they are not safe." This witness gave the names of 50 railroads upon which the Sheffield cars are in use.

Dan O'Brien, for defendant, testified that he was on the hand-car with plaintiff when injured. Six men were on the car at the time. "I do not know of any cause why the car was thrown from the track unless it might be that it was run at too high speed." He also states "that they were not going faster than they were accustomed to go."

From this testimony we may well question whether the hand-car was defective. No witness for plaintiff indicates anything against it except that it was too light. The testimony abundantly shows that the style of car was selected with reference to the safety of the persons using the cars; and that, in the general use to which they are applied, the Sheffield car was considered an improvement over those in ordinary use prior to their introduction, and was adopted on that account. But should it be conceded that by reason of its lightness the car was more liable to jump the track, while the company would be chargeable with knowledge of the defect from its duty to furnish fit and suitable implements and machinery for its employees, can it be ascertained from the testimony that the plaintiff was ignorant of the supposed defect? He testifies that he had seen the cars two weeks. They are of simple structure. Their material was not concealed, but apparent. The witness Cullen, a co-laborer, called by plaintiff, and who was with him when hurt, says: "As soon as we saw these new cars we knew they were too light." The plaintiff testified that he did not know of the danger from using the cars; that no one told him, and he was not competent to judge for himself. He is shown to have been a railroad hand of several years' experience. He, as all others, must be charged with the knowledge of the ordinary laws of nature. His experience would be of negative value if it left him unable to recognize in the machinery he uses the qualities of weight, and its effects, as an instrument has greater or less of it. If the car was too light, the plaintiff had the means of knowing the fact, and he cannot complain that the ordinary laws of physics were not explained to him. That a light body is more easily deflected from its course than a heavy one should be known to every one handling machinery. Railway Co. v. Bradford, 66 Tex. 736, 2 S. W. Rep. 595.

This is not a case of an inexperienced serv-

ant entering upon a dangerous service, from which the duty devolves upon the master to give caution as to the danger. Railway Co. v. Watts, 64 Tex. 570. Nor is it a case of defective machinery, where the defect is apparent but the danger hidden, or remote in its connection with the defect. The defect and its danger, if any, are necessarily presented together to any one using the hand-car. Railway Co. v. Lempe, 59 Tex. 23. The servant assumes to have sufficient knowledge and skill to perform the duties he undertakes, and is chargeable with ordinary care for himself in his service. In traveling upon and propelling a hand-car he is chargeable with adapting himself in its use to the apparent condition of the machine. If light, he must deal with it as light; if heavy, the fact must be recognized. While recognizing fully the duty of the employer to furnish safe implements for its employees in their work, we do not find in this case a state of facts which could support the verdict. It is clearly manifest that the alleged defect, if it be one, was known, and that the danger from it, if any, should have been known, to plaintiff by the ordinary exercise of his judgment upon what was apparent in it.

Referring to the testimony we may remark that it shows an effort on the part of a competent manager to introduce into use upon the road an improved style of hand-car,—one considered to be better adapted for the purposes for which such cars are used, and in some respects safer, than those in use. The objection appears to have been rather to its novelty than to any other cause. It is observed that in the opinions of the operatives there is some confusion. One styles the new car too light, but that its liability to jump the track will be increased by being more heavily loaded. Another thinks the heavier car can be stopped quicker in presence of danger, etc. If aversion to change and refusal to adapt the mode of handling to the conditions of the new machinery be sufficient reason for rejecting an improvement none can ever be made with safety. The claim here is made, and it seems to be the only complaint in fact separated from opinions, that the hand-car should have a given amount of dead weight, without regards to its safety in other respects, or its equal or greater fitness for the usual work for which a hand-car is used. The "Sheffield car" had been but lately introduced when the accident occurred. Upon another trial the merits or absence of merit in the machine with respect to the personal safety of persons using it can be more satisfactorily shown,—the results of a larger experience can be had. The testimony showing that plaintiff knew or should have known the lightness of the car, and it not sufficiently appearing that it was defective, the verdict was without evidence of proper care on part of plaintiff, and it should have been set aside. Judgment reversed, and cause remanded.



## KNIGHTS OF HONOR v. WICKSER.

(Supreme Court of Texas. Dec. 11, 1888.)<sup>1</sup>

## MUTUAL BENEFIT INSURANCE—SUSPENSION OF MEMBERS.

1. Where the laws of a mutual association require the payment of all assessments within 30 days after the date of the notice thereof, on penalty of suspension, the time of which is to be fixed by vote of the association, an order of an officer of the association, suspending a member for non-payment of an assessment, but without the required vote, is inoperative.

2. The entry of the order upon the minutes of the association being only *prima facie* evidence of its legality, parol evidence is admissible to show that it was by order of an officer alone.

3. The suspension being illegal, the refusal of the association to credit the insured with assessments paid thereafter, or to give to the proper officers the required notice of his death, does not prejudice the right of the beneficiaries under his certificate to recover thereon, they having done everything required of them, and there being funds subject to such payment.

Commissioners' decision. Appeal from district court, Lamar county; A. M. TAYLOR, Special Judge.

James O. Pierce and V. W. Hale, for appellants. Mazey, Lightfoot & Denton, for appellee.

COLLARD, J. This suit was brought by the appellee, Fannie Wickser, against appellant, the Supreme Lodge of the Knights of Honor, for \$2,000, and interest, on a benefit certificate of insurance on the life of her husband, Fred Wickser, who died about May 17, 1882. Fred Wickser was a member of Blossom Prairie Lodge, No. 1,031, and a benefit certificate for \$2,000 had been issued to him for the benefit of plaintiff and his two children, in conformity with the laws of the order. After his death the children regularly transferred their rights under the certificate to the plaintiff. From the time of his admission Wickser had paid all assessments against him, and all dues down to and including assessment No. 97. He was suspended by order of the dictator of his lodge on the 19th day of April, 1882, without vote of the lodge. The minutes of the lodge contained the following record of the suspension: "Fred Wickser suspended for non-payment of assessment 98." There were funds in the hands of the order subject to the payment of the certificate if it was not debarred of payment by the suspension.

The main question in the case is, was the suspension legal? The judge below, who tried the case without a jury, decided that it was illegal, and the appeal was taken from that decision and some other minor rulings.

When assessment 97 was called by the supreme lodge, it was the duty of Lodge No. 1,031 to forward the funds in its possession subject to that call, and then make a call upon its members for assessment 98, so as to have assessment 98 in hand when it should be called by the supreme lodge. W. H. C. Johnson was reporter of the Blossom Prairie

Lodge, and as such it was his duty to forward notices to the members to pay assessments. It was allowed by the rules and laws of the lodge that the notices might be given by postal cards. S. C. Hancock was financial reporter of the lodge, and it was his duty to receive and receipt for all moneys paid into the lodge, to pay the same to the treasurer, and take his receipt therefor. The supreme lodge called upon subordinate lodges for assessment 97 on the 18th day of March, 1882. What time it was received by Lodge 1,031, or what time it was read in the lodge, does not appear. One of the laws of the order required members to pay assessments in 30 days after date of the notice, and upon failure to do so the member so failing was to be suspended. The time of suspension was, by the constitution, to be fixed by vote of the lodge. Johnson, the reporter, testified that Wickser had moved from Blossom Prairie, and, not knowing his post-office, he gave notice 98 to his son, George Wickser, who had been for some time paying his assessments. He further says: "I do not know the exact time the notice was handed to George Wickser. The notice was issued on the 17th day of March, 1882, as near as I can recollect. \* \* \* I don't think I could swear to each particular notice issued, but I can swear that I issued the proper notices to every member while I was in office." It was in proof that Fred Wickser received the notice on the 11th day of April, 1882, and that on the 25th he forwarded to Johnson, the reporter, \$6, the amount of two assessments, to pay 98 called, and 99 when it should be called. This sum was received by Johnson on the 26th of the month, and he reported it to the lodge at the next meeting, and read the letter directing its application. The court below, in his finding, says: "There is no evidence of the date of this notice, either direct or circumstantial." It was provided by the laws of the order that, if any lodge neglected to suspend a member when assessments were not paid in time, the lodge should pay to the supreme lodge double the sum due from the delinquent member. There was no vote of the lodge as to time of suspension.

It is evident to us from the foregoing that the dictator of the lodge had not the power to declare a member suspended without vote of the members. If he had such power, it is clear that the time of suspension could only be fixed by vote. The minutes are silent upon this subject. It does not appear that any time was fixed by vote or otherwise. We conclude, then, that the attempted suspension by the dictator was illegal, and the order of suspension by him, if he had the power, was incomplete and technically insufficient to operate as a suspension, because no period of time was fixed for it, as required by the constitution.

It seems the order is holding him to a very strict construction of its laws to avoid payment of the certificate issued to him, while the lodge of which he was a member failed

<sup>1</sup> Publication delayed by failure to receive copy of opinion.

to act legally and pass the very orders upon which relief from liability is asked. The notice was not sent to his post-office, as it should have been. It was delivered to his son, who at some time forwarded it to him. It is not clear that it bore date 30 days before the order of suspension. He received it on the 11th of April, and on the 25th of the same month sent forward the amount demanded, and a sufficient amount to pay the next call. The order of suspension was not by vote of his lodge, and the time of suspension was not fixed as required. Under these circumstances of failure on the part of the lodge to follow its law in suspending a member, we cannot say that the mere order of suspension, as it stands on the minutes, should have the effect of a complete legal suspension, and invalidate the member's certificate.

The records and minutes of a private corporation are admissible to prove acts of the corporation, but they are not the only mode of proof; they are *prima facie* admissible, but may be rebutted by parol. Partridge v. Badger, 25 Barb. 147; Whart. Ev. § 661; Abb. Tr. Ev. p. 46, § 56; Id. pp. 51, 52, § 65. We do not think the minutes of the lodge should be conclusive of the fact that the suspension of Wickser was legally done by the vote of the lodge. The order of suspension is especially defective and inconclusive, because it fixes no period of suspension, as required by the constitution. It was not error to permit Bray to state that the suspension was by order of the dictator alone.

If, then, Wickser was not suspended in fact for non-payment of assessment 98, was he bound to do more than he did do to pay assessment 99, which was called before his death? It does not appear that any notice was sent him to pay assessment 99. He had sent to Johnson, the reporter, six dollars to pay assessments 98 and 99, and Johnson had laid the matter before the lodge. The lodge refused to credit Wickser with the amount, evidently upon the assumption that he had already been suspended. The amount was not returned to Wickser, and no offer to return it was made except by plea of tender in this suit long after the suit was brought. The lodge regarded the rights and liabilities of the parties as fixed by the supposed suspension; otherwise Wickser would have received the credit which would have paid assessment 99 when it fell due. Wickser was not in fault; and in our opinion forfeited no right by the refusal of the lodge to credit him with the payment of the last assessment. For the same reasons the lodge refused to comply with the regulations of the order requiring it to send proper notice of Wickser's death to the supreme lodge. The supreme lodge was required to draw on the supreme treasurer for the amount of the benefit certificate on receipt of such notice. The death of Wickser was reported to his lodge in proper form. The supreme lodge had on hand a sufficient amount of funds, subject to payment of the certificate sued on, if the right

to it had not been forfeited by suspension. Under these circumstances the beneficiaries of the certificate should not be deprived of their right to collect it. The widow of deceased, to whom all rights in the certificate had been transferred, did all she was required to do. The laws of the order prescribed the method of notice to the supreme lodge, which should be by officers of the subordinate lodge. If this was not done, it was the fault of the lodge, and not of plaintiff.

Finding that the court below should not have rendered any other judgment than he did, and finding no error in the rulings that demands a reversal, we conclude the judgment should be affirmed.

PER CURIAM. Report of commission of appeals examined, and opinion adopted.

### STATE *et al.* v. TAYLOR *et al.*

(Supreme Court of Texas. Dec. 14, 1883.)

#### TAXABLE PROPERTY—LEASEHOLDS.

Under Rev. St. Tex. art. 4601, providing that "property held under lease for a term of three years or more, \* \* \* belonging to this state, or that is exempt by law from taxation in the hands of the owner thereof, shall be considered, for all purposes of taxation, as the property of the person so holding the same, except as otherwise provided by law," water-works leased for a term of 25 years from a city cannot be assessed against the lessee at the value of the land, but only at the value of the leasehold, if at all. Following Daugherty v. Thompson, 9 S. W. Rep. 99.

Appeal from district court, Williamson county: A. S. WALKER, Judge.

Injunction by Taylor & Kelley and others against the collector of taxes and others, to restrain him from selling the property of plaintiffs or collecting the taxes. Defendants appeal from a judgment making the injunction permanent.

James S. Hogg, Atty. Gen., and James H. Robertson, Dist. Atty., for appellants. Fisher & Townes, for appellees.

STAYTON, C. J. Appellees are lessees of the water-works property owned by the city of Georgetown. The lease began on February 18, 1884, and is to continue for the period of 25 years; the city, however, having the right to terminate the lease at any time after the expiration of 10 years. The assessor for Williamson county assessed the property for state and county taxes against appellees on the actual value of the water-works property, and not upon the value of the leasehold estate, for the year 1885. The collector of taxes, under the assessment, had levied upon personal property to enforce the payment of the taxes so levied and assessed, and this suit was brought to restrain him from selling the property or collecting the taxes. A writ of injunction issued, and, the facts pleaded being admitted on final hearing, was perpetuated. In Daugherty v.

<sup>1</sup> Publication delayed by failure to receive copy of opinion.

Thompson, 71 Tex. 192, 9 S. W. Rep. 99, it was held that under article 4691, Rev. St., one holding a leasehold estate could not be taxed upon the value of the lands leased, but only on the value of the leasehold. It was, however, held that the leasehold in that case was not subject to taxation. The decision in that case is decisive of the question involved in this; and it is not necessary for us to inquire whether appellees are liable to taxation on their leasehold estate. No assessment of that was made, and the courts could not make the assessment if, on inquiry, it should be found that the leasehold held by appellees was subject to taxation. The judgment of the court below is correct, and will be affirmed.

WALKER, J., did not sit in this case.

### ZIMPELMAN v. KEATING *et al.*

(*Supreme Court of Texas. Dec. 18, 1888.*)<sup>1</sup>

#### PRINCIPAL AND AGENT—RATIFICATION.

When an agent has exceeded his powers in executing a conveyance, a verbal assent by the principal, without receiving any benefit from the transaction, is not a sufficient ratification.

Commissioners' decision. Appeal from district court, El Paso county; JOHN BAILEY, Special Judge.

*Davis, Beall & Kemp*, for appellant.

COLLARD, J. It was not contended in the court below on the part of defendants that Kerber was authorized to make the deed to Keating as Zimpelman's agent. The question was, had Zimpelman ratified the act of Kerber, who assumed without authority to make the deed? Kerber was the agent of Zimpelman to collect his rents at El Paso, to report purchases, and to make sales of lands; but he had no power to make deeds as the agent of Zimpelman. What authority Kerber had was verbal only. Kerber might, under parol authority, only negotiate sales of Zimpelman's lands; but he could not consummate a trade by deed, without authority in writing. *Huffman v. Cartwright*, 44 Tex. 299. Kerber had on one occasion prior to the transaction in this case made a deed to land belonging to Zimpelman, which he afterwards accepted and ratified in writing. Where an agent makes a deed to land of his principal without authority to do so the ratification must generally be by deed of the principal. A mere assent, or such acquiescence as will only amount to evidence of assent, will not be a ratification. The acquiescence by parol to bind the principal must be by such acts as will operate an estoppel *in pais*. *Reese v. Medlock*, 27 Tex. 123, 124. If the principal adopt the sale and receive the purchase money, with full knowledge of the facts, it would be a ratification by estoppel. Was Zimpelman so estopped? Kerber made the deed under the following circumstances: Upon the death

of Judge Howard, Zimpelman's son-in-law, Zimpelman procured Kerber to administer upon the estate of deceased, so as to have the estate applied to payment of debts, and properly closed. The estate was insolvent. Zimpelman instructed Kerber to pay all the just debts against the Howard estate out of his (Zimpelman's) funds. Most of the debts were so paid out of Zimpelman's money. Keating had a suit pending against the Howard estate for \$1,827.35, brought before Howard's death; and there was a suit pending against Keating, brought by Howard, for the land in controversy in this case. In order to settle the suits it was agreed by Keating and Kerber that both suits should be dismissed, and that Kerber should make the deed; and it was done. After the dismissal, Keating's suit was barred by limitation. Kerber informed Keating and his attorney that he had no authority from Zimpelman to execute the deed. The parties, knowing this, took the risk that Zimpelman would ratify the conveyance, as Kerber said he believed he would. Keating's debt may have been a valid claim against the Howard estate. Some time afterwards, when Zimpelman was notified of the conveyance by Kerber, he made no objection. When Kerber saw him again, nearly two years afterwards, Zimpelman said: "You've played thunder making a deed to my land. What's done is done." Keating knew Kerber was authorized to pay Howard's debts by Zimpelman. This circumstance will not amount to an affirmance of the acts of Kerber on the part of Zimpelman. He was in no wise benefited by the transaction. He was under no legal obligation to pay the debts of Howard's estate. His instructions to his agent to pay them were voluntary, and gave no right to creditors to compel him to do it; besides, the power to use funds to pay debts did not authorize Kerber to deed land for that purpose. Keating knew his deed was worthless unless it was ratified by Zimpelman, and he knew he could not enforce a ratification. He was not deceived, and had nothing to rely upon but the generosity of Zimpelman, and his anxiety to have Howard's debts paid. Nothing short of a ratification in writing would have been binding upon him. The court should have instructed the jury, there being no such ratification, to find for the plaintiff; and, such being the case, the judgment of the court below should be reversed, and rendered for plaintiff. Reversed and rendered.

PER CURIAM. Adopted.

### LYON v. ELSER *et al.*

(*Supreme Court of Texas. Dec. 14, 1888.*)<sup>1</sup>

#### MECHANICS' LIENS—FAILURE TO RECORD—ASSENT OF OWNER.

1. Under Rev. St. Tex. art. 3165, providing that in order to secure a mechanic's lien the person

<sup>1</sup>Publication delayed by failure to receive copy. v.123.w.no.11—12

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claiming it must record his contract within six months after the debt becomes due; and article 3166, providing for the recording of "a sworn account" when there is no written contract,—the recording of a note from the owner of the house, which recites that it is "in settlement for account for lumber," is not a sufficient compliance with the statute to preserve the lien.

2. When the lien has been lost by failure to comply with the statute, it will not be made valid by an expression of willingness to that effect by the owner of the property.

Appeal from district court, Hill county; J. M. HALL, Judge.

Action by O. T. Lyon against Max Elser and others. Judgment was rendered for defendants, and plaintiff appeals.

A. P. McKinnon and J. G. Abney, for appellant. Tarlton & Jordan, for appellees.

WALKER, J. Under the constitution of the state, art. 16, § 37, mechanics and material-men have a lien upon the buildings made by them for the labor or materials furnished; and the legislature is enjoined to provide by law for the speedy and efficient enforcement of them. Article 3165, Rev. St., under which the claim of plaintiff is asserted, prescribed that, "in order to fix and secure the lien herein provided for, the person or firm, \* \* \* artisan, or lumber dealer furnishing material shall have the right at any time within six months after such debt becomes due to file his contract in the office of the county clerk, \* \* \* and cause the same to be recorded in a book to be kept by the county clerk for that purpose." Article 3166 provided for the record of "a sworn account," when there was no written contract. In this case Lyon's account was due January 1, 1884. There was no contract in writing for the lumber. The law gave six months within which he could file "a sworn account," and thereby fix his lien and evidence of it. This was never done. June 26, 1884, plaintiff took a note from the owner of the house, due 60 days thereafter, "in settlement for account for lumber due January 1, 1884." This note was recorded August 27th thereafter in the lien-book kept by the county clerk. "It has been held by this court that the written contract to be filed for record to secure a lien of this kind is one by virtue of which the material has been furnished, and not any subsequent contract entered into between the parties in respect to the matter," (Reese v. Corlew, 60 Tex. 70; Lyon v. Ozee, 66 Tex. 46; Tinsley v. Boykin, 46 Tex. 599;) and that a failure to record such "sworn account" in case of verbal contract within six months has the effect of abandoning the lien, (Lyon v. Ozee, 66 Tex. 95.) Appellant cites in support of his claim to lien under the facts the case of Mundine v. Berwin, 62 Tex. 342, but the contract there of itself gave a lien. It was of no consequence that it was called a mechanic's lien. In the case here the note made by Eastland seems to negative the existence of the lien. It recites that the note is in settlement of the account. It did not preserve the lien. Nor did Eastland's will-

ingness that the lien should be valid, as expressed to the attorney, Jordan, when drawing up the deed of trust to Ware for the benefit of Elser, have the legal effect of continuing its existence, when lost by failure to comply with the statute. The petition states facts which would defeat the right of plaintiff to recover under his title, as alleged. At the making of the trust-deed, and at the rendition of the judgment in favor of Bird & Bragg, under both of which it is alleged the defendants hold, there was no valid lien upon the property in favor of plaintiff. His subsequent suit and decree of foreclosure against Eastland alone, and purchase under it, did not confer title against Elser. The demurrer and exceptions were properly sustained. Affirmed.

#### CARRIGAN v. SEMPLE.

(Supreme Court of Texas. Dec. 14, 1888.)<sup>1</sup>

JUDGMENT—STATUTE OF LIMITATIONS—LEX FORI.

1. A judgment on a promissory note recovered against an administrator appointed in another state furnishes no right of action against an administrator appointed in Texas, where it is not shown that assets of the former ever came into the latter's hands.

2. The statute of limitations of the state in which the action on such note is brought prevails over the statute of the state in which the maker and promisee resided at the time the note was executed.

Appeal from district court, Fannin county; D. H. SCOTT, Judge.

Chas. D. Grace, for appellant. R. B. Semple, for appellee.

STAYTON, C. J. On December 18, 1878, Stephen Moore executed to appellant his promissory note, due one day after date. Both Moore and Carrigan resided in the state of Arkansas; and on June 6, 1882, the latter brought suit on the note before mentioned in the circuit court for that state sitting in the county of Hempstead. Pending that suit, Moore died, and the administrator of his estate was made a party, and against him a judgment was entered on January 4, 1883. That judgment decreed the foreclosure of a mortgage given to secure the note, and under it the mortgaged land was sold, and the proceeds applied in part satisfaction of the debt. This seems to have exhausted the assets of Moore's estate in the state of Arkansas. Some time prior to December, 9, 1885, appellee was appointed administrator of the estate of Stephen Moore in Texas, and to him was presented the judgment before referred to for allowance, the proper credits being allowed. This was done on August 20, 1885, and the administrator rejected the claim. On December 9, 1885, the note before referred to, on which a judgment had been rendered in Arkansas, after being properly authenticated, and credits for sums received on sale of property made in Arkansas allowed, was presented to the appellee for al-

<sup>1</sup>Publication delayed by failure to receive copy.

lowance, but was by him rejected. This action was brought on December 30, 1885, to recover balance due on the note, and it may be conceded that both the note and judgment rendered in Arkansas are made the foundation of this action. The defenses were a general demurrer, general denial, and plea of the statutes of limitations. It is not shown that the administrator defendant has assets in his hands which were ever assets in the hands of the administrator appointed in Arkansas; and it may be deemed settled that a judgment rendered against an administrator in another state furnishes no right of action against an administrator appointed by the courts of this state, in the absence of such showing. *Jones v. Jones*, 15 Tex. 468; *Cherry v. Speight*, 28 Tex. 503; *Aspden v. Nixon*, 4 How. 467; *Stacy v. Thrasher*, 6 How. 57; *Brodie v. Bickley*, 2 Rawle, 436; *McLean v. Meek*, 18 How. 18; *Low v. Bartlett*, 8 Allen, 261; *Ela v. Edwards*, 13 Allen, 48; *Slauter v. Chenowith*, 7 Ind. 211. This is conclusive against the right of appellant to recover on the judgment.

It is insisted that the note sued upon was a sealed instrument, and, under the law of the state of Arkansas, not barred by the statutes of limitation unless 10 years had expired after suit might have been brought. That seems, from the evidence offered, to be the law in that state. The statute in this state must, however, govern, and by that an action on a note was barred in four years, and the court below correctly so held. *Clay v. Clay*, 13 Tex. 204; *Allison v. Nash*, 16 Tex. 561; *McElmoyle v. Cohen*, 13 Pet. 312; *Bank v. Dalton*, 9 How. 522; *Ang. Lim. § 65*; *Wood, Lim. 17-23*. There is no error in the judgment, and it will be affirmed.

### JONES et al. v. WHITE.

(Supreme Court of Texas. Dec. 13, 1885.)<sup>1</sup>

#### MECHANICS' LIENS—RELINQUISHMENT.

In the absence of an express agreement the taking of drafts for a debt for materials furnished to build a house is not a relinquishment of the right to a material-man's lien.

Commissioners' decision. Appeal from district court, Tom Green county; WILLIAM KENNEDY, Judge.

*Charles I. Evans*, for appellants.

ACKER, P. J. In August, 1884, C. L. Broome contracted to furnish all labor and material, and build a house for appellee, on the north half of lot 20, in block 8, in the town of San Angelo. During the months of August, September, and October, 1884, appellants, Jones & Co., furnished to Broome lumber and building material to the amount of \$1,200, which was used by Broome in building the house for appellee, White. On October 21, 1884, Broome gave to Jones & Co. two drafts on White, aggregating \$1,200, each reciting that it was given for building material, furnished to

build the house, and each containing the following language: "This payment is to be paid out of the fifteen hundred dollars cash payment, due me when the J. O. K. White brick building is completed according to contract." These drafts were accepted by White. On January 19, 1885, Jones & Co. filed and had recorded itemized and verified bills of particulars of the material furnished, and delivered to White copies thereof, as required by statute providing for fixing the liens of material-men and mechanics. On March 19, 1885, White and Broome entered into a written contract of settlement for building the house, in which White unconditionally promised and agreed to pay the \$1,200 to Jones & Co., and received credit from Broome for the amount in the settlement. This suit was brought July 27, 1885, to recover the \$1,200, and interest, and to foreclose the material-man's lien on the house and lot. The trial was by the court, and judgment rendered in favor of appellants, Jones & Co., for \$1,200, and interest from March 19, 1885, and refusing to recognize or foreclose the lien claimed by them. The court found as conclusions of law that appellee was indebted to Jones & Co. in the sum of \$1,200, and that appellants had no lien for their debt. It is assigned as error that the court erred in refusing to render judgment in favor of appellants foreclosing their lien.

There is no appearance here for appellee, but we have examined the transcript, and find that appellants' brief is a fair and proper presentation of the case, and we so regard it. A careful inspection of the record does not disclose the reason of the trial court for its conclusion of law upon which it refused to give judgment foreclosing the lien. It found as matter of law that appellee was indebted to appellants for the amount of their claim, and must have found also that the claim was due, as judgment was rendered therefor. It seems that every requirement of the statute relating to mechanics' and material-men's liens necessary to establish appellants' lien against the house and lot was strictly complied with by them, and it does not appear that the lien thus acquired had been relinquished or discharged. The last of the material was furnished by appellants on the 10th day of October, 1884, and the drafts were drawn by Broome and accepted by appellee on the 21st of that month. Under the law then in force, appellants had six months after their claims for material furnished became due within which to fix their lien against the building and lot, and this they did within three months after the drafts were given, by complying with all requirements of the statute. In the absence of an express agreement to that effect, the taking of the drafts did not operate as a relinquishment or discharge of the lien which appellants then had the right to acquire, and which they afterwards did acquire in the manner authorized by law. The accepted drafts in the hands of appellants was simply an adjustment of the

<sup>1</sup> Publication delayed by failure to receive copy.

amount due, and a promise to pay it. *Phil. Mech. Liens*, § 276; *Gillespie v. Remington*, 66 Tex. 109. It appears from the record that appellee did not defend against the lien claimed by appellants, but defended solely upon the ground that he was not liable on the accepted drafts, because Broome had not finished the building according to contract.

We are of opinion that the judgment of the court below should be reformed, and judgment entered here foreclosing appellants' lien against the building and lot. Reformed and rendered.

PER CURIAM. Adopted.

#### CARPENTER v. MINTER.

(Supreme Court of Texas. Dec. 31, 1888.)<sup>1</sup>

#### PROMISSORY NOTES—ATTORNEY'S FEES—SUBROGATION OF SURETY.

In an action by a surety against the maker of a note which stipulates that, in case of suit by payees, a certain per cent. shall be allowed as attorney's fees, the surety, having paid such note, is subrogated to the rights of the payees, and his affidavit for attachment, averring the indebtedness to be the amount of the principal, interest, and attorney's fees, is not at variance with the petition setting out such note.

Commissioners' decision. Appeal from district court, Wise county; F. E. PINER, Judge.

Action by J. C. Carpenter against T. A. Minter, to recover a sum of money paid as surety for the latter. Plaintiff alleged that on the 10th day of August, 1885, defendant executed a note to Henry Greathouse for \$306, due at 20 days, bearing 12 per cent. per annum from maturity; that plaintiff signed the note with defendant as principal, but was in fact only a surety for defendant; that by the execution of the note defendant and plaintiff became bound to pay the principal and interest thereon at maturity, and 10 per cent. attorney's fees on the amount, in case the note was not paid at maturity, making a total of \$336.60; that after the maturity of the note plaintiff paid the note in full to the payee. It is then alleged that defendant became liable to pay plaintiff \$336.60, being the amount actually paid out for defendant by plaintiff, including the 10 per cent. attorney's fees provided for, which sum defendant has wholly failed to pay, etc. The note, which is made an exhibit to the petition, is an ordinary promissory note for \$306, due in 20 days, bearing 12 per cent. interest per annum from maturity, with the following stipulation: "In case of non-payment of the above note at maturity, we hereby authorize any licensed attorney at law to appear for us in court, and accept service, waive process, and confess judgment in favor of the legal holder of said note against us for the amount of said note and interest, with 10 per cent. attorney fees additional." The note is signed by plaintiff and defendant. Plaintiff sued out an attachment, the affidavit for which avers that

the amount due by defendant is \$336.60, etc. Defendant's motion to quash the attachment "because the affidavit for attachment \* \* \* sets forth an indebtedness of \$336.60, while the petition \* \* \* shows an indebtedness of only \$306," was sustained, and plaintiff excepted. Judgment for plaintiff for \$328.95, and plaintiff appeals, and assigns error in the ruling of the court quashing the attachment proceedings on the ground of a variance between the petition and the affidavit for attachment.

*Gose & Bonner* and *L. C. Sparkman*, for appellant. *Craw, Patterson & Martin*, for appellee.

COLLARD, J. This case must be reversed. There was no variance between the affidavit for attachment and the petition. The affidavit claimed that \$336.60 was the amount justly due the plaintiff. The petition claimed by its allegation the same amount, and the exhibit attached to the petition did not show that a less amount was due. It is true, the petition alleged that the attorney's fees were to become due on maturity of the note, and the note, filed as an exhibit to the petition, only allowed attorney's fees in case of suit by the payees; but the surety paid the note on maturity, and then brought suit against his principal, the maker. This, of course, he had the right to do, and his right to sue was on the note itself. The error of the court below was in finding that the surety could only sue for the amount that appeared to be due on the note at the time it was paid by the surety without suit by the payee. This was incorrect. The surety, having paid the note, was subrogated to all the rights of the payee,—that is, to sue on the note, and recover the same amount the payee could have recovered by suit. The right of the surety, after payment of his principal's note, was not on the implied *assumpsit* for the amount paid, but to sue on the note itself. The payee by suit could have recovered the principal and interest and 10 per cent. attorney's fees on the amount. *Worsham v. Stevens*, 66 Tex. 89. The surety could, by suit on the note, recover the same judgment. The note was not extinguished by the surety's payment. *Tutt v. Thornton*, 57 Tex. 35; *Sheld. Subr.* § 86. An inspection of the petition and the exhibit does not show that the attorney's fees were not due, but that they were due plaintiff below. There was no variance between the petition and the affidavit for attachment. The cause should be reversed. Reversed and remanded.

PER CURIAM. Adopted.

#### BENDER et al. v. BEAN et al.

(Supreme Court of Arkansas. June 29, 1889.)<sup>2</sup>

#### EXECUTORS AND ADMINISTRATORS—RELINQUISHMENT OF REALTY—TAX-TITLES—REDEMPTION.

1. An order of the probate court authorizing an administrator, on his *ex parte* petition, to re-

<sup>1</sup>Publication delayed by failure to receive copy.

<sup>2</sup>Publication delayed by failure to receive copy.

linquish land belonging to the estate of his decedent to the vendor thereof, upon the latter's surrender of the notes given for the purchase money, does not operate to divest the title of the estate and vest it in the vendor, since it is not binding upon him.

2. A deed made pursuant to such order after the administrator's removal cannot pass any title, the jurisdiction of the court over the land having ceased, and the right of possession being in the heirs.

3. The minority of parties claiming land under an ancestor is no protection against the statute of limitations, where the right of action accrued and the statute began to run in the life-time of their ancestor.

4. Under Mansf. Dig. Ark. § 5792, providing that owners of land under tax-sales are entitled, upon redemption of the same, to the full cash value of improvements, made after two years from the date of sale, they are entitled thereto without deduction for rents received by them before such redemption.

Appeal from circuit court, Saline county; J. B. Wood, Judge.

*P. C. Dooley*, for appellants. *Ratcliffe & Fletcher* and *J. B. Jones*, for appellees.

COCKRILL, C. J. The complaint in this cause was filed for the purpose of effecting a redemption of the lands described therein from tax-sales. It alleged that the plaintiffs Julia and Adelia Bender, Sallie Morris, and Maggie Vanlandingham, together with Walter and David Bender and Agnes Douglas, were tenants in common and owners of the lands when they were forfeited for the non-payment of taxes; that the four first named were the minor children and heirs of Samuel Bender, deceased, who died seised of the lands, and that the others were the heirs at law of Agnes Douglas, who was daughter to Samuel Bender, and who died after the forfeitures; that each of the defendants Bean, Helms, and Haynes held part of the lands by virtue of donation deeds from the state, executed in pursuance of forfeitures for the non-payment of taxes; that they had made a tender to each of the amount required by law to redeem, and that the tenders had been refused. The prayer was for an account of rents, and for the enforcement of their right to redeem. Haynes and Helms filed a joint answer, admitting that they held under donation deeds, but denying that the plaintiffs were ever the owners of the lands, and alleged that they had paid taxes and put valuable improvements upon them. Bean denied that he held under a tax-deed, admitted that the lands in question had once belonged to Samuel Bender, the plaintiffs' ancestor, and that he had died seised and possessed thereof, but alleged that the administrator of his estate, acting under authority of the probate court of his appointment, conveyed the same to one David Bender before the forfeiture mentioned in the complaint, and that he had succeeded to David Bender's title through certain mesne conveyances. He pleaded the seven-year statute of limitations, alleged that the tax-titles of Haynes and Helms were irregular and void, made his answer a cross-complaint against them and the plaintiffs, and prayed that his title be quieted against the claim of

title of all the parties. Proof was taken, and the court heard the cause without objection from any source as to multifariousness or misjoinder of parties, and decreed that Bean had no title except as against the Douglas heirs; that the minor children of Samuel Bender were entitled to recover 4-7 of the land which he held; that they were entitled to redeem the same proportion of the lands held by Haynes and Helms on paying the excess of the amount of taxes paid, and the value of improvements made by the tax purchasers over the value of the rents enjoyed by them, and dismissed the complaint as to the heirs of Agnes Douglas. The plaintiffs appealed, and afterwards cross-appeals were allowed here in favor of each of the other parties. Bean argues that he succeeded to the title of Samuel Bender by virtue of the administrator's deed, and that the decree granting the plaintiffs relief against him is wrong for that reason. Haynes and Helms also argue that the administrator's deed divested the title of the plaintiffs before the forfeiture, and left them without interest to redeem; but say, if they are mistaken in that, that the court erred in refusing to allow them credit for the full amount of their tax expenses, and the value of the improvements, without diminution for rents enjoyed by them. The successful plaintiffs complain because they are required to pay for the improvements, and the other plaintiffs appeal because no relief was granted them.

The facts in relation to the execution of the deed by Bender's administrator are as follows: In 1860 Samuel Bender purchased the lands in dispute from David Bender, who, as all the parties admit, was then the owner in fee, making a cash payment, and giving his notes for \$2,000 for the deferred payments of the purchase money. A lien was retained in the deed as security for the payment of the unpaid purchase money. Samuel Bender died in January, 1869. In March of the same year Walter Bender was appointed administrator of his estate, and in August, 1871, presented his petition to the probate court of his appointment, alleging that the notes for the purchase money were unpaid, and that the lands were worth less than the principal and interest due on them; that the estate was insolvent; and that he was unable to discharge the notes if it was to the interest of the estate to do so; and prayed that authority be granted him to relinquish to David Bender all the interest of the estate in the lands, upon condition that he would surrender the purchase-money notes to the petitioner. The order of the probate court in this connection is as follows: "Upon examination it is considered and ordered by the court that the prayer of said petition be granted, and he [the administrator] is hereby authorized to make said relinquishment." The records of the administration of the estate of Samuel Bender were put in evidence, and it nowhere appears that the claim of David Bender against the estate of Samuel



was ever allowed by the court, or presented to the administrator. In June, 1873, the accounts of Bender's administrator were examined and approved, and the administrator was discharged. In October, 1874, a deed of relinquishment was executed by Walter Bender, purporting to act as administrator of the estate of Samuel Bender, deceased, to David Bender to carry out the order of August, 1871, in reference to the settlement of the purchase-money notes. The deed was acknowledged by Walter Bender before the probate court, and was spread at large upon the record. No order in reference to the matter was made by the court. David Bender appeared at the time the deed was acknowledged, and surrendered the purchase-money notes. No other action was had in the matter of the estate after the discharge of Walter Bender as administrator in 1873. The lands were assessed for taxation in the name of David Bender after 1874. He conveyed them to one Allen, and Allen to the defendant Bean. Bean, and those through whom he claimed title, had been in the adverse possession for more than seven years when the suit was instituted. Such is Bean's title.

1. The order of the probate court of August, 1871, was evidently made in pursuance of the supposed authority of the fourth section of chapter 3 of the so-called "Chapters of the Digest," which was to the effect that, where lands of a decedent had not been paid for, the court might, if it believed it advantageous to the estate, "order the same to be relinquished" to the vendor on the most advantageous terms that could be agreed upon. But the "Chapters of the Digest" did not receive legislative sanction in legal form, and the provision referred to never became a law. *Vinsant v. Knox*, 27 Ark. 267. In 1873 the legislature enacted that all sales previously made in pursuance of the "Chapters of the Digest" should be binding, (Acts 1873, p. 13;) but this act could add nothing to the validity of the order of August, 1871, because it was not in itself a sale, but purported only to confer authority upon the administrator to sell, and the power had not been executed when the healing act was passed. If the order rested upon the supposed authority of the "Chapters of the Digest," it was a nullity, and no rights could be acquired under it. But it is argued that under the act of March 16, 1871, which was in force when the order was made, the probate court was clothed with all necessary jurisdiction at law and in equity to do whatever was necessary to close up the administration of estates, (Acts 1871, p. 18;) and that as it is a superior court, and had jurisdiction of the subject-matter, the order is valid. But the order does not profess to divest the title of the estate and vest it in David Bender, as counsel argue; and, if it be admitted that the probate court had authority to do that, it could not have been effected upon the *ex parte* petition of the administrator. The order was not binding on David Bender. His assent to the condition

upon which the conveyance was to be made—that is, the surrender of the notes which he held—was necessary to give it effect. But his assent was not obtained, and no effort was made to execute the order, until the administrator had been shorn of his authority to act by the court's order of removal. What he did after removal was no more than the act of a stranger. The administration had ceased; the heirs had the right to the possession of the land, (*Stewart v. Smiley*, 46 Ark. 373;) and the court had lost its jurisdiction over it. An order confirming the execution of the previous power to sell under such circumstances could not have breathed life into the deed. It would have been an *ex parte* judgment, with no party in interest before the court, and no cause pending. See *Phelps v. Buck*, 40 Ark. 219; *Summers v. Howard*, 33 Ark. 490; *Guynn v. McCauley*, 32 Ark. 97. There was no error in declaring Bean's claim of title without foundation. The plaintiffs who recovered against Bean were minors when their cause of action accrued and when the suit was brought, and the statute of limitations did not operate as a bar against them. But the minority of the heirs of Agnes Douglas is no protection to them, because the statute was set in motion in the life-time of their mother.

2. It follows that the plaintiffs in whose favor the decree was rendered were owners of the lands when they were forfeited to the state for the non-payment of taxes, and, as they were within age when their suit was begun, their right to redeem was intact, and could be enforced in equity. *Carroll v. Johnson*, 41 Ark. 59; *Keith v. Freeman*, 43 Ark. 296. The question is, what must an infant pay to redeem, or what is the tax purchaser entitled to receive as the price of redemption? The answer, so far at least as the purchaser is concerned, depends upon the law in force when the rights of the parties accrued. *Railway Co. v. Alexander*, 49 Ark. 190, 4 S. W. Rep. 753. One of the tax-deeds is based upon a sale made in 1876, and the other in 1877. The lands were certified to the state land commissioner, and donation certificates were issued by him to the present claimants in 1879, and were followed by deeds in due course of time. The privilege of redemption was extended to minors by the revenue act of 1873, (Gantt's Dig. § 5197,) and has remained unchanged. By the seventeenth section of the amendment to the revenue law, enacted March 5, 1875, any person desiring to redeem lands sold for non-payment of taxes could do so within the time limited by law by paying "an amount of money equal to the taxes for which the land was sold, penalty, and cost of advertising, and the taxes subsequently paid thereon by such purchaser or those claiming under him, together with interest at the rate of 10 per cent. per annum on the whole amount so paid, and the amount paid by the purchaser for the certificate of purchase, and the expenses of advertising." Acts 1875, p. 227. While this sec-



tion applies to redemptions by minors, (*Keith v. Freeman*, supra,) the reference to payment for a certificate of purchase, without mentioning the deed, shows that the legislature had in view more particularly a redemption within two years from the sale, and before a deed issued. Nothing is said in this section about improvements; but in section 186 of the same act, (*Gantts' Dig.* § 5216,) it was declared that no compensation should be allowed for improvements made within two years of the sale, but that for "improvements made after two years from the date of sale [such] proceedings shall [should] be had in relation thereto, as shall be prescribed in any law existing at the time of such proceedings for the relief of occupying reclaimants of land." This law was in force when the forfeitures were had. It was, then, a condition upon which the right to redeem was granted to the minors, that the legislature might regulate the compensation to be paid by them for improvements thereafter placed on his land by the tax purchaser. The amount of the taxes, penalties, and the rate of interest the purchaser was to receive were unalterably fixed by the terms of the implied contract made at the date of his purchase. These are regulated, as we have seen, by the act of 1875, above quoted. The law for the relief of occupying tax claimants of land, in force when the suit was instituted, was the one hundred and fifty-fifth section of the revenue act of 1883, (*Mansf. Dig.* § 5792,) which provides that they shall be allowed the full cash value for improvements made after two years from the date of sale. The law was passed subsequent to the "betterment act," and gives to the claimant the right to compensation without the showing of belief in the integrity of his title, which is demanded by the latter act. Being the last expression of the legislature, and applicable especially to tax claimants who are favored by our enactments, it prevails in this suit.

The court followed the correct rule in allowing the tax purchasers the value of the improvements made by them. But upon what principle can they be charged with the value of the rents? Upon the execution of the tax-deeds they became the owners of the lands. *Craig v. Flanagan*, 21 Ark. 319. The minor's right to redeem is not an estate in the lands, but only a statutory privilege to defeat the purchaser's title within a limited time. That was the effect of the ruling in *Craig v. Flanagan*, supra, where the right to redeem by a non-resident (a privilege granted by a previous law) was considered. The right is analogous to a condition subsequent attached to an estate, and it was only by virtue of the statutory recognition of the minor's vendee that we were able to rule that the privilege was not strictly personal. *Neil v. Rozier*, 49 Ark. 551, 6 S. W. Rep. 157; *Mansf. Dig.* § 4272.

The plaintiffs' suit to redeem was an affirmation of the validity of the tax-titles, and an election to defeat them by complying with

the law governing such cases. It is true allegations of irregularities in the tax proceedings were made in the complaint, but the proof does not sustain them.

The court erred, therefore, in charging Haynes and Helms with rents. As to them the decree will be reversed, and the cause remanded, with instructions to enter a decree in accordance with the opinion. Otherwise the decree is affirmed.

#### DARDANELLE & R. RY. CO. v. SHINN.

(*Supreme Court of Arkansas.* Oct. 12, 1899.)

##### CONTRACT—INTERPRETATION.

In a contract by a ferry-man to transport all the passengers presented for ferriage by a railway company, from its terminus to a certain town, in consideration of one-fifth of the gross earnings of the railway on such passengers, the term "gross earnings" includes the entire sums received from passengers, including the amounts paid to a transfer company to which the railway has let the contract of hauling its passengers from its terminus to the specified town, where the railway sells the tickets of the transfer company, and manages it as part of its system.

Appeal from circuit court, Johnson county; J. E. CRAVENS, Special Judge.

*U. M. & G. B. Ross*, for appellant. *G. W. Shinn*, for appellee.

COCKRILL, C. J. The only question involved in this case is the true construction of the terms of a written contract. The record shows substantially the following state of facts: The appellant owns a short line of railway running between Russellville and a point on the Arkansas river opposite the town of Dardanelle. Shinn, the appellee, is proprietor of a steam-ferry between Dardanelle and a point near the terminus of the railroad track. The company is known as the Dardanelle & Russellville Railway Company, and sells tickets to passengers and issues bills of lading for freight, from the town of Dardanelle to Russellville, and from Russellville to Dardanelle. It maintains a passenger ticket office, and a warehouse for the receipt of freights, in the latter town. To facilitate the transaction of its freight and passenger business it entered into a written agreement with Shinn, by the terms of which the latter agreed (to quote from the contract) "to ferry all passengers, freight, baggage, mail, express matter, live-stock, and other kinds of freight presented for ferriage by the party of the second part [the company] in the course of transportation by it, together with such conveyances as may be necessary to convey and transfer the same with dispatch and safety across the Arkansas river, for and in consideration of which ferriage, and the services in regard thereto, the party of the second part hereby agrees to pay the party of the first part [Shinn] one-fifth of the actual gross earnings of the railway, the party of the second part, on all passengers, freight, mail, express, or other matter, of every kind and nature whatsoever, carried across the said river either way." Under the agreement the com-

pany transported its freights from the terminus of its track across the ferry to its destination in Dardanelle, and from Dardanelle to the railway, at its own cost, and accounted to Shinn for one-fifth of the gross amounts earned thereby, and for the same proportion of the gross receipts for mail and express matter. It let the contract to haul its passengers to a transfer company, which ostensibly charged 25 cents for transporting each passenger to or from the terminus of the track and points in the town of Dardanelle. The passenger vehicles were carried over the ferry without charge by Shinn, under the impression that they were acting for the railway company, as a continuation of its line. The railway company sold the hack tickets, and out of the proceeds paid the transfer company 20 cents for their services, and retained 5 cents as a commission for selling such tickets, and as pay from the transfer company for ferrage for their hacks. The fare on the railway proper between Dardanelle and Russellville was 50 cents, which sum, added to the hack fare, made 75 cents, for a complete ride between the two towns. Passengers were not required to purchase the hack tickets, and the railway fare entitled them to free ferrage without transportation from the terminus of the track to the ferry. The railway company accounted to Shinn for one-fifth of the amount collected by them as railway fare,—that is, 10 cents on each passenger and one-fifth of the 5 cents retained by them on the sale of each hack ticket. Shinn contended that he was entitled to 5 cents for each hack ticket sold, as being a part of the gross earnings contemplated by the contract. The railway company insisted that the transfer company was not a part of its system, and what it earned was a matter of no concern to Shinn. The latter instituted this suit to recover the difference between the amount he received and what he claimed. The cause was tried without a jury before the circuit judge, who heard testimony establishing the facts above detailed, and found therefrom that Shinn was entitled to recover. The only ground assigned for a new trial is that the finding is not sustained by the facts.

The duty of the judge was to ascertain what was meant by the parties by the use of the term "gross earnings of the railway." To do that it was necessary that he should put himself, as nearly as possible, in the position of the parties at the time of making the contract, and to inform himself of everything which could legally illuminate the question of their intention; for the foremost rule of interpretation is to give to language employed by the parties to a contract the meaning they intended, if it is capable of more than one interpretation. Could the circuit judge legally reach the conclusion that the term "gross earnings of the railway" included the earnings of the transfer company? The railway company was actually engaged in a transportation business other than that carried on by the railway proper; that is to

say, it ran a line of wagons from the termination of its tracks to the town of Dardanelle, in connection with, and as an appendage to, its railway business, in order to reach the destination its name indicated, and to fulfill the contracts for transportation it was in the habit of entering into after as well as before its stipulation with Shinn. It may not be strictly within the corporate powers of the railway to carry on a transportation business between its terminus and Dardanelle, but if such a business is operated by it, and a charge is made over the line as for one indivisible trip, what is received by the company as compensation therefor would be earnings of the railway company, for that is the style under which the concern is operated. An individual who contracted with the company about its earnings would be justified in that construction. The earnings of a railway, say the supreme court of the United States in the case of *Railway Co. v. U. S.*, 99 U. S. 419, "must be regarded as embracing all the earnings and income derived by the company from the railway proper, and all the appendages and appurtenances thereof, including its ferry and bridge, \* \* \* its cars, and all its property and apparatus legitimately connected with its railroad." That was the view entertained by the parties to the contract in dispute, as is shown by their division of the gross earnings for freight, etc., carried by the company. But by the terms of the contract freight and passengers are put upon exactly the same footing. It will not do, therefore, for the company to say that Shinn is entitled to one-fifth of the gross earnings received for freight, but shall not participate in like manner in the gross earnings from passengers, unless they can show some reason, other than the terms of the contract for the distinction. We do not understand that that is the position of the officers of the company who negotiated the contract with Shinn. They seem to assume because they have farmed out the privilege of running vehicles to transport passengers from the terminus of the road to the river and thence into Dardanelle, and thus shifted the burden of that part of the trip to other shoulders, they may share with Shinn the net profit that is received by them on such transportation, and, instead of paying him one-fifth of the gross sum received for such transportation, pay him one-fifth of the net earnings. But the non-ownership of the transportation company does not tend to alter the case so long as the transportation privilege is practically controlled or managed by the railway as part of the system. What is received from the passengers, under the circumstances, is as much a part of the gross earnings of the company as what is received for freight transported over its railway and wagon line. The latter the company concedes, as we have seen, is covered by the contract. There is no proof in the record to indicate that the state of facts existing at the time the contract was made would justify any distinction between

the gross earnings from the freight and passengers. Shinn's testimony is to the effect that, in carrying the passenger vehicles over his ferry without charge, he supposed they were a continuation of the railway line of business. The contract contemplates that such vehicles may be used by the company for that purpose; and there is nothing, except the company's subsequent refusal to pay, that tends to show that either party contemplated that such a distinction should exist. We think the circuit judge was warranted in concluding that the gross amount earned in the carriage of passengers between Russellville and Dardanelle was contemplated by the parties in the use of the terms adopted by them. We do not hold that the railway company is under obligation to Shinn to run a transfer business in connection with its railway, or that it may not run such a business south of the ferry into the town of Dardanelle without allowing him to participate in the receipts. Those questions are not before us. Affirmed.

#### SIMBALL *et al.* v. MORTON.

(Court of Appeals of Kentucky. May 80, 1889.)<sup>1</sup>

CONTRACT—QUANTUM MERUIT—VERDIOT.

1. Defendant employed plaintiffs to collect a claim against a railroad company, and agreed to pay them a per cent. of the amount realized or secured, "whether by suit, compromise, or otherwise; and, if nothing of said claim is realized or secured, said attorneys (plaintiffs) are to receive no compensation." The evidence showed that after much litigation, in which a judgment was procured, plaintiffs had advised defendant that the claim was hopeless. Afterwards defendant became one of a syndicate which bought the road, whereupon he abandoned the litigation. He afterwards realized the amount of his claim. Held, that plaintiffs were not entitled to recover under the contract.

2. A nominal verdict for plaintiffs in such case is not an inconsistency for which a new trial will be awarded.

Appeal from court of common pleas, Jefferson county; EMMET FIELD, Judge.

"Not to be officially reported."

John P. Morton, being a creditor of the Louisville, Cincinnati & Lexington Railroad Company, on December 28, 1874, employed J. R. Hallam, Bodley & Simrall, and R. W. Woolley as attorneys, to collect his debt, and entered into an agreement with them, of which the following was a part: "And for their services [the lawyers aforementioned] I agree to pay each of said firms a sum of money equal to the value of ten per cent. of any amount that shall hereafter be realized from or secured to me of said claim, whether by suit, compromise, or otherwise; and, if nothing of said claim is realized or secured, said attorneys are to receive no compensation." The attorneys obtained a judgment at law against the railroad company, which was insolvent. Execution issued thereon was returned "*nulla bona*," and then a suit in equity on the judgment was instituted, and an attempt was made to attach the net

earnings of said road in the hands of its receiver. This suit in equity was heard together with one by Douglass, trustee against the Louisville, Cincinnati & Lexington Railroad Company, and the attachment was sustained, but Morton's claim was postponed to that of certain mortgage creditors of the railroad company. From this judgment Morton appealed to this court, where the case was affirmed. See 12 Bush, 673. After this, Morton's attorneys instituted another suit against the directors of the railroad company in behalf of Morton. About this time Morton became a member of a syndicate that purchased said road at a judicial sale, and abandoned the litigation concerning his claim. Simrall & Bodley instituted this suit against John P. Morton to recover 10 per cent. of the amount they alleged he had made on his claim as a member of the syndicate, insisting that they were entitled to said amount by the terms of their contract with Morton. There was a judgment for defendant, which was reversed by this court, April 28, 1885.<sup>2</sup> On the return of the case there was a judgment for plaintiffs for one cent, and they appeal.

*Wm. Lindsay and Brown, Humphrey & Davie*, for appellants. *Barnett, Noble & Barnett and Dodd & Grubbs*, for appellees.

PRYOR, J. On the former hearing of the case in this court it was insisted by the appellants that the means adopted by the appellee to secure his debt were within the meaning of the contract under which they prosecuted the claim of the appellee, and when the object had been accomplished, viz., the debt secured, they were entitled to the agreed compensation, as there had been no express waiver of their claim for services; and it seems to us the only question now presented by the record is: Are the plaintiffs entitled to the value of their services rendered to the date of the formation of the syndicate and the abandonment of the litigation by the appellee? If abandoned without the consent of the appellants, they should be paid; if at the instance of, or by the consent of, the attorneys for the reason that future litigation was hopeless, then no recovery should be had. This was substantially the issue presented by the pleadings and tried on the return of the case to the lower court. If the court below has followed the mandate of this court as to the law of the case, we can then perceive no reason for disturbing the verdict.

The court, in instructions Nos. 1 and 2, presented the questions raised so that the jury could not have misconceived the issue. The jury was told that if the appellee was advised by his counsel, in effect, that further litigation was unnecessary, and that no recovery could be had so as to enable him to make his debt, etc., the law is for the defendant, but the plaintiffs cannot be bound by the "advice of any one else given the de-

<sup>1</sup> Publication delayed by failure to receive copy.

<sup>2</sup> Not reported.

fendant to that effect, unless the jury should believe from the evidence that the person so advising him (if any) was authorized by the plaintiffs to do so." For the plaintiffs the jury was told "that if the defendant, at his own instance, and not at the advice of the plaintiffs, or some one authorized by them, surrendered the debt for the collection of which he had employed the plaintiffs to sue, then the law is for the plaintiffs, and they are entitled to such a sum as will fairly compensate them for the services rendered in the effort to collect defendant's debt." On this issue, and the only one entitled to be presented to the jury either by the opinion formerly delivered in this case or from the evidence, the jury returned a verdict for the defendant, or, rather, for the plaintiffs, fixing the recovery at one cent.

On the trial the appellee testified that the senior counsel in the case, Judge Bodley, after this court had decided adversely to the appellee in his effort to make the debt, said to the appellee that this ended the matter. Judge Bodley had bestowed a great deal of labor on the preparation of the case, had argued the case in this court with much zeal and ability, and, on being informed of the result, was asked by the appellee what was to be done, and his reply was that this was the end of it, or words to that effect. It seems that the present appellants were not consulted, if at all, by the appellee, and that Judge B., by reason of the magnitude and importance of the case, and his confidence in the recovery for the appellee, was intrusted with its sole control. His remark to the appellee, with the construction that would naturally be placed upon it, was sufficient to induce the belief that in his (Judge B.'s) opinion further litigation was useless; and so the appellee must have regarded it, if we are to judge by his subsequent conduct. But it is said that, after this conversation with Judge Bodley, the appellants, under the contract, proceeded to bring another action to hold the stockholders of the railroad corporation liable for the debt. This fact does not appear. An action was instituted by Mr. Pindell, in conjunction with the surviving member of the firm of Bodley & Simrall, (Judge B. having died,) with this object in view. The appellee, however, testifies that Pindell told him "there was nothing to be made out of the suit, and that the syndicate was the only chance for him." It is evident, therefore, that the lawyers with whom the appellee consulted, and who were the active managing attorneys in the preparation of the case, regarded the case as hopeless; and the appellee, with a view of securing his debt, and at the risk of losing a great deal more, entered into the syndicate, and purchased the road. The stock at the time of the purchase by the syndicate was of no market value, and was in this condition until two years or more from the date of the purchase. The speculation turned out fortunately, the stock advancing in value to an extent that not only secured ap-

pellee's debt, but paid him greatly in excess of it. But for this act on the part of the appellee in purchasing the road, it is manifest that not one dollar of his debt would ever have been realized; and its recovery can in no wise be attributed to the services rendered by the appellants. That their services were valuable, and rendered at much loss of time and labor, cannot be questioned; but, the fee depending on the recovery, as none was had, the appellants must sustain the loss, as this entire record shows that but for the act of the appellee in investing as much money in the syndicate as he had already lost, for the purpose of regaining it, the loss to him would have been complete.

It is said, however, that the finding by the jury in favor of the plaintiffs for one cent in damages was inconsistent with the testimony; for, if the plaintiffs' theory was the correct one, the appellants were entitled to recover the value of their services as proven. It must be conceded, if the services had been rendered, to be paid for regardless of any contingency, that then the value of the services as fixed by the testimony must control, and the jury would have no right to disregard it; but here the testimony of the defendant conducted strongly to show that, although the services were rendered, the fee by the contract depending upon the contingency, and that contingency, the happening of which entitled the appellants to compensation, never happening, and the entire litigation being abandoned, left appellee to make his money as best he could. If the jury believed this,—and doubtless they did,—the verdict was in fact for the defendant, but requiring him, by giving nominal damages, to pay the cost of the suit. No claim or demand seems to have been made of Morton for these services for years, and not then until the stock in the road had become valuable, which was some years after the litigation had virtually ended. The surviving partners construed the contract as entitling them to compensation, although the money was secured otherwise than by the litigation. This construction was held to be erroneous, and the finding of the jury on the issue of fact, if the testimony of Morton is to be credited, ought not to be disturbed. The preponderance of the proof was on that side of the issue, and, the appellants not being entitled to any fixed sum, the verdict was not even against the evidence offered by the plaintiffs. It was held in the case of Hubbard v. Mason City, 64 Iowa, 245, 20 N. W. Rep. 172, that where the verdict for the plaintiff was only one dollar, the evidence being strongly against the right of recovery, the motion for a new trial was properly overruled. So the manuscript opinions of this court in the cases of Callahan v. Harris,<sup>1</sup> and Ray v. Jeffries, 5 S. W. Rep. 867, sustained the same view of the question as in the case reported in 64 Iowa, 20 N. W. Rep.; and those cases are distinguishable from the

<sup>1</sup>Not reported.

MS. opinions of this court in the cases of *Houston v. Blackwell*,<sup>1</sup> and *James v. Braswell*,<sup>1</sup> where the services were rendered, and no question at issue but the sum to which the plaintiffs were entitled as compensation; this court holding that the verdict in the case of *Houston v. Blackwell* was inconsistent with the testimony, and the jury had no right to disregard it. The inquiry, being why did the jury return a verdict of one cent only? is answered by a reference to the testimony, that conduces strongly to establish the defense; while, on the other hand, if the value of the services rendered by the appellants had been the only issue, the finding of the jury would have been flagrantly against the testimony, and a new trial would have been granted.

It appears from the testimony that Pindell, who prepared the last action or petition, was employed by the appellee to defend the action of Hallam against him for a like character of service, and originating from the same contract; that no demand or claim for the reasonable value of the services was made until after the success of the venture in which the appellee had engaged; that the deceased partner regarded the litigation as ended, and the circumstances tend to show that the effort to recover by suit ceased when the syndicate was formed; and the fact the appellee was willing to incur an additional liability equal to the amount already invested, the result of which depended upon what then seemed to be a reckless speculation, adds to the strength of the conclusion that all hope of recovery by suit had vanished. It is hardly reasonable to suppose that a man of business qualifications, with such heavy interests involved, would have turned a deaf ear to the advice of such distinguished counsel, who believed a recovery could be had, and embark in such a hazardous speculation as the appellee did in order to secure his debt. While the labor of years had been bestowed on the case in its preparation by an able and experienced lawyer, and the belief on the part of the junior members of the firm entertained that those labors would be fully compensated if success attended the speculation entered into by the appellee, this court is not justified in placing any other interpretation on the contract than has already been given it; and, the issue of fact being in effect determined for the defendant, in accordance with the law applicable to the case the judgment below must stand.

The interlineation of the instructions by the court after the case had gone to the jury could not have prejudiced either party; and so of the admission of the record in the suit against the railroad, showing its insolvency, and the claims of creditors. This record could not have influenced the jury either way; and, while the court should have designated what part of the record was to be considered as evidence, its introduction as a whole could not have affected the result. The instruc-

tions offered by plaintiffs and defendant were properly refused, and the instructions given made the issue so plain and simple that the jury must have known what they were called on to decide. Judgment affirmed.

#### MORTON *et al.* v. HALLAM, (two cases.)

(*Court of Appeals of Kentucky.* Oct. 10, 1889.)

##### ATTORNEYS' LIENS.

After an attorney had procured a judgment against a railroad company, all its property and franchises were sold to satisfy various liens. The client and others became purchasers, the company was reorganized, and stock was issued to the purchasers, by mutual agreement among them, in payment of their claims against the old company. Liens prior to the judgment procured by the attorney absorbed all the purchase price. *Held*, that the attorney had no lien, by virtue of the judgment, on the stock which was issued to his client.

Appeal from chancery court, Campbell county.

"To be officially reported."

*Lytleton Cooke, A. Barnett, Geo. Washington, and J. C. Wright*, for appellants. *O'Hara & Bryan, R. W. Nelson, Hallam & Myers, and E. F. Trabus*, for appellee.

PRYOR, J. This appeal is prosecuted by John P. Morton & Co. and the Louisville & Nashville Railroad Company from a judgment of the Campbell chancery court in favor of the appellee, J. R. Hallam. The action was instituted to enforce a lien asserted by the appellee as an attorney at law for his fees under a contract with John P. Morton & Co., who were his clients, in a litigation with the Louisville, Cincinnati & Lexington Railroad Company. The lien, as is alleged, existed on the stock of the Cincinnati & Lexington Railway Company that was created by the purchase through a syndicate of the Cincinnati & Lexington Railway Company, John P. Morton being one of the purchasers, and accepting for his debts against the old company stock in the new company, the Cincinnati & Lexington Railway Company. The old company—the Louisville, Cincinnati & Lexington Railroad Company—was largely indebted to the firm, of John P. Morton & Co., and, being insolvent, the appellee, J. R. Hallam, was employed, in conjunction with R. W. Woolley and Bodley & Simrall, by the firm of John P. Morton & Co., to secure in some way by suit these large sums of money due the firm. They entered into a written contract, by which they were to bring one or more suits, as in their judgment might be proper, against the railroad company and others, and for their services the firm "agreed to pay each of the three firms of attorneys a sum of money equal to the value of ten per cent. of any amount that shall hereafter be realized from, or secured to us on, said claims, whether by suit, compromise, or otherwise." This contract was entered into in December, 1874. Certain actions were instituted under this contract in the courts of Jefferson county against the Louisville, Cincinnati & Lex-

<sup>1</sup> Not reported.

ington Railroad Company, and judgments recovered for large sums of money, amounting in the aggregate to about \$130,000, including the interest. The indebtedness was evidenced by written obligations, and no controversy existed as to the right to a judgment, except as to usury alleged to have been embraced in the transactions. In September, 1874, this corporation, or its property, had been placed in the hands of a receiver at the suit of one Douglass, then pending in the Louisville chancery court, for the benefit of the holders of certain mortgage bonds. The contract with the appellee was made in December following; and in the condition the railroad company was then in, millions of dollars had to be paid, by reason of liens, before the non-preferred creditors could share in the proceeds of the railroad property. Upon a return of "no property" Morton & Co., through their counsel, had an attachment levied on the railroad property, including all the rights, franchises, etc., pertaining to it, and, their suits being consolidated with that of Douglass, and other actions, the road, together with its property, franchises, etc., was sold and purchased by a syndicate, of which the firm of Morton & Co. was a member. The attachment lien of Morton & Co. was inferior to other liens existing by mortgage, etc., for several millions of dollars, at the time the syndicate was formed and the purchase made; and it is evident that the stock accepted by the appellants Morton & Co. in the new enterprise,—the Cincinnati & Lexington Railway Company,—in lieu of its debts, was at that time of but little, if any, value. Morton & Co., instead of making their debts, had incurred a much greater liability by becoming bound, as purchasers of the old road, for several millions of dollars of liens prior in law and equity to their purchase, and which had to be satisfied. They acquired no lien or preferred claim by reason of the attachment levied on this railroad property that placed them in any better condition than any unsecured creditor; but, on the contrary, were risking a loss of more money, by entering into the syndicate, and forming a new corporation that in running the road might meet with the same fate as the old corporation. The stock in the new corporation—the Cincinnati & Lexington Railway Company—was issued under the agreement between those who purchased the road, John P. Morton & Co., being among the number, and the appellee, Hallam, as the attorney for Morton & Co., had no interest in the stock, and was in no manner connected with the purchase. He had sued the appellants Morton & Co., on the contract of employment in the Jefferson court of common pleas in March, 1879, and Morton & Co. had procured this stock and entered into the syndicate in the year 1877, under which the purchase was made. No lien was asserted by the appellee, or claim set up to this stock, until these actions were instituted in the Campbell chancery court, in July, 1881. The

appellants Morton & Co. resided in the city of Louisville, and so did the chief officers of the corporations, made defendants to his action, and the right of the appellee to maintain his action is based upon the fact that the garnishee, or, rather, the Louisville & Nashville Railroad Company, had been served in the county of Campbell, and that this corporation had purchased of Morton & Co. the stock of the Cincinnati & Lexington Railway Company, that had been assigned or issued to him by the syndicate creating the last company; and that, having a lien by reason of his services as attorney on the property rights and franchises of the Cincinnati & Lexington Railroad Company, the Louisville & Nashville Railroad Company must be presumed to have had notice of his lien when it purchased the stock of Morton & Co.; that the Louisville & Nashville Railroad Company had acquired stock in the new company, on which he held a lien as an attorney, by reason of the judgment obtained against the old company.

It is insisted by the appellants that the service of process on the station agent of the corporations was not a legal service; and by Morton & Co., that the appellee had no right to prosecute this action against them to enforce the lien until he first established a valid claim upon which to base his lien, and to do this he was compelled to bring his suit where the defendant lived, in the absence of an actual service in the county where the action was instituted. His action in the Jefferson court of common pleas on the original contract is still pending, and by the judgment of the Campbell chancery court the Louisville & Nashville Railroad Company is made to pay for having purchased subject to a lien that may be shown, when the action is tried in Jefferson county, never to have existed. It is said, however, that Morton & Co. entered their appearance in Campbell county, and made no objection, or failed to take an exception to the action of the chancellor in sustaining demurrers to their several defenses. The record is somewhat confused, and it is difficult to determine whether an objection was made or an exception reserved; and, in view of the facts before us, it is only necessary to determine whether any lien existed in favor of the appellee on this stock sold the Louisville & Nashville Railroad Company by Morton & Co. No personal judgment was rendered against Morton & Co.; but a judgment was rendered against the Louisville & Nashville Railroad Company, requiring the latter to pay the appellee about \$20,000, with interest from July, 1881, his part of the proceeds of the speculation made by Morton & Co. in the purchase of the road, upon the idea that, under the terms of the contract, the debt of Morton was secured by reason of the services of his attorneys. This court, as the case is now prepared, will not undertake to pass on the merits of the controversy, and, as said in a former case involving a like question upon the same contract, ante, 185, if

John P. Morton embarked in this enterprise, and abandoned these suits without the consent of his attorneys, in that event the attorneys would be entitled to a reasonable compensation for the services rendered.

What character of lien, assuming that a valid claim existed on the part of the appellee against Morton & Co., did the appellee have on the property and stocks sold the appellant, the Louisville & Nashville Railroad Company? We have looked to the facts of this record, and are unable to find any rule of law or equity or statutory regulation with regard to the fees of counsel that would create such a lien. The action of Douglass in the interest of bondholders, as well as the actions of the appellants Morton & Co. against the old or first-named corporation, had gone to judgment. From that judgment the appellee, as attorney, claims the lien originates. That judgment was to sell all the property rights and franchises of the corporation. The sale was made, and the road purchased by the syndicate for \$800,000, and bonds executed for the purchase money. The purchasers took the property subject to the liens of the bondholders, that amounted to several millions of dollars. All the creditors, including bondholders, as well as Morton & Co., looked to this judgment to satisfy their claims. Morton's judgment, with his attachment, was gone, in so far as it created any lien, because the property was sold to satisfy it. The bondholders had priority, because the sale was subject to their lien. Morton & Co., as well as the other creditors, could look to nothing else but this judgment of sale, or the bonds executed in pursuance of the judgment, to satisfy their demands, and when it clearly appears that the prior liens swallowed up all the purchase money, and there was nothing left to pay the claim of Morton & Co., what lien had the appellee by reason of the judgment that could be enforced? If the stock Morton obtained in the new corporation had, at the time it was issued, been worth what it called for in money, what lien would the attorney have as against a *bona fide* purchaser? The purchaser would look to the judgment, and that was satisfied; or, if not, he would see that Morton could derive no benefit from it because of the preferred claims, and he certainly would not be required to investigate the result of the speculation entered into by the syndicate. Suppose that Morton had been no party to the purchase, the attorney would have no lien as to third persons, because he must look alone to the judgment he had recovered; and, that judgment being satisfied by the payment of other claims, he would be remediless as against a purchaser of the road or the stock of Morton. If it can be said that the attorney had any interest in this stock, there was no notice, actual or constructive, to the Louisville & Nashville Railroad Company of the existence of any lien; and when the purchase money was paid, and the bondholders satisfied, the Louisville & Nashville Railroad Company took under the purchase,

free of any lien the appellee may have had. How a lien can exist, as to third parties, by reason of a judgment that is satisfied in full by the payment to creditors entitled to the fund, as against the claim of the one asserting the lien, it is difficult to comprehend. If Morton got nothing by the judgment, the attorney could occupy no better position than his client. The fact that Morton & Co. made by the purchase would affect them, if the appellee by his contract was entitled to any part of what was made by the venture; but when the rights of *bona fide* purchasers are concerned, it presents a different question. There being no lien to assert against the appellant the Louisville & Nashville Railroad Company, the judgment below was erroneous, and is reversed, with directions to dismiss the petitions as to both the appellants in both appeals, without prejudice.

#### KERFOOT v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 10, 1889.)

##### PERJURY—INDICTMENT.

Gen. St. Ky. c. 29, art. 8, § 2, provides that if any person after being sworn by a person authorized to administer oaths, upon a matter whereon he can be legally sworn, shall swear falsely, he shall be confined in the penitentiary, etc. Crim. Code, § 82, provides that a magistrate may examine any person on oath concerning the commission of a public offense. *Held*, that an indictment for false swearing upon an investigation before a police judge as to whether whisky had been sold in a certain town, alleging that an ordinance of the town prohibited such sale therein, does not sufficiently charge that the accused was sworn upon a matter whereon he could be legally sworn, for the violation of such an ordinance is not shown to be a public offense without setting out the authority by which it was enacted, as Gen. St. c. 107, art. 8, § 1, providing that town trustees may make such regulations for the government thereof as are not inconsistent with the laws of the state, does not confer upon them power to prohibit the sale of liquor, that being regulated by general laws.

Appeal from circuit court, Hardin county.  
"To be officially reported."

*Hargis & Eastin* and *T. A. Robertson*, for appellant. *P. W. Hardin*, Atty. Gen., for the Commonwealth.

*Lewis*, C. J. Appellant was tried and convicted under an indictment for false swearing, charged to have been committed as follows: "The said Henry Kerfoot did willfully, falsely, and feloniously swear and state in the police court of the town of Elizabethtown, after first being sworn by J. D. Irwin, the police judge of said court, to testify as a witness, that he had bought whisky on the ——— day of ———, of John Jones, in an alley of said Elizabethtown. The police court was then investigating whether said Kerfoot had bought whisky in the aforesaid town; if so, from whom he had bought it; which said statement was false, untrue, and so known to be by said Kerfoot when he swore and stated it." The only ground for reversal necessary to be considered is the action of the lower court in overruling the mo-



tion in arrest of judgment, which, as provided in section 276, Crim. Code, involves the inquiry whether the facts stated in the indictment constitute a public offense within the jurisdiction of the court. The offense charged is described in section 2, art. 8, c. 29, Gen. St., as follows: "If any person, in any matter which is or may be judicially pending, or on any subject on which he can be legally sworn, or on which he is required to be sworn, when sworn by a person authorized by law to administer an oath, shall willfully and knowingly swear, depose, or give in evidence that which is false, he shall be confined in the penitentiary not less than one nor more than five years." Though there appear to be three distinct conditions upon the existence of either of which a person may be convicted under that section, obviously it is necessary that the false swearing be in a matter on which the law authorizes or requires an oath to be taken, and, moreover, he must be sworn by an officer legally empowered to administer the oath. And such was in effect the ruling of this court in *Com. v. Powell*, 2 Metc. (Ky.) 10, where this language was used: "The offense is complete if it be shown the false oath was taken on a subject on which the party could be legally sworn, and before a person legally authorized to administer the oath." It is charged in the indictment, that, at the time of the alleged false swearing, "the said police court was investigating whether said Kerfoot had bought whisky in the aforesaid town; if so, from whom he had bought it;" and, in substance, that the false statement was made by the accused in said police court, after being sworn by the judge thereof to testify as a witness in such investigation. The only authority for such a proceeding is section 32, Crim. Code, which provides that "a magistrate, if satisfied that any public offense has been committed, shall have power to summon before him any person he may think proper for examination on oath concerning it, to enable him to ascertain the offender, and to issue a warrant for his arrest." But, under that section, a magistrate has no power to administer an oath, nor could a person be legally sworn unless the matter concerning which the examination is had be a public offense.

In our opinion, it is not sufficiently charged in the indictment that the matter on which the accused was sworn—that is, the sale to him of whisky, at the time and place named, by Jones—was such as might be judicially pending, or on which the accused could be legally sworn, or was required to be sworn. For it does not appear from the indictment that such sale by Jones was a public offense for which he could be legally arrested or punished, the only allegation relating to the subject being that "there was at the time an ordinance of said town prohibiting the sale of whisky in said town." It is true, section 1, art. 8, c. 107, Gen. St., provides that "trustees of towns may make such rules and

regulations for the government thereof, not inconsistent with the laws and constitution of this commonwealth, as they may deem necessary and proper." But that section does not, in the absence of express and specific statutory authority, confer upon trustees of towns power to prohibit by ordinance the sale of liquor; that is regulated by general laws. And, consequently, the mere allegation that there was an ordinance of said town prohibiting the sale of whisky therein, without the terms of such ordinance, or authority of the trustees to enact it, being set forth, is not sufficient to show that Jones was, by the sale of liquor to the accused, guilty of a public offense; and, unless he was, the matter could not, in the language of the statute, be judicially pending, nor could the accused be legally required to be sworn on it.

We think, therefore, the lower court erred in overruling the motion in arrest of judgment, and the judgment of conviction is reversed, and cause remanded to dismiss the indictment.

VANCE v. FIELD, Judge.

(Court of Appeals of Kentucky. Oct. 12, 1889.)

CHANGE OF VENUE—AFFIDAVIT.

An affidavit, filed by plaintiff in the trial court, "that the judge \* \* \* will not afford him a fair and impartial trial," without stating any facts upon which such belief is founded, does not entitle him to a transfer of the action to another court.

Petition for *mandamus*.

"To be officially reported."

*Barnett, Miller & Barnett, W. W. Thum, and C. B. Seymour*, for plaintiff. *O'Neal, Jackson & Phelps and John S. Jackman*, for defendant.

LEWIS, C. J. This is a proceeding by Burton Vance for a *mandamus* from this court, requiring Emmet Field, judge of the Jefferson court of common pleas, to proceed according to the rules of court and law of the land to judgment with an action ordinary, in which said Vance is plaintiff, and the Louisville Courier Journal Company is defendant. It appears from the petition filed in this court, and transcript of the record accompanying it, that the action was, in December, 1886, commenced in the Louisville law and equity court, and the parties had pleaded to an issue triable by jury when, February 4, 1889, the plaintiff filed with the clerk of that court the following affidavit: "The plaintiff, Burton Vance, on oath says that the judge before whom the above-styled action is now pending will not afford him a fair and impartial trial." But, notwithstanding the affidavit was filed, and objection made to the jurisdiction of the court, the action was, February 12, 1889, submitted to a jury for trial, who, however, having failed to agree on a verdict, were, February 15, 1889, discharged. Whereupon, on motion of the defendant, an order of court was reassigning the action for trial



April 12, 1889; and April 11, 1889, another order was made in the same court assigning it for trial June 15, 1889. It further appears that February 25, 1889, the plaintiff, in writing, directed the clerk of the Jefferson court of common pleas to place said action upon the docket of cases set at rules in that court to be called March 18, 1889, which was done; and, upon call of said action, the plaintiff moved the last-named court to assign it to a day for trial, and to proceed with it to judgment; but the court refused to permit any entry of the motion, or of exceptions to its action or non-action, or to grant an appeal to this court, the reason, as appears from minutes of the proceeding then had, and as stated in the answer of the judge to the petition filed in this court, being that the action had not been transferred from the Louisville law and equity court to the Jefferson court of common pleas, and the latter had, consequently, no jurisdiction of it.

Section 477, Civil Code, is as follows: "The writ of *mandamus*, as treated of in this chapter, is an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act, or omit to do an act, the performance or omission of which is enjoined by law; and it is granted on the motion of the party aggrieved, or of the commonwealth, when the public interest is affected." The writ of *mandamus* as thus defined and treated of in the Civil Code cannot, in any case, be issued by this court, which is of appellate, and not original, jurisdiction; but its power to issue the writ, where there is a right, and no other specific remedy, directed to even an inferior court of judicature within its jurisdiction, still exists as it did before the adoption of the Civil Code, and, as the language of the section quoted plainly implies, was not intended by the legislature to be taken away or impaired. But it is not necessary to here discuss the extent of that power, or class of cases, in which it may be properly exercised, because in our opinion the Jefferson court of common pleas has no jurisdiction of the action in question, nor legal authority to make any orders in it, and, therefore, cannot be required to proceed with it, for it never has been transferred from, but is still pending in, the Louisville law and equity court.

In the case of *Insurance Co. v. Landram*, 11 S. W. Rep. 367, (decided by this court March 28, 1889,) it was held that an affidavit identical with the one filed by the plaintiff in the Louisville law and equity court was not sufficient to require the judge of a court to vacate the bench, or to deprive him of the power to try the action; and that "the fact or facts upon which the belief that the judge will not give the litigant a fair trial should and must be stated in the affidavit, and they must be of such a character as should prevent the judge from properly presiding in the case." As the affidavit filed by the plaintiff contains simply an expression of his belief that the judge of the Louisville law and

equity court will not afford him a fair and impartial trial, without a statement of any fact whatever upon which the belief is founded, he was, according to the case referred to, clearly not entitled to a transfer of the action to another court; and it would be unnecessary to say anything further on the subject, except that counsel in arguing this seem to have to some extent misconstrued the opinion in that case. It was not intended to there decide that the judge of the court has the right to put in issue or call in question the truth of the statement of facts contained in the affidavit, but simply that there must be in the affidavit such fact or ground for the belief stated "as would prevent an official of personal integrity from presiding in the case," or as would prevent him affording a fair and impartial trial; and, when such affidavit is filed, the statement of facts it contains, and of the belief founded thereon, must be taken as true. Nor was it intended by the opinion to decide that a party may not file an affidavit based upon facts discovered after the issues are formed. Wherefore the application for the writ of *mandamus* is refused.

#### DICKISON et al. v. OGDEN'S EX'R et al.

(Court of Appeals of Kentucky. Oct. 5, 1889.)  
WILLS—DEFEASIBLE FEES—TRUSTS—RIGHTS OF CREDITORS.

Testator devised property in trust for his daughter and her children, with power to the trustees to sell and reinvest. The trustees were directed to permit the daughter to have possession and enjoy the property, and to receive the yearly rents and profits during her natural life, "and after her death then in trust for the use and benefit of the children of my daughter and the descendants of such children as may be dead; and, on the arrival at age of the youngest of my daughter's children, or upon the marriage of said youngest child, then to divide the estate into as many shares as there are children of my said daughter then living and children of my said daughter who are dead leaving descendants then alive," and convey one share to each living child, and one to the descendants of each child. Held, that the daughter's children took a defeasible fee, which interest could be sold for the payment of their debts during the life of the daughter, notwithstanding the trust, under Gen. St. Ky. c. 68, § 21, which declares that estates of every kind, held or possessed in trust, shall be subject to the debts of the beneficiary.

Appeal from circuit court, Warren county.

"To be officially reported."

H. T. Clark, for appellants. Wright & McElroy, for appellees.

PRYOR, J. The will of Thomas Rogers is before us for construction. After making various devises, etc., the testator gives all the rest and residue of his estate to three trustees, to be held by them for the benefit of his daughter, Mary Jane Dickison, and her children, with the power to the trustees or the survivor to sell and reinvest the proceeds in other property, with the consent of his daughter, etc. The trustees "shall suffer and permit my said daughter to have possession and enjoy the said property, and to take and receive the yearly rents and profits thereof, during her natural life, and after her

death then in trust for the use and benefit of the children of my daughter and the descendants of such children as may be dead; and on the arrival at age of the youngest of my daughter's children, or upon the marriage of said youngest child, then to divide the estate into as many shares as there are children of my said daughter then living and children of my said daughter who are dead leaving descendants then alive, and convey one share to each of the children then living, and one share to the descendants of each of the children who may be dead, the children to take such portions of the share as their parents would have been entitled to and no more." Two of the children of the devisee became involved in debt, and their creditors are attempting to subject their interest in the land, which constitutes the trust fund, or a part of it, to the payment of their debts; and the only question presented is: Have they such an interest as can be subjected to sale by creditors, the life-tenant being still alive? The chancellor below has so adjudged, and in this conclusion we concur. The beneficiaries of the testator are his widow and children. The plain provision of the will, and such was the intention of the deviser, was to vest the daughter with an estate for life, remainder to her children, the land to be divided at a certain period between such of the children as might then be living. The children took as remainder-men, subject to be divested of title by their death before the happening of the event designated as the time the division is to be made. It is in the nature of a defensible fee, and such an estate, notwithstanding the legal title is in trustees, may be sold to pay the debts of the remainder-man. It is argued that a sale of the children's interest would defeat the object of the testator, when confiding in the trustees, or a majority of them, the power to sell and reinvest the trust fund. The manifest purpose of this provision of the will was to enable the trustees to invest when in their judgment it would prove beneficial to the life-tenant, and, of course, looking to the rights of those in remainder. The life-tenant was to be consulted in regard to the investment, and none could be made without her consent, as it was her comfort and support that the testator was evidently looking to when this clause of the will was inserted. The purchaser stands in the shoes of the child whose interest he buys, and cannot prevent the reinvestment of the trust fund for the purposes and in the manner directed by the will. If the child could not prevent it, his vendee is placed by his purchase in no better condition. The statute of this state, found in section 21 of chapter 63, Gen. St., also provides that estates of every kind, held or possessed in trust, shall be subject to the debts, etc., of the person for whose use and benefit the trust property shall be held. As the appellants had an interest in this trust fund, the chancellor properly adjudged that interest liable for their debts. Judgment affirmed.

STEPHENS v. STEPHENS' ADM'RS.

SAME v. BLACKBURN'S TRUSTEE.

(Court of Appeals of Kentucky. Oct. 12, 1889.)

RESULTING TRUSTS—CO-EXECUTORS.

1. In consideration of a conveyance of land, testator's two sons executed a note to him, binding themselves, jointly and severally, to pay interest thereon semi-annually, and the principal, when due, to specified beneficiaries. By his will, appointing his two sons executors, testator provided that the note should be held by his son N. in trust to pay over the semi-annual interest, the principal to be retained undiminished, "and I forbid any other use or appropriation of said funds in any way whatsoever." N. became active executor, and released his brother from liability on the note in consideration of certain land conveyed to him individually, and the transfer of an interest in certain other notes. Held, that such release was invalid, and that the land conveyed in consideration thereof, and its proceeds in the hands of N.'s representative, were held in trust for his brother or the beneficiaries.

2. No trust resulted as to the proceeds of the notes received as part consideration for such release, and collected by N. and applied to his own use while acting executor.

3. Gen. St. Ky. c. 89, art. 2, § 33, providing for the payment in full out of an insolvent decedent's estate of funds held by him of a dead person, ward, or one of unsound mind, is not applicable to an action by N.'s committee to settle his insolvent estate, though he died during the pendency of the suit.

Appeals from chancery court, Kenton county.

"To be officially reported."

O'Hara & Bryan, for appellant. Cleary & Hamilton, for appellees.

HOLT, J. February 25, 1867, N. B. Stephens and his brother, the appellant, L. B. Stephens, executed an obligation acknowledging an indebtedness by them to their father, Leonard Stephens, in consideration of land conveyed by him to them of \$14,647.69, and by his direction binding themselves, jointly and severally, to pay the interest thereon semi-annually to his granddaughter, Mary L. Blackburn, during her life, and thereafter to her children during their minority, each of them to receive his or her proportion of the principal upon arriving at age; and, in the event the granddaughter died without surviving children, then to pay it and any unpaid interest to their father's heirs as if he had died intestate. He retained the obligation until his death, which took place in March, 1873. While he held it he collected the semi-annual payments of interest, but paid them over to the granddaughter. He also, in a letter to her dated January 30, 1868, stated, in substance, that he held it in trust for her, and suggested that she retain the letter as evidence of it. His will, executed on December 30, 1871, recites the holding of the obligation by him for her and her children, and provides that it is to be for her separate use; "but the same shall pass to and be held by my son N. B. Stephens as trustee for her, who shall manage the same, and pay over to her semi-annually the interest and profits thereof, only the principal to be retained undiminished and to descend to

her children after her death, and I forbld any other use or appropriation of said funds in any way whatsoever." The two sons were appointed his executors, and qualified as such; N. B. Stephens, however, taking charge of the estate, and becoming the active executor. He also, as trustee, but without giving any bond, (inasmuch as the will provided that it should not be required,) took control of the note upon himself and the appellant. March 1, 1874, the appellant paid to him one-half of the note, and it was thus indorsed by him: "L. B. Stephens has this day paid me, as trustee of J. M. and M. L. Blackburn, \$7,323.84, which is the one-half thereof, and all interest which had accrued to this date, and the note, so far as he is concerned, is canceled March 1, 1874. N. B. STEPHENS, Trustee of J. M. and M. L. Blackburn." This payment was made by the conveyance of about 68 acres of land at the price of \$4,126.87 to N. B. Stephens, in his individual name, by the appellant, and the release by him to N. B. Stephens of his one-half interest in certain land notes devised to them jointly by their father. It does not appear whether N. B. Stephens had then collected them, and was merely allowed by the appellant to retain his one-half of the proceeds, or whether the active executor subsequently collected them. It is reasonably certain, however, from this record that the money had come to N. B. Stephens' hands before he was adjudged an imbecile on May 16, 1882. This action was brought by his committee to settle his estate, which is insolvent. By proper cross-pleadings the appellant and the present trustee of the Blackburns have presented the questions—*First*, whether the payment by the appellant to N. B. Stephens of one-half of the note, in the manner recited, released him from further liability upon it; and, *second*, if not, whether, to the extent of the payment, he is a preferred creditor of N. B. Stephens' estate, which is now represented in this action by his administrator, he having died pending the litigation, and whether the Blackburns and their trustee should be secured in the payment of the trust fund, dollar for dollar, out of N. B. Stephens' estate, to the extent of the payment to him by L. B. Stephens, before the general creditors can receive anything.

It is urged upon the part of the appellant that by the will of Leonard Stephens the title to the note passed to the trustee; that he had unlimited control over the fund represented by it, and that therefore the release upon it of the appellant from further liability was valid, and is effective for the intended purpose. We do not think they had a right to thus traffic with each other. Both were bound for the full amount of the note. The trustee had no right to diminish the security for its payment. Moreover the will not only did not authorize him, of his own will, and in his own discretion, to change the investment and security of the fund, but it in substance, if not expressly, forbade it. Whether this could

have been done by the order of, and under the direction of, a court of chancery is a question not now presented. To permit the trustee to deal, as was done in this instance, with one who was familiar with the terms and nature of the trust, to their own profit and advantage, and then hold that it operated to release the latter from his liability for the trust fund, would open a door through which wrong and injustice could walk with impunity. We fail to see, however, why the 68-acre tract of land, or its proceeds, less the small portion thereof sold by N. B. Stephens to J. T. Richardson, should not be treated as held in trust for the beneficiaries of the note, or for the appellant, who is still liable for it. As the payment to N. B. Stephens and release by him to the appellant was not valid, certainly as between them the latter would have been entitled to a reconveyance of his land. There was no consideration for its transfer. Equity would have treated N. B. Stephens as holding it in trust for the appellant. Its identity had not been lost when N. B. Stephens was adjudged of unsound mind. It is averred in the answer of the appellant, and not denied, that the title to it was then in N. B. Stephens, save as to the small portion sold Richardson; and, while it does not expressly appear from this record that it was sold by his committee, yet, from what does appear, we so infer. In any event it was not disposed of by N. B. Stephens. It or its proceeds came, therefore, to his committee as a part of his estate. In such a case, if the property yet exists in kind, his estate should not be allowed to hold it; and, if the representative of the estate has received the proceeds of it, they should not be retained by him. The same result follows as if one by misrepresentation, conspiracy, intimidation, surprise, or any other practice at variance with honest gain, has been induced to convey the legal title to his real estate. A court of equity will not in such a case, or where the consideration for a conveyance, attended by circumstances like this one, fails, permit the grantee to enjoy the beneficial interest, but will regard him as a trustee, compel him to account upon equitable principles, and reconvey the property. This rule does not apply to the payment by the appellant to N. B. Stephens so far as it was made in money, or by notes which were collected by the latter and applied by him to his own use, or disposed of by him before he was adjudged of unsound mind. The equitable rule we have been considering cannot well be applied to money in such a case. It loses its earmarks, and equity can do no better in such a case than treat the payor as a creditor of the payee.

The thirty-third section of article 2, c. 39, of the General Statutes, providing for the payment in full out of the estate of an insolvent decedent of funds held by him of a dead person, ward, or one of unsound mind, has no application to this case. The fund in contest is going to parties who do not fall within the

description of those named in the statute, and the relief now granted rests upon the general rules of equity.

The judgment does not determine the question as to the right of the appellant to be treated as a preferred creditor of N. B. Stephens' estate as to one-half of the J. C. Thomas \$1,060 note, due July 27, 1882. We will not, therefore, consider it. Nor does the judgment, in express words, say that the appellant is to no extent to be regarded as such a creditor by reason of the payment to his brother of one-half of the trust note. Such relief was asked both by him and the trustee of the Blackburns. It is expressly refused *in toto* as to the latter, and we regard the judgment as in substance holding that neither the trustee nor the appellant is entitled to any relief on this account.

The judgment of November 18, 1887, is therefore reversed to the extent indicated, and cause remanded, with directions to settle the estate of N. B. Stephens in conformity to the principles of this opinion, and for any orders that may be necessary to protect the trust-estate of the Blackburns in connection therewith. The appeal from the judgment of February 13, 1888, in favor of the trustee and against the appellant for an installment of interest due upon the \$14,647.69 note is affirmed.

#### MILLER *et al.* v. BENNETT.

(Court of Appeals of Kentucky. Oct. 15, 1889.)

##### HOMESTEAD—TIME OF CLAIM—LACHES.

Defendant's undivided interest in his father's estate and the right of redemption were sold on execution. Shortly afterwards, by partition of such estate, a house and lot were allotted to him, into which he moved with his family within four months after his father's death, and ten days after partition. *Held*, that there was no unreasonable delay in asserting his claim, and he was entitled to claim the property as his homestead, having no other, as he was not required to notify the purchaser of the undivided interest that he would claim a homestead.

Appeal from circuit court, Daviess county.

"To be officially reported."

O. H. Haynes and R. W. Slack, for appellants. Geo. W. Jolly, for appellee.

PRYOR, J. The father of the appellee died on the 4th of April, 1885, owning some real estate that descended to his children. The appellants, having judgments against the appellee, who had inherited an interest in this realty, in a few days, or within two or three months, had executions levied on the interest of the appellee, Felix Bennett, to satisfy these judgments. A sale was made under an execution in June, 1885, and the right of redemption sold under another execution in July, 1885. Blandford's execution, under which the sale was made, was issued in three or four days after the death of the appellee's father, and was levied on the undivided one-fifth interest. In July or August, 1885, this land was divided by a deed of partition, and the house and lot in contro-

versy was allotted the appellee. He made some slight repairs on the house, and moved into it the last of August, 1885, about four months after his father's death, and in about ten days after partition. He had a family, consisting of wife and children, and owned no other homestead. He moved into or took possession of his inheritance within a reasonable time after the division, and after the death of his father. The homestead is of less value than \$1,000, and there is no reason for disturbing him in his possession. The case of *Dwelly v. Galbreath*, 5 Ky. Law Rep. —, is decisive of this case.

The appellants purchased this property at their peril. There had been no abandonment of the right to enter, by the appellee; nor was he required to notify them when they levied on or sold his undivided interest that he would claim a homestead. There was no unreasonable delay in asserting the claim, and on the facts as well as the law the appellee was entitled to his home. Judgment affirmed.

#### MERGER *et al.* v. GLASS' EX'R.

(Court of Appeals of Kentucky. Oct. 15, 1889.)

##### APPEALABLE ORDERS.

An order transferring an action from one court of the state to another is not a final order, and hence not within the appellate jurisdiction of the court of appeals, under the Kentucky statute, which confines the appellate jurisdiction of that court to final orders and judgments.

● Appeal from circuit court, Christian county.

"To be officially reported."

Feland, Stites & Feland and Petru & Downer, for appellants. J. W. McPherson, for appellee.

HOLT, J. The appellants, who were plaintiffs below, objected in proper form to the regular judge trying this cause, because he was not only related to one of the defendants, but his attorney. A motion was at the same time entered by the appellants to hold an election for special judge. It was overruled, and the court, over the objection of the appellants, ordered the action transferred to the circuit court of another county. Subsequently the appellants moved to set aside this order. This motion was also overruled, and they have appealed.

The appellate jurisdiction of this court is confined to final orders and judgments. Gen. St. c. 28, art. 22, § 1, p. 311. The question at the threshold is, does an appeal lie from the order of transfer? Is it of a final character? It has not been made so by statute, and we must turn to the general law for an answer. It is often difficult to fix the boundary between orders which are and are not final. A final order has been defined to be one which "either terminates the action itself, decides some matter litigated by the parties, or operates to divest some right in such manner as to put it out of the power of the court making the order, after the expiration of the term, to

place the parties in their original position." Briefly, it is one which disposes of the cause, or of a distinct and definite branch of it. To be such, it need not determine the merits of the cause, or be a final determination of the rights of the parties as to the matter of dispute. *Freem. Judgm.* § 21. It is sufficient if it be a final determination of that particular suit. Thus, as said in section 17 of the work just cited, the dismissal of an action by the plaintiff is a judgment. An interlocutory order, however, is one which does not dispose of the action. In this instance it was not ended by the order of transfer, but merely sent to a court invested with like jurisdiction of the same government. The order was not equivalent to one of dismissal. There is some conflict of decision as to whether even an order transferring a case from a state to a federal court is a final one, and authorizes an appeal. It was held in the cases of *Jackson v. Railroad Co.*, 58 Miss. 648, and *Jones v. Dav-enport*, 7 Cold. 145, that it was not; but otherwise in *Rosenfield v. Condict*, 44 Tex. 464; *Burson v. Bank*, 40 Ind. 173; *State v. Judge*, 23 La. Ann. 29; and by this court in *Hall v. Ricketts*, 9 Bush, 366. In such a case, however, the party is taken into the court of a different government. The order of removal determines finally the question of the jurisdiction of the state court, and is equivalent to sustaining a plea to its jurisdiction. The state's judicial power is then at an end. If the party opposing the order cannot appeal at this stage of the case to this court he can never do so. Without now deciding, however, whether a party can appeal from such an order, because the question is not now before us, we pass it by with the suggestion that reasons exist in such a case in favor of the right, which are not found in the one now presented. Blackstone says that "final judgments are such as at once put an end to the action, by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for," and that "interlocutory judgments are such as are given in the middle of a cause, upon some plea, proceeding, or default, which is only intermediate, and does not finally determine or complete the suit." 3 Comm. 397, 398. Here the order does not terminate the action, or decide any matter in contest, or divest any right. It is only "intermediate."

It was said in *Teaff v. Hewitt*, 1 Ohio St. 511, that "an interlocutory decree is one which leaves the equity of the case, or some material question connected with it, for future determination." So here the action is yet pending, and the merits undecided.

It was held in *Fields v. Gagne*, 83 La. Ann. 839, where the judge could not act by reason of personal interest, that an appeal did not lie from an order sending the case to another district court of the state, and refusing to refer it to an attorney of the court in which it was then pending.

In *Vance v. Hogue*, 85 Tex. 432, and *Nounnan v. Aspinwall*, 1 Utah, 140, an or-

der changing the venue was held to be merely interlocutory.

The opinion in the case of *Juan v. Ingoldsby*, 6 Cal. 439, seems to support the same rule, although it is too brief for a full understanding of the case, and appears to be based, partially at least, upon the practice act of that state.

In *Turner v. Browder*, 18 B. Mon. 825, an action was transferred from the circuit court of one county to that of another by change of venue. The latter court made an order remanding it, and it was held by this court that an appeal did not lie from it, because it was not of a final character.

It is the policy of the law to prevent unnecessary appeals. Courts should not be compelled to review cases by piecemeal. It is urged that unless a party can at once appeal from an order of transfer he may be compelled to look to a long litigation in the court to which the transfer is made, and then at its close upon an appeal it may be held that the change should not have been made, and that all that has been done is therefore invalid. This argument is not without weight; but yet the interest of litigants demands that appeals should not be prematurely taken. If an appeal could be taken from every order interlocutory in its character, and which is fraught with interest to the litigants, then useless delay and expense would often result, and the appellate courts be burdened with unnecessary labor. For instance, an error is committed against a party in ordering a transfer of a cause, and yet this very party is successful upon the final trial. The illustration shows the wisdom of limiting appeals to orders final in their character as to the relief sought by the party. Moreover, if he loses the case he is not remediless. He can then appeal, and test the validity of the order which brought him into the trial court. These considerations outweigh the argument made in favor of the claim to a right of appeal from the order in question. Public policy and individual interest alike forbid it. Indeed the right of appeal rests upon the idea of permanent injury unless it be afforded.

We have been urged by both sides to waive this question, and determine the right of the judge to order the transfer. We were disposed to reach the consideration of the latter question, if possible; but reason, law, and precedent forbid it. Consent cannot give this court jurisdiction, if not conferred by law. The order in question not being a final one, this appeal is dismissed.

#### LOUISVILLE & N. R. CO. v. BELCHER.

(Court of Appeals of Kentucky. Oct. 15, 1889.)  
STOCK-KILLING CASES—PLEADING—CONSTITUTIONAL LAW.

1. Gen. St. Ky. c. 57, § 2, provides that if cattle shall be killed on the track of a railroad company "adjoining lands belonging to or in the occupation of the owner of the cattle, who has not received compensation for fencing the land along said road," the loss shall be divided between the railroad and

the owner of the cattle. *Held*, that the occupant of lands can recover, under this statute, only when neither he nor the owner has been compensated for fencing, and his complaint must allege failure to compensate either.

2. Such statute is not unconstitutional as depriving defendant of its property by fixing upon it liabilities not imposed on other citizens, as the same liability is imposed upon all such corporations for the protection of person and property, in consideration of the exclusive or extraordinary privileges granted them.

Appeal from circuit court, Logan county.  
"To be officially reported."

Action by W. W. Belcher against the Louisville & Nashville Railroad Company to recover for a horse, which was killed on defendant's road. Judgment for plaintiff, and defendant appeals.

W. F. Browder, for appellant. Thos. B. Blakey, for appellee.

PRYOR, J. Section 2, c. 57, Gen. St. tit. "Injuries to Person or Property," provides: "If, by the locomotives or cars of a railroad company, cattle or other stock shall be killed or injured on the track of said road, adjoining the lands belonging to or in the occupation of the owner of such cattle or stock, who has not received compensation for fencing said land along said road, the loss shall be divided between the railroad company and the owner of such cattle or stock, unless the killing or injury arose from the willful act or carelessness or negligence of the agents or servants of such company, in which case the whole loss shall be paid by such company."

As we construe this statute, the question of negligence on the part of the company is not required to be alleged or proven in order to entitle the owner of the stock killed or injured to recover of the company one-half the loss sustained. This action by the appellee is based on the statute, and, a recovery having been had in the court below on an admission of the facts alleged by the demurrer filed, the sole question presented is: Did the facts alleged, if true, authorize the judgment, the appellant having declined to amend when the general demurrer was overruled? It is alleged by the plaintiff that his horse was killed on the track of the railroad adjoining the lands in his occupancy, and that he had not received compensation from the company for fencing along said road. All the essentials to constitute a cause of action are set forth, except the alleged failure on the part of the company to compensate the owner of the land to enable him to make the fencing. If neither the owner nor the one occupying the land adjoining the track of the company where the stock was injured had received compensation, a right of action existed for the loss sustained. Under the statute, however, compensation may not have been made the one in possession, and still no cause of action will accrue to the occupant if compensation had been made the owner of the adjoining land. The statute reads, "killed or injured on the track of said road, adjoining the lands belonging to or in the occupation of the owner

of such cattle or stock, who has not received compensation." The owner of the land may recover when no compensation has been made him, or the occupant may recover if neither have been compensated. If the fact that the owner of the land has not been furnished with the means to construct the fence is a matter of defense, then that fact should have been pleaded, and the demurrer was properly overruled.

The presumption must arise from the averment that the plaintiff occupied the premises; that he was not the real owner; and, if compensation has been made the owner, this action must fail. If, then, under this section of the statute, the facts alleged by the plaintiff could be admitted, and still, by reason of the very clause upon which the recovery depends, a state of fact might exist preventing the recovery, the existence of such facts must be negated by his pleading. The general rule in pleading, "that matter which should come more properly from the other side need not be stated," does not apply to a case like this. The general rule, says Mr. Bliss, in declaring on a deed or other instrument consisting of distinct parts, is only to state so much as makes, *prima facie*, a cause of action; and, if any other part furnishes the means of defeating the action, it comes from the defense. The difference is "when the exception is embodied in the body of the clause, he who pleads the clause ought to plead the exception; but where there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause, and leave it to his adversary to show the proviso." It is well understood that if the proviso is in the body of the covenant in the nature of an exception, the liability must be consistent with the exception, and must be noticed by the pleader. Bliss, Code Pl. § 202. Mr. Newman, in his work on Pleading, says: "If the defendant's promise contains, as part of it, an exception which qualifies his liability, or, in certain contingencies, renders him altogether irresponsible, the petition must ordinarily notice the exception or proviso. But when the proviso is distinct from the promise made, and does not vary its legal effect, it is not necessary to notice it." Page 398.

The obligation on the part of the company, imposed by the statute, is to furnish the owner or the occupant the means to construct fencing, in order to prevent the injuries complained of. The body of the statute in the one section, and in the same sentence, relieves the company from liability upon compensation to either party; and, while it may be neither an exception nor proviso in a technical sense, it is plain that the clause of the statute under which the recovery is sought makes the right of action, when the occupant sues, depend upon the failure by the company to compensate either the owner or the occupant to enable them to provide against such loss.

As this case must go back, with directions

to sustain the demurrer with leave to amend, it is proper to notice the constitutional question raised by the appellant. It is argued the appellant is deprived of his property by this statute that fixes one grade of liability for it that is not imposed on other citizens under like circumstances. We understand that the same liability is imposed on all such corporations, and when exclusive, or, if not exclusive, extraordinary rights and privileges are granted such corporations, there is no reason why some liability should not attach for the protection of both person and property. While the consideration for such peculiar privileges granted to corporations is the benefit to the public, the danger resulting from the operation of railways demands some legislation that will result in an equitable adjustment of the loss between the owner of stock and the railroad company, where the latter, whether negligently or by accident, destroys it. Such legislation is not inhibited by any provision of the constitution; and when such rights and privileges are conferred on corporations that do not pertain to the citizen, and of which the citizen cannot complain, certain liabilities will necessarily attach for the privileges granted. The common-law liability has been changed by repeated statutes, and the rights and duties of corporations regulated by such legislation as was deemed necessary for the protection of property; and we think there is no room to question the constitutionality of the act under which this judgment was rendered.

For the reasons indicated the judgment is reversed, with directions to sustain the demurrer, with leave to the plaintiff to amend, and for proceedings consistent with this opinion. *Railway Co. v. Humes*, 6 Sup. Ct. Rep. 110; *Mackie v. Railroad Co.*, 6 N. W. Rep. 725; *Johnson v. Railway Co.*, 13 N. W. Rep. 673.

### WATHEN v. BYRNE *et al.*

(Court of Appeals of Kentucky. Oct. 5, 1890.)

#### APPEAL—REVIEW.

1. A deposition purporting to be one read at the trial, and copied into the transcript by the clerk, cannot be considered on appeal, as the evidence must be made a part of the bill of exceptions, or made a part of the record by an order of court.

2. Under Code Ky. § 335, subsec. 2, which declares that if the party wish to appeal upon the ground that the verdict is not sustained by the evidence it shall be stated in full in the bill of exceptions, a judgment will not be reversed for insufficiency of the evidence to sustain the verdict unless the evidence is stated in full.

3. Under section 333, subsec. 8, which declares that a party cannot "except to a decision made at the instance of the adverse party unless objection shall have been made to the motion, offer, or request of the adverse party," exceptions to instructions will not be considered where the record fails to show that the instructions were objected to, though it recites that "to the giving of which instructions, and each of them, defendant excepted."

4. To permit a plaintiff to recover \$40 or \$50 more than he claims is not such a trifling error as can or should be overlooked by the appellate court.

Appeal from Louisville law and equity court.

"Not to be officially reported."

Action by J. P. Byrne & Co. against J. B. Wathen. Judgment for plaintiffs, and defendant appealed to the superior court, where the following opinion was delivered by Judge WARD:

"The grounds relied upon for a new trial were: '(1) The verdict is contrary to law. (2) The verdict is not sustained by the evidence. (3) Error in the amount of recovery. (4) Error of law occurring at the trial and excepted to by the defendant. (5) Giving erroneous instructions prejudicial to defendant moved for by plaintiffs and objected to by defendant.' As to the first, third, and fourth grounds it is sufficient to say that they are too general, and, for that reason, cannot be considered. *McLain v. Dibble*, 13 Bush, 297; *Com. v. Williams*, 14 Bush, 298.

"As to the second ground. It appears from the bill of exceptions that the deposition of W. H. Wathen was read on the trial. But said deposition is not copied into the bill of exceptions nor in the report of the official reporter. As has often been decided by the court of appeals, and followed by this court, we cannot consider instructions or evidence as a part of a bill of exceptions, unless embraced in it, or identified and made a part of the record by an order of the court. A deposition, purporting to be the same as the one read on the trial, and copied into the transcript by the clerk, cannot be considered. The clerk is not by law charged to make a record of what occurs on the trial; that record is made by the judge as such, sanctioned by an approving order entered of record, and we can only regard as the record that which is so made and authenticated. We cannot reverse a judgment on the ground that the verdict is not sustained by the evidence unless the evidence is stated in full in the bill of exceptions. Subsection 2, § 335, Code.

"As to the fifth ground. The bill of exceptions shows that two instructions were given upon the motion of plaintiffs; and it is then shown that 'to the giving of which instructions, and each of them, defendant excepted, and now excepts.' But there is nothing to show that the instructions were objected to. 'But a party cannot except to a decision made at the instance of the adverse party, unless objection shall have been made to the motion, offer, or request of the adverse party.' Subsection 8, § 333, Code, notes 2, *f*, to said section in Bullitt's Code; *Loving v. Warren County*, 14 Bush, 316. So we cannot review the verdict and judgment for any of the grounds relied upon for a new trial.

"But it is insisted for appellants that the verdict and judgment are not sustained by but are contrary to the pleadings. One item of controversy was about the stopping of cattle by defendant for plaintiffs. As to this, plaintiffs admitted in their petition that they were indebted to defendant therefor in the sum of \$4,025, which, by agreement be-



tween them, was to be and had been entered as a credit on the note sued on by plaintiffs. As to this item defendant in his answer claimed that plaintiffs were indebted to him in the sum of \$4,639.52. The difference in the claim made by the defendant grew out of a claim for the slop from 1,000 bushels of grain in December, 1885, and for slopping for 26 days in June, 1886, and for interest on the amount due for slop from the end of the current month until the time when the credit was placed on the note. Plaintiffs' allowance of credit made no allowance for December slop, for interest, and only for 12 days in June. But plaintiffs by their reply admitted that they did receive some slop in December, 'not exceeding in all 150 or 200 bushels;' and further that 'slop was only furnished them during fifteen days of the month of June, 1886.' The agreed price for the 200 bushels in December, 1885, would be \$14, and the agreed price *per diem* for the slop in June was \$35; making an excess of credit to which the defendant was entitled, under the admission of the reply, amounts, as we think, to at least \$49 over that allowed in the petition. The jury fixed the credit, and the judgment was rendered on the basis of the admission in the petition.

"It is claimed for appellant that the admission of the reply entitled the defendant to a credit for \$119 more than he received, and for appellees it is admitted that they received judgment for \$14 more than they claimed, and this was all. But for reasons, apparent from the record, and now needless to state with minuteness, we are of opinion that the error to the prejudice of the defendant was \$49. And, as before stated, this error is manifested by the pleadings, and is for that much more than plaintiffs were entitled to recover. It is contended by attorney for appellees that this is a trifle; and that, as the law does not concern itself about trifles, the judgment must be affirmed. After an examination of a number of text-books and adjudged cases we have not been able to find any authority for the application of this maxim to a case where the plaintiff has recovered more than he claimed, or more than by his pleadings he admitted he was entitled to recover. The maxim in its inception seems to have been applied to the subject-matter of litigation when it was of such a trifling nature as to be unworthy of consideration; afterwards to have been extended, in a more enlarged sense, to matters in dispute, but of such doubtful character as to render it very uncertain whether the matter could or would be remedied under or by another trial freed from the prejudicial error. It is also applied where material agencies have to be employed or difficult and tedious calculations made, and where some allowance must be made or may be made for mistakes. It is expressed in our Code under this form: 'The court must, in every stage of an action, disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse

party.' Code, § 134. In this sense every error is deemed prejudicial to the substantial rights of a party which denies him relief to which he is clearly entitled,—clear not only in view of the basis on which the right depends, but as to the mode by which the result is to be reached. 'In ordinary' as remarked by Lord KENYON, C. J., 'where the damages are small, and the question too inconsiderable to be retried, the court have frequently refused to send the case back to another jury. But, wherever the mistake of the judge has crept in and swayed the opinion of the jury, I do not recollect a single case in which the court have ever refused to grant a new trial.' Broom, Leg. Max. 142.

"In this case the defendant, now appellant, claimed that the verdict and judgment against him should have been for \$1,884.17 less than it was. And that it should so be, if his contentions of fact can be made to appear, is not questioned. So the matter in controversy is of great importance, and in law meritorious. It is true, as the record now stands, the presumption of law is that his contention cannot be sustained; but the presumption will hardly authorize the court to apply the maxim, and thereby say that the plaintiff shall not only have that to which as matter of fact he is now presumptively entitled, but shall also have \$49, or even \$14, more than he claimed. The plaintiff's right to relief can never exceed the amount of his demand. For the reasons indicated, the judgment is reversed and remanded for a new trial and further proceedings."

Code, § 335, subsec. 2, provides that "if the party wish to appeal upon the ground that the verdict is not sustained by the evidence, it shall be stated in full" in the bill of exception.

*Barnett, Noble & Barnett*, for appellant.  
*C. H. Gibson and E. J. McDermott*, for appellees.

PRYOR, J. After a careful consideration of the record we are disposed to concur in the conclusion reached by the superior court. While the issue made shows a wide difference of opinion between the parties as to the terms of the contract, and that a considerable sum of money is necessarily involved, the plaintiffs have recovered \$40 or \$50 more than they claim, and this is not such a trifling error as can or should be overlooked by the court, and particularly in view of the pleadings before us, and the character of the contract, the breach of which is alleged. Reversed and remanded for a new trial.

#### CITY OF LITTLE ROCK *et al.* v. KATZENSTEIN.

(*Supreme Court of Arkansas.* Oct. 12, 1889.)

#### CONSTITUTIONAL LAW—MUNICIPAL IMPROVEMENTS.

1. Const. Ark. art. 19, § 27, provides that nothing in the constitution shall be construed to prohibit the general assembly from authorizing assessments on land for local improvements in towns and



cities, "to be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected." *Held*, that "property adjoining the locality to be affected" is any property adjoining or near the improvement which is physically affected, or the value of which is commercially affected, directly by the improvement, to a degree in excess of the effect on the property in the town or city generally.

2. *Mansf. Dig. Ark. § 826*, provides that when 10 resident owners of land shall petition the city council to take steps towards making such local improvement the council shall lay off the whole city, if the whole of the desired improvement be general and local in its nature, or the portion mentioned in the petition, if it be limited to a part of the city, into one or more improvement districts, designating the boundaries of such districts, etc. *Held*, that the action of the council in including property in an improvement district is conclusive of the fact that it is "adjoining the locality to be affected," within the above constitutional provision, except when attacked for fraud or demonstrable mistake.

Appeal from chancery court, Pulaski county; D. W. CARROLL, Chancellor.

One Katzenstein filed a bill to enjoin the city of Little Rock and others from exacting an improvement tax from him. A demurrer to the bill was overruled, and defendants appeal.

*U. M. & G. B. Rose*, for appellants. *W. S. McCain*, for appellee.

**SANDELS, J.** Section 27 of article 19 of the constitution of Arkansas is as follows: "Nothing in this constitution shall be so construed as to prohibit the general assembly from authorizing assessments on real property for local improvements in towns and cities, under such regulations as may be prescribed by law, to be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected; but such assessments shall be *ad valorem* and uniform." Section 826, *Mansf. Dig. Laws Ark.*, is as follows: "Sec. 826. When any ten resident owners of real property in any such city, or of any portion thereof, shall petition the city council to take steps towards the making of any such local improvement, it shall be the duty of the council to at once lay off the whole city, if the whole of the desired improvement be general and local in its nature to said city, or the portion thereof mentioned in the petition, if it be limited to a part of said city only, into one or more improvement districts, designating the boundaries of such district, so that it may be easily distinguished; and each district, if more than one, shall be designated by number, and by the object of the proposed improvement." Pursuant to the foregoing provisions, the city council of the city of Little Rock, on the 10th day of May, 1887, by ordinance created "Sidewalk Improvement District No. 2 of the City of Little Rock," for the purpose of building a sidewalk on Second street. Its boundaries were defined; and it may be said, generally, embraced half of each block on either side of Second street, in said city, from Main street to the western boundary of the district. Block 82 of said city lies on the south side of Second street,

and a diagram of the same, with the numbers of its lots, is here given:

SECOND STREET.

1	12
2	11
3	10
4	9
5	8
6	7

CENTER STREET.

The district for the improvement of Second street embraced lots 1, 2, 3, 10, 11, and 12. The council proceeded regularly and in due course; the levy was made upon all the property in the district included in the district, to pay the costs of said improvement; and, within the period of limitation prescribed by law, *i. e.*, within 20 days from the publication of the ordinance levying said tax, the appellee, Katzenstein, filed the bill herein, alleging that he was the owner of lot 3, in block 82, and praying that the defendants be enjoined from exacting or claiming any tax from him, under said ordinance. He insists that said lot 3 does not abut upon, and is not contiguous or adjoining, Second street; that he owns no property between lot 3 and Second street; and that said lots are 50 feet wide. He does not claim that his property is not affected by the improvements. The defendants demurred generally. Their demurrer was overruled, and, declining to plead further, the preliminary injunction granted by the chancellor was made perpetual, and they appealed.

Two questions are presented for determination: *First*, what is "property adjoining the locality to be affected?" *Second*. To what extent is the action of the city council, in placing lands in an improvement district, conclusive of the fact that it is "property adjoining the locality to be affected?" The two questions may be considered together. Appellee insists that all reference to "benefits" must be excluded from consideration, and that only property abutting upon the sidewalk or other improvement, or owned by one who also owns abutting lots, can be subjected to the tax. The appellants insist that the word "affected" has a larger meaning than "benefited;" that property may be "affected" injuriously as well as beneficially; and that all property in the locality "affected" by the work should be included in the district, and be required to bear its share of the burden. It has been so often said as to have become axiomatic, that absolute equality in the distribution of benefits and burdens is unattainable, yet was also everywhere held that the very existence, in justice and equity, of the power of taxation, rests upon the theory of corresponding benefits to the tax-payer.

We cannot exclude from view the idea of benefits, when the propriety of a tax is under consideration. Nor is it practicable to determine whether property is, or is not, "adjoining the locality to be affected" by the accident of proprietorship. The property of A. to-day becomes the property of B. to-morrow; and it is inconceivable to us that the invisible and intangible passage of title from one to another can work any physical or legal removal of real estate from the locality to be affected. The "improvement" contemplated need not always have a physical effect upon the land taxable for its construction. Indeed, in most cases its effect is only upon its commercial value; and the land affected in either way, so that the effect be traceable directly to the neighboring improvement, is the "property adjoining the locality to be affected," mentioned in the constitution. Under some circumstances the effects may be more extended and far-reaching than under others. There is a given amount of improvement which will affect all localities alike; and the constitution wisely avoided the erection of an absolute limit up to or beyond which the benefits might go, or below which they might fall. There is no procrustean measurement for the exercise of equitable discretion. To the general assembly, then, was delegated the task of providing agencies for the accomplishment of these improvements. The general assembly, in the exercise of well-recognized constitutional power, imposed the duty of forming improvement districts and defining their boundaries upon the various city councils. The city council is invested with the discretion, in this behalf, necessary to a just performance of the duty; and when it has acted the property included by it in any district is *prima facie* adjoining the locality to be affected. We conclude, therefore, in answer to the two queries originally propounded: *First*. That property adjoining the locality to be affected is any property adjoining or near the improvement which is physically affected, or the value of which is commercially affected, directly by the improvement to a degree in excess of the effect upon the property in the city generally. *Second*. That the action of the city council in including property in an improvement district is conclusive of the fact that it is adjoining the locality to be affected, except when attacked for fraud or demonstrable mistake. Upon the various propositions above stated we cite *Little Rock v. Board of Improvements*, 42 Ark. 153; *McDermott v. Mathis*, 21 Ark. 60; *Wassell v. Tunnah*, 25 Ark. 101; *Davis v. Gaines*, 48 Ark. 382, 8 S. W. Rep. 184; *Peay v. Little Rock*, 32 Ark. 38; *Shepherd v. Railway Co.*, 180 U. S. 432, 9 Sup. Ct. Rep. 598; *County Judge v. Railway Co.*, 5 Bush, 228; *Nevin v. Roach*, 5 S. W. Rep. 547; *Goodrich v. Mintonk*, 62 Ill. 123; *Michener v. Philadelphia*, 12 Atl. Rep. 174; *Massing v. Ames*, 37 Wis. 651; *Strowbridge v. Portland*, 8 Or. 67;

*State v. District Court*, 29 Minn. 65, 11 N. W. Rep. 133; *Rogers v. St. Paul*, 22 Minn. 494; *Carpenter v. Same*, 23 Minn. 232; *State v. Board of Public Works*, 27 Minn. 442, 8 N. W. Rep. 161. Reversed, with direction to sustain the demurrer to the complaint.

#### RAMSEUR v. BROWNELL et al.

(Supreme Court of Arkansas. Oct. 12, 1889.)

#### FRAUD AND MISTAKE—PLEADING.

In a suit to enjoin the sale of property under execution, the complaint alleged that complainant confessed the judgments upon which such executions were issued, upon defendants' assurance that the amounts were just balances due them, but that he afterwards learned that these amounts included the price of certain machinery, for which he was not chargeable; that defendants, who were in possession of all the accounts when he confessed the judgments, had led him to believe that the value of the machinery was not included. *Held*, that the complaint did not show fraud or mistake, and was properly dismissed.

Appeal from circuit court, Miller county; W. E. ATKINSON, Special Judge.

Peter S. Ramseur filed his complaint in equity against John B. Brownell & Co. to enjoin the sale of his property under executions issued from the circuit court and a justice's court of Miller county, alleging that said executions were issued upon judgments obtained against him by said Brownell & Co. through fraud and misrepresentation; that, in the settlement of a course of dealings between himself and said Brownell & Co., he confessed said judgments for the amounts therein named, upon the assurance of said Brownell & Co. that they were the just balances due from him to them; but that he afterwards learned that in these amounts he was charged with the price of certain machinery which had been destroyed by fire after he had delivered it back to said Brownell & Co., by agreement, and for which he was not chargeable; that he had been led to believe by Brownell & Co., who were in possession of all the accounts and statements of said dealings, when he confessed the judgments, that he had been credited with the value of the machinery, but which had not been done. He prayed, in effect, that the executions be quashed, and that he be allowed credit on the judgments for the value of such machinery, and for other relief. Upon the hearing the court dismissed the complaint for want of equity. Complainant appeals.

Dan W. Jones and E. C. Johnson, for appellant. Scott & Jones, for appellees.

PER CURIAM. It does not clearly appear, from allegations of the pleadings or from the evidence that any fraud was practiced by defendants, or any mistake made by the plaintiff. Certainly nothing against which a court of equity could relieve. The decree of the chancellor is affirmed.

**GIBNEY et al. v. TURNER.**

(Supreme Court of Arkansas. Oct. 19, 1889.)

**ASSUMPSIT—FOR WORK AND LABOR—EVIDENCE—DAMAGES.**

1. In an action on a contract to pay a specified sum for work, evidence for defendant as to the value of the work is inadmissible.

2. In an action for breach of contract to employ plaintiff to do certain work for a specified sum, an instruction that, the breach being proved, the plaintiff is entitled to recover the sum agreed, less the cost of material and labor necessary to complete the contract, unless defendant shows that during the time for the performance of such contract plaintiff was or might have been engaged in "work of like kind, which would have yielded him the same profits," is erroneous, as the measure of plaintiff's damages is the sum agreed on, less the cost of material and labor, and what he gained, or might have gained, by the saving of his time not employed in completing the contract.

Appeal from circuit court, Clark county.

C. S. Turner sued Gibney and Patterson in a justice's court on an open account for \$40, and when the jury returned a verdict for defendants the plaintiff appealed to the circuit court. At the trial he testified that defendants engaged him to do certain work, for which they were to pay him \$40, but subsequently they gave the job to some one else. He also testified as to the value of the materials to be used, and of the labor necessary to complete the contract. Defendants offered the testimony of a witness, (Phillips,) that he had done the work, for which he received \$16.50, which was a fair price for it. The court excluded this testimony, and defendants excepted. At plaintiff's instance the court gave an amended instruction (No. 1) that if the jury believed from the evidence that defendants employed the plaintiff to do work for them at an agreed price, and that plaintiff, without fault on his part, was prevented by defendants from performing the same, then plaintiff is entitled to recover on the contract, the basis of damages being the amount agreed upon less the cost of material to be used and the labor necessary to perform the contract, "unless the defendants show to the jury that during the time for the performance of such contract plaintiff was, or could have been, engaged in other work of like kind, which would have yielded him the same profits." There was a judgment for plaintiff, and defendants appeal.

*Murry & Kinsworthy*, for appellants.  
*Crawford & Crawford*, for appellee.

**PER CURIAM.** The court did not err in excluding the testimony of Phillips; but error was committed in giving instruction No. 1, asked by plaintiff, and amended by the court. The rule in cases of this kind is that plaintiff, if he prove the existence of a contract for a specific sum, for the performance of specific work, is entitled for the breach thereof by his employer to damages equal to the difference between the cost of the work and the price to be paid for it; the cost being the market value of the material on hand, and the amount that would have been paid for labor and material in completing the con-

tract, and the value to him of his own time that would have been consumed in completing the contract. *Gardenhire v. Smith*, 39 Ark. 280; *Brodie v. Watkins*, 33 Ark. 545. The value of the time is what he gained, or might have gained, by the saving of his time not employed in completing the contract. Reverse and remand for further proceedings.

**HOLMES et al. v. MORGAN.**

(Supreme Court of Arkansas. Oct. 19, 1889.)

**INTOXICATING LIQUORS—APPEAL.**

1. When, on the petition of citizens of a county, an order has been granted by the county court prohibiting the sale of liquor within a certain district, a person who files an affidavit for an appeal nearly four months thereafter, and after the term of the court is over, does not thereby make himself a party to the proceeding, and cannot appeal.

2. Under Const. Ark. art. 7, § 51, providing that in all cases of allowances made for or against a county an appeal may be granted at the intervention of any citizen, resident, or tax-payer, an order prohibiting the sale of liquor is not an allowance for or against the county.

Appeal from circuit court, Desha county;  
J. A. WILLIAMS, Judge.

On January 3, 1886, certain citizens of Desha county filed in the county court a petition for an order prohibiting the sale of liquor within three miles of Bethlehem Church, in that county. The order was granted on the same day, and on April 30, 1886, and after the term of the court was over, B. F. Morgan, "as a citizen and tax-payer," filed an affidavit for an appeal from the order. The constitution of Arkansas (article 7, § 51) provides that in all cases of allowances for or against a county an appeal may be granted at the intervention of any citizen, resident, or tax-payer. On the appeal the circuit court dismissed the petition, and from this judgment the petitioners appeal.

*W. S. McCain*, for appellants. *C. H. Harding*, for appellee.

**PER CURIAM.** The judgment of the county court was not an allowance against Desha county, within the meaning of section 51, art. 7, of the constitution.

We are not called to decide whether B. F. Morgan might or might not have become a party to the proceeding in the county court. It is sufficient to say that he made no effort to avail himself of the right, if it existed. Not being a party to the proceeding, he could not appeal. *Austin v. Crawford County*, 30 Ark. 578. Reverse and remand, with instructions to dismiss the appeal.

**WHITE v. WHITE.**

(Supreme Court of Arkansas. Oct. 19, 1889.)

**ADVANCEMENTS—LIMITATION OF ACTIONS.**

In an action by a son against his father to recover possession of certain land it appeared that the father had purchased the land, and had it conveyed to the son, then an infant, declaring at the time that he intended it as a present to the son. The father kept possession of the land for a time, exceeding the period prescribed as a bar by the

statute of limitations, at one time renting it out, and at another cultivating it together with the son, alleging as his reason for not giving possession of the land to his son that the other children might object. It also appeared that the father had declared in the presence of the son, and without objection from him, that the son held the land as trustee from him in order to aid him in defending the title, and that the son had paid rent for the land. *Held*, that the evidence did not overcome the presumption that the land was intended as an advancement to the son, and that the statute of limitations did not apply, in view of the relationship between them.

Appeal from circuit court, Washington county; J. M. PITTMAN, Judge.

Action by William J. White against John S. White, his father, to recover certain lands. The lands had been bought by defendant, who caused them to be conveyed to plaintiff, at that time an infant, declaring at the time that he intended them as an advancement to plaintiff. Defendant held possession of them for a period of time exceeding that prescribed as a bar to recovery by the statute of limitations, and at one time rented them out, and at another cultivated them with plaintiff. He assigned as his reason for not delivering possession of the land to plaintiff that he was afraid it would create ill feeling among the other children. There was some testimony to show that defendant had claimed in presence of plaintiff, and without objection from him, that plaintiff held the lands as trustee in order to enable defendant to defend his title to them, and some evidence that plaintiff had rented them from defendant. Judgment was rendered for defendant, and plaintiff appeals.

*L. Gregg*, for appellant. *J. D. & J. V. Walker, Sam H. West, and B. R. Davidson*, for appellee.

**PER CURIAM.** The presumption of the law is that the purchase of the land in controversy was by way of advancement to the son. *Robinson v. Robinson*, 45 Ark. 481. The proof does not overcome this presumption. The statute of limitations does not aid defendant under the facts of this case. The occupancy of each was with reference to parental and filial duty. 1 White & T. Lead. Cas. Eq. pt. 1, p. 331; *Sidmouth v. Sidmouth*, 2 Beav. 447.

The decree is reversed, with costs, and the cause remanded with direction to the Washington circuit court to enter a decree giving plaintiff possession of the premises sued for.

#### SANGSTER v. DALTON.

(*Supreme Court of Arkansas*. Oct. 12, 1889.)

##### HEARSAY EVIDENCE.

In a suit on a note, testimony as to payments made on by defendant, as to which witness knew nothing personally, is hearsay, and inadmissible.

Appeal from circuit court, Sebastian county; J. S. SUTTLE, Judge.

William Sangster sued S. S. Dalton in attachment on a note. A witness, Dalton, testified as to payments made on the note by

defendant, of which the witness had been told, but knew nothing personally. Judgment for defendant, and plaintiff appeals.

Appellant *pro se*.

**PER CURIAM.** The testimony of the witness, Dalton, was hearsay, and its admission was error highly prejudicial to the plaintiff. Reverse and remand.

#### WALL v. LOONEY et al.

(*Supreme Court of Arkansas*. Oct. 12, 1889.)

##### APPEAL—DISMISSAL—SPECIAL JUDGE.

A motion to dismiss an appeal will be granted when the record fails to show that the special judge who presided at the trial of the cause was duly elected.

Appeal from circuit court, Green county; E. F. BROWN, Special Judge.

*B. H. Crowley*, for appellant. *L. L. Mack*, for appellees.

**PER CURIAM.** The record fails to disclose that the special judge who presided at the trial of this cause was ever elected for that purpose. The motion to dismiss the appeal will be granted.

#### DOUGLASS et al. v. SHARP et al.

(*Supreme Court of Arkansas*. Oct. 12, 1889.)

##### WILLS—CONSTRUCTION—DURATION OF ESTATE.

Under a will, giving testator's real estate to his wife, "during her natural life, and to dispose of discretionary, according to her own free-will and judgment, providing that she never marries a second time," in which event it "shall go to my children now living, or who may be living at the time of my wife's death or marriage," the widow takes a life-estate only, to which her power of disposal is limited. *Following Patty v. Goolsby*, 9 S. W. Rep. 846.

Appeal from circuit court, Drew county; O. D. WOOD, Judge.

Ejectment by A. L. Douglass and others, children of W. A. Douglass, deceased, against T. M. Sharp and others, to recover certain land. Plaintiffs claimed under the following clause of decedent's will: "*First*. After all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give, bequeath, and dispose of as follows, to-wit: To my beloved wife all my real and personal estate, notes, and accounts, during her natural life, and to dispose of discretionary, according to her own free-will and judgment, providing that she never marries a second time; and in the event that she marries, then all my property, real and personal estate, notes, and accounts, shall go to my children now living, or who may be living at the time of my wife's death or marriage." Testator's wife, while sole, sold said land to defendant Sharp, through whom the other defendants claim, and subsequently died. The court found that the will vested the land in testator's wife in fee-simple. From this judgment plaintiffs appeal.

*Wells & Williamson*, for appellants. *Harrison & Harrison*, for appellees.

**PER CURIAM.** The will gave to the widow a life-estate only, and the power of disposal vested in her was limited to her life-estate in the land, as decided by this court in *Patty v. Goolsby*, 51 Ark. —, 9 S. W. Rep. 846. See also *Giles v. Little*, 104 U. S. 291.

Reverse and remand.

### KING v. CONNEVEY, Sheriff.

(*Supreme Court of Arkansas. Oct. 12, 1889.*)

#### REPLEVIN—DESCRIPTION OF PROPERTY—VARIANCE.

1. Where an affidavit for the replevin of a mare describes her as a blazed-faced, cream-colored mare eight or nine years old, described in a mortgage of record to plaintiff as a cream-colored mare seven years old, the variance is immaterial.

2. Even if such a variance were material, it can be availed of on the trial only, and not by demurrer to the complaint, or by motion to quash the order of delivery.

Appeal from circuit court, Lafayette county; C. E. MITCHELL, Judge.

Replevin by D. L. King, mortgage trustee for J. M. Witt, against W. L. Connevey, sheriff, for the recovery of a mare. Plaintiff filed an affidavit before a justice of the peace against defendant for the delivery of a blazed-faced, cream-colored mare eight or nine years old, described in a mortgage of record from James M. King to J. M. Witt as being a cream-colored mare seven years old. The order was issued, and upon bond being furnished the constable took the mare from defendant's possession and delivered her to plaintiff. Defendant's demurrer to the affidavit was sustained, and upon appeal to the circuit court the decision was affirmed, whereupon plaintiff filed an amended affidavit. Upon defendant's motion, the order of delivery was quashed because it did not describe the horse mentioned in the affidavit. Plaintiff appeals.

D. L. King, *pro se.* W. P. Parks, for appellee.

**PER CURIAM.** It was error to quash the order of delivery on demurrer to the complaint. The complaint stated a good cause of action, and the demurrer should have been overruled. If there was a fatal variance between the description of the horse in the mortgage and the one taken under the order of delivery, it was a matter to be availed of at the trial. The variance between the two as set forth was immaterial in any event.

Reversed and remanded for further proceedings.

### BROWN v. ST. LOUIS, I. M. & S. RY. CO.

(*Supreme Court of Arkansas. Oct. 12, 1889.*)

#### NEGLECT—TRESPASSER ON RAILROAD TRACK—PLEADING—INSTRUCTIONS—HARMLESS ERROR.

1. Where the jury find for defendant, a refusal to instruct that they might return a verdict for punitive damages is not prejudicial error.

2. In an action for killing plaintiff's son, the complaint alleged that deceased was thrown from a freight train, by defendant's servants, and sustained injuries from which he died. It appeared that deceased fell upon the track and was struck

by a passenger train. The court refused to charge that the jury should find for plaintiff if they believed that defendant's agents in charge of such passenger train, by reasonable care and watchfulness, might have discovered the perilous position of deceased in time to avoid the accident, although he were a trespasser. *Held*, that such refusal is proper, as a railroad company is not liable to a trespasser for its agents' negligence in failing to discover him, and as the instruction was not responsive to the cause of action stated in the complaint.

3. Upon the cause of action made by such complaint, the plaintiff must prove that deceased was thrown from defendant's train; and there can be no recovery for his having been run over by another train, without an amendment stating that as a cause of action.

4. An objection to the prejudice of a juror is too late after verdict, where the party has failed to examine him on the *voir dire*, and was not misled or deceived in reference thereto.

5. Newly-discovered evidence is no ground for a new trial where it is cumulative only.

Appeal from circuit court, Clark county; R. D. HEARN, Judge.

Action by Maria Brown against the St. Louis, Iron Mountain & Southern Railway Company, for damages caused by the death of her minor son. The complaint alleges that William C. Brown was on one of defendant's freight trains as a passenger, and was assaulted and thrown therefrom by brakemen in the service of defendant, and in consequence he died a few hours later. The testimony upon this point was conflicting; but it appeared from the evidence that deceased, shortly after the time when it was alleged that he was thrown from the freight, was lying along-side defendant's track, and was struck by a passenger train which the engineer was unable to stop after he discovered deceased. The court refused to instruct the jury that, if they found that the alleged assault upon the deceased was malicious, they might allow punitive damages in addition to those actually sustained. The court also refused plaintiff's third prayer for instructions, to the effect that the jury should find for the plaintiff if they believed defendant's agents in charge of the passenger train, by reasonable care and watchfulness, might have discovered deceased's perilous position on the track, although he were a trespasser. There was a verdict for defendant, and plaintiff moved for a new trial on the ground of prejudice on the part of one of the jurors, and of newly-discovered evidence. The motion was overruled, and plaintiff appeals. The supreme court held in *Railway Co. v. Monday*, 4 S. W. Rep. 782, that the liability of a railroad company to a trespasser on its track must be measured by the conduct of its employees after they become aware of his presence there, and not by their negligence in failing to discover him; for as to such negligence the contributory negligence of the trespasser will defeat a recovery.

S. W. Williams and Murry & Kinsworthy, for appellant. Dodge & Johnson, for appellee.

**PER CURIAM.** 1. Maria Brown, the plaintiff, was not prejudiced by the court's refus-

al to instruct the jury that they might return a verdict for punitive damages, because by their finding she was entitled to nothing.

2. The plaintiff's third prayer for instruction was inconsistent with the ruling in *Railway Co. v. Monday*, 49 Ark. 257, 4 S. W. Rep. 782. Moreover, it was not responsive to the cause of action stated in the complaint.

3. Upon the cause of action made by the complaint it was necessary for the plaintiff to prove that the deceased was knocked or thrown from the defendant's train, before she could recover, and, without an amendment to the complaint showing a cause of action for negligence by being run over by another train, (if such amendment was permissible,) there could be no recovery for that cause. There was no error in instructing the jury to that effect.

4. The objection to the prejudice of the juror came too late after verdict, inasmuch as the plaintiff had not availed herself of the opportunity to examine him on the *voir dire*, and was not misled or deceived in reference thereto.

5. The newly-discovered evidence was cumulative only. Affirmed.

#### CARY v. DUCKER et al.

(Supreme Court of Arkansas. Oct. 12, 1889.)

ACTIONS ON BONDS FOR COSTS—PLEADING—EVIDENCE—INSTRUCTIONS.

1. In an action on a cost-bond executed by defendant and others in another cause, the second paragraph of defendant's answer admitted the execution of the bond, but alleged that defendant had no knowledge or information sufficient to form a belief as to whether any costs had been adjudged to plaintiffs. The third paragraph alleged that defendant had no knowledge or information sufficient to form a belief as to whether the costs claimed to be paid by plaintiffs were the fees authorized by law, and as to whether the same or any part thereof had been paid by them. The fourth paragraph alleged that the court which tried the former cause had no jurisdiction thereof, and no authority to order the execution of the bond. *Held*, that the second and third paragraphs presented good defenses, but that the fourth was demurrable.

2. In such case, the rendition of the prior judgment, the appeal therefrom, and its reversal by the supreme court, and the taxation of costs by the clerk, are provable by the record only, where it is not shown that it has been destroyed.

3. It was error to refuse to instruct that plaintiffs must show, by a preponderance of evidence, that the costs claimed by them were incurred, and adjudged to them by a court having jurisdiction of the subject-matter in the action in which such costs were incurred and adjudged.

4. A request to instruct that plaintiffs must show, by a preponderance of testimony, that the bond was executed by the defendant in manner and form as charged in the complaint; that the court had jurisdiction of the subject-matter of the action; and that the costs paid by plaintiffs were costs allowed by law for such services as were rendered,—was properly refused, as the term "costs" has a known technical meaning, of expenses pending the suit as allowed by the court, and the supreme court, having jurisdiction, had a right to adjudge costs.

Appeal from circuit court, Carroll county; J. M. PITTMAN, Judge.

Action by J. O. Ducker and wife against

J. W. Cary on a bond alleged to have been executed by him and others in another cause, as follows: "We undertake that the plaintiffs A. Mercia and J. W. Petty shall pay to the defendants J. O. and Daisy I. Ducker, and to the officers of the court, all costs that may accrue to them in this action, either in the Carroll circuit court, western district, or in any other court to which it may be carried. [Signed] CRUMP & WATKINS. J. W. CARY. M. H. JONES." The first paragraph of defendant's answer denies the execution of said bond as set forth. The second, admits the execution of said bond, but alleges that defendant has no knowledge or sufficient information to form a belief as to whether any costs have been adjudged to plaintiffs. The third paragraph alleges that defendant has no knowledge or sufficient information to form a belief as to whether the costs claimed to be paid by plaintiffs are the fees authorized by law, and as to whether the same or any part thereof had been paid by plaintiffs. The fourth paragraph alleges that plaintiffs ought not to maintain this action, because the court which tried said cause had no jurisdiction thereof, and no authority to order said bond to be executed; and that the action of said court in maintaining such suit and making and approving said bond was void. The court sustained a demurrer to the second, third, and fourth paragraphs, and the case was submitted to the jury on the first paragraph of defendant's answer. Over defendant's objections, the court admitted J. O. Ducker's testimony that the case was tried in the Washington circuit court, and judgment recovered by plaintiffs, but that the same was reversed by the supreme court, (*Petty v. Ducker*, 11 S. W. Rep. 2; ) and that the clerk in making out the costs took them from the statement of the notary before whom the depositions were taken, and that they amounted to \$230 or \$231 and some cents. Defendant asked the court to instruct the jury: "No. 1. The court instructs the jury that before the plaintiffs can recover on the bond in this action in any amount, it devolves on them to show by a preponderance of the evidence that the costs claimed by them were incurred and adjudged to them by a court having jurisdiction of the subject-matter in the action in which such costs were adjudged and incurred. No. 2. The court instructs the jury that it devolves on the plaintiffs to show, by a preponderance of the testimony, that the bond was executed by the defendant in manner and form as charged by the plaintiffs in their complaint; and that the court had jurisdiction of the subject-matter of the action; and that the costs paid by the plaintiffs were costs allowed by law for such services as were rendered." The court refused to give the instruction, and defendant excepted. Verdict, and judgment thereon, for plaintiffs. The court denied a motion for a new trial, and defendant appeals.

*Crump & Watkins* and *W. S. McCain*, for appellant.

**SANDELS, J.** The fourth ground of appellant's motion for new trial challenged the correctness of the decision of the court in sustaining plaintiff's demurrer to the second, third, and fourth paragraphs of his answer. Both the second and third paragraphs presented good defenses. The demurrer was properly sustained to the fourth paragraph.

The fifth assignment of error is the admission of the testimony of J. O. Ducker as to the rendition of judgment in the Washington circuit court, the appeal by appellees to the supreme court, the reversal of said cause in the supreme court, the taxation of costs by the clerk, etc. All of this was provable only by the record, unless it had been destroyed. There was no claim of that kind here.

The sixth assignment of error is the refusal to give instructions numbered 1 and 2, asked by appellant. There was no error in refusing instruction No. 2; but instruction No. 1 correctly stated the law, and should have been given. The term "costs" has a known technical meaning, as well understood by lawyers as the word "suit" or "prosecution." The expression does not mean all the expenses incurred; but it means expenses pending the suit, as allowed or taxed by the court. *Norwich v. Hyde*, 7 Conn. 533.

A court without jurisdiction of the subject-matter of an action cannot "allow or tax" costs incidental to such proceedings. The supreme court had jurisdiction to hear and determine the cause on appeal, and costs incurred there are legally taxable. *Hightower v. Handlin*, 27 Ark. 20. Reverse and remand.

#### EBERLING v. DEUTSCHER VEREIN.

(*Supreme Court of Texas*. Dec. 13, 1888.)<sup>1</sup>

VENDOR AND VENDEE—HOMESTEAD—BOND FOR DEED.

1. The right of a vendee in possession of land under a contract of sale, to recover the value of his improvements upon a rescission of the contract by the vendor, rests upon principles of equity, and not on provisions relating to claims for improvements in the Texas statutes regulating trespass to try title.

2. Where a vendee under contract of sale made by a husband takes possession of a part of a tract of land, another part of which is occupied as homestead by himself and wife, and makes improvements thereon with the knowledge and consent of the wife, her conduct is proper to be considered as showing the good faith of the vendee in making such improvements.

3. A bond executed by a husband to convey at a future time the homestead of himself and wife is not void; and, should his wife refuse to join him in such conveyance, the vendee may recover for such breach of the condition of the bond the amount he has in good faith expended under the contract of sale.

Commissioners' decision. Error from district court, Tarrant county; *R. E. BECKHAM*, Judge.

*A. M. Carter*, for plaintiff in error. *Hogsett & Green*, for defendant in error.

**ACKER, P. J.** Plaintiff in error, Barbetta Eberling, and her deceased husband, Herman Eberling, owned a homestead consisting of lots 9, 10, 11, and 12, in the "Gin-House" block in Heirstfeld's addition to the city of Fort Worth. On the 25th of February, 1882, the husband entered into a contract of sale with defendant in error, the Deutscher Verein, for the north half of these lots, and executed and delivered his individual bond for title; and the Deutscher Verein executed and delivered to him its promissory note for \$300, to become due at three years from that date. The Deutscher Verein took possession of the property under the bond for title, and erected valuable improvements thereon. On March 10, 1885, Herman Eberling, joined by plaintiff in error, then his wife, brought this suit to rescind the contract of sale, and to recover possession of the property. They alleged that the property was part of their homestead, tendered the note given by defendant in error, and prayed that the bond for title executed by Herman Eberling be canceled, and for rents. Defendant answered, setting up the contract of sale and purchase made with the husband; denied that the property was homestead; pleaded tender of performance, and improvements of the value of \$4,000, made in good faith, with the knowledge and consent of both Eberling and his wife. On June 30, 1886, the case was tried by a jury, and in response to special issues submitted in the charge of the court the following verdict was returned: "We, the jury, find for plaintiffs the lots in controversy; and further find the present value of said improvements to be \$3,250, and that said improvements were made with the knowledge and consent of plaintiffs; and that said property was occupied by plaintiffs as a homestead. That defendant did not have actual notice that said property was claimed as a homestead by plaintiffs. We find total rental value of said lots from 20th day of March, 1885, to June 30, 1886, \$120." On this verdict judgment was rendered in favor of Eberling and wife for the lots, and writ of possession awarded, and canceling the purchase-money note given to H. Eberling, in favor of defendant in error against Herman Eberling for \$3,130, and awarding execution therefor. Herman Eberling filed a motion in arrest, and to reform the judgment, which was overruled. After the judgment, Herman Eberling died, and letters of administration upon his estate were issued to his widow, the plaintiff in error, and she brings the case to this court.

The only assignment of error is: "The court erred in rendering judgment on the verdict of the jury that the defendant recover of H. Eberling the value of the improvements placed on the property in suit—*First*, because there was no issue submitted to the jury that would entitle defendant to such judgment; *second*, because the facts found by the jury did not authorize such a judgment; *third*, because no pleading in the case entitled the defendant to such a judgment."

<sup>1</sup>Publication delayed by failure to receive copy.



Plaintiff in error contends that the provisions of our statutes relating to claims for improvements in good faith made in actions of trespass to try title apply to this case, and that to entitle defendant in error to recover the value of improvements the pleadings, verdict, and judgment should have conformed to the requirement of those statutes. The only authority cited in support of the contention is the articles of the statutes relating to claims for improvements in actions of trespass to try title. We cannot accede to the proposition here insisted upon. This is an action to rescind an executory contract for the sale of land, after the vendee had gone into possession and made valuable improvements. In cases of this character we think it is settled that the right of the vendee to recover the value of improvements is not dependent on the statutes regulating the action of trespass to try title, but on the principles of equity. *Patrick v. Rouch*, 21 Tex. 256.

It is contended that there was no good faith on the part of defendant in error in making the improvements, because the property was homestead, and it went into possession and erected the improvements under a bond for title executed by the husband alone. We do not think it would follow as a necessary conclusion from these facts that defendant in error did not act in good faith in making the improvements. While the jury found that the property was part of the homestead, they also found that defendant in error had no actual notice that the property was claimed as homestead, and that the improvements were made with the knowledge and consent of Eberling and plaintiff in error. The fact that the husband and wife occupied as a homestead a part of a block of land 100 feet square, while the defendant in error, under an executory contract of purchase made with the husband, took possession and made valuable improvements upon another part of the same block, with the knowledge and consent of the wife, was a very potent circumstance tending to support the belief on the part of defendant in error that when the time for performance came the wife would join the husband in conveying the land in compliance with the conditions of the bond. The wife would not be estopped by such conduct, but it is proper to be considered in determining the question of good faith upon the part of the vendee.

A bond executed by the husband to convey the homestead of himself and wife at a future day is not void. Such bond could not bind the wife, if executed by her; and her signature would add nothing to its strength. If the wife should join the husband in the execution of the deed, the conditions of the bond would be complied with, and the obligee in such a bond might confidently expect that the wife would do so. If the homestead should be abandoned, or the wife should die after the execution of the bond by the husband, specific performance of the contract could be enforced against the husband.

*Brewer v. Wall*, 28 Tex. 589; *Cross v. Everts*, 28 Tex. 534. These authorities were approved and followed by this court in the case of *Goff v. Jones*, 70 Tex. 572, 8 S. W. Rep. 525. If the wife should refuse to join the husband in executing the title as required by the conditions of his bond, and the husband and wife continued to occupy the property as their homestead, there would necessarily be a breach of the conditions of the bond, for which the vendee would be entitled to recover against the husband the amount expended by him in good faith under the contract of sale. *Brewer v. Wall*, *supra*; *Kempner v. Heidenheimer*, 65 Tex. 587; *Goff v. Jones*, *supra*. We are of opinion that the judgment of the court below is correct, and should be affirmed.

PER CURIAM. Adopted.

MCANALLY v. WARD *et al.*

(Supreme Court of Texas. Dec. 18, 1888.)<sup>1</sup>

SERVICE OF PROCESS—WAIVER.

Under Gen. Laws Tex. 1885, art. 1847a, providing that the acceptance of service and waiver of process shall not in any action be authorized by an instrument sued on or executed prior to the institution of such suit, nor shall it be made until after suit brought, defendants' acceptance of service and waiver of process indorsed on the petition in the suit against him, before it was filed, will not support a judgment by default.

Commissioners' decision. Error from district court, San Saba county; A. W. MOUR-SUND, Judge.

*Burleson & Harris*, for plaintiff in error.  
*Fisher & Townes*, for defendants in error.

ACKER, P. J. On the 27th of April, 1886, appellant signed a written acceptance of service and waiver of issuance and service of process, indorsed upon a petition, which had been prepared to be filed in a suit against him by appellees on two promissory notes. On the next day, April 28th, 1886, the petition was filed, and the case entered upon the docket. On May 10, 1886, appellant moved to quash the acceptance and waiver of service upon the ground that it was made before the suit was filed, the motion stating that the appearance was for the purpose of the motion only. The motion was overruled. On May 14, 1886, judgment by default was rendered against appellant, and on the same day he filed a motion to set aside the judgment, because "there was no such service, acceptance, or waiver thereof, as authorized the court to render the judgment." The motion was overruled, and the case is brought here by writ of error.

The nineteenth legislature enacted the following amendment to the Revised Statutes: "Art. 1847a. The acceptance of service and waiver of process provided for in article 1240, and the entry of appearance in open court, as provided for in article 1241, for the con-

<sup>1</sup> Publication delayed by failure to receive copy.



fession of judgment, as provided for in article 1347, shall not in any action be authorized by the contract or instrument of writing sued on, or any other instrument executed prior to the institution of such suit; nor shall such acceptance or waiver of service be made until after suit brought." Gen. Laws 1885, p. 33. We think this statute, in its application to this case, admits of but one construction, and that is that acceptance of service, and waiver of issuance, and service of process, made prior to the institution of the suit, will not support a judgment by default. It is contended by appellees that the legislature never intended this law to apply in cases like this, but that the purpose of the legislature was to prevent creditors from obtaining undue advantage over debtors. In reply to this we deem it sufficient to say that it is beyond our power to exempt from the operation and effect of a general law any case that clearly comes within both the spirit and the letter of the law.

We think the court erred in refusing to set aside the judgment, for which it should be reversed, and the cause remanded.

PER CURIAM. Adopted.

#### JOHNSON *et al.* v. SCHUMACHER *et al.*

(Supreme Court of Texas. Dec. 18, 1888.)<sup>1</sup>

#### TRESPASS TO TRY TITLE—IMPROVEMENTS—TENANTS IN COMMON—LIMITATIONS.

1. In trespass to try title, a verdict giving to each defendant the same amount for improvements made is unwarranted, where a certain witness testifies that the improvements of the respective defendants were of different value, and the court finds that defendants proved the value as stated by such witness.

2. Though plaintiff and another owned the land as tenants in common, and plaintiff's coverture prevented the statute of limitations from running against her, yet, if the facts and character of defendants' possession are such as will amount to a bar against her co-tenant, plaintiff is protected to the extent of her own interest only, and cannot recover the interest of such co-tenant not suing.

3. Plaintiff's subsequent acquisition of her co-tenant's title will not interrupt the running of the statute of limitations against the same, notwithstanding her coverture.

4. Upon disclaimer by a defendant who was not in possession at the commencement of the action, judgment should be for plaintiff for the land, and for such defendant for costs.

Commissioners' decision. Appeal from district court, San Saba county; A. W. MOUR-SUND, Judge.

Trespass to try title by Marie Schumacher and husband against J. O. Johnson, D. N. Parrisher, and W. C. Hartley, for survey No. 111, in district 10, San Saba county. Plaintiffs brought another action against the same parties, and also A. McGill, J. W. Williams, Dick Callan, and Katy Williams, for section No. 110 in the same district. Mrs. Schumacher claimed the land as her separate property. The suits were consolidated. Defendants, except Hartley and Katy Williams,

pleaded "Not guilty," limitation of three, five, and ten years, and improvements in good faith. Katy Williams disclaimed. The *feme* plaintiff, in reply to pleas of limitation, set up her coverture. Mrs. Schumacher de-raigned title as follows: The two surveys, 110 and 111, containing 320 acres each, were patented to the heirs of Friedrich Neher, deceased. John G. Neher and Marie Schumacher, *nee* Neher, were his children and only heirs. Mrs. Schumacher offered two deeds from her brother, John Neher, conveying to her his undivided one-half of the two surveys, consideration, love and affection, one dated March 8, 1884, and the other February 13, 1884. The *feme* plaintiff's coverture was proved as alleged. Neher swore that he sold his interest in his father's certificate to W. D. Jackson a short time before the war. Defendants' assignor testified that he purchased the land at a tax-sale in 1879. That he continued to live thereon after the purchase, and made improvements in good faith. That the improvements on the same are valued as follows: J. O. Johnson, \$738; Johnson and Parrisher, \$875; McGill, \$325; W. Williams, \$250. That Hartley had no improvements. Verdict as follows: "We, the jury, find in favor of M. Schumacher, plaintiff in this cause, and we further agree to allow defendants \$600 for their improvements,—each \$150; and we further find the land worth \$2 per acre." Judgment accordingly, from which defendants appeal.

*Burleson & Walters* and *Fisher & Townes*, for appellants. *Sidon Harris* and *S. W. Yoe*, for appellees.

COLLARD, J. The first, second, and fifth assignments of error are too general to require consideration. The third assignment of error is as follows: "The jury, in finding value for improvements made by defendants, \* \* \* disregarded the facts proven, in this: in giving to each defendant the same amount, \$150, when the evidence showed the value of Johnson's improvements to be \$738; of Johnson and Parrisher's, \$875; of McGill's, \$325; and of Williams', \$250." Defendants claimed under a tax-deed and 10 years' possession under one Barber, who bought the land at tax-sale in 1879, and who had had continued possession of both surveys from 1856 to 1883, when he sold to defendants their respective surveys. Witness Barber testified that the improvements of the defendants were worth, respectively, the several amounts as set forth in the assignment of errors, and the judge who made up and filed the statement of facts (the parties disagreeing) simply says upon the subject of improvements: "Defendants each proved their occupancy continuous from their purchase from Barber, and their improvements, the value as stated by the witness Barber; that they purchased and improved the land in good faith; that the improvements were permanent and valuable; and that the land was worth from one to one and one-half dollars

<sup>1</sup>Publication delayed by failure to receive copy.

per acre." The charge of the court submitted the question and the value of improvements made in good faith by each of the defendants. The verdict, after finding in favor of Mrs. Schumacher, proceeded to find as follows: "And we further agree to allow defendants \$600 for their improvements,—each \$150." It is a question of fact for the jury to determine whether improvements are made in good faith. The court should instruct the jury as to the meaning of good faith. The possessor must not only believe he has the superior title, but there must be reasonable grounds for the belief to amount to good faith, in the sense in which the term is used in the statute. The defendant may claim under a defective title, and there may be a superior title in another; but if he have reasonable grounds to believe his is the better title, is ignorant of the superior title, and has used proper care to ascertain the existence of the same, the jury may properly find he is a possessor in good faith, and allow compensation for improvements made in such belief. *Dorn v. Dunham*, 24 Tex. 366; *French v. Grenet*, 57 Tex. 273; *House v. Stone*, 64 Tex. 678. The verdict of the jury did not expressly find that defendants' improvements were made in good faith, but the finding included the fact, as, under the charge, they could not allow compensation for improvements without first finding that they were made in good faith. Four of the defendants only proved improvements and their value, viz., Johnson, McGill, Johnson and Parrisher, and Williams. It is evident the jury intended the finding to include these defendants only, as it was for a total of \$600, distributed into four parts,—\$150 to each. The judgment of the court so construed the verdict. The jury evidently disregarded the evidence in so distributing the amount into four equal portions. The evidence showed no such equality of rights. We cannot apply the evidence to the verdict; it is simply impossible.

Appellants, by the fourth assignment of error, claim that if John Neher conveyed his undivided half of the land to Jackson before he conveyed to his sister by deed of gift, then the plaintiff could at most only recover her undivided half, or 320 acres. This is not a correct principle. One tenant in common can maintain the action of trespass to try title, and recover against a trespasser or a mere wrong-doer. This right is not affected by the Revised Statutes. *Ney v. Mumme*, 66 Tex. 268. If, however, the plaintiff show disabilities that will prevent the running of the statute of limitations against her, and the facts and character of possession are such as to create a bar by limitation against one having no disabilities, then she, as tenant in common, cannot recover the interest of her co-tenant not suing. In such case the defendants in whose favor the bar is made to appear should recover to the extent of the rights so barred in their favor. Again, if the statute commenced running against John Neher in favor of defendants, or him or them

under whom they claim, and the possession was continued, limitation would not be interrupted by the subsequent acquisition of Neher's title by plaintiff, notwithstanding she was a *feme covert*. When the statute begins to run it is not stopped by subsequent disabilities, or by the disabilities of a person into whose hands the title may fall. Mrs. Schumacher being a married woman during the whole of the time in which defendants and those under whom they claim had possession, she would be protected to the extent of her one-half undivided interest, but not to the other half, which may have become barred, if the facts and character of the possession amount to a bar. *Allen v. Read*, 66 Tex. 13; *Stovall v. Carmichael*, 52 Tex. 383.

Upon the filing of the disclaimer by Katy Williams, the court should have given judgment in favor of plaintiff against her for the land, and, unless she was shown to have been in possession at the time the suit was brought, she should have had judgment for her costs. *Wootters v. Hall*, 67 Tex. 513, 8 S. W. Rep. 725. It does not appear that Katy Williams was in possession of the land sued for, and judgment should be here rendered in favor of plaintiff for the land, and in favor of Katy Williams for her costs, and cost of appeal. As to other defendants the judgment of the court below should be reversed, and remanded for a new trial.

PER CURIAM. Adopted.

CRADDOCK *et al.* v. ORAND *et al.*

(Supreme Court of Texas. Oct. 30, 1888.)<sup>1</sup>

ASSIGNMENTS FOR BENEFIT OF CREDITORS—ACTIONS ON ASSIGNEE'S BOND.

1. The assignment law of Texas (act July 24, 1879, § 8) provides that any creditor not consenting to the assignment may garnish the assignee for any excess of the estate remaining in his hands after payment of the debts of consenting creditors and the costs of the assignment. *Held* that, upon such garnishment proceedings, the creditor is entitled to a discovery of the condition of the estate, and thereby establishes his right to such excess.

2. Section 6 provides that the assignee shall give bond that he will faithfully discharge his duties as assignee, and will make proportional distribution of the net proceeds of the estate among the creditors entitled thereto, which bond shall inure to the benefit of the assignor and of creditors, who may maintain an action thereon against such assignee and his sureties for any breach thereof, or violation of this law, by which such assignor or creditor shall sustain damages. *Held*, that in a suit on such bond by a non-consenting creditor his petition should show that there are or should be in the assignee's hands funds subject to his debt, which are withheld.

3. The seizure of the assigned property by judicial proceedings, whereby the assignee is prevented from realizing anything, is a bar to such action on his bond; and a judgment against him in garnishment proceedings under the statute does not estop the sureties from making such defense.

Appeal from district court, Bell county; W. A. BLACKBURN, Judge.

<sup>1</sup>Publication delayed by failure to receive copy.

*W. S. Holman*, for appellants. *Prather & Lindsey*, for appellees.

**WALKER, J.** September 29, 1886, appellees brought suit in the district court of Bell county against *W. A. Craddock*, principal, and his sureties, *B. F. Bullock* and *W. G. Hilliard*, on the bond of *Craddock*, as assignee of *W. J. Wheat*. The petition alleged, in substance, that on February 16, 1884, *W. J. Wheat* made an assignment to *W. A. Craddock* for the benefit of such of his creditors only as would consent to accept their proportional share of his estate, etc., and conveyed to the assignee property supposed to be worth \$2,250. That said *Craddock* qualified as such assignee, and executed a bond, with *Bullock* and *Hilliard* as sureties, in the sum of \$3,000, conditioned as prescribed by the statute, which was duly approved by the county judge of Bell county and filed. That on December 10, 1884, the firm of *McClelland, Orand & Co.* recovered a judgment in the district court of McLennan county against said *Wheat*, and thereafter caused a writ of garnishment to be issued to said *Craddock* in order to subject any excess of such estate, after the payment of consenting creditors, costs, and expenses of the trust. That on December 14, 1885, in said district court of McLennan county, the said firm recovered a judgment against said *Craddock*, on account of his actings and doings as such assignee, for \$624.90. That execution was duly issued upon said judgment, and was returned unsatisfied. That plaintiffs are the surviving partners and owners of the judgment, and that *Craddock* and his sureties thereby are liable for said judgment. The defendants demurred to the petition, and for special exceptions urged that the petition failed to show that *Craddock*, as assignee, had ever received any property of *Wheat* that would be liable to the payment thereof, or to show that the conditions of the bond had not been complied with; that it failed to allege the value of the assets, the consenting creditors, the expenses of executing the trust, and it failed to allege any excess in the hands of the assignee. The exceptions were overruled. In answer, defendants, among other things, alleged that soon after the assignment, March 26, 1884, the sheriff of Bell county levied an attachment in suit of *McIlhenny & Co.*, for \$1,546.09, against said *Wheat*, upon the property conveyed in said assignment. That other attachments were also levied upon the property subject to the first levy. That *Craddock*, as assignee, had filed his affidavit and bond to try the title to said property, and recovered judgment, from which an appeal was taken and is pending. That the attachment proceedings had put in abeyance further proceedings under the assignment. That the amount of indebtedness of *Wheat* was \$4,808.45. That a number of the creditors had consented to the assignment, who had filed their claims, which had not been paid. That the value of the prop-

erty is insufficient to pay costs, expenses, and consenting creditors, etc.

On the trial defendants offered to prove the condition of the estate, and the facts detailed in the answer. Objections were made to the testimony. The court excluded it, holding that the sureties were concluded by the judgment against *Craddock* in the garnishment proceedings alleged in petition. Other matters are presented in the record not deemed necessary to be here considered.

The conditions of the assignee's bond, required by the statute, are "that he will faithfully discharge his duties as such assignee, and that he will make proportional distribution of the net proceeds of the assigned estate among the creditors entitled thereto;" which bond, it is provided, "shall inure to the benefit of the assignor and creditor or creditors, who may maintain an action thereon against such assignee and sureties, in his or their own names, jointly or severally, for any breach thereof or violation of this law by reason of which such assignor or creditor shall sustain damages," etc. Section 6, act July 24, 1879. Section 8 of the act provides: "Any creditor not consenting to the assignment may garnish the assignee for any excess of such estate remaining in his hands after the payment of consenting creditors, the amount of their debts, and the costs and expenses of executing the assignment." From these extracts from the statute the rights of the parties in this case can be determined. The garnishment proceedings in the district court of McLennan county by the plaintiffs were in accordance with the statute, and for the purposes provided. In answer to the writ the assignee should have disclosed the condition of the estate as to assets, and the preferred claims upon them. The proceedings determined the right of the plaintiff to any excess of the assets at the service of the writ in the hands of the assignee after paying consenting creditors, costs, and expenses of the trust.

The sureties, being liable for the payment of the assets, under the law could have no interest in any litigation among creditors for priority of payment. They are liable to suit for any breach of the bond or violation of the assignment law by the assignee by which the creditors have suffered damage. In absence of any negligence in realizing upon the assets, the non-consenting creditor (the law prescribing the order of payment, and designating claims having priority) could only be injured when there is an excess of funds on hand after the payment of the consenting creditors, and the costs and expenses of the assignment, and of others, if any, who may have fixed a right of priority in such excess, and when, under such conditions, the assignee had failed to pay over such excess to which the creditor has fixed his right. The petition, therefore, was subject to the exceptions urged by the defendants.

Our courts have never passed upon the question raised in this case upon the effect of

the judgment against the principal as affecting his sureties under the assignment law. Touching the general question, a standard author gives the condition of authorities: "Although there is a conflict of authority on the subject, it seems to be the better opinion that, except in cases where, upon the fair construction of the contract, the surety may be held to have undertaken to be responsible for the result of a suit, or when he is made privy to the suit by notice, and, the opportunity being given him to defend it, a judgment against the principal alone is, as a general rule, evidence against the surety of the fact of its recovery only, and not of any fact which it was necessary to find in order to recover such judgment." Brandt, Sur. § 524. See, also, Freem. Judgm. § 100. As the purpose and effect of the garnishee process against the assignee is declared by the statute, the sureties had no interest in the contention which might arise in such proceedings, and they were not necessary or proper parties thereto. Accordingly, when sued upon the bond, the sureties should have the right to negative the breach of the bond if such breach had been sufficiently alleged. If the administration of the assets by their principal had been obstructed by legal proceedings in suits by attaching creditors,—seizing the property, compelling suits to regain it,—if such suits be pending, thereby preventing the assignee from realizing upon the property, and if, without fault of the assignee, no funds were in fact in his hands subject to the judgment of plaintiffs, such facts should bar a recovery upon the bond. The objection of the plaintiffs to this testimony was improperly sustained.

The effect of the personal judgment against the principal is not before this court on this appeal. If he has so managed the controversy upon his answer to the garnishment, or if the proceedings were so conducted by his attorney, or by the attorney representing him, that through mistake or collusion he became liable, regardless of the amount of assets, that is his own misfortune. But the decree does not establish beyond controversy the existence of assets subject to the judgment as against the sureties. They are acquitted when the assets have been administered under the law under which their bond was executed. The statute defines their obligation and liabilities. It is here held (1) that, under the assignment law of this state, a non-consenting creditor, by garnishing the assignee, is entitled to a discovery of the condition of the estate, and thereby establishes his right to any excess after the payment of prior claims, costs, and expenses of the assignment; (2) that, in a suit upon the assignee's bond by a non-consenting creditor, he should show that there are or should be assets in the hands of the assignee subject to his debt, and which are withheld; (3) that where, by judicial proceedings, the property has been seized, and the assignee thereby is prevented from realizing anything, such facts are a bar

to an action upon the bond by a non-consenting creditor to compel payment of his debt, and the sureties are not estopped from making such defense by a judgment against the assignee in garnishment proceedings against the assignee under the statute.

For the errors above noted the judgment below will be reversed. Reversed and remanded.

#### MISSOURI PAC. RY. CO. v. BRIDGES *et ux.*

(Supreme Court of Texas. Oct. 15, 1889.)

##### RAILROAD CROSSINGS—NEGLIGENT CONSTRUCTION.

Where a railroad company maintains a road crossing, knowing that such road is in common use by the public, it is liable for injuries caused by defective construction of the crossing, though the road has not been made public by law.

Error from district court, Wood county; FELIX J. McCORD, Judge.

*Whittaker & Bonner*, for appellant. *Giles & Hicks*, for appellees.

GAINES, J. This suit was brought by defendants in error to recover of plaintiff in error damages for injuries resulting in the death of their minor son. The accident occurred at a point on the company's track where it was crossed by a road which was used by the public as a highway. The crossing was at Golden, an unincorporated village in Wood county. The road was not recognized as a public highway by the authorities of the county. The railroad company had constructed a crossing for the road, and had made a bridge across a ditch on the side of its track. The bridge, having become old and out of repair, was reconstructed by the section hands with the old material, and dirt was thrown upon it, which concealed its defects. James D. Bridges, the son of defendants in error, attempted to cross the bridge on a mule, but the bridge gave way under the mule, and caused him to fall and to receive injuries from which it is claimed that he died. For the purposes of this appeal it is conceded in the brief of counsel for plaintiff in error that the injuries so received resulted in his death. The court charged the jury in effect that when a railway company recognized and maintained a crossing over its track for the benefit of the public the company would be liable for injuries resulting to any one using the crossing by reason of defects in its construction. This charge is assigned as error. It is also assigned that the verdict of the jury is contrary to the law and evidence, because, as is insisted, the road not being a public one, the company was not liable in damages for the injury. In *Railway Co. v. Lee*, 70 Tex. 496, 7 S. W. Rep. 857, the doctrine is laid down that a road not established by authority of law, which crosses the track of a railroad, may be so used by the public and recognized by the company as to impose upon the employees of the latter in operating its trains the duty of ringing a bell or blowing a whistle upon approaching the crossing, as is prescribed by article 4232 of

the Revised Statutes, in reference to the crossing of public roads. It is claimed, however, that there is a distinction between that case and the case now before us. This may be, but if a road may be made public merely by use and recognition, so as to impose upon railroad companies a duty purely statutory, we think, for a stronger reason, that if they assume the duty of maintaining a crossing upon such a road, and thereby impliedly invite the public to use it, they should be held bound to maintain it in a safe condition. It is so held by the supreme court of Minnesota in the case of *Kelly v. Railway Co.*, 28 Minn. 98, 9 N. W. Rep. 588. The court, in support of this opinion, cite *Webb v. Railway Co.*, 57 Me. 117, which volume is not accessible to us at this branch of the court. The company may be under no obligation to maintain the crossing of a road, not made public by law, which its track intersects; but, if it voluntarily assumes to do so, knowing that it is a road in common use by the public, it in effect invites the use of it and proclaims it safe, and should be held liable for any injuries resulting to passengers over the crossing by reason of its negligent construction. We conclude that under the undisputed facts of the case the plaintiffs were entitled to recover, and that there is no error in the charge of the court which requires a reversal of the judgment. The damages are large, but not so excessive as to authorize us to set aside the verdict on that ground. We declined to set aside a larger verdict under a very similar state of facts in *Railway Co. v. Lee*, supra. The judgment is affirmed.

COOPER v. PIERCE *et al.*

(Supreme Court of Texas. Oct. 15, 1889.)

EXECUTORS—ALLOWANCE TO WIDOW AND CHILDREN.

1. Under the Texas statute allowing to the widow and minor children of a decedent who have no property adequate to their maintenance one year's support from decedent's estate, a minor son is entitled to such allowance, though he is earning wages sufficient for his support, and is allowed to appropriate them to his own use.

2. Under the provision making it the duty of the court to allow to the widow and children a certain sum in lieu of exempt property not existing in kind, the value of existing exempt property turned over in kind cannot be deducted from the sum allowed.

Appeal from district court, Harrison county; JOHN L. SHEPPARD, Judge.

A. Pope and M. R. Geer, for appellant. T. P. Young, for appellees.

HENRY, J. Mrs. Annie E. Pierce, surviving widow of John T. Pierce, applied to the county court for an order setting apart to her and her two minor children, a son and a daughter, the exempt property belonging to the estate of herself and her deceased husband, and for allowances for a year's support, and in lieu of exempt property not existing in kind. The administrator opposed the application. On appeal to the district court the cause was tried by the judge, who filed

his conclusions of fact, from which it substantially appears that the deceased was at the time of his death a practicing lawyer, owning as part of the community estate of himself and his surviving wife a law-office and law library; that he died insolvent, leaving two minor children, a son and a daughter, who owned no property; that the surviving widow owned a separate estate of the value of several thousand dollars, including the residence in which the family lived at the time of the death of the husband; that the deceased occupied the law-office up to the date of his death; that at the date of the death of the husband, in addition to the law-office, residence, and library, he owned a pair of mules, a wagon, household and kitchen furniture, and implements of husbandry, but none of the other property exempted by law from forced sale; that it required \$40 per month for the daughter, and \$30 per month for the son for food, clothing, education, and incidental expenses for the 12 months next succeeding the death of their father. The court's conclusions of law, in pursuance of which a decree was rendered, were as follows: That the following exempt property be set apart for the benefit of the widow and her minor children: All household and kitchen furniture and all implements of husbandry; all books belonging to the law and family libraries, and all portraits and pictures; two mules and a wagon, and \$40 for their rent, collected by the administrator; the land on which the law-office was situated, and the rent received for it by the administrator. That the widow was not entitled to any allowance for a year's support, and that \$480 be allowed for a year's support of the daughter, and \$360 for that of the son, and that \$420 be allowed the widow and children in lieu of exempt property not belonging to the estate. From this decree the administrator prosecutes this appeal, and urges the following objections: (1) The court erred in finding as a fact that the deceased husband was a practicing lawyer at the date of his death, and in its conclusion of law that his law-office and law library were exempt from forced sale. (2) The court erred in finding that the son did not have any separate estate, because the evidence shows that he was manumitted by his father, and was earning, when his father died, \$75 per month, all of which was his property, amounting to \$45 per month more than was necessary for his support. (The evidence shows that before his death the father, by writing, released to his son all right to control him, as well as all claim to wages earned by him. (3) The allowance to the daughter was excessive. (4) The mules and wagon being of the value of \$220, the allowance of \$420 in lieu of exempt property not on hand in kind was excessive.

The law makes it the duty of the court to set apart to the widow and minor children of the deceased, when they do not have property adequate to their maintenance in their own rights, sufficient for their support for

one year from the time of the death of the testator or intestate. No allowance was made to the widow because she owned separate property adequate to her maintenance. Neither the son nor daughter owning such property, an allowance was properly made to each of them, the amount of which, as fixed by the court, we cannot say is unsupported by the evidence. The fact that the son was earning wages for his personal services, and allowed to appropriate them to his own use, did not deprive him of the right to demand and take the allowance that the law gave him out of his deceased father's estate. The mules and wagon, being on hand in kind, were required to be turned over to the widow and children without regard to their value. The other descriptions of personal property, except one year's supply of provisions, not being found among the effects of the deceased, it was the duty of the court to make to the widow and children an allowance in lieu thereof not to exceed \$500. In estimating the \$500 of value the court properly declined to include the articles of exempt property existing and turned over in kind. If the decedent abandoned permanently his profession before his death, the exemption of his law-office and law library thereby ceased. There is some evidence in the record tending to show that he had done so, but there is some to the contrary. The court's finding that he had not abandoned his profession is sufficiently supported by the evidence, and we do not feel either inclined or at liberty to disturb it. The judgment is affirmed.

#### HURLEY v. LOCKETT *et al.*

(*Supreme Court of Texas. Dec. 11, 1888.*)<sup>1</sup>

ADVERSE POSSESSION — EVIDENCE — ADMISSIONS AND DECLARATIONS — TRANSACTIONS WITH DECEASED.

1. In an action to recover land, where plaintiffs claim title by adverse possession under the Texas statute of 10 years' limitation, the declarations of occupants of the land during that period are admissible against plaintiffs where there is no evidence that such occupants held the land as plaintiffs' tenants, except the general statement that plaintiffs were in possession by agents and tenants.

2. Where husband and wife claim title to land by adverse possession, whatever right the wife may acquire therein is in common with her husband; and his acts and declarations in regard to such possession are admissible in evidence, though not authorized nor acquiesced in by the wife.

3. Where plaintiffs, relying upon the possession of a deceased person to complete their title, introduce the testimony of his administrator as to such possession, it is error to exclude evidence for defendant as to such deceased person's acts in relation to the land on the ground that he was dead, and that plaintiffs claimed by purchase from his administrator; for such exclusion would defeat the purpose of the law, which is to place the parties on an equal footing.

Commissioners' decision. Appeal from district court, Johnson county; J. M. HALL, Judge.

*Poindexter & Padelford*, for appellant.

*James A. Brown and Crane & Ramsey*, for appellees.

HOBBS, J. This suit was brought to recover about two acres of land, situated along and contiguous to the eastern boundary line of the R. Campbell survey, and the western boundary line of the I. B. Sessions survey, these lines being coincident, the latter survey being junior to and calling for the former. The land in controversy is the lower or southern portion of a narrow strip of land situated as above described. The suit was instituted on the 21st day of June, 1883, by Mrs. M. S. Lockett, joined by her husband, Solomon Lockett, against W. J. Hurley. The petition alleges ownership in Mrs. Lockett in fee-simple on and prior to June 4, 1883, and sets forth specially that plaintiffs, and those under whom they claim, have had, 10 years prior to said date, continuous adverse, etc., possession, cultivating, using, and enjoying the same up to the western boundary line of the Sessions survey, which is alleged to be marked on the ground for a distance of about 800 *varas* by a *bois d'arc* hedge and fence. As the case was developed on the trial, the issues between the appellant and appellees were whether the hedge and fence, as claimed by appellees, constituted the eastern boundary line of the Campbell survey, or was it, as contended by appellant, located upon the ground east of said hedge and fence? If said hedge and fence marked the true east line of the Campbell survey, then was appellees' specially asserted title of 10 years' adverse possession established?

Upon the issues thus made the court instructed the jury: "If, under the evidence and instructions given, you find that the east boundary line of the Campbell survey, as originally located on the ground, is east of the line upon which the *bois d'arc* hedge and fence is shown by the evidence to have stood, then you will find for the defendant, and by your verdict say, 'We, the jury, find that the east line of the R. E. Campbell survey, as originally established on the ground, is ——— *varas* [naming the number of *varas*, if any] east of the line marked by the *bois d'arc* hedge and fence, and therefore find for the defendant,' unless you find for plaintiffs under the plea of the statute of limitations, and under the plea of acquiescence, as hereafter instructed. But if you find that the east boundary line of the Campbell survey is on a line where the hedge and fence are shown by the evidence to be, or west of said hedge and fence, as the same stand upon the ground, you will find for plaintiffs, and say, by your verdict, 'We, the jury, find that the east boundary line of the R. E. Campbell survey, as originally established on the ground, is on the line ———, or west of the line ———, as marked by the *bois d'arc* hedge and fence, and therefore find for plaintiffs.'" The form of verdict was given the jury in the event it was found that defendant

<sup>1</sup>Publication delayed by failure to receive copy.

had acquiesced in the hedge and fence line. If plaintiffs were entitled to recover under the plea of 10 years' limitation, the form of the verdict was also given to the jury. The response of the jury to the foregoing instructions was: "We, the jury, find for the plaintiffs, under the statute of 10 years' limitation, with \$12 as rental value of the land." There was abundant evidence, we think, to justify the implication contained in the verdict as to the location of the east boundary line of the Campbell survey, originally east of the hedge and fence line; and it remains then to determine only whether on the trial of this cause, as it is presented to us by the assignments of error, the plaintiffs established their right to the land by adverse possession, in accordance with the familiar principles governing the assertion of title under that plea as settled in well adjudged cases.

The assignments of error relate to the action of the court in excluding testimony, and to instructions given and refused. In support of appellees' plea of title by 10 years' limitation, the plaintiff Solomon Lockett testified that "from the year 1876 up to 1883 plaintiff M. S. Lockett was, by agents and tenants, in actual adverse possession of all the land in dispute, claiming the same as her own, and cultivated, used, and enjoyed the same, to the exclusion of defendant and every one else; and her right to do so was never questioned or disputed until about June 4, 1883." The defendant, for the purpose of showing that the plaintiffs had not held adverse, hostile, and continuous possession of the land in controversy for a period of 10 years prior to the said 4th day of June, 1883, and that the east boundary line of the Campbell survey was where defendant claimed the same to be, offered to prove on the trial, by the witnesses H. T. Wilkinson and W. J. Hurley, that, during the year 1878, Reuben and Charles Lockett resided on and cultivated said Nelson place, and that they claimed that at that time they were the owners of said place; that they did not hold same as tenants of plaintiffs, but in their own right; that during said year the said Charles and Reuben Lockett claimed that the western boundary line of the said Nelson tract was about 20 varas east of the old hedge,—that is, that they claimed that the line claimed by defendant was the true division line between the Campbell and Sessions surveys; and that they did not, during said year, hold the strip of land in controversy adversely to defendant,—all of which testimony was objected to by plaintiffs because the same was irrelevant, and plaintiffs could not be bound by the statements of said Reuben and Charles Lockett, which objections of plaintiffs the court sustained, and all of the above testimony was rejected, and neither of said witnesses were permitted to testify to any of the above facts; to which action and ruling of the court appellant excepted, and assigns the same as error.

The evidence was excluded, it appears

from the record, upon the ground that "title to realty could not be established by verbal declarations of one not a party to the suit;" and the further explanation is made that "the undisputed evidence was that the parties were tenants of M. S. Lockett." We find no evidence in the record that these parties, whose declarations were sought to be used by defendant, were the tenants of M. S. Lockett. The general statement we have quoted from the testimony of plaintiff Solomon Lockett to the effect that M. S. Lockett had been in adverse possession by "agents and tenants" since 1876 is the only evidence upon this subject. There was no lease, contract, or agreement of any character showing or tending to show the relation of landlord and tenant between plaintiffs and Charles and Reuben Lockett. They were not shown to have been in possession in 1878, or at any time, under even a verbal rental contract with plaintiffs. There being no evidence in the record that Charles and Reuben Lockett occupied the land as tenants of Mrs. Lockett, we think their declarations made while in possession of the land were admissible. If, however, it should appear that they were tenants of Mrs. Lockett at that time, their declarations should be excluded.

During the trial of the cause Solomon Lockett testified in behalf of himself and his wife that "he had never at any time acknowledged that the land in controversy belonged to the defendant; that the defendant had acquiesced in the division line as claimed by plaintiffs for the past fifteen years; that he had not offered in 1880 to buy the same from defendant, and had not stated that it was not worth much to the latter, but was of value to him." He also testified that "the land in dispute, and which the defendant fenced, embraced about three-fourths of an acre, which plaintiffs, and those under whom they claim title, had been in possession of, actually inclosed, since about 1862 or 1863; that he was the plaintiff M. S. Lockett's authorized agent, attending to renting out the place for her each year, and the collection of the rent, and that she occupied and cultivated the land by tenants every year since she bought it." For the purpose of contradicting this evidence of Lockett, the defendant offered to prove, by his own testimony, and that of Mat Hale, that the plaintiff and witness Lockett, several times during the year 1877, while attending to the Lockett or Nelson farm as agent for his wife, M. S. Lockett, stated and admitted that the land involved in this suit was the property of the defendant; that he did not claim the same for his co-plaintiff; that he recognized the line claimed by defendant as the true line, and asserted no adverse claim to it. This evidence was objected to by plaintiffs, and excluded by the court, "because, the property being the separate property of Mrs. M. S. Lockett, she cannot be bound by the admissions and declarations of her husband." That the admissions or declarations of the husband with respect to the separate



estate of the wife, and prejudicial to her interests therein, are not admissible as against her, is a rule the correctness of which cannot be doubted, (*McKay v. Treadwell*, 8 Tex. 177;) but when he acts as her agent, under authority express or implied, his declarations made within the scope of his agency would be. So, too, where she claims under or by virtue of the acts and declarations of the husband they would be admissible against her, not as to her separate property, but as to the property she seeks to acquire by virtue of his acts. We do not understand, however, that the rule that the wife is not bound by the declarations or admissions of the husband as to her separate property, when they are prejudicial to her, has any application to this case.

The title to the land is specially pleaded by the plaintiffs to be one acquired by an adverse possession of 10 years. A recovery was had by plaintiffs upon this theory. Consequently, the land could not have been the separate estate of the wife. Whatever right or title she acquired to the land under the statute of limitations was necessarily in common with the husband. Her possession, in whole or in part, for the period of 10 years, was that of her husband, and his possession was hers; and his acts, declarations, and conduct in relation to it were admissible. It is true that defendant and other witnesses testified that Lockett, in 1880, offered to buy the land in controversy from defendant. But we have not been able to find in the record that the facts sought to be proved by the witness Hale, and W. J. Hurley, the defendant, were testified to by the latter, as is stated in the explanation of the ruling contained in the bill of exception. The time referred to in the excluded testimony was during the year 1877; that mentioned by the witnesses testifying to Solomon Lockett's offer to buy the strip of land, and his acquiescence in the correctness of defendant's line, was in 1880.

To show a recognition by the defendant, Hurley, of the hedge and fence line, as claimed by the plaintiffs, and that he was estopped from denying it to be the true line, a witness, D. C. McCain, testified in behalf of plaintiffs that, "during the year 1869, he (McCain) had purchased from defendant, Hurley, 150 acres of the Campbell survey; that defendant executed a deed to him in 1870 for the same; that a surveyor, Quinn, surveyed the 150-acre tract, and, in making this survey, a point in the old hedge was recognized by defendant as the beginning corner of the tract sold to McCain, and as marking the true eastern line of the Campbell survey; that the deed executed to McCain by defendant calls for a stake in the east line of said Campbell survey as its beginning point, and calls also for the west line of the Sessions survey, and running for the closing call up, and along the line of the hedge." To explain and rebut this evidence, the defendant offered to prove by himself that the reason for placing a stake in the edge of the hedge as the south-east corner of the tract he had con-

veyed to McCain, instead of establishing it east of said hedge, was because the east line of the Campbell and the west line of the Sessions or Nelson tract were not then settled; that he, defendant, had agreed with Nelson, the then owner of the Sessions survey, that they would have the Campbell and Sessions surveys run out, and the division line between them settled and fixed; and that, if the true line was ascertained to be east of said hedge, he would let Nelson have the strip east of said hedge; that, in consequence of this agreement to let Nelson have said strip of land if found to be east of said hedge, he placed the eastern line of the tract conveyed to McCain on said hedge." To all of this testimony plaintiffs objected, "because Nelson was shown to be dead, and that plaintiffs are shown to be claiming title by purchase from the administrator of Nelson."

In this connection it will be proper to consider the exceptions to the exclusion of other evidence upon similar grounds. The defendant offered to introduce his own evidence to the effect that "in the year 1870 Nelson and he had procured a surveyor, Hamp Richards, and one Barnett, to establish the division line between the Campbell and Sessions surveys; that said Richards ran and established said line about 20 *varas* east of the hedge; that this line was then adopted by Nelson and defendant as the true division line between these surveys; and that Nelson admitted the land in controversy to be the defendant's land; and that said Nelson never, after the survey made by Richards in 1870, disputed defendant's title to the land, nor did he after that survey claim the same adversely to defendant, but always after that time regarded and considered the line so established as the true division line between them; that Nelson desired to purchase the strip of land, which defendant would not sell, but agreed to let Nelson use it and cultivate it free until defendant was ready to move his fence; that Nelson so used it with this understanding until his death." All of this evidence offered by the defendant was objected to, and excluded upon the ground above stated. Neither the administrator nor heirs of Nelson were parties to this suit. The right given by the law to a party to a suit to testify is general, and it should not be abridged unless he is brought within the exception which operates to curtail this privilege. *Ballou v. Tilton*, 52 N. H. 607. In this case the plaintiffs seek to acquire title under the acts, conduct, possession, and assertion of ownership of Nelson, which, tacked to the occupancy, and combined with acts of plaintiffs, completes their title. The testimony of Banks, Nelson's administrator, in behalf of plaintiffs, as to the conduct and claim of Nelson to this land, that he had held adverse, open, and peaceable possession of it, and had planted the hedge along the western line of the Sessions survey, is replete with details as to Nelson's acts. If Nelson had testified in person upon the trial it is not



probable that his testimony upon this phase of the case would have been more specific; and to exclude the evidence above referred to we think would defeat one object of the law, which is to put the parties where it applies on an equal footing, by allowing the plaintiffs the advantage of the acts and conduct of Nelson as testified to by his administrator, Banks, and deprive the defendant of his evidence with reference to them. We think there was error in excluding the evidence.

Errors contained in the charge of the court are made the basis of several assignments. To authorize a recovery, and complete the 10-years possession, it was necessary that the occupancy of Nelson and Banks should be tacked to plaintiffs'. Hale, a witness, testified that he had resided on the Campbell survey, and had known the land in controversy, for 35 years. In 1859 or 1860, Nelson purchased 100 acres of the Sessions survey from David Smith, the land, however, not being then surveyed. The dividing line between the Campbell and the Sessions surveys was not then definitely known. Nelson went upon the land, which he supposed he had purchased from Smith, built some houses, and set out a hedge. About the time Smith entered the army, in 1863, the land was surveyed by Quinn to obtain the field-notes for insertion in the deed to be executed by Smith to Nelson. After the survey Quinn stated to the witness Hale, and Smith and Nelson, that Nelson had got his fence and hedge over and west of his line; that he (Quinn) tried to save Nelson's house,—"sprung his compass for that purpose, but did not quite do it." After this there was some uncertainty among the owners of various tracts on the Campbell survey as to its east boundary line. It was agreed among them to settle this line. The parties interested in and making this agreement were the witness, defendant, Hurley, Wilkinson, Nelson, and probably others. They procured a surveyor, Hamp Richards, to establish by a survey this line in 1870. All of the parties named went upon the ground, and assisted Richards in making the survey. "We began at a corner of the Campbell survey, about which there has never been any dispute, and ran all the lines, establishing the east line of the Campbell about twenty *varas* east of the hedge, and as it was fixed by subsequent surveys of Wade and Barnett." This witness testified also that "on the same day of the survey, and just after it, and after the parties had agreed that this was the true line," he heard "Nelson offer to buy the land in controversy from defendant, which the defendant declined, but told Nelson he would leave him an outlet when he moved his fence." H. T. Wilkinson testified that Nelson had never during his life-time claimed the line marked by the hedge, but always recognized it as 20 *varas* east of that point. Several other witnesses testified to the fact that the line had been so recognized as claimed by the defendant.

In this connection the defendant requested the following charges, which were refused: "You are instructed that the plaintiffs, in order to recover from the defendant under the ten-years statute of limitations, must show by a preponderance of the evidence that the plaintiff, and those under whom she claims, have had and held for the full period of ten years before the ——— day of ———, 1883, not only actual possession, but also visible, continuous, notorious, and hostile possession, of the strip of land in controversy, against the defendant, and possession of such a character as to indicate unmistakably an assertion on their part of a claim of exclusive ownership in them as against the defendant, Hurley, and, unless you so find from the evidence, you are instructed to find in favor of defendant. You are further instructed in this case that, if you find from the evidence that Nelson held possession of and used the land in controversy by the consent or permission of the defendant, Hurley, or if the said Nelson admitted to said Hurley, during the time that he (Nelson) was in possession of said land, that he (Hurley) was the owner of said land, and did not revoke said admission, in either event the possession of said Nelson would not be adverse to said Hurley; and if you find from the evidence that the said Banks was appointed administrator of the estate of said Nelson, and that he received his possession of the land in controversy by and through his right as such administrator, then the said Banks would hold just as the said Nelson would have been compelled to hold; and if you find from the evidence that said Nelson held the land in controversy by the permission and consent of the said W. J. Hurley, then you must find that the said administrator, Banks, held the said land by the consent and permission of the defendant, unless the evidence in this case shows that the said Nelson before his death, or the said Banks after the death of said Nelson, by acts or words of no uncertain character, repudiated the right of the defendant, Hurley, and claimed said land adversely thereto. You are further instructed that if, under the above instructions, you find from the evidence that said Nelson and Banks held the land in controversy by the permission and consent of the defendant, and that during the time that they so held same (if you so find) neither of said parties repudiated the right of said Hurley to hold same as explained above, then you are instructed that you cannot compute the time during which said parties so held said land in favor of plaintiffs under the claim of ten years' statute of limitations, and you are instructed to find for defendant."

The charge of the court contained the statutory definitions of peaceable and adverse possession. Instructing the jury as to the law applicable to the evidence recited above, the charge in general terms is as follows: "But if one person has peaceable possession of an estate, and holds the same by the will

of the owner, either expressly or by the tacit consent of the owner, and does not claim the same adversely, as hereinbefore explained, then those who hold his estate cannot claim the estate by reason of such former peaceable possession, but they must show that their possession is peaceable, adverse, continuous, and uninterrupted, and used and appropriated, as hereinbefore explained, for more than 10 years, as before explained; and when the same is so shown by the evidence, then the law of limitations will secure to one showing such possession a title to the land against the owner and the rest of mankind." We think the charge requested or similar instructions should, in view of the evidence in the case, have been given. *Wood, Lim. 578; Satterwhite v. Rosser, 61 Tex. 171; Carter v. Town of La Grange, 60 Tex. 638.*

The court instructed the jury that the "mere admissions of the husband as to the right or interest of the wife's separate property will not be sufficient to prejudice or defeat any rights of the wife, unless such admissions are made by authority or consent of the wife, or unless the same are acquiesced in by the wife after the same has come to her knowledge; and in this case, if you find that the husband of the plaintiff M. S. Lockett made any admission to the extent of her right or claim to the boundary lines of her land, then you are instructed that you will not consider such admissions, if any, as evidence against her, unless you further find that she authorized, consented to, or knowingly acquiesced in such, if any, admissions; but if you find that the husband, Solomon Lockett, did make any admission or agreement affecting the right or interest of M. S. Lockett's claim to the land described in the petition, and that the same was done with her authority or consent, or was, after same was known to her, acquiesced in by her, then you may regard such admissions or agreement, if any, as evidence in the case, and you may give to the same such weight as you may think, under all the evidence in the case, the same, if any, is entitled to."

The charge requested by the defendant in this connection was to the effect that if it was found that "Solomon Lockett acted as the agent of, and for his wife, M. S. Lockett, in the purchase of the Nelson tract of land, and took possession thereof under the authority of Mrs. Lockett, and held it as her agent, she would be bound by his agreement and admissions made within the scope of such agency;" and that "if it was found from the evidence that Solomon Lockett was the agent of M. S. Lockett, as stated above, and that she claims the land in controversy under the 10-years statute of limitations, acquired in part by virtue of the possession of the said Solomon Lockett as such agent, and if you find from the evidence that said Solomon Lockett, during the time that he was in possession of said land as such agent, and while acting as such agent, admitted that the defendant was the owner of the land in controversy, you are in-

structed that the plaintiff Mrs. M. S. Lockett is bound by such admissions so made; and, if you so find, you are instructed to find in favor of the defendant." As we have said, the admissions of the husband in respect to the separate property of the wife cannot defeat or prejudice her right or title thereto; nor are they admissible as to the extent of the boundary lines of the wife's land to her prejudice. But in this case the title of the plaintiff M. S. Lockett to the land could be derived from the deed of Nelson's administrator, Banks, only in the event that the hedge and fence mark the true east line of the Campbell and the western line of the Nelson or Sessions survey. It was shown upon the trial that this was not the ground upon which she was entitled to recover; but the title upon which the recovery was had was under the statute of 10 years' limitation, acquired in part by the possession and occupancy of Nelson, her own, and that of her husband.

The case standing thus, we do not think it was necessary, in order to affect her title by limitation, that the plaintiff Mrs. M. S. Lockett should have authorized the admissions of her husband, nor that she should have acquiesced in them. If the title to this land was acquired as set forth in the petition, and as ascertained by the verdict, it was not her separate property; and, the possession of M. S. Lockett being the possession of her husband, his declarations and acts were admissible; and the charge requested presenting this view of the law should have been given, or instructions embodying this principle.

For the errors mentioned in the opinion we think the judgment should be reversed, and the cause remanded.

PER CURIAM. Adopted.

TRAWEEK v. MARTIN BROWN CO.

(Supreme Court of Texas. Oct. 15, 1889.)

APPEAL—OBJECTIONS WAIVED—PLEADING.

1. Where several pleadings are heard out of due order by consent of parties and without objection, an objection to such hearing cannot be raised on appeal.

2. A plea in abatement of the pendency of a prior suit for the same cause of action cannot be sustained where the prior suit is dismissed before the hearing of such plea, and no suggestion as to costs is made, nor objection to the substance of the plea urged.

3. Where it was admitted that the first suit was dismissed before the plea was acted on, that fact cannot be controverted on appeal by a certificate of the clerk.

Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

Ball & McCart, for appellant. Stanley & Spooner, for appellee.

STAYTON, C. J. This action was brought by appellee on December 8, 1886, to recover from appellant a sum due on an open account, and a writ of attachment was sued out and levied on lands belonging to appellant. On

September 15, 1887, appellant filed an answer, and a plea in reconvention, seeking damages for an alleged wrongful use of the writ of attachment. The justice of appellee's claim was admitted. Appellee pleaded, in abatement of the action set up in appellant's reconvention, that he had instituted an independent action in the same court on the same cause of action pleaded in reconvention, which was pending when the plea in reconvention was filed, and demurrers to the plea of appellant were subsequently filed. These exceptions were heard before the plea in abatement, and one of them sustained, but the others overruled. After this was done the parties, by agreement, as is shown by the bill of exceptions, submitted to the court the plea in abatement on the matters of law and fact involved in it, and upon an inspection of the record and the admissions of the parties the court found that the averments of the plea in abatement were true, and no question is made as to the sufficiency of the averments. It was, however, further admitted that, though pending when the plea in reconvention was filed, the former action was dismissed before the hearing of the plea in abatement. So standing the matter, the court below sustained the plea in abatement, and refused to hear the matters set up in the plea in reconvention, and, on hearing, judgment was rendered in favor of appellee for sum claimed, with foreclosure of attachment lien. It is now urged that the court erred in acting on the plea in abatement after action on exceptions to the plea in reconvention. These several pleadings were filed in due order, and should have been so disposed of, (*Sayles*, Tex. Civil St. arts. 1262, 1268;) but if the court, in its discretion, heard them out of their order, this would not deprive a party of the right to have a pleading passed upon out of due order, unless it was one in its nature such as the plea acted upon would waive. It appears, however, that the plea in abatement was heard by consent of parties after the exceptions were acted upon, and the only objection made was to the ruling on the plea. On this state of facts, were the rule otherwise than as stated, the agreement of parties and want of objection in the court below would preclude appellant from raising such a question for the first time in this court.

It is urged that the court erred in sustaining the plea in abatement, for that the former suit had been dismissed before the plea was heard. There are elementary writers and adjudicated cases which hold that if the first action is pending when the second is instituted, the latter, on proper plea and proof of that fact, will be abated, notwithstanding the former action may have been dismissed before the plea in abatement is filed or acted upon. In the case of *Payne v. Benham*, 16 Tex. 867, this rule was not followed. In that case it was said: "We are aware that by the strict rules of practice in the courts of common law, the facts so pleaded would have abated the suit last commenced. We,

however, regard it as a question of costs, not at all involving the merits of the cause of action. If the two suits had been still pending at the time the plea in abatement was filed, we would have required the party to dismiss one and pay the costs before proceeding to trial with the other. \* \* \* If the cost of the first suit had not been paid when it was dismissed, and that fact had been made known to the court, a rule could have been obtained, requiring the cost to be paid or secured before the party would have been permitted to proceed with the suit." This seems to us the better rule, and it seems to be in accordance with the weight of recent cases. *Beals v. Cameron*, 3 How. Pr. 414; *Schmidt v. Braunn*, 10 La. Ann. 26; *Mars-ton v. Lawrence*, 1 Johns. Cas. 397. No suggestion as to costs was made, nor objection to the substance of the plea urged, and we are of the opinion that the court erred in sustaining it upon the facts declared to have been shown by the record, and admitted by the parties. Appellee insists that it was not true that the first action was dismissed before the plea was acted upon, and attaches to his brief a certificate of the clerk of the court to that effect. The bill of exceptions shows that the dismissal of the first suit, before the plea was acted upon, was a fact admitted by appellee on the hearing, and the fact thus shown cannot be controverted in this court in the manner attempted. It is suggested that the court below erred in overruling the exceptions to the plea in reconvention, and that for this reason the judgment should be sustained, even though the court below may have erred in its ruling on the plea in abatement. The ruling of the court on the exceptions is not so presented as to entitle appellee to have it now revised, but if it be true that the exceptions should have been sustained it would have been the right of appellant to amend, and he could not be cut off from that right by a decision of this court affirming the judgment against him on a point decided in his favor by the court below, not now presented for revision and relating to matter which possibly may be made good by amendment if now subject to exception. For the error of the court in sustaining the plea in abatement its judgment will be reversed, and the cause remanded, and it is so ordered.

#### CUNNINGHAM *et al.* v. STATE.

(*Supreme Court of Texas*. Oct. 15, 1889.)

#### APPEAL—RECORD—CONTINUANCE—SURPRISE.

1. Where documents offered in evidence at the trial, and objected to on the ground that the impression thereto attached had no words or letters to show that it was the seal that it purported to be, are found in the record, indorsed with an agreement of counsel that they are the papers referred to in the bill of exceptions, and that they should be made part of the record, but there is no order of the trial court to that effect, such papers will not be considered by the supreme court in determining the correctness of the ruling on the evidence; and the statements of the judge in the bill of exceptions that the impression, though dim, was evi-

dently made with the proper seal, will be conclusive of the question.

2. Where a suit is brought by the state to cancel the sale of certain lands, and the complaint alleging a sale to defendant and a forfeiture, is subsequently amended, changing the suit to an action of trespass to try title, making it necessary for defendant to prove such sale, he may demand a continuance on the ground of surprise, but it is too late to raise the question of surprise on a motion for a new trial.

Appeal from district court, Donley county; FRANK WILLIS, Judge.

*Chas. Wheeler*, for appellants. *J. S. Hogg*, *R. H. Harrison*, and *L. D. Miller*, for the State.

GAINES, J. This suit was originally brought by the state to cancel a sale of a certain section of school lands lying in Donley county, alleged to have been made to appellant Cunningham. By an amended petition, appellant Montgomery was made a party defendant. The first amended petition alleged the sale of the land to Cunningham, his failure to comply with the conditions of the sale, and that Montgomery was setting up a claim to the property. On the day of the trial a second amended petition was filed on behalf of the state, changing the suit to an ordinary action of trespass to try title, and containing only the averments essential to maintain that action under the provisions of our statute. During the progress of the trial the plaintiff offered in evidence certified copies of certain documents on file in the general land-office. The evidence was objected to upon the ground that the impression attached to the officer's certificate, which purported to have been made by the seal of his office, had no words or letters thereon showing, or tending to show, that it was made with such seal. The evidence was admitted, and bill of exceptions allowed. The trial judge, however, modified the bill of exceptions by stating that the impression, though dim, was evidently made with the seal provided for the commissioner. The original copies offered in evidence are not made a part of the bill of exceptions; nor does it anywhere appear that the court ordered them to be sent up to this court as a part of the record. They are found, however, incorporated in the record, and indorsed with an agreement of counsel that they are the papers referred to in the bill of exceptions, and that they should be sent up as part of the record for the inspection of this court. When it is desired that original papers used upon the trial in the court below shall accompany the transcript, we deem the proper practice to be to obtain an order of the trial court to that effect. This seems to have been contemplated when the present rules were adopted. See Rule 62 of "Rules for the Supreme Court." The trial judge must sign the bill of exceptions and the statement of facts. To permit the counsel in a case to agree to send up original documents as those ruled upon in a bill of exceptions, without his approval or order, would be to allow them to bring to this court, by

agreement, a question not passed upon by the court below. It is against the policy of the law and the spirit of our statutes and rules to permit this. We are of opinion, therefore, that we are not at liberty to look to the certified transcripts from the land-office attached to the record in this case, in determining the correctness of the court's ruling in admitting the evidence, and that we must take the statement of the presiding judge that the impression upon the papers was sufficiently distinct to enable him to identify it as the seal of the commissioner of the general land-office as conclusive of the question.

It is insisted the court below should have granted defendants' motion for new trial on the ground of surprise by the filing of the last amended petition. A plaintiff in a suit for the recovery of real estate, who has specifically pleaded his title, is confined upon the trial to the proof of the titles so pleaded; but, should he amend and file his petition in the statutory form, he may prove any title under which he claims. Hence such an amendment is well calculated to operate a surprise to the defendant. In this case the state had alleged a sale to Cunningham, and a forfeiture of that sale. Under that pleading it was unnecessary for defendants to prove the sale. By the amendment this became necessary, since the state had the power to make a *prima facie* case by showing that the land had been surveyed and set apart as school lands under the law. The defendants were clearly entitled to claim a continuance on the ground of surprise upon the coming on of the state's last amended petition. But the defendants should have demanded the continuance, and, if refused, should have taken an exception. It does not appear from the record, in any proper manner, that a continuance was demanded. The judgment entry shows that the plaintiff announced ready, but is silent as to the defendants. In the absence of an exception to the ruling of the court forcing them to trial, the presumption is that they went to trial willingly. It was too late to raise the question for the first time in the motion for a new trial. It appears from the motion that when the case was called for trial the defendants were absent. Under such circumstances we may imagine a case in which a counsel might properly proceed to trial upon the coming in of an amendment presenting new issues. They might be ignorant of important facts known to their clients, and not necessary to have been disclosed to them by the latter under the issues presented under the original pleading. But the motion for a new trial discloses no such state of case. The counsel for the defendants must have known that they claimed title to the land under a sale from the state; and, when the pleadings were so changed that it became necessary for them to prove this, they should have demanded a continuance, and, upon its refusal, have taken a bill of exceptions. This was not done. We con-

clude, therefore, that the court did not err in overruling the motion for a new trial. We find no error in the judgment, and it is affirmed.

**CASWELL et al. v. STATE.**

(Supreme Court of Texas. Oct. 15, 1889.)

Appeal from district court, Donley county; FRANK WILLIS, Judge.

Chas. Wheeler, for appellants. J. S. Hogg, R. H. Harrison, and L. D. Miller, for appellee.

GAINES, J. This case presents substantially the same questions raised and passed upon in *Cunningham v. State*, ante, 217, (this day decided.) For the reasons stated in the opinion in that case, the judgment in this case is affirmed.

**RICHARDSON et al. v. KENNEDY.**

(Supreme Court of Texas. Oct. 15, 1889.)

**EXECUTORS AND ADMINISTRATORS—ACCOUNTING.**

1. As to claims arising before the commencement of administration, Rev. St. Tex. art. 2081, provides that the action of the court in approving or disapproving such a claim shall have the force and effect of a final judgment. Articles 2192, 2193, provide that executors and administrators shall be allowed all reasonable expenses, necessarily incurred by them in the administration, which charges shall be acted upon by the court in like manner as other claims against the estate. Article 2142 provides that the court shall examine the final account of an executor or administrator, and the vouchers accompanying the same, and, after hearing all the exceptions and objections thereto, and the evidence in support of or against such account, shall restate the account if necessary, and audit and settle the same. *Held*, that these provisions do not give the force and effect of a final judgment to the action of the court upon expenses of administration, they being established upon *ex parte* proceedings, without notice to any one interested in the estate.

2. Where an executor's expense account, having been presented as a part of his final exhibit, is acted upon by the court on the same day with such exhibit, the action of the court in approving the expense account and the final exhibit is substantially one and the same judgment, and, as an appeal from the approval of the exhibit carried the whole case into the district court, it is not error to overrule the executor's plea of former recovery as to the expense account.

3. The final account of executors contained the following items: "Dec. 16, Jake Maurer, \$48.85; Aug. 12, Malin & Colvin, \$48.90." One of the executors testified that one of them "was for board and meals furnished myself and hands while attending to business for the estate;" and that the other "was for board and feed for horses while looking after stock belonging to the estate, and also for feed for stock while attending to business for the estate." *Held*, that neither the account nor the evidence contained the specific statements of expense required by Rev. St. art. 2193, providing that such charges shall be made in writing, showing specifically each item of expense, and the date thereof.

4. Such account contained this item: "June 25, to O. J. Wren, stable bill, \$188.84." The evidence showed that the bill was for keeping two horses belonging to the estate, and accrued partly before and partly after the death of the testator, and was a lien on the horses; that there was an immediate necessity for the use of these horses in preserving stock belonging to the estate, and, the party in possession refusing to release them, the debt was paid to get possession of them. The estate was insolvent, and there was no evidence as to the value of the horses. *Held*, that the facts did not show the release of the property to have been so much for the benefit of the estate as to

make it proper for the executor to procure such release by paying the debt, making it a debt of the second class, whereas it was one of the third or fourth class.

Appeal from district court, Mitchell county; WILLIAM KENNEDY, Judge.

Smith & Smith, for appellants. R. H. Looney, for appellee.

HENRY, J. Appellants, as executors of the last will of William W. Emmerson, on the 20th day of September, 1888, filed in the county court their final account of their administration of the estate of said Emmerson. An itemized statement of the expenses of the administration incurred by the executors was attached to and made a part of said final exhibit. Appellee, who was a third-class creditor of the estate, on the 13th day of October, 1888, filed exceptions to a number of items contained in the expense account. On the 27th day of October, 1888, the statement was duly entered upon the claim docket of the county court, and the county judge indorsed upon it his approval. On the same date the county court acted upon the final exhibit, overruling the exceptions and approving it. The creditor appealed to the district court from the order approving the exhibit. In the district court the executors pleaded in bar the entry of their claim upon the claim docket of the county court, and its approval by the county judge, insisting that no appeal had been prosecuted from that proceeding, and that it conclusively established the whole of their demand. The district court overruled this defense, and sustained exceptions to four items of the account, from which judgment the executors prosecute this appeal. Article 2081 of the Revised Statutes provides that "the action of the court in approving or disapproving a claim shall have the force and effect of a final judgment, and when the claimant, or any person interested in the estate, shall be dissatisfied with such action, he may appeal therefrom to the district court, as from other judgments of the county court rendered in probate matters." The claims embraced in this article are such as originate before the commencement of administration, and do not include such as grow out of the administration of the estate. The last-named class are provided for in articles 2192 and 2193 of the Revised Statutes, as follows: "Art. 2192. Executors and administrators shall also be allowed all reasonable expenses necessarily incurred by them in the preservation, safe-keeping, and management of the estate, and all reasonable attorney's fees that may be necessarily incurred by them in the course of the administration. Art. 2193. All such charges as are provided for in the preceding article shall be made in writing, showing specifically each item of expense, and the date thereof, and shall be verified by the affidavit of the executor or administrator, and filed with the clerk and entered upon the claim docket, and shall be acted upon by the court in like manner as other claims against

the estate." With regard to the action to be taken by the court upon the final account of an executor or administrator the Revised Statutes make the following directions: "Art. 2142. It shall be the duty of the court to examine said account, and the vouchers accompanying the same, and, after hearing all exceptions and objections thereto, and the evidence that may be offered in support of or against such account, to restate said account, if necessary, and audit and settle the same." The contention of appellants is that these provisions of the law put the expenses of the administration as to the manner of their establishment upon the same footing, in all respects, as they do debts that precede the administration, and that when thus established the one no more than the other can be revised on final settlement of the account of the executors. The law plainly requires that claims for expenses of administration shall be docketed and acted upon by the court in like manner as other claims against the estate; but, while the provision with regard to the action of the court upon the claims of other parties expressly declare such action "shall have the force and effect of a final judgment," no such effect is declared in favor of claims for expenses of administration in favor of an executor or administrator. It seems to us that there are substantial reasons for a difference in this respect. When claims of third parties are being established, it must be done through the executor or administrator who represents the estate, and whose duty and interest it is to protect the estate. On the other hand, the establishment of claims belonging to the administrator or executor is an *ex parte* proceeding, had without notice to any person interested in the estate, and, with regard to expenses of administration, unlimited as to time, except, we think, that the claims should be presented and acted upon before the final account is filed.

We do not think it was the intention of the legislature that the representatives of an estate should have the exceptional and unusual privilege of establishing final judgments in their own favor upon *ex parte* proceedings, and without notice. If such had been the intention of the legislature, we think it would have been expressed, as it was in the case of other creditors where the same objections do not exist. The requirements that the claims of the legal representatives shall be itemized, sworn to, filed, docketed, and acted upon as other claims against the estate, were no doubt intended as an additional safeguard for persons interested in the estate, without depriving them of the right to contest the account on final hearing, and without depriving the court at that time of the power to hear "all exceptions and objections thereto, and the evidence that may be offered in support of or against such account, and to restate it if necessary." We have deemed it proper to express our views of the proper construction of the above statutes without believing it necessary to do so to dispose of

this appeal. As the expense account of the executors was presented with, and as part of, their final exhibit, and was acted upon in the county court upon the same day that the final exhibit was, we think the action of the court in docketing and approving the account, and in overruling the exceptions to it, and in approving the final exhibit, including the claim of the executors, was substantially one and the same judgment, and that the creditors' appeal carried into the district court the whole case, and that there was no error in overruling the executor's plea of former recovery.

The district court sustained exceptions to four items in the account. Two of the exceptions were sustained on the ground that the items charged for were not shown by the evidence to have been for any service rendered the estate. The only evidence given to sustain these items was given by one of the executors, who testified that one of them "was for board and meals furnished myself and hands while attending to business for the estate," and that the other "was for board and feed for horses while looking after stock belonging to the estate, and also for feed for stock while attending to business for the estate." These items are charged in the account as follows: "Dec. 16, Jake Maurer, \$48.85; Aug. 12, Malin & Colvin, \$43.90." We do not think that either the account or the evidence contain the specific statement of expense required by the statute quoted above. Another item to which exception was sustained reads: "June 25, to O. J. Wiren, stable bill, \$188.84." The evidence with regard to this item shows that it was for keeping two horses belonging to the estate, and that it accrued partly before and partly after the death of the testator, and was a lien on the animals; that there was a necessity for the immediate use of the horses "for the purpose of taking care of and preserving the stock belonging to the estate," and, as the party in possession refused to release the horses, the debt was paid to get possession of them. The estate was insolvent. The evidence does not show the value of the horses. Under the law, the debt for which they were held was a claim of the third class, so far as it could be paid out of the two horses, and of the fourth class for any amount in excess of the proceeds of the property. There may arise cases when it will be so much for the interest of the estate for property subject to a lien to be released for the benefit of the estate as to make it proper, and even a duty of the executor or administrator, to release by discharging the debt when he would be entitled to have it allowed him as a claim of the second class. The facts of this case, as found by the court or developed by the evidence, do not show that state of case. There is nothing to show that the value of the horses, or that their value and use combined, amounted to as much as was paid to release them from the lien.

The remaining items to which exceptions were sustained are stated as follows:

September, 1887, W. D. Richardson, Exop.  
time..... \$39 00  
September, 1887, W. D. Richardson, two  
trips to Dallas..... 74 80  
September, 1887, W. D. Richardson, ex-  
penses to Dallas to negotiate the sale of  
horses..... 10 00

The evidence we think sustains the finding of the court that this indebtedness accrued before the death of the testator, and ought to have been proceeded with as a claim of the fourth class. The judgment is affirmed.

### SMITH v. TRADERS' NAT. BANK.

(Supreme Court of Texas. Oct. 18, 1889.)

#### ESTOPPEL—ADMISSIONS.

The answer in an action on a note alleged failure of consideration, that plaintiff had notice thereof, and that it took the note as collateral security for a pre-existing debt. Plaintiff then filed an amended original petition, alleging that it became the owner of the note by indorsement before maturity for a valuable consideration, and without notice of any defense thereto. Defendant, to secure the right to open and conclude on the trial, then admitted on the record "that the plaintiff had a good cause of action, as set forth in the petition, except in so far as it might be defeated in whole or in part by the facts of the answer constituting a good defense, which might be established on the trial." Held, not such an admission that plaintiff was a *bona fide* holder of the note as would preclude defendant from urging the defense of failure of consideration.

Appeal from district court, Tarrant county;  
R. E. BECKHAM, Judge.

A. M. Carter, for appellant. *Hogsett & Greene*, for appellee.

GAINES, J. This suit was brought by appellee against appellant, to recover upon a promissory note executed by the latter, payable to the order of the Texas Investment Company, Limited, a private corporation, and transferred by the payee to the appellee. The defendant in the court below pleaded a general denial, and also specially answered, alleging a failure of consideration, and that the plaintiff received the transfer of the note with notice of his defense. It was averred in the special answer that at the time of the execution of the note the Texas Investment Company, Limited, was upon the verge of a failure, and that in order to maintain its credit and standing it was agreed among the stockholders that each should execute to the company his promissory note for an amount equal to the amount of stock held by him in the company, except such as held the obligations of the company, and that such stockholders should release to the corporation an amount of their credits equal to the amount of their respective shares. The agreement was alleged to be in writing, and the following was set out as a copy thereof:

"Fort Worth, Texas, July 18, 1884.

"We, the undersigned, shareholders of the Texas Investment Company, Limited, feeling the importance of maintaining the credit of said company, and realizing its present financial condition, agree to donate to the company promissory notes due in twelve months

from date, for the same amount as we now hold shares in said company; provided that shareholders now holding the paper of the company will surrender as much paper as they hold shares in the company.

[Signed] "A. M. BRITTON..... 40 shares  
"W. A. HUFFMAN..... 25 shares  
"J. P. SMITH..... \$5,000  
"J. D. REED..... \$5,000  
"FORE, MORPHY & HENDERSON..... 200 shares  
"SIDNEY MARTIN..... 25 shares  
"W. J. BOAZ..... 25 shares  
"J. H. BROWN..... 25 shares  
New stock: "W. R. BECKWITH..... \$1,000  
"W. L. MALONE..... \$1,000  
"D. BOAZ..... \$1,000  
"THOMAS O. VOGEL..... \$1,000"

It was also alleged that the note sued upon was executed in pursuance of this agreement; that some of the stockholders failed to execute their notes as promised; and that Fore, Morphy & Henderson, who were stockholders, and held the obligations of the company, refused to release such obligations to the amount of the stock held by them. It was also specially averred that it was agreed with the company that the notes executed in pursuance of the written agreement above set forth were to be used by the company in carrying out certain contracts for the delivery of cattle upon which the defendant and others were its sureties; that the note in suit was not so used, but that it was transferred to the plaintiff to secure a previously existing indebtedness to it; and that the company had made default upon the cattle contracts, and that in consequence thereof the defendant had been compelled to pay, as its surety thereon, sums of money largely in excess of the amount of the note. It was also averred in defense that the plaintiff had received the note sued upon in connection with others, as collaterals to secure the payment of a note held by it against the investment company, and that it had collected a sufficient sum of money from the other collaterals to discharge the indebtedness. The plaintiff did not reply to this answer by supplemental petition, but filed an amended original petition, in which it averred that it became the owner of the note sued upon by indorsement and delivery before maturity for a valuable consideration, and without notice of any defense thereto. The plaintiff filed demurrers to so much of the answer as alleged a failure of consideration, which were overruled. Such being the state of the pleadings, the parties announced ready for trial, and the defendant admitted on the record "that the plaintiff had a good cause of action, as set forth in the petition, except in so far as it might be defeated, in whole or in part, by the facts of the answer constituting a good defense, which might be established on the trial," and claimed the right to open and conclude upon the issues presented by his special answer. The right was conceded by the court; but when the defendant offered evidence to prove the failure of consideration alleged in the answer this was objected to by the counsel for the plain-



tiff, upon the ground that the admission entered of record by the defendant conceded the truth of the allegation in the amended petition to the effect that plaintiff became the owner of the note before maturity without notice of any defense; and that therefore the evidence was irrelevant. The objection was overruled by the court, and the evidence admitted. Upon the conclusion of the evidence, counsel for defendant made the opening argument to the court and jury upon the law and facts of the case. Counsel for the plaintiff then addressed the court, insisting that the defendant had admitted that the plaintiff was a *bona fide* holder of the note for a valuable consideration, and hence could not urge the defense of a failure of consideration; that there was no evidence to support his other defense, and that therefore the court should instruct the jury to find for the plaintiff. The court so accordingly instructed the jury, and a verdict was returned for the plaintiff. The assignments of error raise the question of the correctness of the court's action in so instructing the jury.

We think the court below erred in its conclusion as to the scope and effect of the admission. It is a general rule of the common law that a party who has the affirmative of the issue has the right to open and conclude. The admission in this case is in the language of rule 31 of rules of practice for the district courts. The manifest purpose of this rule was to secure to a defendant the right to open and conclude when, upon the real issues in the case, the burden of proof rests upon him; that is to say, when his defense is in the nature of a confession and avoidance of the plaintiff's action he is permitted to admit the *prima facie* case of the plaintiff, although it is denied by his pleadings, and to open the case by introducing evidence to establish the affirmative defense he has set up. The rule is intended to secure a valuable right, and is just, and it should have a reasonable and practicable application. To construe it so as to accomplish in a reasonable and practical manner its object, an admission made in the very language of the rule must be construed to mean that the defendant admits every fact alleged in the petition which it is necessary for the plaintiff to establish in the first instance to enable him to recover; but does not admit allegations in the petition which merely deny new matter alleged in the answer, the burden of proof of which is upon the defendant. Any other construction would enable the plaintiff to deny the defendant the right to open and conclude upon his affirmative defense by simply amending the petition, as was done in this case, and alleging the contrary of the defenses set up in the answer. The answer in this case set up a defense in confession and avoidance of the action. 1 Chit. Pl. 515. The plaintiff was not bound to allege in its petition that it became the holder of the note for a valuable consideration without notice. It was incumbent upon the defendant, in order to make his defense, to

show the contrary. He was bound to allege and prove the want of consideration, and that the plaintiff had notice when it became the holder of the note. In admitting the plaintiff's cause of action, "except in so far as it may be defeated by the facts of the answer," etc., he does not purport to admit the allegations of the petition, but merely to admit that the plaintiff has a *prima facie* case, and expressly declines to admit any fact inconsistent with the new matter alleged in his answer. We think that there was evidence before the jury tending to establish the defense, and that the court should have submitted the question to the jury.

It is insisted for appellee that the defense was not proved. But it is not our province to weigh the testimony. It is sufficient for us to know that there was evidence tending to establish the truth of the answer. In support of the ruling of the court upon the effect of the defendant's admission we are cited to the case of *Alstin v. Cundiff*, 52 Tex. 453, in which it is said, in effect, that if a defendant desires to admit that the plaintiff has a *prima facie* case, but is not willing to admit all the allegations in the petition, his admission should be special, and not in the general language of the rule. The proposition was not necessary to the decision of that case, but even admitting it to be correct, the plaintiff is not in a position to invoke it in this proceeding. The bill of exceptions shows that the defendant did offer to make a special admission and that the plaintiff's counsel objected, and insisted that if defendant desired to open and conclude, his admission should be in the very terms of the rule; and that the court sustained the objection. We think the plea of failure of consideration set up a good defense to the action; that there was some evidence to sustain it; and that, notwithstanding the admission, the court should have submitted the question to the jury. The other questions presented in the record are not likely to arise upon another trial, and need not be considered. The judgment is reversed, and the cause remanded.

#### HODGES v. ROBERTS et al.

(Supreme Court of Texas. Oct. 15, 1889.)

##### VENDOR'S LIEN—LACHES.

In an action against the makers and indorser of a note, it appeared that the note sued on was indorsed over by the payee to plaintiff as part of the price of land purchased by the payee from plaintiff. The deed of the land reserved a lien until "the note, and all interest thereon, are fully paid." The payee testified that the other defendants were insolvent, and that he had frequently requested plaintiff to sue while they were yet solvent, which he neglected to do. Held that, though plaintiff's right to a personal judgment against the payee was lost by negligence, the lien could still be enforced as securing the debt created by the note, and a judgment for all the defendants was erroneous.

Appeal from district court, Montague county; F. E. PINER, Judge.



*Stephens & Herbert*, for appellant. *Jamerson & Chambers*, for appellees.

STAYTON, C. J. On January 8, 1884, B. F. Hodges sold to T. J. Hart a tract of land. For the land Hart paid \$200 cash, and transferred to Hodges a negotiable note for \$300 executed to himself by E. W. Roberts, G. W. A. Roberts, and R. E. Bell, payable on November 1, 1884. This note was accurately described in the deed as a part of the purchase money for the land, and the deed reserved a lien on the land to secure its payment. The reservation was in the following language: "But it is expressly agreed and stipulated that the vendor's lien is retained against the above-described property, premises, and improvements until the above-described note, and all interest thereon, are fully paid according to the face and tenor, effect and reading, when this deed shall become absolute." This action was brought on December 21, 1886, against the makers and indorser of the note, with prayer for judgment against all of them, and for the enforcement of the lien. All the defendants were cited, but only the defendant Hart answered. His answer consisted of exceptions to the petition, and a general denial. The exceptions questioned the sufficiency of the facts pleaded to give a lien, and urged the want of the diligence required by the statute to fix liability upon him as an indorser. The case was tried without a jury, and was disposed of, after the evidence was heard, without any separate ruling on the exceptions, and a judgment was rendered in favor of all the defendants. The evidence offered consisted of the note sued upon, the deed from Hodges to Hart, and the testimony of the latter, who stated that he indorsed the note for the purpose alleged, but that after it was due he had more than once requested the plaintiff to sue upon it when its makers were solvent, but that he had failed to do so until several terms of the court passed, when the makers were insolvent.

There can be no pretense that the petition did not state a cause of action against all the defendants, nor can it be with any show of reason contended that the petition did not state facts which fixed a lien on the land described to secure the payment of the note sued on. We are not informed by the record of the ground on which the court acted in entering a judgment for all the defendants; but from the brief of counsel for appellees we infer that the court held that no judgment could be rendered in favor of the plaintiff because, by his failure to use such diligence as would fix liability on the indorser, no judgment against the makers of the note could be rendered or lien foreclosed. Under the facts shown, it is clear that the plaintiff did not use such diligence as the statute requires to fix the liability of an indorser, and this furnished a sufficient reason why no personal judgment should have been rendered against him, (Rev. St. arts. 262, 273,) but this furnished no reason why judgment should not have

been rendered against the makers of the note. The real question is, ought the express lien given by the deed to have been enforced when a state of facts existed which deprived the plaintiff of the right to a personal judgment against Hart? The existence of a debt is necessary to support a lien, but it does not follow from this that the debt must be that of the person creating a lien on which a personal judgment may be rendered against him. Any person capable of contracting may create a lien on his property to secure the debt of another without subjecting himself to any further obligation than the lien contract gives. A wife may mortgage her property to secure the debt of her husband, and the lien will be enforced, notwithstanding no personal judgment may be rendered against her on the contract. It is immaterial whether the right to a personal judgment against the maker of a lien never existed under the contract, or has been lost by failure to use diligence; for, so long as the debt which the lien was created to secure may be enforced against the person whose obligation is secured by it, the lien exists, and may be enforced, unless there be that in the contract which evidences a contrary intention. The contract before us provided that the lien should continue until the note secured by it, with all interest, was paid, and not that it should cease to exist if the holder of the note failed to use such diligence as was necessary to entitle him to a personal judgment against the indorser. If the indorser desired to enforce the debt against the makers of the note soon after it became due, and thus relieve his property from the lien, he could have paid off the note, and have brought suit on it at any time against the makers, and thus have protected himself. There was neither pleading nor proof such as would protect the indorser against the enforcement of the lien, under the statute giving to a surety the right, on giving the notice required, to have the creditor promptly sue the principal debtor, or otherwise the surety be released; and it is therefore unnecessary to inquire what, under the contract, would have been the right of the indorser had he complied with articles 3660, 3661, Rev. St. On the case made, the court below should have entered judgment against the makers of the note sued on for the full sum due, and should have enforced the lien given in the deed to secure its payment, and its judgment will be reversed, and judgment here so rendered, with costs in this court, and in the court below, against all the appellees. It is so ordered.

PAN HANDLE NAT. BANK v. FOSTER.

(Supreme Court of Texas. Oct. 15, 1889.)

VOLUNTARY CONVEYANCES—INSTRUCTIONS—EXECUTION.

1. On a trial of the right of property in certain horses, levied on as the property of the execution debtor, it appeared that the levy was made without actual seizure, by giving notice to one B., "in charge and controlling said horses." Held, under

Rev. St. Tex. arts. 4838, 4839, providing that in such trials, if the property was taken from the possession of a claimant, the burden of proof shall be on plaintiff, and that the burden shall otherwise be on the claimant, that it was error for the court to permit the sheriff's return on the execution to be amended so as to show that B. had charge of the horses as the claimant's agent, solely on B.'s declaration made at the time of the levy, refusing to hear other evidence, and rule that the burden was on the execution plaintiff.

2. On the question whether a transfer of property was voluntary, and therefore in fraud of creditors, a charge that "if the jury believe that P. [the debtor] transferred the property to F. without a valuable consideration, and that P. was then in debt, and did not have property besides that transferred to F. sufficient to pay his debts then outstanding, and that F. had knowledge of such debts at the time said purchase was made, and that said purchase was without consideration valuable in law, you will find for the plaintiff," is misleading.

Appeal from district court, Knox county;  
J. V. COCKRELL, Judge.

J. T. Montgomery, for appellant.

STAYTON, C. J. This is a proceeding under the statute regulating the trial of the right of property. The property in controversy consists of a stock of horses numbering 400 head, more or less, levied upon on the range as the property of William Perrin, under an execution against him in favor of appellant. The sheriff's return showed that no actual seizure was made, but that notice was given to James Burgess, "in charge and controlling said horses." Before the trial began, the claimant asked that the sheriff be permitted to amend his return so as to show that Burgess was in charge of his horses as his agent; which, without any evidence that the fact was so, other than the declaration of Burgess made at the time notice of the levy was served upon him, the court permitted to be made, and then ruled that the burden of proof rested upon appellant, and refused to hear other evidence. This ruling is assigned as error.

If property be taken from the possession of a claimant the statute places the burden of proof on the party seeking to subject it to the payment of his debt; but, if it be taken from the possession of any other person, then the burden rests on the claimant. Rev. St. arts 4838, 4839. This statutory rule was evidently intended to give effect, in so far, to the presumptions arising from the possession of chattels, and it may be that such possession as is evidenced by an exclusive control of horses running on the range, as they often do in this country, would be within the meaning of the statute. That Burgess had control and management of the horses is not questioned; and this would place the burden of proof on the claimant, unless it was shown in some lawful manner that he was the agent of that person. That fact could not be shown by the declarations of Burgess made to the sheriff, in the absence of some fact other than those shown. The court should have heard any proper evidence offered to show who had possession, actual or constructive, of the horses, at the time the levy was made,

and should not have fixed the burden of proof on appellant upon the mere declaration of Burgess as to his agency.

Appellee claimed to have bought the horses from Perrin, and the issue was whether the sale was fraudulent as to creditors of the latter. The fourth paragraph of the charge given presented the law applicable to the invalidity of voluntary conveyances by a debtor, without making notice or want of notice of the indebtedness a material inquiry; but in the fifth paragraph the court instructed the jury as follows: "If the jury believe, from the evidence, that Wm. Perrin transferred the property to J. S. Foster without a valuable consideration, and that Wm. Perrin was then in debt, and did not then have property besides that transferred to J. S. Foster within this state sufficient to pay his debts then outstanding, and that Foster had knowledge of such debts at the time said purchase was made, and said purchase was without consideration valuable in law, you will find for the plaintiff." This charge was misleading, in that it left the jury to infer that the conveyance, even though without valuable consideration, might be considered valid, if Foster was ignorant that Perrin was indebted at the time the conveyance was made; while knowledge, or want of knowledge, of his indebtedness, was an unimportant inquiry, if the conveyance was purely voluntary. It is urged that the evidence required a finding that the conveyance to Foster was fraudulent, and we are requested to pass upon that question; but, in view of the fact that the judgment will be reversed on account of rulings referred to, it is neither necessary nor proper that we should pass upon the question of fact presented. The judgment of the court below will be reversed, and cause remanded. It is so ordered.

HARRIS v. HOWE.

(Supreme Court of Texas. Oct. 18, 1889.)

CARRIERS OF PASSENGERS—CONNECTING LINES.

Where defendant sells plaintiff a first-class railroad ticket over its own and other lines, containing a provision that in selling the ticket defendant acted only as agent, and was not responsible, beyond its own lines, plaintiff cannot recover against defendant for being ejected from a first-class car, and being compelled to travel in a smoking-car, on one of the other lines.

Appeal from district court, Shelby county;  
JAMES I. PERKINS, Judge.

E. B. Wheeler and R. S. Bryerly, for appellant.

HENRY, J. This suit was brought by appellant against appellee, as receiver of the Houston, East & West Texas Railway Company, to recover damages. Appellant charges that appellee, through his agent at Timpeon, Tex., made with her an express contract to transport her and her three small children from Timpeon, Tex., to Bolivar, Tenn., as first-class passengers in first-class coaches, for which appellant paid appellee in advance the

compensation demanded; and that, in disregard of such contract, she and her children were compelled by a conductor on the route to leave the first-class coach, and enter the smoking-car of the train on which they were being transported, and remain there from 11 o'clock at night until 10 o'clock the next day, under circumstances and surroundings described as being very uncomfortable and disagreeable. The evidence shows that appellant purchased from appellee a coupon ticket from Timpson, Tex., to Bolivar, Tenn., paying him the price asked for it; that appellant asked appellee's agent, who sold her the ticket, if it was a first-class one, and he informed her that it was, and would carry her through all right, without any trouble whatever. The coupons were for passage over the Houston, East & West Texas Railway, the Vicksburg, Shreveport & Pacific Railroad, and the Illinois Central Railroad. The price paid was the full local fare of each road, added together, and the gross sum to which it was entitled was paid by the road receiving it to each of the other roads. Appellee was received and transported over the first two roads as a first-class passenger, but when she reached the Illinois Central, notwithstanding the ticket that she presented entitled her to travel in its first-class cars, the conductor insisted that it did not, and compelled her to go into a second-class car, and stay there under the circumstances alleged in her petition. The ticket is made part of the statement of facts, and, among other printed clauses, contains one in the following words: "That in selling this ticket the Houston, East & West Texas Railway Company acts only as agent, and is not responsible beyond its own line." The court charged the jury to find for defendant.

The question of the liability of a railroad selling a through ticket beyond its own terminus, and over connecting roads, has been much discussed, and different opinions have prevailed. The same question has arisen with regard to the liability of the receiving company for freight shipped beyond its own terminus over connecting lines of transportation, but the existence of such liability, when assumed by contract, seems now too firmly established to justify further discussion. There exists respectable authority to the effect that a distinction exists in this respect between the carriage of goods and of passengers. Hutch. Carr. 464; 2 Redf. R. R. 313. Other authorities hold that there are no substantial distinctions between the rules governing the two subjects. Quimby v. Vanderbilt, 17 N. Y. 313. In principle we can see no distinction. It has been contended that it is *ultra vires* for railroad corporations to contract to carry beyond their own lines, but the great weight of authority unquestionably is that, however that may be, the carrier that engages in such an undertaking is estopped from denying its obligation to perform it. In Hutch. Carr. 117, it is said with regard to the carriage of goods: "It is universally conceded that he may bind himself by an express

contract to carry to any distance or to any destination, whether the carriage can be accomplished by his own means of conveyance, upon his own route, or will require the employment of agents or subsidiary carriers beyond it. In this respect he may bind himself to the same extent as other contracting parties, even to the performance of impossibilities, if he will." The obligation to convey passengers over its own line not only exists as a public duty, independently of any contract to do so, but from considerations of public policy it cannot even be modified by contract so as to exempt the carrier from the duty to protect the passenger from consequences of negligence of its agents and servants. Railway Co. v. McGown, 65 Tex. 640. Beyond its own line, a different rule in some respects prevails. It is only because the carrier has voluntarily contracted to do so that it can be required to transport a passenger over any other than its own line; and it results that, like other contracting parties, it may define the terms and limit the extent of its undertaking over other lines, inasmuch as may be required to leave upon them the responsibilities of their own negligence. The case of Railroad Co. v. Schwarzenberger, 45 Pa. St. 208, was for the recovery of damage for the loss of baggage. The ticket sold by defendant to the passenger contained a stipulation as follows: "In selling this ticket for passage over roads west of Pittsburgh the Pennsylvania Railroad Company acts only as agent for the western lines, and assumes no responsibility west of Pittsburgh." The court says: "The defendants are not common carriers except between Philadelphia and Pittsburgh. They were under no obligation to carry plaintiff beyond the termination of their route, or to transport his luggage. It is true, they received the fare for the whole distance from Philadelphia to Cincinnati, and, if that were all, it might raise a presumption of an agreement to carry over the entire route between the two cities. But contemporaneously with the receipt of the fare, and as evidence of the contract into which they entered, they gave to the plaintiff a ticket informing him that they assumed no responsibility for his carriage, and, of course, for the carriage of his baggage, beyond Pittsburgh. They notified him that they acted only as agents for the carriers whose route extended west from Pittsburgh, and not at all for themselves. With this express disclaimer of personal liability, there is no possibility of implying an engagement. It is not to be doubted that the defendants could act as agents for a connecting railroad line, and, if they could, the contract for carriage between Pittsburgh and Cincinnati was with the principals of defendants, and not with themselves. Their own engagement was performed when they had transported plaintiff to Pittsburgh, and delivered his baggage to the carriers on the connecting railroad beyond, leading to Cincinnati. \* \* \* A carrier \* \* \* may not release himself from responsibility for

want of ordinary care. Here, however, was no attempt by defendants to limit their responsibility as common carriers. There was nothing more than an express refusal to assume an additional and unusual liability, a careful guarding against the implication of a contract, which, without the notice, might have arisen from the fact that the passage-money for the entire distance to Cincinnati was here received. \* \* \* This is the whole case. The plaintiff breaks down in the beginning. He fails to prove that these defendants contracted to carry him and his baggage beyond Pittsburgh. His remedy, therefore, is not against them, but against the company which undertook for that portion of the route upon which the carpet-bag was lost." It is equally clear in the case before us that the defendant's liability for negligence was by the express terms of the contract confined to its own line, and that it made the contract for the transportation of the passenger over the line where the alleged wrong was committed only as the agent of the corporation operating such line; and we conclude that, not being bound by its charter as a public carrier, or by contract, express or implied, to transport the plaintiff over the Illinois Central Railroad, the defendant was not liable in this action, and the court properly so charged the jury. If any negligence of the defendant in issuing the ticket had been the proximate cause of the wrong to plaintiff, the rule would be otherwise. Upon the material issues in the case there is no controversy about the facts, or conflicting evidence. The judgment is affirmed.

**GULF, C. & S. F. R. Co. v. HURLEY.**

(*Supreme Court of Texas. Oct. 23, 1889.*)

**CARRIERS—PLEADING.**

An allegation in a complaint that plaintiff was expelled from defendant's train, that he experienced great fatigue and distress in finding his way back, and that by reason thereof and the ejection from the train he suffered great pain of mind and body, will not admit proof of the sickness of plaintiff's child, to which he was going, and plaintiff's consequent mental suffering, but such fact must be distinctly pleaded.

Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

Action by W. B. Hurley against the Gulf, Colorado & Santa Fe Railroad Company for damages. Judgment for plaintiff and defendant appeals.

*Leake, Shepard & Müller, for appellant.*

HENRY, J. Appellee, who was plaintiff in the court below, alleged that he purchased from the local agent of defendant at Fort Worth, Tex., a ticket over its railroad from Fort Worth to Morgan, and was by such agent directed to board one of the defendant's freight trains, and was assured by him that passengers were carried on such train, and that in pursuance of these instructions plaintiff, at defendant's regular depot, boarded said train as a passenger to said town of Morgan. He

charges that at a point one and a half miles from Fort Worth, and before reaching Morgan, the servants of defendant in charge of said train unlawfully and forcibly expelled him from the train, at a place not a station, and in the night-time, and left him to find his way back to Fort Worth as best he could, and that he, being a stranger, experienced great fatigue and distress in finding his way back, and by reason thereof and the ejection from the train he suffered great pain of mind and body, to his damage \$2,000. That he lost the money paid for the ticket, and was compelled to lie over at Fort Worth, and was hindered from attending to his regular business, to his further damage \$100. The defendant, by his own testimony, proved that he was at Fort Worth, and his family was at Stephenville, to which place he was on his way pursuant to a call from his wife, informing him that his baby was dangerously sick. He testified that, finding that the delay in waiting for a passenger train would cause him to miss connections, he applied to the ticket agent at the Union depot at Fort Worth, and explained to him his anxiety to speedily get home, and the cause of it, whereupon the ticket agent assured him he could take passage on a freight train that would arrive at a certain hour, and that was expected to make the desired connections, and with that view sold him a ticket; that he accordingly, by direction of the agent selling the ticket, took passage on one of defendant's freight trains, from which he was shortly afterwards expelled in the manner charged in his petition, by the servants of defendant, for the reason that the train that he was aboard did not carry passengers. He charges that he informed the agents of defendant who expelled him from the train of the circumstance that was calling him home, and producing his anxiety to avoid delay, and that the agent selling him the ticket had assured him that he could ride on that very train. He proved that the train slowed up, and he was put off without violence or personal injury, somewhere between a mile and a mile and a half from the depot at which he had taken the train; that it was raining, and very dark on his way back to the depot, and from there down town, and he got very wet, and had a severe spell of sickness from it. The next day he went to within 28 miles of his home by rail, and walked and rode on a wagon the balance of the way, reaching home during the night following. There was a trial by jury, and a verdict for plaintiff for \$500. The defendant objected to the evidence with regard to the condition of the child of plaintiff, and to his having been caused great distress of mind by that, and, its objection having been overruled and the evidence admitted, it requested the court to charge that there was no allegation in plaintiff's petition that the child was sick, and of his anxiety to reach home, and mental anguish from that cause, and that the jury should not permit any evidence of such facts to enter into their

computation of damages. The court refused to give this charge, but of its own motion instructed the jury that, in estimating such damage, the defendant would not be liable for the mental suffering of plaintiff on account of the sickness of his child. It is evident that plaintiff's anxiety about the situation of his child, and the mental distress that it produced, existed before his negotiations for passage, as well as during and after his expulsion from the train, and that the treatment received by him from defendant's servants did not produce, and could not, in the nature of things, increase or diminish it. If, under any circumstances, the condition of the child and plaintiff's feelings growing out of that condition could be proper to be laid before the jury, they could not be put in evidence without having been alleged in the pleadings. The bare and general allegation in the petition that plaintiff's mere expulsion from the car caused him mental distress does not admit of any proof to explain to the jury the fact or degree of that condition except the act of expulsion itself. When, for the purpose of explaining the existence of mental distress, or of enhancing the amount of damages by enlarging its degree, it is intended to offer any evidence beyond the trespass or act of physical violence complained of, a proper predicate in the pleadings must be laid. Such mental distress as naturally and usually results from a trespass upon the person may be estimated by the jury from their own knowledge, and without other proof. Anything and every fact beyond that proper to be considered and estimated by the jury must be alleged, or it cannot be proved. There are cases in which it is not proper to reverse for the admission of improper evidence which the court has afterwards endeavored to obviate by a charge to the jury not to consider or estimate it. This will usually be confined to cases in which the objection to the evidence is not clear when it is allowed, and when also the result furnishes reason to believe that the charge to the jury to disregard it has produced the desired effect. When the verdict cannot be clearly accounted for and justified without a resort to the improper evidence, it may always be doubted whether the injurious effect has been removed. As this cause will be reversed in view of another trial, we do not think it proper to make the application of this rule to the verdict before us further than to say that we are not satisfied that the charge sufficiently removed the evidence from the consideration of the jury. We do not find any error in other assignments presented in the brief of appellant's counsel. The judgment is reversed, and cause remanded.

#### FT. WORTH & N. O. R. CO. v. WALLACE.

(Supreme Court of Texas. Oct. 22, 1889.)

##### FIRE SET BY ENGINES—DAMAGES.

1. In an action for the destruction of grass by fire, alleged to have been communicated from defendant's engines, an instruction that the meas-

ure of damages is the market value of the grass for pasturage or hay purposes at the time and place of the fire is proper, though plaintiff did not aver the manner in which she desired to use the grass.

2. An instruction that if defendant is liable, and if the turf was injured by the burning of the grass, the measure of damages is the difference in the value of the land immediately before and after the injury, if any, is correct, and is sufficiently supported by an averment that there was a good turf; that the fire parched the roots of the grass so as to injure the same; and that it will be three or four years before it will be as productive as before the fire; and defendant cannot set up that the land will be as valuable as before if plaintiff uses it for another purpose than the one to which it has been applied.

3. An instruction that if defendant's engines emitted sparks which ignited the grass, if any, on defendant's right of way, and that, if any grass or fence on plaintiff's property was thereby burned the jury shall find for plaintiff, without instructing as to due care, is not ground for reversal, where defendant has adduced no evidence of necessary care on its part, and there was evidence that the fire was caused by the sparks from defendant's engines, and that defendant had permitted inflammable material to accumulate on its right of way.

4. Evidence that plaintiff's husband bought the land and received a deed therefor; that part of the purchase money was paid before and the balance by plaintiff after his death; and that, by the husband's will, duly probated, whatever title he had passed to her,—shows a sufficient title in plaintiff to maintain this action, in the absence of rebutting evidence; and the failure of the court to submit an issue as to title is not prejudicial, especially where defendant does not request a charge thereon.

Appeal from district court, Tarrant county; R. J. BOYKIN, Special Judge.

*Templeton & Carter*, for appellant. *Harris & Harris*, for appellee.

STAYTON, C. J. Plaintiff brought this action to recover damages, which she alleged she had become entitled to by reason of the fact that fire had been communicated to her land through negligence in the management of appellant's cars and right of way, which ran through her land. She claimed that the fire destroyed grass of the value of \$650; fence of the value of \$200; and that the injury to the land by burning the turf and grass-roots amounted to \$375. The averments in reference to the grass, in so far as now necessary to state, were "that said 130 acres so burned off was, at the time, covered with a fine coat of grass, of luxuriant growth, which she had reserved for the wintering of her stock, and which she had begun to use for that purpose only a short time prior to the said burning; that said grass was very valuable, to-wit, of the value of five dollars per acre; and that by reason of the loss and destruction of the same by fire she was deprived of her only winter feed for her stock; that she sustained damage by reason of the loss of said grass in the sum of \$650." The court instructed the jury that in estimating the damages to which plaintiff might be entitled they would look to the market value of the grass destroyed at the time and place where it was, and that they might consider the market value for pasturage or hay purposes; there being much evidence as to the value for either purpose. It is urged that it was error

so to charge, and the ground of the objection, we understand to have been, that there was no averment as to the particular manner in which the plaintiff desired to use the grass. Such an averment was not necessary. The grass belonged to the plaintiff, and if entitled to recover at all, she was entitled to the market value of the grass as it stood, to be ascertained by its value for any legitimate use. Many witnesses had testified to its value if it be used for pasturage, as had many if it was to be used to make hay; but they all had reference to the value of the grass as it stood at the time it was destroyed.

It is urged that the court erred in the following paragraph of the charge: "If you should think that the defendant is liable to the plaintiff for the burning of her grass under the foregoing instructions, and should also believe that the turf or sod of said grass was injured by the burning of said grass, you should find for the plaintiff; also, the amount of damages or injury done by the injury of said sod or turf; and, in estimating this damage, you should be governed by the difference of the value in the plaintiff's land immediately before and immediately after the injury, if any, done to such turf or sod." The proposition under the assignment which raises this objection is that, "there being no allegation in the petition to admit proof of injury to the land, and no proof, were there such an allegation in the petition, that it was depreciated in value, the charge should not have been given." The substance of the allegation was that there was a good turf, well and thickly set; that the fire parched the turf, roots, and sod of the grass on the land so as to greatly injure and damage the same; that on account of the injury to the turf it will be three or four years before the turf will become as productive as it was before the fire; that by reason of burning the turf the plaintiff had been damaged \$375.

We understand the averment of the petition, in effect, to be that the mass of roots to the native grass growing on the land, without sowing or cultivation, which, with the surface earth with which commingled constitutes the turf, sward, or sod, were so injured by the fire as to make the land less productive of grass than it otherwise would have been in the future. The averment was one, in effect, that the land was injured, and the charge as correctly informed the jury what the true measure of damages was as would a charge directing the jury to assess the damages at such sum as would compensate the plaintiff for such injury as resulted from the burning of the turf or sod. The turf or sod was a part of the land, and an injury to it was an injury to the land which could be as well measured by the difference in the value of the land before the burn and afterwards as by an inquiry as to the sum which would compensate the plaintiff for any injury to the turf or sod. The measure is the same, whether expressed in the one way

or the other. Such an injury is one in its nature permanent, though it may not be perpetual, and differs from an injury to a growing crop, which does not result in any injury to the land as distinguished from the crop. It seems to be urged, as the destruction or injury of the turf would have rendered it less difficult to have placed the land in cultivation than it otherwise would have been, that for this reason the owner was not injured at all. It is not the right of one, through whose wrongful act an injury has been done to the land of another, to have the measure of damages fixed by the effect the injurious act may have on the land if used for some purpose other than that to which it was applied or desired to be applied by its owner; but it is the right of the owner to have his damages measured by the extent of the injury to the land used for any lawful purpose to which he had appropriated it, desired to appropriate it, or to which it is adapted. *Railway Co. v. Hogsett*, 67 Tex. 687, 4 S. W. Rep. 365. It does not rest with the wrong-doer to say to the owner: Use your land for a purpose for which you do not desire to use it, and it will be as valuable to you for that use as it was before for another.

It is urged that the court erred in instructing the jury as follows: "If you believe from the evidence that the engines of the defendant emitted sparks that set fire to the grass, if any, that may have accumulated on defendant's right of way adjacent to plaintiff's property, and thereby set fire to and burned any grass or fence of plaintiff, on her said property, you will find for the plaintiff." The defendant was not liable unless the fire had its origin in its negligence, and, had there been any evidence tending to show such care on its part as the nature of its business makes necessary, it would be necessary to reverse the judgment because of this charge, which, in terms, made the defendant liable whether it used due care or not. There, however, was no evidence whatever tending to show that appellant used appliances such as are usual and necessary to prevent, as far as may be, the escape of fire from the engine, nor tending to show that its right of way was kept free from inflammable material. On the other hand, there was evidence which the jury must have believed reasonably sufficient to show that the burn was caused by fire that escaped from the engine, and that inflammable matter was permitted to accumulate on the right of way. Under this state of facts appellee was entitled to a judgment, and had the jury, under a proper charge, found that the fire originated in the manner stated in the charge, but that appellant was not liable, because not negligent, it would have been the duty of the court to set aside the verdict. *Railway Co. v. Horne*, 69 Tex. 648, 9 S. W. Rep. 440; *Railway Co. v. Witte*, 4 S. W. Rep. 492. While the charge did not correctly state the law, the jury found that the fire originated in such manner as to fix liability on appellant; and, in the absence

of some evidence tending to rebut the *prima facie* case made by the evidence and affirmed by the verdict, no injury resulted from the failure of the court correctly to instruct the jury.

The verdict seems to us large, but there was ample evidence to sustain it; and, having been approved by the court below, it cannot be set aside by this court on the ground that it is excessive.

It is now contended that the evidence of title in the appellee was insufficient. The evidence shows that the husband of appellee bought the land and received a deed therefor in 1877; that part of the purchase money was paid before the husband's death, and the balance by appellee since; that by the will of the husband, duly probated, whatever title he had passed to her; and that she and her husband had been in the exclusive possession and control of the land for about 11 years. Such evidence, in the absence of some rebutting evidence, was sufficient to maintain this action; and it is not important, in view of the uncontroverted facts, that the court did not submit an issue as to title. If appellant desired such an issue to be submitted, it should have asked a charge presenting it. There is no error in the judgment, and it will be affirmed.

#### BAKER v. BECK.

(*Supreme Court of Texas. Oct. 22, 1889.*)

##### RECORD OF DEED.

A deed to land, in an unorganized county, is properly recorded in the county of which it had been a part, in the absence of any law at the time requiring titles to such lands to be recorded in counties to which such counties are attached for judicial purposes, and of a statute directing where such deeds should be recorded.

Commissioners' decision. Appeal from district court, Taylor county; WILLIAM KENNEDY, Judge.

I. N. Baker sued J. E. Beck in trespass to try title. From a judgment for defendant, plaintiff appeals.

*Spoons & Legett and Coopwood & Son*, for appellant. *B. F. Ballard*, for appellee.

AKER, P. J. Appellant brought this suit against appellee in trespass to try title to an undivided one-half of 640 acres of land in Taylor county, appellant being owner of the other half. In October, 1880, appellant recovered two judgments in the justice's court of precinct No. 4, in Bexar county, against W. E. Beck, which were duly registered in Taylor county on the 15th day of November, 1880. The land in controversy was sold on the 1st day of March, 1881, under executions issued on these judgments to one Lotspeich, who conveyed the land to appellant on the 21st day of November, 1881. Appellee claims the land by deed from W. E. Beck to him, executed the 21st day of April, 1877, for the consideration of \$320, and registered in Bexar county on the 23d day of April, 1877. The trial was without a jury, and judgment was

rendered for appellee upon the conclusion of the court that the registration in Bexar county was valid and legal registration, and therefore constructive notice to appellant. This conclusion of the court is assigned as error, "because said land is situated in Taylor county, and said Taylor county was at said time unorganized, and was attached to Eastland county for judicial purposes, and was a part of the Palo Pinto land-district." The assignment correctly states the facts, and raises the only question we think it necessary to consider. The land is situated in that part of Taylor county that was in Bexar county prior to the creation of Taylor county. Under repeated decisions of this court, the territory of a new county remains subject to the jurisdiction of the county from which it was taken, until the actual organization of the new county, unless, by act of the legislature, some other county is given jurisdiction of the territory of the new county for specific purposes; and the law thus settled by the decisions was made statutory by article 670 of the Revised Statutes. *Lumpkin v. Muncey*, 66 Tex. 311; *Reeves County v. Pecos County*, 69 Tex. 177, 78. W. Rep. 54. Prior to the act of March 30, 1881, there was no law requiring that titles to land in unorganized counties should be recorded in the counties to which such unorganized counties were attached for judicial purposes, and at the time the deed from W. E. Beck to appellee was recorded in Bexar county there was no statute directing that titles to land in unorganized counties should be recorded in any particular county. We are not aware that the question here presented has been passed upon by this court, but we believe it to be in accord with our decisions upon analogous questions to sustain the conclusion of the court below. The land having been in Bexar county prior to the creation of Taylor county, there being no statute directing that the deed be recorded in any particular county, the registration in Bexar county was proper, and constructive notice to subsequent purchasers. Authorities cited, and *Alford v. Jones*, 71 Tex. 519, 9 S. W. Rep. 470. We are of opinion that the judgment of the court below is correct, and should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

#### BASSETT v. BOWERS et al.

(*Supreme Court of Texas. Oct. 22, 1889.*)

##### MECHANICS' LIENS—FILING CLAIM.

1. Rev. St. Tex. art. 3165, (Sayles, Laws 1885,) requiring every person, in order to obtain the benefit of the mechanic's lien law, to file an itemized statement of his claim with the county clerk within 80 days, is sufficiently complied with where a material-man delivers such a statement to the clerk on the thirtieth day after such indebtedness accrues, but the clerk does not record it until the next day.

2. Where the material-man files an affidavit of the amount due, substantially in the form pre-



scribed by article 8166, which article provides what shall be done to comply with the provisions of article 8165, it is sufficient, though it does not contain the words used in article 8165, that "all just and lawful offsets and credits have been allowed."

Commissioners' decision. Appeal from district court, El Paso county; T. A. FALVEY, Judge.

*Crosby Edwards*, for appellant. *Millard Patterson*, for appellees.

**HOBBS, J.** The construction of articles 8165 and 8166 of the Revised Statutes (Sayles, Laws 1885, p. 63) is involved in the questions presented upon this appeal. This was a statutory proceeding, instituted in the district court of El Paso county, to foreclose an alleged lien, claimed by the plaintiff (appellant) as a material-man and lumber dealer on the lots described, belonging to appellee Schuster, by reason of the fact that appellant furnished to appellee Brower, original contractor with Schuster, the material used in the erection of a certain house for said Schuster on said lots. The account filed, showed a balance to be due by Brower of \$419.15. A foreclosure of the lien was prayed for against Schuster. It was alleged in the petition that the amount sued for became due and owing on the 20th day of August, 1887. The "sworn account of the demand due" plaintiff was filed for record in the office of the clerk of the county court on the 19th day of September, 1887, the thirtieth after the accrual of the indebtedness. But it was not recorded until the 20th day of September, 1887. The petition was excepted to on the ground that it showed upon its face that the original account was not recorded within 30 days from the date of the accrual of the indebtedness, which exception was sustained. It is provided by article 8165 that every journeyman, day laborer, or other person, seeking to obtain the benefit of the article, shall, within 30 days after the indebtedness shall have accrued, file an itemized account of the claim in the office of the county clerk of the county where the property is situated; the purpose being to give notice to third persons of the existence of this lien. In *Throckmorton v. Price*, 28 Tex. 605, where the title to realty was involved, it was held, in effect, that a party having properly filed a deed with the clerk is not prejudiced by that officer's neglect to record it. It is a generally accepted principle of law that private or individual rights shall not be forfeited or lost by reason of the neglect or failure, as in this case, of the officer to perform his duty. *Magee v. Chadoin*, 30 Tex. 644. It is upon this principle that it has been held that the right of the owner of a genuine land certificate to vacant public domain attaches at the date of the file and application to the proper officer for its survey, and cannot be defeated by the officer's refusal or neglect to accept the location, or by the issuance of a patent to another. *De Montel v. Speed*, 53 Tex. 339. Nothing more can be reasonably required of the person desiring to fix the lien by its registry

than to deliver to the officer the "sworn account of the demand due him," to be filed and recorded. It is no part of his duty to see that the clerk does his, by an actual record of it. We think the court erred in sustaining the exception to the petition, on the ground mentioned; the claim showing upon its face that it was filed with the clerk within 30 days from the accrual of the indebtedness. The affidavit in this case, attached to the itemized account of the appellant, it is true, does not contain the language used in article 8165, "that all just and lawful offsets, payments, and credits have been allowed." But it is substantially the affidavit prescribed by article 8166, which article provides with particularity what shall be done to comply with that part of article 8165 which refers to unwritten contracts. The appellant having complied with the form furnished by article 8166, it was not necessary that any other language should have been used. We think the court erred in sustaining the exception to the affidavit on the ground that it did not contain the language "that all just and lawful offsets and credits have been allowed," and that the judgment should be reversed, and the cause remanded.

**STAYTON, C. J.** Report of the commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

#### EVANS v. WELBORNE et al.

(Supreme Court of Texas. Oct. 18, 1889.)

##### MARRIED WOMAN'S SEPARATE ESTATE.

A husband, having become indebted to his wife, invested about \$3,000 in land, and took the deed in her name, but the deed failed to specify that the land was the wife's separate property. The land was then conveyed to one T., to be by him sold for the wife. T. sold the land, the price to be paid in cash, and executed and left at the clerk's office a deed which was recorded and delivered to the vendee before any of the purchase price was paid. In the meanwhile a creditor procured a sale of the land under a judgment against the husband, and purchased it at the sale for five dollars. After the wife had brought suit against T.'s vendee for the land, the creditor procured for \$200 a deed from T.'s vendee, who had never made any payment, and then intervened in the action. Held, that the wife was entitled to recover.

Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

*A. M. Carter*, for appellant. *W. S. Pendleton* and *Bowlin & Bowlin*, for appellees.

**HENRY, J.** This suit was instituted on the 30th day of November, 1883, by Duana Welborne, joined by her husband, William Welborne, against Thomas W. Welborne and Hannah and Byron Bartlett, to recover a tract of land alleged to be the separate property of said Duana. On the 4th day of June, 1884, B. C. Evans intervened in the cause, asserting title in himself to the land. The record shows that William Welborne, the husband of Duana Welborne, had made use of, and lost in his business, certain separate



property of his wife, and that to reimburse her he invested the proceeds of other separate property belonging to her and some money that he had borrowed for that purpose in the land in controversy, taking the deed in her name. The record shows that the money, before it was paid for the land, had been given to and was in the possession of the wife. The deed to the wife contained nothing showing that the land was paid for with the separate money of the wife, or that it was intended to make it her separate property. William Welborne, the husband, being insolvent, he, joined by his wife, deeded the land to Thomas Welborne, his brother, who gave his notes for the purchase money. It is clearly proved that this conveyance was made for the sole purpose of preventing the creditors of William Welborne from subjecting the land to the payment of their demands; and that it was the intention of the parties that the notes of Thomas Welborne should not be collected; and that he should hold the land in trust for Duana Welborne, and sell it for her benefit. The deed to Thomas Welborne was made on the 27th February, 1883. William Welborne was indebted to Evans and Martin, and they, having sued on their debt, caused an original attachment to be levied on the land on the 1st day of March, 1883, as the property of said William Welborne. Judgment was rendered in the suit foreclosing the attachment lien, and the land was purchased under the order of sale issued on said judgment by B. C. Evans, one of the plaintiffs in the judgment, who paid for it five dollars. Thomas Welborne conveyed the land to Hannah Bartlett by deed dated 1st March, 1883. Bartlett was to pay \$1,300 for the land, but before paying he required the notes given by Thomas Welborne to be surrendered. Accordingly these notes were indorsed by Duana Welborne, and delivered to Thomas Welborne to enable him to perfect the sale of the land to Bartlett; but during the interval required to execute this purpose the attachment of Martin and Evans was levied on the land, whereupon Bartlett refused to pay the purchase money. The evidence is quite conflicting as to whether the deed from Thomas Welborne to Hannah Bartlett was ever delivered. It was left at the office of the county clerk, either as an escrow or to be recorded. In fact it was promptly recorded and delivered by the county clerk to Bartlett. Though the consideration was to be paid in cash by Hannah Bartlett, no part of it has ever been paid; but, on the 1st day of May, 1884, she deeded the land to B. C. Evans for the consideration of \$500 paid her by him. The land is proved to have been worth \$2,000, or more. The trial resulted in a verdict and judgment for plaintiffs, to reverse which the intervenor, B. C. Evans, prosecutes this appeal.

There can be no controversy about the sufficiency of the evidence to show that William Welborne had become indebted to his wife, Duana Welborne, by appropriating the pro-

ceeds of her separate property, and that, before the purchase of the land in controversy, he had paid to her a sum of money, to belong to her separately, and to be used by her in the purchase of land to be likewise held as her separate property. When the land in controversy was conveyed to her, the money so held by her paid the consideration. The deed failing to show that the money paid for the land belonged to her separate estate, or that it was intended to make the land her separate property, it was liable to be seized and sold by her husband's creditors so as to vest title in a purchaser who paid a valuable consideration, without notice of her equitable right before the date of his purchase. The land, having been paid for with money that had been paid into her hands and made her separate property before it was invested in the land, created a resulting trust in her favor, which, it has frequently been held by this court, could not be defeated by the levy of an attachment, or any proceeding short of a sale of the land to an innocent purchaser for value. *Stoker v. Bailey*, 62 Tex. 299. If it be true that the intervenor had no notice of the wife's equity, it still must be held that the payment of the paltry sum of five dollars, at a sale made under his own judgment, cannot be held to entitle him to protection as a purchaser for value. Whatever may be the fact about the delivery of the deed from Thomas Welborne to Bartlett, it is an undisputed fact that the terms of the sale were that the consideration was to be paid in cash. Without that the sale was incomplete. The purchaser declined to pay the money or complete the trade, and it was a palpable fraud for her to take advantage of an apparent delivery of the deed, and sell and convey the land to Evans. He testifies that he purchased without notice of the non-delivery of the deed, if in fact it was not delivered. But he purchased after plaintiff had instituted this suit against the vendor for the land and during its pendency, and he stands charged with knowledge of everything that injuriously affects his vendor's title. As a purchaser *pendente lite* he can make no defense that his vendor cannot make. The land having been, at the time of the conveyance by William and Duana Welborne to Thomas Welborne, the separate property of the wife, it was not liable for the husband's debts, and therefore no kind of conveyance or disposition of it could have had the effect to defraud his creditors. The fact that the fears of the parties were excited, and that they were willing to convey it fraudulently, if that was necessary to protect it, or that if it had been the husband's property they would have committed a fraud by conveying it to avoid the payment of his debts, does not affect or change the rule. The land being in equity the wife's separate property, there was nothing improper in its being conveyed by her and her husband to Thomas Welborne in trust, to be held and disposed of for the benefit of the wife. The property having

been, intentionally or otherwise, diverted from the purposes of the trust, it became the wife's right to sue for and recover the property. We have carefully examined all of appellant's assignments of error, and, without referring to them in detail, we conclude that they show no error for which the judgment ought to be reversed, and it is therefore affirmed.

WILLIS *et al.* v. YATES.

(Supreme Court of Texas. Oct. 15, 1889.)

FRAUDULENT CONVEYANCES.

In an action to set aside a sale of goods as in fraud of creditors, it appeared that the debtor was insolvent; that he was indebted to defendant; and that he sold the goods to defendant for their fair price, the excess over the amount which he owed defendant being paid to a third person for distribution among certain creditors other than plaintiffs. It was found as a fact that the debtor intended to hinder payment of plaintiffs' debts, and that defendant knew or ought to have known of the intent. Held, that the sale would be set aside as fraudulent.

Appeal from district court, Lampasas county; WILLIAM H. STEWART, Judge.

*W. B. Abney and Fisher & Towns*, for appellants. *Matthews & Wood*, for appellee.

STATTON, C. J. On December 3, 1886, C. N. Witcher, a merchant, was insolvent, and his insolvency known to S. W. Yates, to whom he was indebted about \$2,500. He was indebted to many other persons, some of whom lived in the county of his residence, and he was also indebted to P. J. Willis & Bro. to the extent of \$8,000. On date above mentioned Witcher conveyed to Yates his stock of groceries for the sum of \$3,500,—the sum agreed upon by the parties,—which it is not claimed was not a fair value. This sum was paid in part by the cancellation of the debt due by Witcher to Yates, and the balance—\$1,000—in cash. Willis & Bro. brought suit on their claim, sued out writ of attachment, and also writ of garnishment, which was served on Yates, who answered denying the existence of any fact that would fix liability on him; but his answer was controverted, and on the issue thus formed this controversy rests. Appellants contended, and still contend, that the conveyance made to Yates was fraudulent, and made and received with intent to hinder, delay, or defraud the creditors of Witcher, and that for this reason the property conveyed to Yates, as to creditors, remained the property of Witcher; and appellee contends that the conveyance was *bona fide*, and in all respects valid. No question is made as to the propriety of litigating such a question through proceedings in garnishment. The cause was tried without a jury, and the conclusions of fact were as follows: (1) That on the 3d day of December, 1886, C. N. Witcher was in failing circumstances, and was indebted to plaintiffs and divers other persons in divers sums of money, amounting, in the aggregate, to \$20,000 or more. (2) That at said date he was indebted to plaintiffs in a large amount, viz., about the sum of \$5,579.50, and for which amount the plaintiffs recovered a judgment against said Witcher in the district court of Galveston county on the 16th day of March, 1887. (3) That on the 8th day of December, 1886, plaintiffs had a writ of garnishment issued from the district court of said Galveston county, which was executed on the garnishee, S. W. Yates, on the 9th day of December, 1886. (4) That on the 3d day of December, 1886, the said C. N. Witcher was indebted to said garnishee, the said Yates, in about the sum of \$2,470. (5) That on the said last-named day the said Witcher sold and delivered to said Yates a stock of groceries for the sum of \$3,500, or about that sum. (6) That said groceries were paid for by releasing to said Witcher said indebtedness of \$2,470, and the payment by Yates to Witcher of one thousand dollars in cash, paid Witcher, December 3, 1886. (7) That said Yates knew at the time of said purchase that Witcher was indebted to plaintiffs in a large amount. (8) That Yates knew Witcher was in failing circumstances, or might have known it by the exercise of ordinary diligence. (9) That the purpose of Yates in purchasing said groceries was to secure his said claim of \$2,470 against Witcher. (10) That Witcher's object in selling was to pay Yates and other creditors in the town and county of Lampasas in preference to plaintiffs and other non-resident creditors. (11) That the one thousand dollars in cash, paid by Yates as part consideration, was paid out by said Witcher to his said local creditors; that is to say, his creditors that resided in Lampasas county and town. (12) That Witcher intended to hinder and delay the payment of plaintiffs until his said local creditors were paid, and Yates knew or ought to have known of this intent of Witcher. (13) That about the sum of \$746.87 was paid out by said Witcher, and assumed by said Yates, out of said \$1,000, prior to the service of the garnishment in this case, and that the remainder of said \$1,000 was paid to his local creditors during the month of December, 1886. In other words, I find that Yates, on the day of his said purchase, assumed or guaranteed the payment of about \$475 that Witcher owed the Texas Trading Company, which was doing business in the town and county of Lampasas, and that debt and debts to the amount of \$1,000 were paid by Witcher during the month of December, 1886; the persons to whom paid, the amount paid to each, and the day of each payment not deemed necessary to be here stated, although appearing in the testimony. (14) That the amount paid by Yates, viz., the sum of \$3,500, was the full value of the groceries purchased by him. (15) The \$1,000, mentioned herein, were delivered by Yates to one Stokes, who had been book-keeper for Witcher up to the date of the sale of the groceries, and, as the agent of Witcher, was to make settlement with and pay said local creditors, and who did settle, and for Witcher paid most of said \$1,000, but

was at that time in the employ of Yates. (16) The amount of claims paid by said Stokes out of said \$1,000 ranged from about \$1, the smallest, to about \$475, and were fifteen or twenty in number."

On these findings a judgment was rendered in favor of the garnishee. It is proper to say that the evidence wholly fails to show any agreement whatever between Witcher and Yates whereby the latter made himself in any way responsible to any creditor of the former for any sum whatever. It fails to show that Yates in any manner placed himself under any legal obligation to any creditor of Witcher. It fails to show that Yates reserved any right or power to control the use to which the \$1,000 paid by him to Witcher should be applied, and the most the evidence does show, in any of these respects, is that Witcher declared, and Yates may have believed, that he would use that money in payment of debts due to local creditors. The evidence shows, further, that at the time the conveyance was made Witcher had probably more money, other than that paid to him by Yates, than he is shown to have paid to creditors. Under the findings of the court and the uncontroverted facts, it appears that Witcher was insolvent; that this was known or ought to have been known by Yates at the time he purchased more property than was necessary to pay the debt due to him; and that under these circumstances he bought and placed in the hands of Witcher, freed from his own control or right to control, \$1,000 of the purchase money. This enabled Witcher to place so much of his estate beyond the reach of his creditors, and its legal effect, whatever may have been the real intention of the parties, was to hinder and defraud the other creditors. Whether the transaction was, within the meaning of the law, fraudulent must be determined by the facts existing when the transaction was consummated, and it is immaterial whether Witcher subsequently used the money paid to him by Yates in payment of debts due to other creditors. It further appears that Witcher had a specific intent to hinder and delay appellants, if not actually to defraud them, and that this intent was or ought to have been known to appellee. Under such a state of facts we are constrained to hold that the conveyance was fraudulent in effect, and therefore fraudulent in law, and the property subject to the claim of appellants. *Elser v. Graber*, 69 Tex. 226, 6 S. W. Rep. 560; *Oppenheimer v. Half*, 68 Tex. 409, 4 S. W. Rep. 562; *Seligson v. Brown*, 61 Tex. 180; *Ellis v. Valentine*, 65 Tex. 532; *Allen v. Carpenter*, 66 Tex. 138. If it had been shown that the money paid was placed, by agreement of the parties, in the hands of Stokes to be applied to the payment of the debts due to all the creditors of Witcher resident in Lampasas county, or to creditors named, then the result might have been different, for in that event Stokes would have held the funds in trust for creditors, and could have been compelled to disburse it in accordance with the agreement

of the parties; but there is no evidence from which it can be inferred that any such state of facts existed. The judgment will have to be reversed, and, were the issues made and findings thereon sufficient, judgment would be here rendered for appellants, but they are not so found. The use of a writ of garnishment for reaching assets fraudulently conveyed by a debtor is unusual; but, while it is ordinarily true that a plaintiff in garnishment does not acquire any right against the garnishee other than the defendant debtor might have enforced, such procedure is recognized to be proper when the garnishee has received property from the debtor under a conveyance fraudulent as to creditors. This is upon the theory that such conveyances are inoperative as to creditors. *Devoll v. Brownell*, 5 Pick. 447; *Lamb v. Stone*, 11 Pick. 526; *Burlingame v. Bell*, 16 Mass. 317; *Gutterson v. Morse*, 58 N. H. 529; *Drake*, *Attachm.* § 458; *Wade*, *Attachm.* § 412; *Wap. Attachm.* § 215. Such procedure seems to have been recognized in *Bailey v. Mills*, 27 Tex. 484. There are no issues or findings on which it can be ascertained what part of the property conveyed was in the possession of Yates when the writ of garnishment was served upon him, nor from which we can ascertain what part he had sold before the service of the writ, or the sum received therefor. If the sale was fraudulent, then appellants are entitled to a judgment against appellee for such sum as he had received from the sale of the goods prior to the service of the writ of garnishment on him; for, in legal effect, so far as creditors are concerned, in that sum the garnishee is indebted to Witcher. 1 *Sayles*, *Civil St. art.* 205. Under such circumstances, appellants would be entitled to a decree directing the garnishee to deliver to the proper officer such of the property as he had in his possession at the time the writ was served, but not to a judgment for money, unless a state of facts was shown under which such relief would become necessary. *Id.* arts. 206, 207. Before this case can be finally disposed of, such issues must be presented and tried as will enable the court below to render such judgment as the statute requires in such cases. The judgment of the court below will be reversed, and the cause remanded, that the parties may take such steps, in relation to the whole controversy, as they may deem necessary to the adjustment of their respective rights. It is so ordered.

#### GUNST v. PELHAM.

(Supreme Court of Texas. Oct. 22, 1889.)

#### SALE OF MORTGAGED PROPERTY—ATTACHMENT.

1. Where one buys property subject to a mortgage, his promise to pay the note for which the mortgage was given is a promise to pay to the holder of the note, and not to the maker; and where the mortgaged property is sold, and the note paid from the proceeds, the maker acquires no right of action against the vendee.

2. Nor can he in a suit against the vendee on his promise to pay the note, attach property sold by the latter to a third person, on the ground that

the sale was fraudulent, as his alleged debt does not in fact exist, and the sale can only be attacked for fraud by the vendee's creditors.

3. Default in payment of purchase money due on land gives the vendor the right to rescind his contract of sale, or enforce his vendor's lien, but by suing directly for the purchase money he affirms the contract of sale.

4. Under the Texas statute requiring parties suing out an attachment to make oath that it is not for the purpose of injuring or harassing either of the defendants named therein, an affidavit that "this attachment is not sued out for the purpose of injuring or harassing the defendant," where there are two defendants, is insufficient. *Perrill v. Kaufman*, ante, 125, followed.

Appeal from district court, Henderson county; F. A. WILLIAMS, Judge.

Suit in attachment, and to recover on a promissory note, by C. C. Pelham against Charles A. Gunst and one Johnson. Defendants excepted to the petition as alleging no liability on the part of either defendant, and also moved to quash the writ of attachment. The exception being overruled and the motion denied, the case was tried by jury, a verdict given for plaintiff, and judgment rendered thereon. Defendant Gunst appeals.

*Richardson & Watkins* and *W. R. Dickerson*, for appellant. *Faulk & Faulk* and *Jones & Jones*, for appellee.

GAINES, J. Appellee, Pelham, on the 25th day of August, 1886, sold to one Johnson a certain tract of land and certain live stock, consisting of horses, cattle, and hogs, for which Johnson paid in cash \$368, and executed his six promissory notes, amounting in the aggregate to the sum of \$5,500, and at the same time bound himself to pay a note executed by Pelham to Murchison & Coleman for the sum of \$1,050, which was secured by a mortgage upon the land. The consideration was recited in the deed, and a lien was expressly reserved upon the land for the payment of the notes. Subsequently Johnson sold the property to appellant, Gunst, upon the same terms; appellant paying him \$368, and binding himself to pay the six promissory notes executed by Johnson to Pelham, as well as that held by Murchison & Coleman. The latter having matured, and not having been paid, the holders brought suit thereon against the maker, and sought to foreclose the mortgage, making Johnson and Gunst parties. A decree was rendered foreclosing the mortgage, and in pursuance thereof the land was sold. It brought at the sale but a few dollars more than was necessary to satisfy the judgment and costs. This suit was brought to recover of Johnson and Gunst the amount of the Murchison & Coleman note, and an attachment was sued out and levied upon a portion of the live-stock sold by Pelham to Johnson, and by the latter to Gunst. The petition alleged very fully the facts hereinbefore stated, and also averred that the sale from Johnson to Gunst was made to defraud the plaintiff in the collection of his debt. The petition was excepted to by Gunst on the ground that it showed no lia-

bility on part of either defendant to the plaintiff, and the exceptions were overruled. The action of the court in overruling the exceptions to the petition is assigned as error.

We think the exceptions should have been sustained. Upon the conveyance of the property to Johnson, and Johnson's assuming to pay the note secured by the mortgage, the plaintiff acquired no immediate right of action against Johnson upon the promise. The promise was to pay the holders of the note, and not him. As between plaintiff and Johnson, by agreement Johnson became primarily liable to pay the note; but plaintiff could only acquire a right of action against him upon the promise by paying the note himself. *Ayers v. Dixon*, 78 N. Y. 318; *Lappen v. Gill*, 129 Mass. 349. Plaintiff did not pay the note voluntarily, and we have only to inquire whether or not the payment through a sale of the mortgaged premises can be deemed a payment by him. It is claimed, in argument on behalf of appellee, that since our courts hold that, in a sale of land by a deed which reserves a lien for the payment of the purchase money, the paramount title remains in the vendor until the price is paid, the land in controversy at the time of the sale is to be deemed the property of the plaintiff. It is true that it has been held that when the vendee holding such conveyance makes default in his payments, or repudiates his contract, the vendor may either sue for the purchase money, and enforce his lien, or he may rescind the contract, and recover directly the land. On the other hand, it is held that by suing for the purchase money he affirms the sale. It follows that, when defendants made default, the plaintiff had the right to claim a rescission of the contract. But he could not rescind the contract and claim under it at the same time. His suit shows that he is claiming under the contract; and hence the land, when sold, must be deemed the property of Gunst. Not having paid the note secured by the mortgage, he had no cause of action on their *assumpsit* to pay the debt, either against Johnson or Gunst. See *Ayers v. Dixon* and *Lappen v. Gill*, supra; *Risk v. Hoffman*, 69 Ind. 187. If the plaintiff had rescinded the sale, then the defendants would not have owed him the purchase money.

But it is insisted, on behalf of appellee, that, since the jury found that the conveyance from Johnson to Gunst was made to hinder, delay, and defraud plaintiff in the collection of his debt, therefore Gunst has no right in the property attached, and cannot complain. But the conveyance, if fraudulent as to creditors, was good against Johnson, and no one but a creditor could take advantage of the fraud. The property was not subject to be seized as the property of Johnson for an alleged debt which did not in fact exist.

An attachment was sued out against the property of both defendants. The affidavit for the attachment states that the attach-

ment was not sued out for the purpose of vexing or harassing "the defendant." It was held in *Perrill v. Kauffman*, ante, 125, (Tyler term, 1883,) that such an affidavit was insufficient to support an attachment. The court should have quashed the writ upon the motion of defendants. We have not deemed it necessary to consider the assignments of error *seriatim*. For the errors pointed out the judgment is reversed, and the cause remanded.

#### MCDONALD v. RED RIVER COUNTY BANK.

(Supreme Court of Texas. Oct. 18, 1889.)

##### JUDICIAL SALES—DESCRIPTION OF LAND.

Where a judgment foreclosing an attachment lien and an order of sale issued thereunder describe the land to be sold simply as part of designated lots, without identifying the part, a sale thereunder is void.

Error from district court, Red River county; D. H. SCOTT, Judge.

H. D. McDonald, for plaintiff in error.  
Sims & Wright, for defendant in error.

STAYTON, C. J. This is an action of trespass to try title brought by plaintiff in error, who alleged that he was the owner of "lot or parcel of land situated in the town of Clarksville, Red River county, Texas, to-wit, being twenty-five feet by fifty feet off of lots Nos. 1 and 4, in block No. 18, according to the plat of said town, fronting 25 feet on Walnut st., and running back west 100 feet, the same being the lot alongside and immediately north of a lot of the same size taken off of the south end of said lots 1 and 4." After these general averments of ownership, the petition set out the facts on which plaintiff claims title, which are: (1) That Wood & Lee brought suit against W. S. Thompson, in justice's court, on September 15, 1880, in Red River county, and therein sued out an attachment, the return on which showed a levy upon property described as in the petition; (2) that judgment was rendered against Thompson, and the attachment lien foreclosed; but that, in describing the land in the judgment, by inadvertence it was only described as "one certain lot of land situated in the town of Clarksville, Red River county, being 25 feet by 50 feet off of lots Nos. 1 and 4, in block No. 18, according to the plat of said town, making 25 feet front on Walnut street, and running back west 100 feet;" (3) that an order issued directing the sale of property, as described in the judgment, at which Wood & Lee became the purchasers, they receiving a deed containing no other description; and that after that Wood & Lee conveyed to plaintiff by a deed containing no other description; but that afterwards they made to him a deed describing the land as described in the return on the writ of attachment. There is no averment that the judgment made any reference to the officer's return, or that such reference was made at the sale, or in any paper subsequently executed.

Plaintiff prayed for a decree reforming and correcting the deeds through which he claims, and for a judgment for the land. Exceptions were filed by the defendant, which questioned the sufficiency of the facts stated to confer title on plaintiff.

Plaintiff having pleaded his title, it was proper for the court to determine on exception whether the facts pleaded gave title. That the judgment rendered by the justice of the peace might have been amended in that court with the proper parties before it is true; but the question in the case is, did the judgment and steps taken under it confer title on the plaintiff? Neither the judgment, order of sale, nor sheriff's deed described any property so it could be identified. They all refer to some parts of named lots less than the whole, but to what parts cannot be ascertained from any of these proceedings. It was necessary that the lien secured by attachment should be foreclosed, as the law was at the time the judgment was rendered. Sayles, Civil St. art. 180. The decree of foreclosure was the authority for the officer authorized to issue process to enforce the lien acquired through the attachment, and such person had no power to issue a writ commanding the officer to whom directed to sell any property other than that described in the decree of foreclosure; nor had the officer to whom the writ was directed any power to sell any property other than that which the writ commanded him to sell. The judgment and writ were the sources of power to the officer selling, and when these directed the sale of property not identified by either, directly or by reference, the sale was a nullity for want of description of the thing to be sold. Certainty as to the thing to be sold, offered for sale, and sold is necessary for the protection of the person whose property is to be sold, as well as for the protection of the purchaser, and no amendment could be allowed which would give validity to a sale of property not directed to be sold, nor in fact sold. Had an ordinary execution issued and been levied on the property in controversy, a sale made thereunder might have passed title to the property, although there was no proper decree of foreclosure; but no such state of facts is shown. There was no error in the rulings of the court below, and its judgment will be affirmed.

GAINES, J., did not sit in this case.

#### BATEMAN *et al.* v. RAMSEY.

(Supreme Court of Texas. Oct. 22, 1889.)

##### ATTACHMENT—INTERVENTION OF JUNIOR CREDITORS.

In a suit to foreclose an attachment, the record failed to disclose the grounds for the attachment, but strongly indicated that no statutory ground existed, and that the issuance of the writ was the result of a collusion to defraud creditors. Plaintiff, who was the debtor's father, and worked for him, and with whom the debtor lived, testified that the debtor did not convert any of his property

into money; that he paid his debts as fast as he could, with the money for which he sold his goods; that he did not fear that the debtor would defraud him if let alone, but that plaintiff sued for attachment because the debtor paid off other debts, and not his claims, which he could not otherwise collect. *Held*, that junior attaching creditors might intervene to show that plaintiff's attachment was fraudulent; and that if, on new trial, they established that grounds therefor did not exist, and that plaintiff's affidavit was false, plaintiff would be entitled to a personal judgment for his debt, but not to a judgment foreclosing his attachment, except only for any surplus which might remain after satisfaction of the attachment of the intervening creditors.

Appeal from district court, Johnson county; J. M. HALL, Judge.

*Poindexter & Padelford*, for appellants.  
*Crane & Ramsey*, for appellee.

HENRY, J. J. R. Ramsey, as plaintiff, instituted this suit against B. B. Ramsey on the ——— day of October, 1887, for money charged to have been loaned him as follows: April 1, 1885, \$500; May 1, 1885, \$55; November 1, 1886, \$180,—upon which, the petition charges, defendant promised to pay interest at the rate of 1 per cent. per month. The indebtedness was not evidenced by writing. The plaintiff sued out a writ of attachment, which was levied on all the property owned by the defendant, consisting of a stock of merchandise and a horse and wagon. A few days after its seizure, the property was sold by the sheriff, by order of court, for \$596.25; of which, part (\$76.15) was retained by the officer to pay costs, and the balance (\$520.10) was deposited with the clerk of the court to abide the result of the suit. The defendant did not appear or answer. Appellants intervened in the suit, contesting the correctness of plaintiff's debt, and charging collusion and fraud between plaintiff and defendant for the purpose of cheating intervenors and other creditors of defendant. Judgment was rendered for plaintiff for the sum of \$889.23, and foreclosing the attachment, from which the intervenors appeal. It was admitted that the defendant was insolvent. Plaintiff was the father of defendant, who was an unmarried man, and boarded with his father. Plaintiff usually worked for defendant about his store for small wages. Intervenors proved that they had recovered judgments in the county and justice's court, foreclosing their second and third levies of attachment on the same property that was levied on by plaintiff's writ, subject to plaintiff's writ. Intervenors' debts amounted to \$577.35, besides costs. The property, when levied on, was found to be worth \$1,050. The record before us does not contain the affidavit, or show the grounds upon which the attachment was sued out. The amount of plaintiff's debt was contested by the intervenors. The evidence with regard to it is vague and unsatisfactory. Without undertaking to analyze it, we will say that we are not able, from any view of the evidence, to see how it was made to amount to as much as the judgment was rendered

for. It seems clear that one item—a note amounting to \$180—was counted twice. As the case will be reversed, and the evidence of the amount of the debt may be made more satisfactory on another trial, we do not think it necessary to comment further on this aspect of the case.

With regard to his causes and motives for suing out the writ of attachment, plaintiff testified that it was his opinion that the defendant did not convert any of his property into money; that defendant paid his debts as fast as he could, with the money that he sold his goods for; that he was not afraid defendant would defraud him if he was let alone, but plaintiff knew that he owed other debts, which he was paying off, and because he was doing that, and was not paying him, he sued out his writ of attachment; that he sued out the attachment because he found he could not otherwise collect his debt. Plaintiff testified that before he sued out his writ of attachment he talked to defendant about doing so, more than once. As we have said, the record before us fails to disclose the grounds upon which the attachment was sued out by plaintiff. It strongly indicates, however, that no statutory ground existed, and that the issuance of plaintiff's writ was the result of a fraudulent combination between plaintiff and defendant, whereby they proposed to effect a transfer of defendant's property to plaintiff for the purpose of defrauding the other creditors of defendant. It has long been settled in this state that the defendant cannot put in issue the truth of the grounds on which the plaintiff sues out his attachment in that suit. The defendant, however, has a complete remedy in this respect by a suit on the attachment bond. But a fraudulent attachment suit may be more injurious to the creditors of defendant than to the defendant himself. The divestiture of all his property may be as completely effected by an insolvent debtor through a collusive and fraudulent attachment suit as by a voluntary transfer by deed. As was said by this court in the case of *Johnson v. Heidenheimer*, 65 Tex. 263, a fraudulent disposition of a debtor's property by a suit is as much prohibited by the statute of frauds as it is by a private transfer. Rev. St. art. 2465. It is well settled by the decisions of this court that a junior attaching creditor may intervene in the suit of the first attaching creditor for the purpose of contesting the validity of the debt upon which it is founded, but not for the purpose of quashing the writ for informalities. *Nenney v. Schluter*, 62 Tex. 828. We have no doubt about the right of such intervening creditors to attack the attachment proceedings for the purpose of showing they are fraudulent. Wap. Attachm. 480; Wade, Attachm. 117; Drake, Attachm. § 273. When it can be shown by intervening creditors that the grounds upon which the writ was sued out did not exist, and that the affidavit on which it was predicated was known to be false by the party making it, or by the

plaintiff, the proceedings should be set aside because fraudulent. As in other cases, badges of fraud may exist, such as the failure of the defendant to make such defenses as would defeat the attachment or the cause of action, and any other things that indicate collusion between plaintiff and defendant. Our laws do not intend that the harsh remedy of attachment shall be resorted to merely because a debtor is unable to pay his debts as they become due. The circumstances under which such writs may be sued out are plainly stated by our statutes. Our courts are not organized as instrumentalities through which the statutes may be subverted and silenced by perjury. If, upon another trial of this case, it shall be made to appear that plaintiff's attachment was sued out upon grounds that did not exist,—upon an affidavit known by him to be false,—while he will then be entitled to a personal judgment against defendant for so much of his debt as he may establish, he should not have a judgment foreclosing his attachment, except for such surplus, if any, as may exist after satisfaction of the claims of intervening creditors. In that case the intervenors ought to have judgment for so much of the proceeds of the property as they may show themselves entitled to by virtue of their own writs of attachment. The judgment is reversed, and cause remanded.

**SEELIGSON et al. v. MITCHUM.**

(Supreme Court of Texas. Oct. 22, 1889.)

**VENDOR'S LIEN—PAROL EVIDENCE.**

In a suit on a note, and to foreclose a vendor's lien, where a second note has been given for the same debt, a memorandum made on the note sued on, without the knowledge of the parties, by the one transacting the business, to the effect that it was held as collateral security for the new note, is not evidence of the contract, and the testimony of the one making the memorandum as to the circumstances under which, and the purpose for which, it was made cannot be excluded under the rule that parol evidence is inadmissible to vary or contradict a written contract.

Error from Henderson county court.

Action on a promissory note, and to foreclose a vendor's lien, by James A. Mitchum against P. C. Cotton and George Seeligson & Co. Cotton made no defense, but Seeligson & Co. pleaded payment and discharge of the lien. On trial by jury, the exceptions of defendants to the admission of certain evidence was overruled, and their request for a charge refused. Judgment was rendered on a verdict for plaintiff, and the defendants George Seeligson & Co. bring error.

*Faulk & Faulk*, for appellants. *Richardson & Watkins*, for appellee.

**STAYTON, C. J.** James A. Mitchum, the holder, brought this action against P. C. Cotton on a note executed by the latter to secure a part of the purchase money for lots 5 and 6, block 6, in the town of Athens, and to enforce a lien on the lots which was retained in the face of the deed through which the con-

veyance was made. George Seeligson & Co. held a debt against Cotton, secured by trust-deed executed by Cotton on July 17, 1883, and, with Cotton, were made defendants. Cotton made no defense, but Seeligson & Co. alleged that the note for the purchase money for the lots was paid by Cotton on March 1, 1884, with money borrowed by him from Mitchum, and thus the lien discharged. That firm further alleged that, if the note sued on had not been paid, the lien had been lost, in that on March 1, 1884, Cotton executed to Mitchum a new note, covering the principal and interest on the note sued on, and gave a lien on other lands to secure its payment. There was a judgment in favor of Mitchum. There was a controversy upon the trial whether Mitchum bought the note sued on from the person who held it on March 1, 1884, or loaned to Cotton the money with which the latter paid it. Seeligson & Co. contended that the latter was true, and that the trust-deed executed to Mitchum on that day on other land was given to secure the money then loaned by Mitchum to Cotton. The evidence upon this point was conflicting, but the weight of the testimony sustained the proposition that Mitchum then bought the note from its holder, and that he did not make a loan of money to Cotton. It appears, however, that Cotton did execute a trust-deed to Mitchum on that day, to secure a note then executed to Mitchum for a sum equal to the principal and interest then due on the note now sued on, and that trust-deed embraced only a tract of land situated in Anderson county. The evidence was conflicting as to the purpose for which the note and trust-deed last referred to were executed,—that offered by Seeligson tending to show that they were executed to secure the repayment of money loaned by Mitchum to Cotton, with which the latter paid the note sued on, or that there was a substitution of security through which the lien now sought to have enforced was relinquished; while that offered by plaintiff tended to show that they were intended only as additional security, and that there was no intention to relinquish the lien on the lots for which the note in suit was given. It appears that some question arose, at the time the last note was executed, as to whether the two notes should remain in the possession of Mitchum; each evidencing, as they did, an indebtedness of Cotton, on the face of the notes, not shown to be the same.

W. T. Eustace, the person who prepared the trust-deed, and negotiated between the parties as to all matters leading to the execution of that, and the note executed simultaneously, stated that Mitchum never agreed to lend to Cotton any sum of money; but did agree, if the latter would give security other than that afforded by the lien on the lots, to buy the notes so secured, and to extend time for its payment, and that it was the agreement of the parties that the lien given by the trust-deed should be an additional security. He further stated that, at his own sug-



gestion, for the purpose of showing that the payment of one of the notes would satisfy both, and for the protection of Cotton, he made on the note sued on a memorandum as follows: "This note is held as security to secure the payment of one certain note for \$280, dated March 1, 1884, due January 1, 1885, signed by P. C. Cotton, and payable to James A. Mitchum or bearer." The evidence shows that neither Cotton nor Mitchum knew what the memorandum made on the note by Eustace was, until after this action was brought, though it does show that they both may have known of Eustace's intention to make a memorandum which would show that Mitchum had no right to collect both notes. The admission of the evidence of Eustace as to the agreement of the parties, and as to the purpose for which the memorandum was made, was objected to on the ground that this evidence varied or contradicted the writings. In signing the bill of exceptions, the court stated that "the witness did not state the meaning or sense of the language used, but the circumstances under which, and the purpose for which, the indorsement was made." Appellants treat the memorandum as the evidence of a contract between the parties, and seek to subject it to the rule applicable to the admission of parol evidence to vary or contradict a written contract; but it seems to us that such is not its character. Neither party claims that it evidences any contract made between them, and both deny the existence of such a contract, as well as knowledge of what Eustace placed on the note until long after the memorandum was made. As the matter stood, we are of opinion that the court did not err in permitting the facts attending the transaction, or the purpose desired to be attained by the making of the memorandum, to be shown.

The memorandum, it seems to us, had but little bearing on the question presented, and, if given full effect, would not better the position of appellants. Appellants' first defense was that the note on which the memorandum was placed was paid; and that thus it, and the lien to secure it, ceased absolutely to exist. The memorandum contradicts that, and shows that it was the intention to keep the obligation evidenced by the note alive; and with this would continue the lien to secure it, unless in some way waived. The second defense was that the lien on the lots was waived by taking the lien on land in Anderson county. If it was the intention of the parties that the lien should continue on the lots, either as primary or collateral security, it was not waived. If two notes be given by the same person to evidence the same debt, it cannot be said that one may be held as collateral security for the other, for the security consists in the solvency and willingness of the maker to pay. If, however, two notes to evidence the same indebtedness be secured by liens on different property, the one lien, in a qualified sense, may be collateral; but if it could be held, in this case, that such was

the character of the lien on the lots, the assertion of this by appellants would be destructive of both defenses urged by them. That the two notes were given by the same person, and to secure the same debt, the great weight of the evidence shows, as does it that there was no abandonment of the lien on the lots; and the real inquiry was, did the parties intend that the lien on the lots should cease when the lien on the land in Anderson county was given to secure the same debt? This question was presented for the decision of the jury by a very clear charge, to which no objection is urged, and the finding was against appellants. There was nothing in the second note or deed of trust which evidenced that the lien then given was not intended as an additional security for the sum then due, and the interest which would accumulate at the maturity of the note; and the evidence of Eustace, bearing on that question, was not admitted, in violation of the rule of evidence which appellants insist was infringed.

It is urged that the court erred in refusing to give a charge requested by appellants as to the burden of proof as to the continuance of the lien on the lots. If the charge asked was correct, the court did not err in refusing to give it; for substantially the same charge as asked, had been given by the court, and there was no necessity for its repetition. There was no prayer that securities held by appellee be marshaled, nor question made as to whether appellants had acquired any rights, superior to that held by appellee, to enforce their lien on the lots, by reason of the fact that appellee may have surrendered his lien on the land in Anderson county after appellants acquired a lien on the lots, and with knowledge of that fact. There is no error in the judgment, and it is affirmed.

#### GRAVES v. CAMPBELL et al.

(Supreme Court of Texas. Oct. 22, 1889.)

#### INSTRUCTIONS—HOMESTEAD—ABANDONMENT— OPINION EVIDENCE.

1. Where, in trespass to try title, there is some evidence that defendant's wife owned the property, she having paid for it with her separate means, an issue as to whether it was her separate estate is properly submitted to the jury, though there may be evidence from which the jury ought to find that plaintiff was an innocent purchaser; and, if plaintiff desires to have determined on what issue the cause is decided, he should ask for special issues.

2. Where there is no controversy that such land was at one time the homestead of defendant and family, and the preponderance of evidence shows that defendant was absent from the state under treatment for a dangerous disease, but intended to return as soon as his condition would permit, plaintiff is not prejudiced by an instruction that if defendants did intend and still intend to return and occupy said homestead, and that if neither has acquired any other homestead since their departure, then such property was not subject to forced sale, and defendants are entitled to a verdict.

3. Testimony that it had been defendants' intention to return and again occupy the homestead is merely the expression of witnesses' opinions, and although the facts on which such opinions are



based are fully stated, their admission in evidence is prejudicial error.

4. A request to instruct that if the husband, after leaving the state, and prior to the sale of the homestead on execution, formed an intention to, and did, become a citizen of another state, his homestead rights are lost, and that if his wife voluntarily accompanied and remained with him, then her homestead rights are also lost, and plaintiff is entitled to a verdict; that a party cannot be a citizen of more than one state at the same time; and that if defendants were citizens of another state at the time of the execution sale, they cannot claim homestead rights in this state,—was properly refused, as it did not inform the jury what facts would make the husband a citizen of another state so as to preclude his retaining said homestead.

Appeal from district court, Red River county; V. W. HALE, Special Judge.

Trespass to try title by R. C. Graves against W. S. Campbell. Defendant's wife intervened, claiming the property as her own. Judgment for defendants, and plaintiff appeals.

*Chambers & Doak*, for appellant. *Sims & Wright*, for appellees.

STAYTON, C. J. Appellant purchased the land in controversy under an execution against a firm of which W. S. Campbell was a member. Campbell's defense was that the property was the homestead of himself and family at the time appellant bought. Mrs. Campbell, the wife of W. S. Campbell, intervened, and asserted that she owned the property in her separate right, for that it was paid for with her separate means. There was evidence tending to show that this was true, as well as evidence tending to show that appellant was a purchaser for valuable consideration, and without knowledge or notice of any right Mrs. Campbell may have had. The court correctly instructed the jury upon these several issues, and it is now insisted that no issue whether the property was the separate estate of Mrs. Campbell should have been submitted, and so it is insisted on the claim that there was no evidence tending to show that the property was paid for with the separate funds of Mrs. Campbell, and, further, because the evidence was clear that appellant had no notice of her right, if it existed, when he bought.

We are not prepared to say that there was not such evidence as made it proper for the court to submit the issue to the jury whether the property was the separate estate of Mrs. Campbell; and the fact that there may have been evidence from which the jury ought to have found that appellant was an innocent purchaser made it none the less proper to submit the issue. If appellant desired to do so, he could have had the cause submitted on special issues, and thus have had the means of determining on what issue the cause was decided against him, and whether in the findings the jury had given proper weight to evidence or disregarded it.

The second assignment is that "the court erred in the third paragraph of his charge, in this: He tells the jury, "if defendants, W.

S. Campbell and wife, Adelia, when they moved away from said property did not intend not to return to said property, and use it as a homestead, or if they did intend and still intend to return and so use said property and occupy it as a homestead, and that neither of them has ever acquired any other homestead since they went away from the property in controversy, then, in such case, such property was not subject to forced sale, and you will find for defendant." There was evidence which made such a charge proper, and we understand the law to be as therein stated. There was no controversy as to the fact that the property was at one time the homestead of Campbell and his family, but he and family had been absent from it for some time, as he claimed, and the great weight of the evidence tended to show, because it was necessary for him to remain in the state of Missouri under treatment by a specialist for a dangerous disease, but with intent at all times to return to it as soon as his condition would permit. So being the evidence, the court, in connection with other proper and relevant charges, instructed the jury that, "in order for the plaintiff to recover on the grounds of abandonment, you must be satisfied by preponderance of evidence that W. S. Campbell, at the time of leaving the state, did so with the intent to abandon his said homestead, or that since leaving he determined to abandon the same." Appellant claimed that Campbell had changed his domicile from Texas, where it is shown once to have been, to the state of Missouri, and the great burden of his brief is to establish the proposition that Campbell had changed his domicile and become a citizen or resident of the state of Missouri, without intent to return to his home in Texas. If he had established that proposition to the satisfaction of the jury, under the charge of the court, the verdict would have been in his favor on the question of abandonment. One having acquired domicile does not lose it without removal from it with intent not to return, and the same is true as to abandonment of a homestead once acquired. The burden of proof in either case rests upon the person asserting the affirmative of the proposition. One may wrongfully exercise such powers or privileges as can be exercised lawfully only by an actual citizen of the state in which they are exercised, and this will be evidence of the fact that he is a citizen of the state in which he assumes to exercise rights which pertain only to citizenship, but not conclusive evidence of that fact. There is nothing in the charge referred to of which appellant can complain, but it went too far in appellant's favor in that it left the jury to infer that an intent not to return, formed since appellant purchased, would render his title good.

Several witnesses were permitted, over proper objection, to state that it had been the intention of Campbell and wife to return to Texas and again occupy the homestead. This

was but the opinion of the witnesses, and should have been excluded. The witnesses stated very fully the facts on which they based their opinions, and upon these facts it may be that the jury would have reached the same conclusion as to intention as did the witnesses; but it was the right of appellant to have his cause passed upon by the jury, with none but proper testimony before them, and we cannot assume that the evidence improperly admitted may not have influenced the verdict.

It is claimed that the court erred in refusing instructions asked by appellant, which are as follows: "(1) If you believe from the evidence that W. S. Campbell, at any time after leaving Texas, and prior to the sale of this land in controversy by the sheriff, formed an intention to be and become a citizen of another state, and did so become a citizen of another state, then I charge you that his homestead rights were lost and abandoned in this state; and that if you further believe from the evidence that his wife, Adelia Campbell, voluntarily accompanied him there, and remained with him, then her homestead rights were also lost and abandoned, and you will find for plaintiff. (2) That a party cannot be a citizen of more than one state at one and the same time, and if you believe from the evidence that the defendants were citizens of Kansas City, Mo., at the date of levy of execution and sale, then they cannot claim homestead rights in this state." Neither of these charges informed the jury what facts would make Campbell a citizen of a state other than Texas, such as would preclude his retaining homestead here, and for this reason were properly refused. It probably was argued in the court below, as seems to be insisted here, that if Campbell exercised powers or privileges in Missouri which none but a citizen of that state may lawfully exercise, this is conclusive evidence of his citizenship in Missouri. If by the word "citizen" was meant, in its application to Campbell, a person who had moved from Texas to Missouri with a fixed intention not to return to this state again to reside, then it would have conveyed, taken in the connection used, no other instruction than that already given in language not calculated to mislead; but if by the use of the word, in its connections, it was intended to have the jury to understand that Campbell, by a residence intended by him only to be temporary, must be held to have abandoned his homestead here if he had performed acts in Missouri which he could not lawfully perform without having acquired a domicile there, even though at all times he may have had a fixed intention to return and occupy his homestead here, then the charge was intended to give the jury an erroneous impression as to the law which should govern them. The court had clearly instructed the jury what would operate an abandonment of the homestead; but, had this not been so, would correctly have refused to give the instruction asked, couched as it was in lan-

guage calculated to make a false impression on the jury, and especially so in view of the character of evidence offered to show abandonment.

C. N. Walker, a tenant of appellee, was made a defendant, and it is insisted that the judgment makes no disposition of the case as to him. The judgment is that appellant take nothing by his suit; that the sheriff's deed to him be canceled; that Campbell and wife recover the land; and that the defendants recover of appellant their costs. This was a final judgment.

It is further urged that a new trial should have been granted on the ground that the verdict was contrary to the evidence, but this proposition is not supported by the record. For the error of the court in permitting witnesses to give their opinions that Campbell intended at all times to return and occupy again the property as a home, the judgment will be reversed, and the cause remanded.

#### HARVEY v. CRAWFORD COUNTY.

(*Supreme Court of Arkansas. Oct. 26, 1889.*)

##### COUNTIES—COSTS IN CRIMINAL CASES.

Under Mansf. Dig. Ark. § 2343, which provides that, in criminal cases where the defendant is acquitted, the county shall pay the costs, except where the prosecutor is adjudged to do so, the county is not liable for costs upon acquittal for a misdemeanor where the justice of the peace should have exacted a bond for costs, but did not do so.

Appeal from circuit court, Crawford county; J. S. SETTLE, Judge.

Charles F. Harvey, a justice of the peace for Crawford county, presented to the county court his bill for fees due him for hearing a prosecution for misdemeanor, wherein the defendant was acquitted. His claim was disallowed, and upon appeal the circuit court affirmed the judgment of the county court, and ruled that the justice should require from the prosecutor a bond to secure costs in case of acquittal; and that the county was not liable for costs in any case of misdemeanor. Plaintiff appeals.

In regard to costs in criminal proceedings, Mansf. Dig. § 2343, provides: "In all criminal or penal cases, if the defendant shall be acquitted, except in cases where the prosecutor shall be adjudged to pay the costs, \* \* \* the same shall be paid by the county."

*Charles F. Harvey, pro se.*

PER CURIAM. The county is not liable for costs upon acquittal for a misdemeanor in any case in which the justice of the peace should have exacted a bond for costs, but did not. *Stalcup v. Greenwood Dist.*, 44 Ark. 81. The judgment is affirmed.

#### MUNDAY v. COLLIER.

(*Supreme Court of Arkansas. Oct. 26, 1889.*)

##### HUSBAND AND WIFE—FORM OF ACTION.

A note given by a husband to his wife is an equitable claim against him, and the error in

bringing an action at law upon it is waived by defendant's failure to move a transfer to the proper docket.

Appeal from circuit court, Randolph county; J. W. BUTLER, Judge.

Action by M. F. Collier, as administrator of Mary Munday, against Daniel Munday, on a promissory note. Defendant answered that at the time the note was executed he and Mary Munday, the payee, were husband and wife, and set up partial payments upon the note. The case was tried by a jury, and there was a verdict for plaintiff, and judgment accordingly. Defendant appeals, urging that, if the note was not absolutely void, the only remedy upon it is in equity.

*Sam. W. Williams*, for appellant. *U. M. & G. B. Ross*, for appellee.

**PER CURIAM.** The question of the application of the sums claimed to have been paid by defendant, Munday, to his wife, was fairly submitted to the jury, and they found that the amounts, if paid, were not made as payments on the note, and their verdict is conclusive. Whether the note constituted a liability or not, it was unquestionably an equitable claim against the husband. The error, if any, in bringing the action at law was waived by the defendant's failure to move a transfer to the proper docket. *Organ v. Railway Co.*; 51 Ark. —, 11 S. W. Rep. 96. Affirmed.

#### **WILLIS v. REINHARDT et al.**

(*Supreme Court of Arkansas.* Oct. 26, 1899.)

##### **REPLEVIN.**

The owner of personal property seized under an attachment against the property of another may maintain replevin against the officer having such property in possession.

Appeal from circuit court, Prairie county; M. T. SANDERS, Judge.

Replevin by George W. Willis against Abel S. Reinhardt and James T. Lashley, sheriff and deputy-sheriff of Prairie county, to recover certain property of which defendants were in possession by virtue of a writ of attachment against one Nikola Meyer, but which plaintiff claimed to be his. Upon motion of defendants the court dismissed the suit upon the ground that the order for delivery to plaintiff sought to take property out of the custody of the law, and plaintiff appeals.

*J. E. Gateswood* and *J. S. Thomas*, for appellant. *C. E. Warner*, for appellees.

**PER CURIAM.** The owner of personal property seized under an attachment against the property of another may maintain replevin against the sheriff or other officer having it in possession. The right has been recognized by this court in many cases. *Thatcher v. Franklin*, 37 Ark. 64; *Cox v. Vise*, 50 Ark. 283, 7 S. W. Rep. 134; *Raleigh v. Griffith*, 37 Ark. 151; *Clayton v. Johnson*, 36 Ark. 406; *Overby v. McGee*, 15 Ark. 459;

v.12s.w.no.13—16

*Hickman v. Ford*, 43 Ark. 207; *Mansf. Dig.* § 5572, subd. 5. Reverse the judgment, and remand the cause for further proceedings.

#### **PINYAN v. BERRY et al.**

(*Supreme Court of Arkansas.* Oct. 26, 1899.)

##### **GARNISHMENT—RES JUDICATA.**

An order to pay money made by the court on a garnishee after his failure to appear in the garnishment proceeding is not a judgment against him, so as to preclude him from setting up any defense to a suit by the attaching creditor for the garnished debt that he might have made before garnishment.

Appeal from circuit court, Madison county; HENRY GLITSCH, Special Judge.

Action by M. E. Pinyan, administratrix, against T. G. Berry and others, for a sum of money which the court had theretofore ordered to be paid plaintiff's intestate by defendant Berry, in a suit in which intestate was plaintiff, and one McReynolds was defendant, and defendant Berry was garnishee. Defendants alleged that the judgment was void, and that the mortgage had been satisfied. There was judgment for defendants and plaintiff appeals, alleging that the judgment was against both the law and the evidence.

*E. S. McDaniel* and *Crump & Watkins*, for appellant. *O. R. Buckner* and *J. D. Walker*, for appellees.

**PER CURIAM.** An order to pay money made by the court upon a garnishee, after his failure to appear in the attachment proceeding wherein he was garnished, is not a judgment against the garnishee, and does not determine his liability to pay. *Giles v. Hicks*, 45 Ark. 271; *Railway Co. v. Richter*, 48 Ark. 349, 3 S. W. Rep. 56. The garnishment proceeding is not instituted to settle the question of indebtedness between the attached debtor and third persons, (*Moore v. Kelley*, 47 Ark. 219, 1 S. W. Rep. 97.) and the only effect of the court's order upon the garnishee is to confer upon the attaching creditor of his creditor the same right to collect whatever he may owe his attached creditor that the latter had against him, *i. e.*, the garnishee. *Giles v. Hicks*, supra. When suit is instituted by the attaching creditor to recover the garnished debt, the order made in the attachment proceeding does not preclude the garnishee from setting up any defense he might have made before the garnishment. The chancellor heard the witnesses orally, and had opportunities of judging of their credibility that we have not; and his finding of fact, if opposed to the preponderance of evidence at all, is not so grossly opposed to it as to warrant our interference. Affirmed.

#### **BENDER et al. v. BEAN et al.**

(*Supreme Court of Arkansas.* Oct. 26, 1899.)

##### **TAXATION—REDEMPTION—TENDER.**

A bill filed by minors to redeem land sold for taxes, as provided by law, implies an offer to

pay such amounts as the law allows to the purchasers, and such tender, not being met by any objection to its terms, or to the fact that no money is actually tendered, terminates the estate of the tax purchasers, and they are liable for rents from the institution of the suit. *SANDELS, J., dissenting.*

On motion to modify decree. For former opinion, see ante, 180.

**HEMINGWAY, J.** Upon the hearing of this cause, we held that defendants Haynes and Helms were not chargeable with rents of land purchased by them at tax-sale. The plaintiffs, who prevailed, have filed a motion seeking to modify the decree in this respect, and to charge Haynes and Helms with rents after they offered to redeem and made a tender of the sum necessary. As we said upon the hearing of this cause the minor's right to redeem is a statutory privilege to defeat the purchaser's title within a limited time. The purchaser holds an estate in fee, subject to be defeated by the exercise of the privilege. This the minor may do by making the payment prescribed by the statute, within the statutory period, to the purchaser. Upon such payment the fee of the purchaser is terminated, and the person redeeming becomes seised thereof, with all rights pertaining thereto, including the right to rents. A tender of the amount necessary to redeem is as effective as a payment thereof, and an offer, made in good faith, to redeem, which is refused, not because no tender, or an insufficient tender, is made, but because the right to redeem is denied, is equally effective. Any other rule would make a profit for the purchaser from his unlawful denial of a statutory right. A tender of the exact amount necessary, under a statute which exacts payment for improvements, would in many cases be impracticable. If the purchaser could decline it, without making a showing as to the correct amount, and still enjoy the rents and profits of the land, redemption by minors would be difficult and tedious. In all cases where the rents and profits for a few years exceeded the cost of litigation, redemption would be allowed only at the end of vexatious suits. When the former owner, who is entitled, desires, and in good faith attempts, to redeem, the tax purchaser should offer no obstacles to his doing so. If the sum offered is inadequate, the inadequacy should be objected to, and the correct amount indicated. It will not do to maintain silence as to objections, which, if expressed, might be met, and afterwards assert them to the owner's prejudice.

The plaintiffs made a tender before bringing the suit, but it was joined with a tender from another party, who was not entitled to redeem. This was not a good tender. In the bill filed they set out their respective interests, and ask to be allowed to redeem as provided by law. This implied an offer to pay the amounts which the law allowed to each of the tax purchasers. It was met by no objection to its terms, or to the fact that

no money was actually tendered, but by a denial of the right to redeem, and by the assertion of a title adverse to the plaintiffs. They desired to redeem, and sought to terminate the estate of the tax purchasers, which they had a right to do. The purchasers could not, by their improper refusal of the privilege sought, extend the term of their estate, and continue to enjoy its rents and profits. The decree will be modified, and Haynes and Helms will be charged with rents from the date of the institution of the suit.

*SANDELS, J., (dissenting.)* I do not assent to the conclusion of the court upon the motion of plaintiffs below to award them the rents of the lands in controversy since the filing of their bill. I do not think they are entitled to rents until after the decree of the court has adjudged them entitled to redeem, and they have paid the sums adjudged against them. So much of the record as is necessary to a proper understanding of my position is as follows: There were seven heirs of Bender. Two were confessedly barred of their right to redeem. Five of them claimed the right, and sent their attorney to Haynes and Helms to effect the redemption. He offered to each of them (Haynes and Helms) \$100 to cover taxes, penalty, costs, etc., on behalf of the "Bender heirs." Each refused to accept the sum tendered without assigning any reason for the refusal. Five of the Bender heirs soon after filed their bill to redeem, and, after alleging the tender of \$100 to each of the defendants, offered to pay such sums as the court might adjudge against them for the redemption of five-sevenths of the land. By the consideration of this court it was determined that one of the five plaintiffs was not entitled to redeem, and that only four-sevenths of the land was redeemable. It was determined also that the sum due to Haynes was \$—, and to Helms \$—. The sum tendered before the filing of the bill was for the redemption of more land than they were entitled to redeem, and was insufficient to pay for the redemption of that to which they were entitled. It is conceded by the court that this tender was ineffectual for any purpose. It is decided, however, that, by the subsequent filing of the bill by five heirs, claiming five-sevenths of the land, and offering to pay such sums as the court might adjudge, and also by the filing of the answer denying the right of these plaintiffs to redeem, but insisting that if they were so entitled the sum tendered them was inadequate, the right of plaintiffs to the rents accrued. For a long time the right to maintain a bill to redeem without a previous sufficient tender was denied; except when the fraud of the tax purchaser or officer had prevented redemption within the proper time, or when the bill presented other features that brought the case within some distinct head of equity jurisprudence. But the last, as also the greatest, innovation, in favor of liberal deal-

ing with delinquent tax-payers, is that they may preserve their right of redemption by filing a bill without tender at all, where it is difficult to tell what exact sum should be tendered. This saves the right to redeem when the bill offers to pay such sums as are adjudged. But I maintain that the right to redeem does not necessarily carry with it the right to rents. The right to rents depends upon the ownership of the lands. In cases of redemption, by persons generally, within two years from the sale, the tax purchaser has only an inchoate right to the land, and is not entitled to possession. He is a trespasser if he takes it. He gets title upon the execution of a deed to him at the expiration of two years. This title is unqualified, except in cases where the delinquent tax-payer is a minor. In that event the tax purchaser takes the title subject to divestiture by the exercise of the minor's right of redemption within the statutory period. From the time of the execution of the tax-deed then, the tax purchaser's title is indefeasible, except upon the contingency above stated, the minor paying or tendering the full amount of taxes, penalty, costs, etc. If the sum be tendered before or at the filing of the bill, the minor, upon recovery in the action, is entitled to the rents and profits from the time a sufficient tender was made and refused. Why? Because the payment, or the tender, of the full sum due the tax purchaser operated to divest his title, and from that time he holds wrongfully the plaintiff's land. But, in case the plaintiff offers generally to do what the court may adjudge proper, there is no divestiture of the title of the tax purchaser, until the court adjudges the plaintiff's right to redeem, fixes the amount of plaintiff's liability, and the plaintiff pays it. The plaintiff may never pay it, in which case there would never be a divestiture. Until such adjudication and payment, the land remains the property of the tax purchaser, and he is not chargeable with rents for living on his own place.

#### STATE v. MORGAN.

(Supreme Court of Arkansas. Oct. 26, 1889.)

##### SCHOOL LANDS—STATE PATENTS—CANCELLATION.

1. Gould's Dig. Ark. c. 154, § 53, provides for sale of school lands on credit, and also that "any person may pay the amount in cash for which said land was sold." Act April 12, 1869, § 14, provided a mode by which persons, who had purchased lands according to law, might acquire a patent. Gantt's Dig. §§ 5564, 5565, enlarged the authority to sell such lands, elsewhere conferred on the county collector. *Held*, that the first statute was not intended to allow persons other than the purchasers to acquire land sold, by paying in cash the amount for which some one else had purchased it on credit, and that neither of the statutes conferred upon the board of commissioners of the common-school fund authority to sell such land.

2. Gantt's Dig. Ark. § 5570, provided that every purchaser of common-school lands should be entitled to a patent from the state after payment of the price, and section 5571 made it the duty of the secretary of state to make out patents to be countersigned by the governor, with the state seal affixed.

*Held*, that the decision of the officers issuing a patent, as to whether the necessary antecedent acts had been done, was conclusive against the state in a collateral attack on the patent by ejectment; but, as the complaint alleged that defendant obtained the patent by falsely representing that he had purchased the land, it showed a right to have the patent canceled, and the cause should have been transferred to equity.

8. The equitable relief of cancellation will be granted the state only on condition of its restoring purchase money and taxes.

Appeal from circuit court, Independence county; R. H. POWELL, Judge.

*Coleman & Yancey*, for the State. *Robert Neill*, for appellee.

HEMINGWAY, J. The state of Arkansas brought suit in the Independence circuit court to recover of Thomas J. Morgan a section of common-school land. The defendant filed his answer to the complaint, to which a demurrer was interposed. The demurrer was overruled, and the cause tried upon the pleadings and exhibits. There was verdict and judgment for the defendant, from which the state prosecutes this appeal. The court treated the answer as a complete bar to plaintiff's right of recovery, and we are now called upon to decide whether this was error. The complaint alleges that the plaintiff is the owner of the land, and that defendant is in the unlawful possession thereof; that the state acquired title by an act of congress and an ordinance of the general assembly, each approved in 1836; that the defendant claims title under a patent from the state, signed by the governor, and counter-signed by the secretary of state, bearing the date of 27th day of February, 1875; that the patent was procured by the false and fraudulent representations of the defendant in this, that the defendant presented an application to the board of common-school commissioners for the purchase of the land, and also an unsigned paper, addressed to the secretary of state, who was a member of the board, purporting to come from the office of said board, stating that the defendant had paid in full the purchase money for the tract of land, and recommending that a patent be issued to him. It is further alleged that the defendant had not acquired a right to a patent, either by original purchase or by assignment from the original purchaser; and that the action of the governor and secretary of state in issuing the patent was in excess of their authority, and without warrant of law. There is prayer for the possession of the land with damages. The answer of the defendant alleges that in 1854 the land was sold by the county commissioners to one John W. Bright upon a credit; that Bright failed to pay either the principal or interest, and, by the provisions of the law regulating the sale, the land reverted to the state; that on the 18th of February, 1875, the land was subject to sale by the board of commissioners of the common-school fund, and he made application to said board to purchase it. Denies that he made any false or fraudulent representations to the board to procure a pat-

ent, but alleges that his application disclosed the sale to Bright and its terms. Alleges that the application was duly considered at a meeting of the board, and that the board, being satisfied that the land had been sold to Bright at public auction, that he had failed to pay for the same, that it had reverted to the state, and that two dollars per acre was a fair price for it, ordered that it be sold to him at that price; that he paid into the treasury of the state the price fixed, and thereupon the patent issued to him, and he thereby acquired title to and became the owner of the land; that the board had adjudged that he had become and was the purchaser of the land, and that the finding was conclusive against the state; that the facts so found were true. It is further alleged that the defendant complied with all the conditions of purchase, entered immediately into possession of the land, paid all taxes assessed against it, and had made lasting and valuable improvements upon it. A copy of the patent is exhibited with the answer. The complaint was entitled "At Law," and the court so treated the case. With this view, it overruled the demurrer to the answer. Was this error?

It is contended for the appellee that the state board had ample authority to sell the land, and that he acquired a perfect title to it. To support this contention we are referred to section 52, c. 154, Gould's Dig.; section 14, act April 12, 1869; and sections 5564, 5565, Gantt's Dig. Section 52, c. 154, Gould's Dig., prescribes the terms upon which school lands should be sold. It provides for sales upon a credit, purchasers to give bonds, and pay interest semi-annually. It contains a provision "that any person may pay the amount in cash for which said land was sold," and it is upon the terms of this provision that the appellee relies to sustain his right to purchase. We cannot give it the construction contended for, even if the act was in force when he purchased. Its manifest purpose was to permit purchasers to pay cash instead of giving the bonds provided for. It was not intended to allow other persons than the purchasers to acquire land sold by paying in cash the amount for which some one else had purchased it. The fourteenth section of the act approved April 12, 1869, provided a mode by which persons who had purchased lands according to law, and complied with the terms of purchase, but who had received no patent, might acquire patents, and perfect their legal title. It conferred no authority to sell. Sections 5564 and 5565 of Gantt's Digest conferred no new authority to sell, but only enlarges the authority elsewhere conferred on the collector of the county. It is not alleged that the appellee purchased from the county commissioner under the provisions of Gould's Digest, or from the county collector under the provisions of Gantt's Digest. As the board of commissioners never had authority to sell, it follows that his purchase was made without any warrant of law..

But it was provided by the law in force when the appellee received his patent that every purchaser of common-school lands should be entitled to receive a patent from the state conveying and assuring title after the purchase money was paid. Id. § 5570. And it is made the duty of the secretary of state to make out patents, to be signed by the governor, and countersigned by him, with the seal of state affixed. Id. § 5571. The object of patents so made is to invest the legal title of the lands described in the patentee. Such a patent was executed and delivered to the appellee, and the purchase price of the land received and appropriated by the appellant. What, then, is the effect of the patent, and the status of the parties with reference to the land? / It was state land, subject to sale, and the patent was executed by the officers charged with that duty. Patents should issue only to persons who had purchased in the manner provided by law; but whether the particular facts existed or the antecedent acts had been done necessary to the issuance of a patent was a question for the officers making it, and their determination is conclusive against collateral attack. Their acts in the line of authority cannot be questioned because they took mistaken views of the law, or of their duty under it. If the patent were absolutely void on its face,—that is, if it appeared on its face to be invalid either when read in the light of existing law or by reason of what the court must take judicial notice of, as, for instance, that the land is reserved by the statutes from sale, or otherwise appropriated, or that it was executed by officers not intrusted by law with the power to issue grants of portions of the public domain,—it would be subject to assault in any controversy. But where such is not true, and it is attempted to annul it for some official error or misconception, resort must be had to a direct proceeding in a proper tribunal. *Smelting Co. v. Kemp*, 104 U. S. 636; *Wilson v. State*, 47 Ark. 199, 1 S. W. Rep. 71. It follows that the state could not assail its patent in an action of ejectment, and the complaint did not state a good cause of action at law. But upon the facts alleged it had an undoubted right to ask that the patent be canceled, and, although it may have brought its case on the law side of the docket, the court should have proceeded to try it, and administer relief according to the case made.

The answer is not a complete bar to the case made by the complaint. If its allegations be confessed, the patent may be avoided at the suit of the state, and the defendant shows only the right to have such terms imposed as are equitable and just. It is a familiar principle of equity jurisprudence that, "when a complainant comes before a court of conscience invoking its aid, such aid will not be granted, except upon equitable terms." *Whelan v. Reilly*, 61 Mo. 565. In suits to set aside conveyances between private persons, this principle has been held to apply, and require that the plaintiff restore the considera-

tion he has in hand. *Stull v. Harris*, 51 Ark. 294, 11 S. W. Rep. 104; *Bozeman v. Brown*, 31 Ark. 364; *Ellis v. Ellis*, 4 South. Rep. 868. It has been held that the sovereign is not bound by any statute of limitations, or barred by the laches of the officers in suits to enforce a public right; yet it must receive its relief in accordance with the general principles of equity, and not in violation of their terms. *Brent v. Bank*, 10 Pet. 615; *U. S. v. Beebee*, 17 Fed. Rep. 86. In this case the state cannot retain the purchase money and taxes received from the defendant, and ask to receive from a court of equity possession of the land improved by his betterments. It cannot escape a compliance with the terms that its laws impose upon others. The complaint contains no offer to comply with equitable terms. In that respect it is defective, and until it shall be so amended as to remedy this omission the answer is sufficient. On account of this defect the demurrer to the answer should have been sustained, and its effect extended back to reach the complaint. We might so treat it here, but, as this would result in dismissing the case without affording the plaintiff an opportunity to perfect his complaint, we will reverse the judgment, and remand the cause. The court can render no judgment against the state, but it may impose equitable terms in administering relief, and make a full compliance with them a condition precedent to its enjoyment. If the plaintiff shall amend its complaint, and supply the omission we have indicated, the court will hear the cause, have an account stated of the amount which plaintiff should pay the defendant, crediting him, as in other similar suits, by the purchase money, amount paid for taxes, and the value of improvements on the land, and charging him with the rents and profits; and upon the payment of said sum render a decree canceling the patent. If such amendment is not made, the cause will be dismissed. As the plaintiff may not be able to comply with equitable terms until the legislature meets, and provides, if it so desires, the fund necessary, it would perhaps be well for the court to continue the cause until that time.

#### STATE v. RICHARDSON.

(*Supreme Court of Missouri*. Nov. 4, 1889.)

##### CRIMINAL LAW—NEW TRIAL.

Defendant pleaded not guilty to an indictment for larceny. He afterwards withdrew the plea, and pleaded guilty, and was sentenced for two years. The next day he moved to have the judgment and plea set aside, and for leave to plead not guilty; alleging in his affidavit that he was not guilty, and that his plea was made under a mistake as to statements made at the time by the officers of the court. An affidavit of the state's attorney and the clerk of the court, and the statement of the judge in the bill of exceptions, were to the effect that there were two indictments against him; that he was told that if he pleaded guilty he would be sentenced for two years on one, and the other would be dismissed. He stated to the court that he wished to plead guilty. One indictment was dismissed, and he was sentenced for

two years on the other. *Held*, that the motion was properly denied.

Appeal from St. Louis criminal court; JAMES C. NORMILE, Judge.

P. W. Fauntleroy, for appellant. Atty. Gen. Wood and A. C. Clover, for the State.

BLACK, J. The defendant, being arraigned on a charge of grand larceny in the St. Louis criminal court on the 26th March, 1889, had entered a plea of not guilty. On the 12th April following he withdrew this plea, and pleaded guilty, and was sentenced to two years' imprisonment. On the 13th of that month he filed a motion to set aside the judgment and plea, and for leave to plead not guilty, which was overruled, and on that ruling this appeal was taken.

The motion is supported by his affidavit, in which he states he is not guilty of the charge, that the plea of guilty "was made by reason of, and entirely owing to, a mistake and misunderstanding on his part of the proceedings of the court, and of what was said to him upon the occasion of his said plea in reference thereto by the officers of the court." The deputy-sheriff testified in an affidavit filed by plaintiff: "While I was taking him from the court-room back to the cage, immediately after his plea of guilty and sentence, he said to me: 'I don't want two years. I want a trial.' After he got into the cage he asked me why his trial did not go on. I told him it was because he had pleaded guilty and taken two years." The circuit attorney makes a detailed sworn statement, the substance of which is: "Two indictments for grand larceny were pending against him. When first arraigned he stated to the court that he had an attorney, and did not want the court to appoint one to defend. The case came on for trial on the 8th April, and was postponed, at the request of the defendant, because of the absence of his attorney. This attorney appeared when the case came on again, and stated to the court that he had not been employed by the defendant. The jury being called, defendant asked the court for counsel, but the court declined to make an appointment, because defendant had previously represented that he had counsel, and because there was no member of the bar then present that he could ask to conduct the defense. Defendant then asked what was the lightest punishment he would receive on a plea of guilty, and I told him two years in one case, and the other would be dismissed, to which he agreed." The further evidence of the circuit attorney and of the clerk of the court, and the statement of the judge found in the bill of exceptions, is that the defendant stepped to the bar of the court, and the circuit attorney made known to the court defendant's desire to plead guilty. The court then inquired of him if such was his desire, and he said it was; and thereupon the court pronounced the sentence, dismissed the other case, and discharged the



witnesses in both cases, to all of which defendant then made no objection.

The defendant did not enter the plea of guilty under the belief that he would receive a lighter punishment than that imposed. No such claim is made. He does say he made the plea owing to a mistake and misunderstanding of the proceedings, and of what was said to him by the officers, but he does not state wherein he was mistaken. He does not state what he understood would be the result of a plea of guilty. It appears he had been before convicted of grand larceny, and had served his time in the penitentiary, and he must have had some knowledge of court proceedings. We have examined the affidavits with much care, and are of the opinion that the defendant was not misled by anything said or done by the prosecuting officer. The motion seems to be the result of an afterthought, and there was no error in overruling it. The case is wholly unlike *State v. Stephens*, 71 Mo. 535, and *State v. Kring*, Id. 551. The judgment is affirmed.

RAY, C. J., absent. The other judges concur.

#### STATE v. HOCKADAY.

(*Supreme Court of Missouri*. Nov. 4, 1889.)

##### EVIDENCE—PRIOR CONVICTION.

1. The state, to prove a prior conviction, introduced the docket of a justice of the peace showing that a private citizen made an affidavit before him charging defendant with theft; that a warrant issued, defendant pleaded guilty, and was sentenced. *Held*, that it was competent to prove by the justice that before plea an information was filed by the prosecuting attorney in accordance with Acts Mo. 1885, p. 145, amending sections 2025, 2026, and 2028, Rev. St. 1879, providing that a justice shall issue a warrant on a verified complaint, and that an information shall be filed before the party is put on trial or required to plead.

2. The failure of the justice to make a docket entry of the filing of the information does not invalidate the judgment.

Appeal from criminal court of Lafayette; JOHN E. KYLAND, Judge.

*Hicklin & Welborn*, for appellant. *Atty. Gen. Wood* and *W. B. Wilson*, for the State.

BLACK, J. The defendant was indicted by the grand jury of Lafayette county for the second offense of petit larceny, committed on the 15th May, 1888. The indictment states that he was convicted for the first offense on the 28th March, 1887, before GRANVILLE CLAYTON, a justice of the peace within and for that county. The only questions made on this appeal relate to the evidence by which the state proved the first conviction. The justice produced in court his criminal docket, and the record therein made of a case of the state against this defendant was read in evidence, which discloses these facts: Joseph Bowman made affidavit before the justice that the defendant did, on the 26th March, 1887, steal five boxes of cigars, of the value of \$20, being the property of one I. Silverman. Warrant was issued on that

day, (26th March, 1887,) by virtue of which the defendant was arrested and brought before the justice. Cause continued until the 28th March, on which day the defendant entered a plea of guilty, and the justice assessed his punishment at a fine of one dollar, and ninety days' imprisonment. The justice having identified the papers in the cause, including an information made by the prosecuting attorney, testified: "This information was filed with me by the prosecuting attorney, and was read to the defendant in that case before any plea was entered by him. The defendant entered the plea of guilty to the information, and not to the affidavit of Joseph Bowman, and I rendered judgment on such plea to the information."

The objections made to this evidence are that the court erred in allowing the justice to contradict his record, and that the record shows on its face that defendant was convicted on the affidavit of a private person, and not on the information of the prosecuting officer, and that the judgment is therefore void, under the rulings in *State v. Kelm*, 79 Mo. 515, and *State v. Briscoe*, 80 Mo. 643. Both of these objections are based upon a misconception of the purport and effect of the record of the justice. It does not show that the conviction was had upon the affidavit, and not upon an information. It is silent as to whether it was had upon the one or the other. By the act of March 31, 1885, (Acts 1885, p. 145,) amending sections 2025, 2026, and 2028, Rev. St. 1879, the justice could issue the warrant for the arrest of defendant upon the filing of a complaint, verified by a person competent to testify against the accused. The information "shall be filed with the justice as soon as practicable, and before the party \* \* \* shall be put upon trial, or required to answer to the charge." If the information was filed before defendant entered his plea, then the record as a whole shows a valid conviction; and the real question is whether it was competent to show by the oath of the justice that the information was filed before plea entered by the defendant, the docket entries being silent in respect thereto. It has been held that the failure of the clerk to enter upon the indictment the day of its return into court does not entitle the defendant to his discharge, (*State v. Clark*, 18 Mo. 432,) and that it is not a sufficient cause for quashing an indictment that the record does not show that the bill was filed, (*State v. Hogan*, 31 Mo. 342.) A paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file. *Bouv. Law Dict.*; 7 *Amer. & Eng. Cyclop. Law*, 960. And in *Grubbs v. Cones*, 57 Mo. 83, it is said: "The filing is the actual delivery of the paper to the clerk, without regard to any action that he may take thereon." Hence it was held the date of filing a mechanic's lien account, as indorsed by the clerk, might be corrected, and the true date shown by parol evidence. See, also, *Baker v. Henry*, 63 Mo. 517. The rulings in



the earlier cases in respect of filing a bill of exceptions have been much modified by what we said in *Ferguson v. Thacher*, 79 Mo. 514, and *Rine v. Railroad Co.*, 88 Mo. 401. We are all agreed that it was competent to show by the oath of the justice when the information was lodged with him; and his failure to make a docket entry of the filing of it does not invalidate the judgment. The evidence of the justice that the defendant entered a plea of guilty to the information, and that it was read to him, is no more than the record imports, when read in the light of the fact that an information was in point of fact filed in due time. The admission of this evidence, under such circumstances, constitutes no ground for a reversal. It shows nothing but what the record imports. The judgment is therefore affirmed.

RAY, C. J., absent. The other judges concur.

#### STATE v. SMILEY.

(*Supreme Court of Missouri*, Nov. 4, 1889.)

##### BIGAMY—VENUE.

Rev. St. Mo. § 1536, providing that an indictment for bigamy may be found and trial had in the county where the offender is apprehended, is in violation of the constitution of 1875, providing that the indictment must be found by a grand jury of the county where the offense was committed, and, where a second marriage was performed in J. county, an indictment and conviction in M. county is error.

Error to circuit court, Madison county; JAMES D. FOX, Judge.

W. W. Wood, for plaintiff in error. *Atty. Gen. Wood*, for the State.

BLACK, J. This indictment for bigamy was found by the grand jury of Madison county. It states that defendant, on the 24th August, 1884, at the county of Johnson, state of Missouri, married Ruth Grant, he then having a wife living, and that afterwards, and prior to the filing of this indictment, he was lawfully apprehended and in custody in Madison county for the felony aforesaid. The statute provides: "Sec. 1535. Every person, having a husband or wife living, who shall marry another person, whether married or single, except in the cases specified in the next section, shall, on conviction, be adjudged guilty of bigamy," etc. Section 1535 relates to those cases where the prohibited marriage is solemnized without this state, and the parties cohabit within this state. "Sec. 1536. An indictment for bigamy, as defined in the preceding sections, may be found, and proceedings, trial, conviction, judgment, and execution thereon had, in the county in which such second or subsequent marriage or cohabitation shall have taken place, or in the county in which the offender may be apprehended."

The first marriage is alleged to have been

contracted in this state, so that section 1535 has no application whatever to the present case. Indeed, it is not alleged that defendant cohabited at any time or place with Ruth Grant. The indictment is based on section 1538, and cohabitation is not made an element of the offense therein described. The offense was completed in Johnson county, when the second marriage was solemnized. *State v. Fitzgerald*, 75 Mo. 572. The indictment should have been preferred by a grand jury of Johnson county, unless it can be upheld by force of the last clause of section 1536, namely, "or in the county in which the offender may be apprehended." There can be no doubt but the allegations of the indictment are sufficient to bring the case within this clause. This clause has nothing to do with the elements of the offense, and relates alone to the place where the indictment may be found. Now, under the constitution of 1875, the indictment for a felony must be found by a grand jury of the county where the offense was committed. It was so ruled, after mature deliberation, in *Ex parte Slater*, 72 Mo. 102, and that ruling has been followed in subsequent cases. *State v. McGraw*, 87 Mo. 161, and *State v. Briscoe*, 80 Mo. 644. It follows that the clause of section 1536 just quoted is void, because in conflict with the constitution of 1875, and it matters not that it might have been upheld under the constitution of 1865. The indictment is worthless, for the Madison circuit court had no jurisdiction of the offense.

Cases are cited which show that indictments for larceny may be found in any county into which the property stolen is taken by the thief, but such indictments are upheld on the ground that taking the property from one county into another is a fresh theft. *State v. McGraw*, supra, and the cases cited, have no application to the case in hand. The constitution is supreme, and the legislature has no more power to provide for the indictment of a person for bigamy in a county other than that where the offense was committed than it has to make a like provision for the indictment of a person for murder or burglary. The defendant was sentenced to three years' imprisonment in the penitentiary from the 3d April, 1885. Because of the delay in suing out this writ of error, and in bringing the cause on for hearing in this court, it would seem that he has served out the period of imprisonment, and this fact is suggested by the state, but without any statement of the consequences which should flow therefrom. A conviction for bigamy carries with it a disqualification to hold any office of honor, profit, or trust, or to vote at any election, and this of itself is a sufficient reason why the judgment should be vacated. The judgment is reversed.

RAY, C. J., absent. The other judges concur, BARCLAY, J., in the result.

CITY OF ST. LOUIS v. SCHULENBURG-BROCK-  
LER LUMBER CO.

(Supreme Court of Missouri. Nov. 4, 1889.)

## EJECTMENT—RES ADJUDICATA—ESTOPPEL.

1. Where defendant in ejectment fails to show performance of conditions precedent in the deed under which it holds, a judgment for plaintiff is no bar to defendant's recovery of the same land, by proving such performance in a subsequent action against the plaintiff's grantees.

2. In Missouri a defendant in ejectment may set up his equities as a separate defense in the same suit, and the judgment thereon is final.

3. A defendant in ejectment wherein plaintiff recovered is not estopped by conduct to bring a subsequent action for the same land against plaintiff's grantees, who supposed the judgment to be conclusive, where such defendant neither induces them to buy nor knows of the purchase.

Appeal from St. Louis circuit court;  
GEORGE W. LUBE, Judge.

Geo. M. Stewart and Rudolph Schulenburg, for appellant. Leverett Bell, for respondent.

BLACK, J. This is an action of ejectment, prosecuted by the city of St. Louis, to recover a parcel of land, the same being a part of the north wharf. The answer is a general denial, *res judicata*, and estoppel *in pais*. The plaintiff put in evidence a deed signed by Mary A. Pendleton and some 40 other persons, as parties of the first part, to the city of St. Louis, as party of the second part. It bears date in January, 1858, and was recorded in 1854. The grantors were owners in severalty of various parcels of land on the west bank of the Mississippi river, and by the deed they conveyed to the city, for the purposes of a wharf, the property owned by them, east of a designated line. The deed contained various conditions and covenants, some of which are to be performed by the city before it takes effect, and others are to be thereafter performed; and they contemplate a large expenditure of money on the part of the city in the improvement of the wharf. It is the same instrument which was before this court in *St. Louis v. Ferry Co.*, 88 Mo. 615. The other evidence for the plaintiff, the bill of exceptions states, tends to show that the city had complied with the terms and conditions of the deed. The evidence for the defendant shows that in 1872 Mary A. Pendleton sued the city of St. Louis in ejectment to recover the parcel of land now in question. The defendant in that case answered by way of a general denial, and on the trial adduced evidence tending to show that it had performed the conditions in the Pendleton deed, and then offered it in evidence; but the court excluded the same, on the ground that the evidence did not show a performance of the conditions precedent, and therefore gave judgment for the plaintiff. The plaintiff was put in possession by virtue of an execution issued upon the judgment, and the city paid the damages assessed in favor of Mary A. Pendleton. On the 9th May, 1879, she, being then in possession, conveyed the property to Schulenburg and Boeckler for the con-

sideration of \$300, and they conveyed to the defendant corporation in 1881. When the defendant's grantors purchased they knew of the judgment in favor of Mary A. Pendleton; that it had been satisfied; and that no appeal had been prosecuted by the city. They believed that the judgment was final and conclusive, and had no notice of any intention on the part of the city to further litigate the title. The court refused all of the instructions asked by the defendant, and, in effect, ruled that all of this evidence offered by it constituted no defense.

1. The judgment in the former suit is not a bar to the prosecution of the present one. The repeated rulings of this court are that a judgment in an ejectment suit is no bar to a second action between the same parties for the same property, and this is true whether the titles and defenses are the same or not. *Kimmel v. Benna*, 70 Mo. 52; *Ekey v. Inge*, 87 Mo. 493; *Avery v. Fitzgerald*, 94 Mo. 207, 7 S. W. Rep. 6. We do not overlook the arguments in favor of a contrary ruling; but it must be remembered that in 1855 the legislature, by an amendment to the statute concerning ejectment suits, made a judgment in such cases, except of nonsuit, a bar to any other suit between the same parties, or those claiming under them, as to the same subject-matter. 1 Rev. St. 1855, p. 695, § 88. That section was repealed in 1857, and this court, in *Slevin v. Brown*, 82 Mo. 176, concluded that this legislation placed a judgment in an ejectment suit on its early footing. The whole subject was again considered in *Kimmel v. Benna*, supra. Our rule that a judgment in an ejectment suit is no bar to a second action is based on legislation peculiar to this state, and constitutes a rule of property not to be disturbed, save by legislative enactment. If the city failed to show a performance of the conditions precedent in the Pendleton deed on the trial of the former suit, it was at liberty to make the proof on the trial of this action.

2. Under our practice act the defendant in an ejectment suit is not bound to first try his title at law, and, if defeated, then file his petition in equity to enjoin execution. He may set up his equities as a separate defense in the ejectment suit, and have equitable relief, if entitled thereto. If he does make such a defense, then the judgment thereon is final and conclusive, unless reversed on appeal or writ of error. All this is the effect of the rulings in *Chouteau v. Gibson*, 76 Mo. 38, and *Preston v. Riekets*, 91 Mo. 320, 2 S. W. Rep. 793. These cases are in accord with those before cited.

3. The claim of an estoppel *in pais* is equally untenable. The former judgment in favor of Mary A. Pendleton was rendered in 1877, and in 1881 the city commenced this suit to regain possession. In the mean time Pendleton sold the property to the grantors of the present defendant. These grantors supposed the former judgment was conclusive, but that was a mere mistake of the

law on their part. It does not appear that the city in any way induced the defendant or its grantors to buy the property, nor does it appear that the city, by its proper officers, had any knowledge of the proposed purchase. The first element of an estoppel by conduct is that there must have been a false representation or a concealment of material facts, (*Bigelow, Estop.* [3d Ed.] 484;) and this element is wanting in the present case. In *Guffey v. O'Reilly*, 88 Mo. 418, the plaintiff, though he had a deed to the land in his pocket, and knew the defendant was about to purchase it, said nothing about his deed, and made no claim to the property, but told defendant that he (plaintiff) would like to rent the land from him, (the defendant.) Nothing approaching this state of facts appears in the case at bar. The judgment is therefore affirmed.

RAY, O. J., absent. The other judges concur.

### WILSON *et al.* v. HART.

(*Supreme Court of Missouri.* Nov. 4, 1889.)

#### EQUITY JURISDICTION—LOCATION OF BOUNDARY.

Where plaintiff has a dispute with an adjoining land-owner as to the proper boundary line, but is in possession of all the land which he claims, equity has no jurisdiction to determine the proper location of the line.

Appeal from circuit court, Franklin county; A. J. SEAY, Judge.

J. C. Kiskaddon and John R. Martin, for appellant. John W. Booth, for respondents.

BRACE, J. The petition in this case alleges that the plaintiffs are the owners in fee, and in possession, of the S. W.  $\frac{1}{4}$  of section 19, township 44, range 1 west, in Franklin county; and that the defendant is the owner in fee, and in possession, of the N. W.  $\frac{1}{4}$  of said section. That the line between the said north-west and south-west quarters of said section has never been established by authority of the government of the United States. That there is a controversy between plaintiffs and defendant as to the true location of the dividing line between said quarter sections; in which dispute the plaintiffs claim that said dividing line should be run and located as follows: Beginning at the quarter section corner on the eastern line of said section, and running thence in a straight line to a point on said range line equidistant from the north-west and south-west corners of said section 19; and the defendant denies that the said line should be run and located as aforesaid, and claims that it should be run from said quarter section corner in a straight line to a point on said range line the same distance north of the quarter section corner on the east line of section 24, township 44, range 2 W., as the south-east corner of said section 24 is south of the south-west corner of said section 19. That plaintiffs have no remedy for the settlement of said dispute, and to fix and adjudicate the true location of said dividing line, save by the intervention of the

equity powers of this court; and accordingly pray the court, by its decree, to determine the manner in which said line shall be run and located, and to direct the same to be so run and located, and to fix and establish forever the said boundary line, and for all other proper relief. The defendant in his answer admits that he is the owner in fee of said N. W.  $\frac{1}{4}$ ; avers that the plaintiffs are in possession of a strip on the south side thereof, which he avers they wrongfully withhold from the defendant; and avers that the boundary line between said quarter sections should be located in accordance with his claim as set out in the petition; and prays the court, by its decree, to direct the county surveyor to so locate and establish it. The court below entertained the petition. The plaintiffs introduced the plat book and field-notes of the government survey of said section 19 and adjoining sections, and a plat showing the difference between the present chaining and that of the original government survey. The court ordered a survey, and rendered a decree in accordance with plaintiffs' claim and the prayer of the petition, from which the defendant appeals; his motion for a new trial having been overruled.

1. The facts stated in the petition constitute no cause of action at law, and no ground for equitable relief. "A court of equity has no jurisdiction to fix boundaries of legal estates, unless some equity is superinduced by the act of the parties." *Norris' Appeal*, 64 Pa. St. 275. The limit of equity jurisdiction in cases of disputed boundaries is thus stated by leading text writers, and is established by an unbroken chain of adjudicated cases, many of which are cited in the notes to the texts quoted: "The general rule now adopted is not to entertain jurisdiction, in cases of confusion of boundaries, upon the ground that the boundaries are in controversy, but to require that there should be some equity superinduced by the act of the parties." 1 Story, *Eq. Jur.* § 615. "The mere fact that certain boundaries are in controversy is not of itself sufficient to authorize the interference of equity; and upon such a showing the parties would be left to their rights and remedies at law. Courts of equity will not interpose to ascertain boundaries, unless, in addition to a naked confusion of the controverted boundaries, there is suggested some peculiar equity, which has arisen from the conduct, situation, or relation of the parties." 3 Pom. *Eq. Jur.* § 1384. "As the line of demarkation between estates determines the extent of the possession on either side, and the right to possession is a legal right, a contest about the line necessitates a trial by jury, and equity cannot be resorted to in such cases. \* \* \* The jurisdiction of chancery to fix disputed boundaries, where these have become obscure, has been recognized by the courts, but only in cases in which some special equity attaches, and there is no adequate relief at law. \* \* \* Among the grounds of equitable interference may be mentioned multi-

plicity of suits, irreparable mischief not easily measured by damages, fraud or mistake." Sedg. & W. Tr. Title Land, § 865. "As a general rule a court of equity has no jurisdiction to fix the boundaries of legal estates, unless some equity is superinduced by the act of the parties, or unless some particular circumstance of fraud or collusion exists." 6 Amer. & Eng. Cyclop. Law, p. 722, par. 7. The case presented by the petition is a bare, naked controversy between the plaintiff, who is in the peaceable possession of all the lands he claims, and the defendant, an adjoining proprietor, as to a single dividing line between their premises, which can be settled any day in an ordinary action of ejectment, should it ever become necessary, and presents no feature that would warrant the interposition of a court of chancery.

2. The petition wholly failing to state a cause of action, either at law or in equity, the decree and judgment of the circuit court will be reversed, and the plaintiffs' bill dismissed. *McIntire v. McIntire*, 80 Mo. 471. All concur, except RAY, C. J., absent.

#### STATE v. MELROSE.

(Supreme Court of Missouri. Nov. 4, 1889.)

##### LARCENY—DECLARATIONS OF ACCOMPLICE.

On trial of a joint indictment for larceny, proof of the declarations made by one of the conspirators after the common criminal enterprise had been accomplished and the defendants had separated, reciting the statements made by a fellow-conspirator pending the criminal enterprise, is inadmissible against such fellow-conspirator.

Appeal from circuit court, Morgan county; E. L. EDWARDS, Judge.

D. E. Wray and John D. Bohlingand, for appellant. The Attorney General, for the State.

BRACE, J. The defendant was jointly indicted with James Farris and John Hilderbrand for stealing a three-year-old steer, the property of one D. P. Taylor, and upon a separate trial was found guilty, and sentenced to the penitentiary. It appears from the evidence that on the 23d day of September, 1887, the defendant sold to one McMoore five steers. That these steers were driven from Daniel Ray's, where defendant was staying, by defendant, Farris, and Hilderbrand, to McMoore's place. The defendant first proposed to McMoore to pasture the cattle for a few days, and then to sell them to him. That finally he did sell them to McMoore for \$95; Farris and Hilderbrand being present. That previous to this time the said Taylor had running upon the range in the neighborhood the steer described in the indictment. That he missed it; heard that some cattle had been sold to McMoore; went there about three weeks after the sale; found a steer answering the description of the missing one described in the indictment, which he identified as his; proved it to the satisfaction of McMoore, and took it away. This

was one of the five steers sold by defendant to McMoore. The evidence for the state tended to prove that it was Taylor's steer, and that, when defendant sold it, he knew it was not his property. The evidence for the defendant tended to prove that he bought the steer from John Hilderbrand, that it belonged to John's brother Jake, and that Jake authorized John to sell it. The state also introduced evidence tending to show that, some time prior to this sale, a Mr. Burris, in driving a large drove of cattle through the neighborhood, lost three or four steers. That it was known in the neighborhood, and to the defendant, that these strays were on the range, and that a reward was offered by the owner to any one who would get them up and keep them for him. That, a short time prior to the sale by defendant, he made an arrangement with Farris and Hilderbrand to get up these strays. That they brought four steers to the defendant, at Ray's. That these four steers, and one that defendant had at Ray's, were the five driven by defendant, Farris, and Hilderbrand, and sold, to McMoore. That three of the four steers driven to Ray's, and the one that defendant previously had at Ray's, were the strays of the said Burris. That the other one of the four driven to Ray's was the Taylor or Jake Hilderbrand steer. The evidence for the defendant tended to prove that he bought the four steers driven to Ray's—one being the Taylor or Jake Hilderbrand steer, as aforesaid—from John Hilderbrand, and the one that he previously had at Ray's from a man by the name of Ward, and that he (Ward) raised the steer, and was the owner of it at the time he sold it to the defendant. The state was permitted, over the objection of the defendant, to introduce in evidence declarations made by Farris to four witnesses after the steers had been sold to McMoore, and after Farris had been arrested upon a charge of stealing them. The substance of these declarations, using the language of one of these witnesses, was as follows: "James Farris said to me, on the day he was arrested, that Henry Melrose offered him and John Hilderbrand five dollars a piece if they would bring to him three steers that ranged in the hills, and known as 'stray steers,' (steers that strayed out of a drove that passed through here.) They refused to bring them at that price; and he afterwards told them, if they would bring them up, and deliver them at old man Ray's down here, he would sell them, and divide the money equally." To the admission of this evidence the defendant excepted, as also to instructions given by the court based thereon; and the action of the court in this respect is well assigned as error. The declarations of a conspirator or accomplice are receivable against his fellows when they are either in themselves acts, or accompany and explain acts, done in pursuance of a concerted criminal purpose, if made during the pendency of the common criminal enterprise. If made at a subsequent period, and are

merely narrative of past occurrences, they must be rejected. 1 Greenl. Ev. (14th Ed.) § 111; *State v. Ross*, 29 Mo. 32; *State v. Duncan*, 64 Mo. 262; *State v. McGraw*, 87 Mo. 161. The declarations of Farris, made after the common criminal enterprise had been accomplished, the parties separated, and some of them arrested for the offense, narrating past statements made to him by the defendant during the pendency of the criminal enterprise, ought to have been rejected; and for the error of the trial court in admitting them this case must be reversed, and remanded for new trial. All concur, except RAY, C. J., absent.

#### CRANE v. DAMERON.

(*Supreme Court of Missouri*. Nov. 4, 1899.)

##### TAX-TITLE—RECORDS.

A purchaser under a judgment in a back-tax suit, to which the person appearing by the registry of deeds to be the true owner was made a party defendant, in the absence of notice that such person was not the true owner, cannot be protected against the true owner, whose deed was recorded on a record book which was destroyed by fire; but the contents of the book may be proved by secondary evidence, and must be taken notice of by him who claims title under the record.

Appeal from circuit court, Shannon county; J. R. WOODSIDE, Judge.

*James Orchard*, for appellant. L. B. WOODSIDE, for respondent.

**BRADE, J.** Action in ejectment for a tract of land in Shannon county. The land was entered by Cyrus M. Brown in 1858; and on the 10th day of August, 1859, Brown, by warranty deed, conveyed the land to the plaintiff, whose deed was on the 5th day of March, 1860, filed for record in the office of the recorder of said county; and on the 8th of March, 1860, the same was recorded among the land records of said county in Deed Book C, at pages 114 and 115. On the 31st of December, 1871, Deed Book C was destroyed by fire. The taxes on the land for the years 1871 to 1878, inclusive, were assessed to Brown. A suit for delinquent taxes for these years was instituted by the collector of said county against this tract of land, to which Brown was made the party defendant; and on the 6th day of November, 1880, judgment was rendered for the taxes; and on the 5th day of May, 1881, the land was sold under this judgment, the defendant Dameron became the purchaser, received his tax-deed therefor, and put the same on record in said county. The court, before whom the case was tried without a jury, found for the defendant, and plaintiff appeals. The plaintiff was the owner of the land during the years in which it was assessed to Brown. He was the owner when the suit was brought for the delinquent taxes for those years, when the judgment was rendered, and the land sold to the defendant under the judgment; in which suit Brown was defendant, and to which plaintiff was not a party. The law under which this tax suit

was brought, required that it should be brought against "the owner of the property." Rev. St. 1879, § 6837. The doctrine announced in *Vance v. Corrigan*, 78 Mo. 94, and recognized in the subsequent cases cited in *Allen v. Ray*, 96 Mo. 542, 10 S. W. Rep. 153, that a purchaser under a judgment in a back-tax suit, to which the person appearing by the registry of deeds to be the owner was made a party defendant, in the absence of notice that such party was not the true owner, would be protected in his purchase against the holder of an unrecorded deed from such apparent owner, was, in the subsequent case of *Payne v. Lott*, 90 Mo. 676, 3 S. W. Rep. 402, held to extend to the person who appeared to be the owner by the plat book of lands, duly certified, and on file in the county clerk's office. The defendant is a purchaser under a judgment in a back-tax suit, to which the person appearing by the plat book to be the owner of the land was made party defendant; and under the rule in that case he is to be protected. But against whom? Against the holder of an unrecorded deed from such apparent owner. But the plaintiff is the holder of a recorded deed from such apparent owner, and against him the rule affords the defendant no protection. True, the book in which the plaintiff's deed was recorded was destroyed; but that was not his fault, and cannot be made his misfortune. It is not non-existent, in contemplation of law. Its contents can be proved by secondary evidence, and must be taken notice of by him who claims title, by virtue of the record, against the true owner. The judgment is reversed. All concur, except RAY, C. J., absent.

#### STATE v. MONTGOMERY.

(*Supreme Court of Missouri*. Oct. 30, 1899.)

For majority opinion and statement of the case, see 11 S. W. Rep. 1012. For concurring opinion of BARCLAY, J., see ante, 126.

**SHERWOOD, J., (concurring.)** Let us see about that. The Pennsylvania statute, the act of 1794, referred to above, is in this language: "All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether it be murder of the first or second degree." Our statute on the subject reads as follows: "Upon the trial of an indictment for murder in the first degree, the jury must inquire, and by their verdict ascertain, under the instructions of the court, whether the defendant be guilty of murder of the first or second degree, and persons con-

victed of murder in the first degree shall suffer death. Those convicted of murder in the second degree shall be punished by imprisonment in the penitentiary not less than ten years." Rev. St. 1879, § 1234. From our statute it does plainly appear that it is only where the indictment charges murder in the first degree that a jury are either authorized or required to "inquire, and by their verdict ascertain, whether the defendant be guilty of murder in the first or second degree." If the indictment be only for murder in the second degree, our statute neither authorizes nor requires that the verdict of the jury should designate the homicidal crime of which the defendant is found guilty. The case of *Johnson v. Com.*, 24 Pa. St. 386, was one where the indictment did not charge murder in the first degree, by reason of the fact that such indictment failed to contain those words, "willful, deliberate, and premeditated," etc., which, under the statute already quoted, were necessary to make the crime murder in the first degree. Besides, the verdict of the jury in that case found the defendant "guilty in manner and form as he stands indicted;" but the verdict in the present case, as before stated, was, simply: "We, the jury, find the defendant guilty,"—a wide difference, I take it, between the two verdicts, to start out on; so that the assertion, made that those verdicts are "similar" is not, in my humble opinion, well founded. Upon the verdict thus returned in the Pennsylvania case, the lower court rendered a judgment for murder in the first degree; but this judgment was reversed upon two express and distinct grounds,—the one that, under former rulings in Pennsylvania, such a verdict, "guilty in manner and form as he stands indicted," "made the indictment a part of the verdict," and thus "ascertained" the degree of the offense with which the accused was charged; as much so as if the jury "had found a special verdict, stating the facts precisely as they are set forth in the indictment." The other ground was that the indictment was only an indictment for murder in the second degree, because it lacked the requisite words, and therefore the judgment was erroneous; *Lewis, C. J.*, remarking: "But the indictment under consideration is totally destitute of either of these averments. It merely charges that the murder was committed 'feloniously, willfully, and of malice aforethought.' This is the usual and proper description of the crime at common law. \* \* \*

The clear and positive provisions of the act of 1794 fix the interpretation beyond a doubt. We have seen that the indictment is destitute of the averments required by the statute to constitute murder of the first degree. The case must therefore, of necessity, fall into the class provided for by the clause in the act which declares that 'all other kinds of murder shall be deemed murder of the second degree.'" For these reasons the supreme court of Pennsylvania, under their former rulings, very properly held that the judgment

should be reversed, etc., with directions to enter a judgment for murder in the second degree. But see, for a brief moment, how differently stands the case at bar: (1) An indictment for murder in the first degree; (2) a verdict of, "We, the jury, find the defendant guilty." "Guilty" of what? Conceding the correctness of the Pennsylvania rule, the verdict of the jury here would have been manifestly insufficient to have "made the indictment a part of their verdict;" but, if it were, then the judgment of conviction of murder in the first degree was right, and should have been affirmed, and so our opinion was wholly wrong; and my learned brother should not, therefore, have given that opinion the distinguished sanction of even so much as his partial approbation by concurring in the bare result. In order to be consistent with himself, he should, it seems to me, have dissented *in toto*. In making the ruling we did, we simply followed our former adjudications; and though they are in some respects in direct opposition to those of Pennsylvania, they are well supported by authorities elsewhere, as will be shown by the references in the majority opinion. But, for myself, I am content to follow our own decisions; especially so when some case cited from a distance is found, upon examination, to be so different in its facts and in its record as to have no appreciable bearing on the point under discussion. Again, section 1930 does not apply to capital crimes. It only applies where the jury find a verdict which ascertains the offense in some appropriate form, without assessing the punishment. Here the verdict is a general one of "guilty." What of,—murder in the first degree or murder in the second degree? Who can tell? To say that this court should arbitrarily assume that by that verdict the jury meant murder in the second degree, in the face of the indictment and of the evidence, is, to my mind, an assumption that goes too far. In short, it is an infringement of the right of trial by jury, and a rank usurpation of their province and prerogative, aside from being a plain violation of a very plain statute.

MURRAY v. ST. LOUIS, C. & W. RY. CO.

(Supreme Court of Missouri. Nov. 4, 1889.)

FELLOW-SERVANTS.

One employed by a cable-car company to watch at a curve in the track, and signal trains to stop or to continue on, so that they will not meet at the curve, is a fellow-servant with the gripman of a motor car, so as to exempt the company from liability for the death of the watchman, caused by the negligence of the gripman.

Appeal from St. Louis circuit court; AMOS M. THAYER, Judge.

Action by Mary Murray against the St. Louis Cable & Western Railway Company for damages for the death of an employee of defendant. Judgment for defendant, and plaintiff appeals.

*A. R. Taylor*, for appellant. *P. H. Kern*, for respondent.

**BLACK, J.** This is a personal damages suit, and the only question is whether the court erred in sustaining a demurrer to the evidence at the close of the plaintiff's case. The defendant owned and operated a cable street railroad in the city of St. Louis; and the plaintiff's husband, James Murray, was in the defendant's employ as a watchman at the corner of Fourteenth and Wash streets. The defendant's two tracks at that point make a short curve. It was the duty of Murray to guard the crossing, and to prevent injuries to persons crossing the tracks, and to signal the approaching cars to stop and start, so that they would not pass each other upon the curve. Beyond this, he had nothing to do with the operation of the cars. The evidence tends to show that in the night-time, and while Murray was in the discharge of his duties at the curve, he signaled two of defendant's approaching cars,—the one to stop and the other to move on around the curve. The car signaled to stop, through the negligence of the gripman in charge of it, failed to stop, and the gripman let it go forward until it run over and killed Murray. Murray was exercising ordinary care.

The only question presented by this statement is whether the negligent gripman and the deceased were fellow-servants within the rule that exempts the master from liability for injuries occasioned by one servant to a fellow-servant. The defendant cites and relies alone upon the case of *Moore v. Railroad Co.*, 85 Mo. 588. In that case the plaintiff was a car-repairer, and was injured by the negligence of his foreman. The principle which that case turned upon was this: that, where the master has intrusted to a foreman power to superintend, direct, and control work, the foreman, in the exercise of such powers intrusted to him, is a representative of the master, and for that reason not a fellow-servant. There is no evidence in this case that the gripman occupied the position of a vice-principal, and of course the plaintiff here cannot recover on any such ground. The plaintiff cites and relies alone upon *Lewis v. Railroad Co.*, 59 Mo. 495; *Hall v. Railroad Co.*, 74 Mo. 801; and *Sullivan v. Railway Co.*, 97 Mo. 114, 10 S. W. Rep. 852. In the *Hall* Case, the plaintiff, who was switchman, brought this suit to recover damages for injuries received by reason of a loose iron rail left upon the track by the negligence of a section foreman. It was then said: "The principal ground relied upon for a reversal of the judgment which the plaintiff recovered is that a switchman and a section foreman are fellow-servants. Adjudications of the courts of other states of the Union sustaining the appellant's position are cited by counsel; and whatever our opinion might be, if it were a question of the first impression in this court, the contrary was held in *Lewis v. Railroad Co.*, 59 Mo. 495; and

the doctrine of that case has been adhered to by this court, and we are not inclined to depart from what must therefore be now accepted as the rule settled on that subject in this state." The case of *Condon v. Railroad Co.*, 78 Mo. 567, which is cited in the *Sullivan* Case, was a suit by a brakeman to recover damages occasioned by reason of a defective hand-hold on the top of a box-car. The court in that case observed: "The third refused [instruction] declares that car-inspectors, at the intermediate stations, were fellow-servants of plaintiff, and that, if the proximate cause of plaintiff's injury was attributable to any want of care or caution on their part, defendant was not liable. Car-inspectors are not co employees with trainmen. *Long v. Railway Co.*, 65 Mo. 225." These observations must be considered in the light of the facts then before the court, and of the cases which are there cited. When this is done, it will be seen that the *Hall* and *Condon* Cases turn upon the principle of law that it is the duty of the railroad company to furnish a safe road and cars. This duty requires the company to use due care in keeping the road and cars in repair. If this duty is devolved upon servants, their negligence in respect thereto is the negligence of the company. The doctrine sometimes asserted, that when the company employs competent inspectors and repairers it is not liable for injuries resulting to employees through the negligence of such inspectors and repairers, is denied in *Long v. Railroad Co.*, supra; and the doctrine is there asserted that the carelessness of such persons in the performance of such duties is not put upon the footing of that of a fellow-servant, but such negligence is that of a representative of the company,—the negligence of the company itself. And to the same effect is *Bowen v. Railroad Co.*, 95 Mo. 273, 8 S. W. Rep. 230, and other cases.

There is in the present case no evidence or claim that defendant failed to use proper care in respect of any of the appliances; and the cases cited by plaintiff are without application, lest it be the case of *Sullivan v. Railway Co.*, supra. In that case the husband of the plaintiff was a track-walker, and was run over and killed by reason of the negligence of the engineer and fireman of a through passenger train. It was held in one branch of the case that the engineer and fireman were not fellow-servants, because engaged in different departments of the general business of the defendant. But it is difficult to see how that case can help the plaintiff here. It was the duty of *Sullivan* to walk back and forth over a section of four miles, and to see that his section of the road was in repair. He had nothing to do with the operation of the train, and he and the trainmen were under different directing agents of the company. Here it was the duty of the deceased to keep watch of the cars as they approached the curve, and to give signals to the gripman, so that only one train should pass the curve at a time. The negligent gripman and the deceased were



both employed in operating the car,—one from the car, and the other from his station on the ground. They were engaged in the same department of work, and their common business was such that one could exercise a preventative care over the other. They were evidently servants employed in the same common employment. The writer of this and the opinion in the Sullivan Case feels in duty bound to say that the cases cited in that case, when properly considered, do not sustain the doctrine there announced; namely, that the servants are not in the same common employment when engaged in different departments of the general business of the company. The cases cited stand on the ground that it is the duty of the master to use due care in furnishing the instrumentalities with which the servant is to perform his work, and that duty is personal to the master. It does not follow, however, that the ruling in the Sullivan Case is to be disturbed. The majority of the courts, it is believed, hold that servants are in a common employment when they are engaged under the same master in the same general business. The rule of exemption as declared in the case of *Farwell v. Railroad Corp.*, 4 Metc. 49, and followed in many other cases, has been much modified in this state, in so far as it relates to servants occupying different grades, so that the master is liable for the negligence of those who are clothed with power to superintend and direct subordinates. *Smith v. Railroad Co.*, 92 Mo. 359, 4 S. W. Rep. 129. Many well-considered cases go still further, and restrict the exemption of the master from liability to those cases where the servants are engaged in the same department of the general business, and are in a position to have an influence over each other's conduct. *Railroad Co. v. Moranda*, 93 Ill. 302. Other cases in that court are collected in 1 *Shear. & R. Neg.* (4th Ed.) § 238; *Cooper v. Mullins*, 30 Ga. 150; *Railroad Co. v. Jones*, 9 Heisk. 27; *Railway Co. v. O'Brien*, 21 Pac. Rep. 32. But under either line of authorities the plaintiff in the present case cannot recover, and we say no more upon the subject at the present time. The judgment is therefore affirmed.

RAY, C. J., absent. The other judges concur.

#### STATE v. LEE.

(*Supreme Court of Missouri*. Nov. 4, 1889.)

#### CRIMINAL LAW—CONTINUANCE—CHANGE OF VENUE.

1. Where defendant asks for continuance on account of an absent witness, and attachment issues, which fails to secure his attendance on the day set for trial, and attachment issues with a like result on the succeeding day, it is error to refuse a second application for continuance, though the prosecuting attorney admits that a statement of what defendant proposed to prove by the absent witness might be read to the jury.

2. The action of the trial court in refusing a defendant, under indictment, a change of venue on account of the prejudice of the community, will not be revised on appeal, unless it appears that

there has been a palpable abuse of judicial discretion.

BARCLAY, J., dissenting.

Appeal from circuit court, Livingston county; J. M. DAVIS, Judge.

*Jonas J. Clark and Scott J. Miller*, for appellant. *The Attorney General*, for the State.

BRACE, J. At the September term, 1887, of the circuit court of Livingston county, the defendant was indicted for grand larceny, and on the 3d of October filed an application for a change of venue on the ground of prejudice of the inhabitants of said county against him; which coming on to be heard, the defendant introduced evidence tending to show the existence of such prejudice, and the state introduced evidence tending to show that such prejudice did not exist so as to prevent his having a fair trial in said county. The court refused to grant a change of venue. Thereupon the defendant made application for a continuance of the cause until the next term on account of the absence of Daniel Gibbons and other witnesses. The court refused to continue the cause until the next term, caused writs of attachment to be issued for the absent witnesses, and continued the case until the 21st day of November, 1887. On which day, the cause coming on to be heard, the witness Gibbons being still absent, though in the mean time he had been arrested, and brought into court, and discharged on recognizance to appear on the 21st of November, a second attachment was issued against him, returnable forthwith, and the cause passed until said attachment should be returned. On the next day the attachment was returned not served, and, the said Gibbons still being absent, the defendant filed a second application for a continuance on account of the absence of said Gibbons, and of two other witnesses whom he alleged to be material, setting out the facts which he expected to prove by them. On the hearing of this application the prosecuting attorney announced that the state was ready for trial, and would admit the matters and things which defendant proposed to prove by said Gibbons as facts to be given in evidence on the trial. Thereupon the court overruled the application, and required the defendant to proceed to trial, and on the trial permitted the defendant to read in evidence in his behalf a written statement of facts substantially the same as the facts which the defendant, in his application for continuance, stated he expected to prove by the absent witness Gibbons, and that the same was admitted by the prosecuting attorney as facts in the cause. The jury found the defendant guilty, and he appeals.

1. The action of the trial court upon an application for a change of venue, in a criminal case, on the ground of the prejudice of the inhabitants of the county against the defendant, is final, unless it appears that there has been a palpable abuse of judicial discretion; and no such abuse appears from the ev-



idence upon that issue in this case. *State v. Hunt*, 91 Mo. 490, 3 S. W. Rep. 858; *State v. Holcomb*, 86 Mo. 871; *State v. Wilson*, 85 Mo. 134.

2. The court committed no error in continuing the cause on the first application until the 21st of November; but when its process, issued for the purpose of securing the presence of the witness Gibbons on that day, failed to bring him into court to testify on behalf of the defendant on that day, and its writ of attachment then issued failed to secure his attendance upon the following day, it committed error in refusing to grant him a continuance when he presented his second application therefor, based in part upon the absence of such witness; the sufficiency of which was conceded by the action of the prosecuting attorney in consenting that a statement of the facts which defendant proposed to prove by such absent witness might be read in evidence, and by the court in thereupon overruling defendant's application for a continuance, and permitting such statement to be read to the jury. *State v. Dyke*, 96 Mo. 298, 9 S. W. Rep. 925; *State v. Neiderer*, 94 Mo. 79, 6 S. W. Rep. 708; *State v. Warden*, 94 Mo. 648, 8 S. W. Rep. 233; *State v. Berkeley*, 92 Mo. 41, 4 S. W. Rep. 24.

3. Some other points are made against the action of the court on the trial of the cause; but as the subjects of some of them are not properly saved for review in this court, and others are not likely to occur in a future trial, and as the case, for the error of the trial court in refusing the defendant a continuance, must be remanded for a new trial, it will not be necessary to notice them. The judgment of the circuit court is reversed, and the cause remanded for new trial. All concur, except RAY, C. J.; absent, and BARCLAY, J., dissenting.

#### STEVENSON *et al.* *v.* EDWARDS *et al.*

(*Supreme Court of Missouri*. Nov. 4, 1889.)

#### MORTGAGES—REDEMPTION—PURCHASER PENDENTE LITE—ESTOPPEL.

1. Persons who have a remainder under a deed which has been declared void as to creditors and purchasers, such deed being valid as between the parties thereto, may bring suit to redeem the land from the lien of deeds of trust executed by the life-tenant, though the land has been sold thereunder.

2. In such a suit, the purchaser under the deeds of trust should be credited with his expenditures for necessary repairs, and must account for all rents actually received by him.

3. A purchaser of land sold under deeds of trust, pending a suit to redeem therefrom, takes the land subject to the result of such suit.

4. A judgment charging land with a lien, on the ground that a former conveyance of the same land, duly recorded, was made in fraud of creditors and subsequent purchasers, is final, and cannot be questioned in a suit between the same parties, though it has been partially overruled by a holding that a deed duly recorded, though made to defraud creditors, is not void as to subsequent purchasers; nor can plaintiffs, in a suit to redeem from such lien, question its validity, where it has been admitted in their petition.

Appeal from circuit court, Saline county; GEORGE L. HAYS, Special Judge.

*Wm. D. Bush*, for appellant. *Boyd & Seabree*, for respondent.

BLACK, J. This is a suit in equity to redeem 160 acres of land from the lien of two deeds of trust. The court awarded a decree according to the prayer of the petition, and the defendants appealed. The plaintiffs are the children of Sally Y. Lewis, and the defendants are Edwards, Tracy, and Henry B. Lewis, who was the husband of Sally Y. Lewis. There are some other defendants, but it is not necessary to make special mention of them. The land was purchased with the money of Henry B. Lewis, except some \$600 advanced by Charles B. Lewis. It was conveyed to Charles, who held it for Henry. On the 27th October, 1864, Charles B. Lewis conveyed it to Sally Y. Lewis in trust for her sole use during her life, and, after her death, for the use of her children and her husband, Henry B. Lewis; the property in no event to be liable for the debts of her said husband. The deed was duly recorded in the year 1865. Thereafter, and on the 10th March, 1871, Sally Y. Lewis and Henry B. Lewis conveyed the land to Edwards, in trust to secure their note of the same date for \$700, payable to defendant Tracy. In 1873 they made a second deed of trust to Edwards, to secure their note to Tracy for \$300. These deeds of trust profess to convey the fee, though Sally Y. Lewis had but a life-estate. In 1877, after the death of Sally Y. Lewis, these plaintiffs brought a suit against the present defendants to set aside and cancel the \$700 deed of trust on the ground that it was a cloud on their title. To that suit these defendants answered that the land was purchased with the money of Henry B. Lewis, and was conveyed to Sally Y. Lewis to defraud the creditors of said Henry. The court found the issues for the defendants, and dismissed the plaintiffs' petition, and that judgment was affirmed by this court. *Shaw v. Tracy*, 83 Mo. 224. The \$700 deed of trust having been thus adjudged to be a lien on the land, even as against the plaintiffs, they brought this suit to redeem from that, and also from the \$300 deed of trust.

1. The first claim on the part of the defendants is that as the deed to Sally Y. Lewis for life, remainder to her children, has been adjudged to be a fraudulent and void conveyance, these plaintiffs have no interest in the property, and therefore no standing in this case. That deed was adjudged to be fraudulent and void as to the creditors of and purchasers from Henry B. Lewis, in the case of *Shaw v. Tracy*. But it does not follow that it is a nullity for all purposes. A deed, though fraudulent as to creditors, is valid as between the parties thereto. *George v. Williamson*, 26 Mo. 190; *Wait, Fraud. Conv.* § 995. Such a conveyance is void only as to the creditors, and to them only to the extent necessary to pay the debts. Satisfy the debt, and the conveyance must stand. Nor do we see

that it can make any difference that Tracy is to be deemed a purchaser also, for his deeds of trust are in effect but mortgages, and are of no validity upon the payment of the debts thereby secured. The plaintiffs have a right to prosecute this suit.

2. It follows from what has been said that Tracy must account for all the rents received by him, and it is no defense to such an accounting that he has paid part of the rents to his co-defendant Henry B. Lewis. The evidence of such payment, and of a settlement of the rents between Tracy and Henry B. Lewis, was therefore properly excluded.

3. After this suit had been commenced, the land was sold under the deeds of trust, and Tracy, the beneficiary, became the purchaser. Having purchased pending the litigation, he purchased subject to the result of the suit, and, so far as this case is concerned, is in no better position than he would have been had there been no sale.

4. In a supplemental brief of the appellants, some reliance is placed upon a sheriff's deed, dated in June, 1879, purporting to convey the land to Tracy under an execution issued upon a judgment rendered in 1878 in favor of Tracy, and against Henry B. Lewis. Nothing is claimed by reason of this deed in the answer. It is not set up or mentioned in any of the pleadings in this case, and has nothing to do with any of the issues. It will be disregarded here, as it doubtless was by the trial court.

5. Tracy took possession of the land on the 1st of March, 1880, and leased it out until March, 1886. The trial court charged him with rents at \$440 per annum on the evidence of two or three witnesses who testified as to the rental value of the property. The other proof is conclusive that he only received from \$355 to \$400 per annum; the amount for each year being given. A mortgagee in possession will not be held accountable for more rents than he actually received, unless he has been guilty of fraud or negligence. There is no evidence of either in this case, and the defendant Tracy should have been charged only with the rents which he received. *Turner v. Johnson*, 95 Mo. 431, 7 S. W. Rep. 570. The property was out of repair, and in a dilapidated condition, when Tracy took possession; and it is shown that he expended in repairs \$230.85. These repairs were necessary and proper, and he should have been credited with the full amount.

6. This brings us to some questions made in the brief of the respondents, the plaintiffs below. The \$700 deed of trust having been adjudged to be a lien on the reversionary interest of the plaintiff in *Shaw v. Tracy*, supra, they were obliged to file this bill to redeem. The judgment in that case is made to flow from the fact that the deed to Sally Y. Lewis was made in fraud of the creditors of and subsequent purchasers from Henry B. Lewis. Since the present case was decided in the circuit court, it has been held that a

deed duly recorded, though voluntary and made to defraud creditors, is not void as to subsequent purchasers. *Bonney v. Taylor*, 90 Mo. 71, 1 S. W. Rep. 740. In view of this state of the law, the plaintiffs say they ought not to be required to pay these deeds of trust, or either of them. In the first place, the petition does not question the validity of either deed of trust. It is, in its scope and framework, an admission that these deeds of trust are valid claims on the plaintiffs' property, and the prayer is to redeem. Plaintiffs cannot be heard to question the admission thus made by their pleadings, and still standing on the record. Again, the parties to that suit and to this one are the same, and the \$700 deed of trust was the subject-matter of that suit, and is a part of the subject-matter of this one. The judgment in that case is final and conclusive, and cannot be questioned in this suit. *Caldwell v. White*, 77 Mo. 472. The question whether the deed of trust is a charge on the interest of the plaintiffs in the land is *res judicata*, and cannot be relitigated, even though the judgment may have been for the wrong party. 1 Herm. Estop. § 115. Nor can it make any difference that that case has been in part or whole overruled as a precedent. The \$300 deed of trust, however, was not in question in the former case. The plaintiffs did not seek to have it set aside, nor is it mentioned in any of the pleadings in that case. It was not a part of the subject-matter of that suit, and, as to it, the plaintiffs are not estopped by the former judgment. Since the judgment in the present case must be reversed because of the errors in respect of the accounting before mentioned, it will be remanded, and the plaintiffs may amend their petition in respect of the \$300 deed of trust, if advised so to do. We think the cause should be remanded with such leave, in view of the ruling in *Bonney v. Taylor*, supra, made after this case had been decided in the circuit court.

RAY, C. J., absent. The other judges concur.

#### COMMONWEALTH v. NEAT.

(Court of Appeals of Kentucky. Oct. 20, 1889.)

##### TRIAL FOR MISDEMEANOR—DEFAULT.

1. Crim. Code Ky. § 184, provides that a misdemeanor may be tried in the absence of the accused; section 187 provides that, on the call of an indictment for a misdemeanor for trial, he must either move to set it aside or plead; and section 171 provides that, if he fail to do so, final judgment shall be entered against him, and, if necessary, a jury impaneled to fix the punishment. Defendant was indicted for betting on an election, the punishment for which is a fine of \$100, (Gen. St. p. 695;) and at the trial neither pleaded nor moved to set the indictment aside. *Held*, that the court should, on motion of the state, have entered final judgment against defendant.

2. Act Ky. April 10, 1878, § 2, providing that if a part or all of the penalty for a misdemeanor prescribed in Gen. St. c. 28, be a fine, the jury, in fixing the amount, shall say in its verdict whether, on failure to pay, defendant shall be put to hard labor in lieu of imprisonment, does not apply to a conviction for betting on an election, made a misde-

memeanor by Gen. St. c. 47; and, on default by defendant, it is not necessary to impanel a jury to fix the punishment.

Appeal from circuit court, Taylor county.  
"To be officially reported."

Thomas Neat was indicted for betting at an election. From a judgment acquitting defendant, the commonwealth appeals.

P. W. Hardin, Atty. Gen., and Finley Shuck, for the Commonwealth.

HOLT, J. A misdemeanor may be tried in the absence of the accused. Crim. Code, § 184. Any plea save that of "guilty" may be entered by his counsel, and his defense conducted without his presence. Johnson v. Com., 1 Duv. 244. It is only upon an indictment for a felony that an arraignment must be had, or dispensed with by his consent. Code, § 155. Upon the call of an indictment for a misdemeanor for trial, he must either move to set it aside or plead to it. Id. § 157. If he fail to do so, then section 171 of the Code provides that "final judgment shall be entered against him, and, if necessary, a jury impaneled to fix the punishment." These statutory provisions show that if, upon the call of an indictment for a misdemeanor for trial, the defendant neither moves to set aside the indictment nor pleads thereto, he becomes liable to judgment by default. Such a failure operates as a confession of the facts charged; and in such a case final judgment should be entered against him, unless the punishment be not definitely fixed by statute, and it therefore becomes necessary to impanel a jury merely to do so. The provisions of the former Criminal Code upon this subject were substantially similar to those of the present one; and it was decided in the case of Com. v. Cheek, 1 Duv. 26, that a judgment could be rendered by default upon an indictment for a misdemeanor.

This indictment is for betting on an election. The punishment fixed by statute is a fine of \$100. Gen. St. p. 695. It is a certain sum, it is definitely fixed; and the lower court should therefore have sustained the motion of the prosecuting attorney, and, without the intervention of a jury, rendered a judgment for it, instead of *sponte sua* entering a plea of "not guilty" for the defendant, resulting in his acquittal under a peremptory instruction, as the state declined to offer any evidence. Its motion to impanel a jury to fix the punishment was improper. It was made, doubtless, under the impression that the act of the legislature of April 10, 1878, and which is sometimes called the "Working Statute," applied to such a case. The second section of it provides: "If a part or all of the penalty for a misdemeanor prescribed in said chapter [29] of the General Statutes be a fine, it shall be in the discretion of a jury fixing the amount of the fine to say in its verdict whether, if the fine and costs are not immediately paid or replevied by the defendant, he shall be put at hard labor, in lieu of imprisonment, for non-payment of the fine. \* \* \*

v. 12s. w. no. 13—17

Gen. St. p. 464. The language of this statute appears to confine its operation to cases where the jury fixes the amount of the fine; and it, beyond question, is limited to penalties prescribed by chapter 29, tit. "Crimes and Punishments," of the General Statutes. The title of it is: "An act to amend chapter 29 of General Statutes, entitled 'Crimes and Punishments.'" The body of the act, in both the first and second sections, also expressly limits its application to penalties prescribed by that chapter. Whether this was intentional or through mistake upon the part of the legislature is not our province to inquire. We must administer the law as we find it. The penalty for betting on an election is not prescribed by chapter 29, but by chapter 47, of the General Statutes. Many of our statutory penalties are found elsewhere in our statutes than in chapter 29. It results that the statute above cited is not applicable to this case; and therefore, if there be any question as to its constitutionality, it does not now arise. The judgment is reversed, with directions for a new trial, and further proceedings consistent with this opinion.

GIVENS' ADM'R v. KENTUCKY CENT. R. CO.  
(Court of Appeals of Kentucky. Oct. 26, 1889.)

#### DEATH BY WRONGFUL ACT.

1. Gen. St. Ky. c. 57, § 1, gives to the personal representative of one killed by the negligence of the proprietor or servants of a railroad company, of which deceased was not a servant, the right to recover damages in the same manner that the person himself might have done for an injury where death did not ensue. Section 8 gives the widow, heir, or personal representative of one killed by the willful neglect of another a right of action for punitive damages. *Held*, that the personal representative of a child nine years of age, who was killed by a train through the negligence of the railroad employee, can recover under section 1, but only compensatory damages.

2. The degree of the neglect alleged determines the section under which the action will be deemed to have been brought; if ordinary, under section 1, and if willful, under section 8.

3. The sum recovered by the personal representative under section 1 becomes a part of the assets of deceased's estate.

Appeal from circuit court, Harrison county.  
"To be officially reported."

Action by Tom Givens' administrator against the Kentucky Central Railroad Company, for the killing of intestate by defendant's cars. Judgment for defendant, and plaintiff appeals. Gen. St. Ky. c. 57, § 8, provides that "the widow, heir, or personal representative" of one whose life is lost by the willful neglect of another may sue and recover punitive damages.

Ward & Kimbrough, J. F. Wright, and M. C. Swinford, for appellant. T. T. Forman, for appellee.

PRYOR, J. The cases of Henderson v. Railroad Co., 5 S. W. Rep. 875, and Jordan's Adm'r v. Railway Co., 11 S. W. Rep. 1018, determine this controversy. The intestate when killed by the cars was only nine years of age.

His death was instantaneous, and, under the statute or at common law, no action survives to his personal representative. Affirmed.

#### ON RECONSIDERATION.

PRYOR, J. When this case was considered, and the judgment affirmed, the court was of the opinion that the two cases of *Henderson v. Railroad Co.*, 5 S. W. Rep. 875, and *Jordan's Adm'r v. Railway Co.*, 11 S. W. Rep. 1013, settled this case; but, after reconsidering the question, we are satisfied the court erred in the former opinion. While the death of the child was instantaneous, and at common law no cause of action survived to his personal representative, the statute that applies alone to railroad corporations gives in express terms a right of action to the personal representative of the person killed. That statute reads: "If the life of any person not in the employment of a railroad company shall be lost in this commonwealth by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, or by the unfitness or negligence or carelessness of their servants or agents, the personal representative of the person whose life is so lost may institute suit and recover damages in the same manner that the person himself might have done for any injury where death did not ensue." Section 1, c. 57, Gen. St. The case of *Canal Co. v. Murphy*, in 9 Bush, 522, and similar cases, were where the intestate was killed by some other agency than that of a railroad train; and, there being no statute by which a right of action was given the administrator, the common-law rule prevailed, and, the death being instantaneous, there was no cause of action.

In this case a child nine years of age was run over and killed by a train of cars belonging to the appellee, his death resulting, as is alleged, by the negligence of the employees of the defendant in charge of the train. At common law there was no cause of action that survived to the personal representative upon such a state of fact; and the law-making power, in order to provide a remedy against railroad companies, where negligence on the part of its employees has caused the death, has said that the representative of the intestate may recover damages in the same manner that the person himself might have done for any injury where death did not ensue. For a personal injury the intestate, if living, could maintain his action, and recover damages for the negligence of the employees of the company; and, as death has ensued, the statute provides that, for the injury resulting in the loss of life, the personal representative may sue. As there are two sections of this statute,—the one permitting the personal representative to sue, and the other giving to the widow and children the right to recover punitive damages, and to appropriate the amount of recovery to their own use, which right is given in the third section,—the personal representative who sues under

the first section must be confined in his recovery to compensatory damages. *Railroad Co. v. Case's Adm'r*, 9 Bush, 728. It was evidently intended to restrict the recovery under the first section to compensation, and not damage by way of punishment for the wrongful act.

It is true this court has held that a recovery under the third section of the act may be had, although a less degree of neglect is established than willful neglect; and, as the widow, child, or personal representative may sue under that section, a recovery in the name of either would bar a right of action under the first section. The degree of neglect alleged determines the question as to the section under which the plaintiff is seeking to recover, and if ordinary neglect, or the averment that the intestate's death was caused by the negligence only of the employees of the company, the action will be regarded as under the first section, and the recovery limited to compensation, and neither the widow nor the child can maintain such an action, but it must be instituted in the name of the personal representative. The cases of *Railroad Co. v. Case's Adm'r*, 9 Bush, 728, and *Railroad Co. v. Gastineau's Adm'r*, 88 Ky. 119, decide this question; and it is apparent, whatever may be said as to the manner in which the recovery, when had and received, is to be distributed by the administrator, that the legislature intended to confine the right of action under the first section to the personal representative; and, as there is no direction as to the disposition of the fund recovered under that section, the personal representative would hold it like other assets left by the intestate.

Judgment reversed and remanded, with directions to overrule the demurrer, and for proceedings consistent with this opinion.

#### HARRISON COUNTY v. BERRY & FAIRVIEW BAPTIST CHURCH TURNPIKE CO. *et al.*

(Court of Appeals of Kentucky. Oct. 15, 1899.)

##### TURNPIKES—PLEADING.

Where plaintiff, a county, has taken stock in a turnpike company, requiring, as a condition of its subscription, a bond, with sureties, that on completion of the road the company should be free from debt, a petition seeking to recover from the company and the sureties on its bond plaintiff's proportionate share of the earnings of the road, without regard to the company's indebtedness to a surety, who was also an officer of the company, is not demurrable for failure to make a full and specific statement of the cost of the road, the amount of stock subscribed, and the earnings; it being alleged that all these facts were in the knowledge of defendants, and were not known to plaintiff, as the officers of the company had failed to perform their duty in making an official report.

Appeal from chancery court, Harrison county.

"Not to be officially reported."

W. T. Lafferty and M. C. Swinford, for appellant.

LEWIS, C. J. Appellee the Berry & Fairview Baptist Church Turnpike Company, or-

ganized to construct a turnpike road in Harrison county, four and five-eighths miles in length, filed in the Harrison county court a statement of the length and character of the road to be constructed, together with the plan, specifications, and profile thereof, and made application to the court for a subscription of stock in behalf of the county to the capital stock of the company at the rate of \$1,200 per mile. The subscription was made upon the condition, stated in the order of court, that the company would execute a bond to Harrison county containing covenants that said road would be completed according to the written statement filed, the right of way obtained, and necessary toll-houses, etc., built and paid for by the aid of said subscription, so as to leave the company out of debt when the road was completed. Subsequently, upon completion of two miles of the road, in order to obtain the amount of subscription due from the county therefor, and for the residue of the road, the company as principal, and the other appellees, including McNees, as sureties, executed a bond in pursuance of the order of court making the subscription, and containing the stipulations provided for in that order; and thereupon the county court directed to be, and there was, paid, on the subscription, the sum of \$5,100, which was \$382.72 less than the whole amount due for the entire length of road, which, when completed, was 4 miles 3,004 feet. But the company, upon completion of the road, was indebted to McNees about the sum of \$1,000 in excess of the whole amount of the county subscription; and for the amount of such indebtedness McNees had, when this action was commenced, recovered judgment against the company, and obtained an order of the Harrison circuit court appointing a receiver of said road, who had been collecting the earnings of the road, and paying the same over to McNees in satisfaction of his debt.

The object of the Harrison county court in making the conditional order of subscription mentioned was to require that the balance of money necessary to complete the road should be subscribed and paid by other stockholders having an interest in, and deriving benefit from, it, so as to assure to the county its fair proportion of the earnings of the road. And as it was competent and legal for the county to prescribe the conditions mentioned, and require a bond from the company covenanting for a compliance therewith, unquestionably the bond, a copy of which is filed with the petition, is binding on both the company and the other appellees, who are the sureties, and all, at the time of its execution, officers of the company, and interested in completing the road. And as McNees was a party to that contract with the county court, and at the time an officer of the company, it seems he has no right to any part of the county's share of the dividends or earnings of the road to pay a debt alleged to be due to him by the company; for as surety on the bond, as well as officer of the company when the subscrip-

tion of stock was made, he accepted the condition upon which that subscription was made, and covenanted against the creation of precisely the character of indebtedness he is now claiming exists in his favor against the company.

As the foregoing facts are substantially set out in the original petition, the lower court properly overruled the demurrer, but unnecessarily required the plaintiffs to amend, and make the petition more definite; for while the plaintiffs have no right to recover the whole amount of the county subscription paid in damages, which was prayed for in the alternative, they do have a *prima facie* right, as against the company and parties to the written contract, to the county's proportionate share of the earnings of the road, without any abatement or discount by reason of alleged indebtedness of the company to McNees, one of such parties. And as the action was commenced, and was, when the demurrer was filed, on the equity docket, it was in the power and duty of the chancellor to require an answer from the defendants, and to ascertain by reference to a commissioner, in case they failed to disclose, the whole cost of the road, the amount of stock subscribed and paid, the earnings of the road, and such other facts as might be necessary to determine the rights and interests of all the parties. And as it was alleged in one of the amended petitions that all these facts were in the knowledge of the defendants, and no official report or statement in regard to them had ever been made to the county court, as it was the duty of the officers of the company to do, it seems to us it was error in the lower court to sustain demurrers to any of the amended petitions because they did not contain full and specific statement of facts in the knowledge of the defendants, and not in that of the plaintiffs. Why the county has not paid the balance due of its subscription of stock does not appear; and consequently it may be, though not so decided, such balance will have to be deducted from the aggregate of dividends or earnings of the road the county has been entitled to since it was completed. Nor does it appear that there is any other creditor of the road except McNees, who is a party to the contract, and therefore not entitled to any part of the share of dividends the county is entitled to by the terms of subscription and the bond mentioned. The judgment of the lower court sustaining demurrers to the amended petitions is therefore reversed, and cause remanded, with directions to overrule the demurrers, and for further proceedings consistent with this opinion.

GARGAN *et al.* v. LOUISVILLE, N. A. & C. RY. CO.

(Court of Appeals of Kentucky. Oct. 17, 1889.)  
MUNICIPAL CORPORATIONS—RIGHT TO CLOSE  
STREETS.

The charter of the city of Louisville provides for the closing up of any of its streets dividing

any of the squares or lots thereof, by an action by the city against all the owners of ground on the square or lot, and authorizes the court to decree the closing if all such shall consent, or if satisfied that it will be beneficial to the city, and not injurious to any of such land-owners not consenting. In an action to close up the eastern end of a street, in a square on which appellants owned land and lived, west of the point to which it was proposed to close the street, it appeared that in order to go east, where the center of trade lay, they would first have to go west to the next street, then north or south to another street, thence east. *Held*, that the court had no authority to close the street without the owner's consent, as it would be depriving them of their property without due process of law.

Appeal from Louisville chancery court.

"Not to be officially reported."

*Dodd & Dodd, J. P. Gregory, Cary & Spindle, and C. S. Gruffs, for appellants. H. S. Barker and E. F. Trabue, for appellee.*

PRYOR, J. The charter of the city of Louisville provides "that said city may at any time institute suit in the Louisville chancery court for the purpose of closing up any of its streets or alleys dividing any of the squares or lots thereof, and to such suit all the owners of ground on the square or lot shall be made defendants; and if all such defendants are competent to act for themselves, and shall consent to the closing up prayed for, then the court shall render the decree accordingly; but without such consent said court shall hear the proof made by the parties, and if satisfied that the closing up would be beneficial to said city, and not injurious to any party not consenting, shall render a decree closing up such street or alley." An ordinance of the city of Louisville, approved on the 5th of November, 1886, reads: "Be it ordained by the general council of the city of Louisville that the city attorney be, and he is hereby, authorized and directed to enter the appearance of the city of Louisville to any proceeding that may be instituted in court to procure Columbia street to be closed from the west side of Fourteenth street to the west side of the grounds of the Louisville, New Albany & Chicago Railway Company, and to consent on behalf of said city in said proceeding to said portion of said street being closed." In a few days after the passage of this ordinance the city of Louisville instituted the present action, alleging that the closing up of said street, as indicated in the ordinance, would prove beneficial to the city, and would work no injury to the property holders thereon, reciting the ordinance by which the consent of the city is given, and asking the chancellor to inquire into the facts alleged, and, if true, that the street be closed, etc. The Louisville, New Albany & Chicago Railway Company filed its answer and cross-petition against the present appellants, in which it unites with the city of Louisville in asking that Columbia street be closed, for the reason it would prove beneficial to the corporation, and result in no injury to the property holders.

This is in fact a controversy between the corporation and the appellants, whose prop-

erty borders on Columbia street; the attorney for the city consenting, because he had been so directed by an ordinance of the city council. The real estate owned by these appellants, and upon which they live, lies between 14th and 15th streets, and Columbia street is between Rowan and Duncan streets. There is much conflict in the testimony as to the injury sustained by these lot-owners in the event Columbia street should be closed at the point and in the manner directed by the ordinance. It is maintained by the railroad company or by the city that the mode of ingress and egress to and from this property is in no wise disturbed; and that such is the condition of Columbia street, where the obstruction complained of is said to exist, that travel in vehicles would be dangerous by reason of railroad tracks and the moving of cars, that have already, in effect, for the purposes of travel, closed this street. Still it appears that those living on Columbia street, and who wish to go east to the main or business part of the city, must first go west on Columbia to 15th street, and then north or south to some other street, and thence east to the center of trade. The legislature, in giving this power to the city council, has been careful to guard the interest of those owning property on a street, and before it can be closed it must appear that it will be of benefit to the city, and not injurious to the owner of the property bordering on the street. While many of the witnesses say that the appellants ought not to complain because they are not injured, the fact exists that the ingress and egress to and from their houses to 14th street is closed, if this ordinance of the city is enforced; and as a result, when they wish to travel east on foot or in a vehicle, they must go west, leaving 14th street behind, and travel to 15th street. That this works an inconvenience and injury to the lot-owners, who had in the first place but two modes of ingress or egress, is too plain a proposition to be controverted; and, besides, the fact of the injury is established upon testimony, not in effect disputed, as to the great inconvenience that must necessarily result to the owners of lots bordering on this street, and lying between 14th and 15th streets.

The case of *Bailey v. Culver*, found in 12 Mo. App. 175, is the strongest case referred to by counsel for the appellee in support of the right of the city to close this street, either for its own use, or for the benefit of the Louisville, New Albany & Chicago Railway Company. In that case a deflected alley was substituted for a straight one; and the court, in substance, said that this change was as harmless to the absolute rights of the parties complaining as if the obstruction was on a street in any other part of the city. The rule laid down in that case accords to the owner of a lot abutting on a public street a vested right to the easement, only in so far as his boundary line extends; and this right, says the court, "is as fully protected against invasion by legislative or municipal agencies

as the right to his home or his farm. But, beyond the limits of contiguity with his lot, his rights in the easement are only those of a member of the public at large. If he could claim more than these at a longitudinal distance of fifty feet from his lot, he could claim the same at a distance of a mile, or of ten miles." The court in the case cited was using this argument, in reference to the facts of the particular case, upon the idea, as said in the opinion, that "other egress being still provided for them," etc. If the owner is confined in his right to the enjoyment of the easement, in so far as this lot borders on the street, it then follows that the owners of these lots located on Columbia street between 14th and 15th streets may be denied all access to their lots by closing the approach from each end of the street, and the only remedy is a resort to an indictment, upon the idea that it constitutes a public wrong, and not a private injury. Nor does it follow, because this vested right to the easement exists to enable him to approach the streets running north and south in front of the square in which the property is located, that he can assert the same right in regard to all the other streets in the city. The owner has purchased his property located on a street where his approach and egress is intercepted from the street adjoining. He has an outlet east and west, and no other; and to close either or both is a private injury for which he should have redress, unless another way is created that affords him a like convenience; and the mere fact that it may be a few feet longer, or crooked instead of straight, is not such an invasion of his rights as would require the chancellor to interfere, or give to him an action at law for damages. In the case of *Smith v. City of Boston*, reported in 7 Cush. 255, the owner of lots had sued the city for damages caused by the discontinuance of a part of Market street. On the trial the court told the jury that the plaintiff was not entitled to damages, because neither of his lots abutted on that part of Market street discontinued. The case went to the supreme court of the state, and it was held (Chief Justice SHAW delivering the opinion) that the direction given by the trial judge was proper, and that the inconvenience, if any, sustained by the appellant was not such an injury as entitled him to damages within the true intent of the law. In that case the court said: "There is obviously a difficulty in laying down a general rule applicable to all cases, but, as the petitioner had free access to all his lots by public streets, he was not entitled to recover, although by the change he was obliged to go somewhat further than he otherwise would;" and the rule was there laid down, followed by the Missouri case, that the damage was limited to some estate bounded on that part of the highway discontinued.

It must be conceded that the two cases cited sustain the judgment below, as well as the views of counsel appearing in this court

for the city; but, after giving to each case the most careful consideration, we are unable to see why such an injury is not direct and specific in its character, and easily distinguished from remote and contingent rights that, when disturbed, affect the entire public. We are aware that the injury resulting from a public nuisance may be greater in degree to one citizen than another, and still the one who is the greatest sufferer must look to a public prosecution to suppress it; but where the damage is direct and immediate, such as depriving the owner of property bordering on a street or alley of the right of ingress and egress by stopping up one end of the street or alley, and providing no other means of egress to other streets, the party injured is entitled to his action for damages; or the corporation, whether municipal or private, seeking to appropriate the street to its own use, must resort to the writ of *ad quod damnum*, and under it compensate the owner for the injury sustained. This court, since the opinion in the case of *Railroad Co. v. Applegate*, 8 Dana, 289, was delivered, has universally held that this right of property in the streets, is as inviolable as the property in the lots themselves; and the case of *Transylvania University v. City of Lexington*, 8 B. Mon. 27, settles the rights of the parties in this case. In discussing the constitutional question presented in that case, Chief Justice ROBERTSON, speaking for the court, said: "As a private right, it must, like that of vicinage, be limited by its own nature and end; that is, chiefly by the necessity of convenient access to, and outlet from, the ground of each proprietor." This right, therefore, is not to be determined by the mere fact as to whether the property affected by the obstruction borders immediately on that part of the street obstructed; but, has the owner been deprived of convenient access to, and outlet from, his ground? and "beyond such general limit, as to each proprietor of ground in the city, the streets are altogether public highways, and subject like other public roads to alteration," etc. It was expressly held in the *Transylvania Case* that this vested right in the street was not co-extensive with all the streets and alleys of the city, but that the "owner of ground on any street in Lexington has a right, as inviolable as it is indisputable, to the common and unobstructed use of the contiguous highway, so far as it may be necessary for affording him certain incidental easements and services, and a convenient outlet to other streets; and of this right the legislature cannot deprive him without his consent, or a just compensation in money." If in the nature of a private right,—and such is the doctrine recognized by this court,—then any obstruction that deprives the property holder, in a case like this, of the legitimate use of the street without his consent, or by due process of law, is in violation of his right of property.

We are not to be understood as holding



that such is the nature of the right vested in the property holder as to prevent any change or alteration of a street under proper legislative authority, where there is still left convenient and reasonable access to, and outlet from, the ground of the owner; for at last this is the right he acquires in the streets or alleys upon which his property is located. Nor is it a question as to the increased or diminished value of his property by reason of an improvement that causes the obstruction. His property might be increased in value by obstructing or closing the entire street, and still, if the right of ingress or egress is taken from him, wholly or partially, so as to work an injury, it is taking private property without first making just compensation. This right the citizen is entitled to, whether he travels on foot, horseback, or in his carriage. It is as sacred to the one as the other; and the fact that teams are not used on the street is no response to the complaint made. In the case of *Fulton v. Transfer Co.*, 85 Ky. 640, 4 S. W. Rep. 332, it was held that "the construction of a railroad along a street is not *per se* an encroachment upon the individual right of the abutting lot-owner, \* \* \* but, when deprived of the reasonable use of the street, he may appeal to the courts for relief." It was there held that the construction of an elevated railroad, by reason of the manner of its elevation, was not an unreasonable obstruction. That case sustains the doctrine announced in this case, in holding that individual rights will not be disregarded, that public benefits may accrue.

The consent of the city was given to the railroad company for the reason, no doubt, that the improvement to be made by the use of the street was regarded as beneficial to the city; and in this view of the case the appropriation by the railroad was proper, if the rights of others were not affected by it. As the case is here presented, the city has deprived the appellants of their right to the proper and necessary use of the street by closing it for the benefit of the railroad company, and, if closed by the city for its own purposes, the same constitutional question would arise. Neither could appropriate the street to the injury of the property holder without making just compensation. The judgment below is reversed, with directions to dismiss the petition of the city, and the answer and cross-petition of the railroad company, without prejudice.

#### HOLMES *et al.* v. BRAMEL.

(Court of Appeals of Kentucky. Oct. 17, 1889.)

#### EQUITY—SETTING ASIDE SALE.

Land sold to satisfy a judgment was purchased by the creditor, and before he had received a deed therefor he sold to plaintiffs, who received a deed from the commissioner. Plaintiffs purchased for the use and benefit of the judgment debtor, and held the land in trust for him. The quantity of land sold was never ascertained by survey, but was sold and reported as a certain amount, while, in fact, there was much less. The

creditor did not know of the defect, and was innocent of any fraud. Held, that plaintiffs could not have the sale to them rescinded on account of the defect, though they would be entitled to such rescission had they purchased in their own right.

Appeal from circuit court, Robertson county.

"Not to be officially reported."

*Kennedy & Son* and *Mr. Bayne*, for appellants. *W. W. Kimbrough* and *Ross & Owens*, for appellee.

LEWIS, C. J. Under a judgment of appellee, Bramel, against H. T. Overby and wife, a tract of land upon which a mortgage lien existed was, January 19, 1880, publicly sold to the plaintiffs, at \$8 per acre, which amounted to the sum of the debt of \$1,006, interest and cost, the tract as reported by the commissioner containing 131 acres and 31 poles; and, though the sale was confirmed, no deed was made to the purchaser, but afterwards he, in writing, sold the land or his interest in it to appellants, who, March 23d, received a deed from a commissioner of court therefor; and, April 5, 1878, brought this action for a rescission of the contract of purchase, and recovery of the money paid therefor by them, upon the alleged ground that instead of 131 acres it really contained only about 65 acres. It appears that after the judgment appellee, Bramel, and Overby agreed about where the line should run dividing the land sold from the residue of the tract, though it appears the mortgage really covered the whole tract. But the quantity of land sold never was ascertained by survey, though sold and reported by the commissioner as 131 acres. Nor is there any evidence showing that Bramel knew there was in the boundary less than the quantity sold. Nor is it proved that he at any time represented to appellants that there was that quantity, though his bid at the sale shows he accepted as true the statement contained in the judgment that there were 131 acres within the boundary as described in the judgment. But though, by the written contract of sale made by him to the appellants, he, in terms, sold only his entire interest in the land, and agreed merely to direct the court to have the deed made directly to appellants, he did, in effect, covenant that there were 131 acres and 31 poles in the tract, and, as appellants allege they were induced to believe, and did believe, it contained that quantity, and agreed to pay therefor the amount appellee had paid, and interest, we think they would be entitled to a rescission of the contract and repayment of the purchase money, if they had really bought and paid for the land for their own use and benefit. But Overby, the original owner of the land, states, as a witness, that there was an understanding between him and appellants that they were to buy the land, and give him a chance to pay for it; and that statement is confirmed by the fact that Overby did occupy and use without rent the land for three years. If, then, the land was purchased by appellants for the use and benefit of Overby, and held by them in trust for



him, it seems to us they have no right to any relief against Bramel, who was innocent of fraud, and ignorant of any deficiency in the land, and purchased it simply to satisfy his debt. For Overby, for whose benefit the purchase was made by the appellants, was not, if they were, ignorant of the quantity of land within the boundary sold; and to rescind the contract, still holding appellee to his bid, would enable Overby to profit by his own bad faith in permitting the land sold by the commissioner, and afterwards by appellee, Bramel, as 181 acres, when he must have known, being the owner of, and living on, the land, that there were only 65 acres. We therefore think the lower court properly dismissed the action, and the judgment is affirmed.

#### FUSON v. COMMONWEALTH.

(*Court of Appeals of Kentucky.* Oct. 19, 1889.)

##### SPECIAL JUDGE.

After the case had been closed on both sides, and the instructions had been given to the jury, counsel for the accused and for the commonwealth agreed that one F., a lawyer, might preside during the balance of the trial, and receive the verdict, which he did. He also discharged the jury, and ordered defendant into the custody of the jailer after a verdict of guilty, but had no further connection with the case. It did not appear that the regular judge was beyond easy call, that any objection was made to the special judge, or that he made any ruling affecting defendant's rights in any way. Held a mere irregularity, and not an error for which judgment would be reversed.

Appeal from circuit court, Bell county.

"Not to be officially reported."

Wm. Cromwell, for appellant. P. W. Hardin, Atty. Gen., for the Commonwealth.

LEWIS, C. J. The record in this case shows that after the jury had been selected and sworn, the evidence on both sides closed, and instructions prepared and given, all of which was done while the regular judge was presiding at the trial, the attorney for the commonwealth and one of the attorneys for the accused agreed that John B. Fish, a practicing attorney, might preside during the remainder of the trial, and receive the verdict of the jury. And thereupon he did, without being sworn, preside to keep order during argument of counsel to the jury, and receive the verdict, by which the accused was found guilty and his punishment fixed at confinement in the penitentiary, and also discharged the jury, and ordered the accused in custody of the jailer, and thereafter did not preside, nor was connected with any further proceedings in the case. It does not appear that the regular judge, though absent from the courtroom while said Fish presided, was either needed for any purpose, or beyond easy call, if his presence had been required, nor that any objection was made by the accused to said Fish presiding for the purposes and during the time indicated. It seems to us that as the verdict of the jury was not at all influenced by the presence of said Fish as presiding judge, nor any ruling was made by him,

nor question submitted to or passed on by him affecting or jeopardizing the rights of appellant in the least degree, he was not prejudiced, and, having consented, has no right to rely upon what at most was a mere irregularity for reversal. Judgment affirmed.

#### MUDD v. MULLICAN et al.

(*Court of Appeals of Kentucky.* Oct. 19, 1889.)

##### WILLS—CONSTRUCTION—FEE-SIMPLE.

A devise of "all my property, real, personal, and mixed, to my wife, Teresa, so long as she remains my widow; but, should she marry or die, I will one-half of my property to her, or, in case of her death, to her relations, and the remaining half to go to my relations,"—gives testator's wife a fee-simple in half of the land.

Appeal from circuit court, Washington county.

"Not to be officially reported."

J. W. S. Clements, for appellant. W. C. McChord, for appellees.

PRYOR, J. In the month of December, in the year 1855, William P. Skidmore died in the county of Washington leaving a last will and testament. He died childless, and left surviving him his widow, who is now dead, she having also left a last will by which the appellant, C. B. Mudd, is made the sole devisee; and, having disposed by her will of certain land that was devised to her by her husband, the principal question in this case is as to the interest she acquired in the devise by her husband. Was it a fee, or did she hold for life only? If a fee, the appellant takes the land. If a life-estate, it passes to the relatives or heirs at law of the wife under her husband's will. Some parol proof has been taken explanatory of the testator's intention, all of which is incompetent, as in a case like this the language used must determine the consideration to be given to the writing. The clause of the will brought here for construction reads: "I will and bequeath all my property, real, personal, and mixed, to my wife, Teresa, so long as she remains my widow; but, should she marry or die, I will one-half of my property to her, or, in case of her death, to her relations, and the remaining half to go to my relations." The testator gave the whole of his estate to his wife during widowhood, and provided that, if she should marry or die, (the one event being uncertain, and the other certain,) "I will one-half of my property to her, or, in case of her death, to her relations." It is manifest that the testator intended that one-half of his estate should pass from him to his relations,—that is, his heirs at law; and one-half from the wife to her heirs at law. He was making simply a division of his estate between himself and wife. They were childless, and perhaps each had contributed to the accumulation of the estate he was about to dispose of; and therefore he felt it incumbent on him to so provide as that the one-half of the estate should in no event pass from him to his rela-

tions, and he therefore used the language that causes this trouble,—“or, in case of her death, to her relations.” They were to take from the wife as heirs at law, and not from the will of the testator. He had given his wife the whole estate during widowhood, and in the event of her marrying he wanted the estate divided between his heirs and his wife, and therefore provided that, “should she marry or die, I will one-half of my property to her,” etc. Now it is plain that if he had said nothing more, and the widow had married, she would have taken a fee to the one-half, or if she had died without marrying the fee would have been in her, and passed to her heirs at law. He could not have intended to give her the fee if she married, and a life-estate only if she remained single, in this one-half of the property; and, when using the language, “or, in case of her death, to her relations, and the remaining half to go to my relations,” the testator was endeavoring to make his purpose of having the estate equally divided only the more certain,—that is, “in no event is this half devised to my wife to go to my relations, but at her death to pass to her heirs at law.” This was not intended to divest the wife of the fee, but only to express, in plain terms, the devise of the testator.

The draughtsman of the will in making this effort, however, instead of making it plain has confused the intention of the testator. The testator had given his widow the whole of his estate as long as she remained single, and then, if the will is construed as it was below, he had given her one-half the estate in fee if she married, and if she failed to marry she only had a life-estate in the one-half. This was not the testator's purpose, and the last clause of the will, providing that one-half the estate should pass to his heirs at law, and one-half to the heirs at law of his wife, was, in effect, a division of the estate so as to permit the inheritance to pass from the wife to her heirs, instead of passing by the will from the testator. In our opinion the fee passed to the wife to the one-half of the property, and she had the right to devise it.

As to the account of the appellant presented against the estate of William Skidmore, it is plain that no recovery should be had. It was created more than 15 years before this action was instituted.

The judgment is therefore reversed, and cause remanded for proceedings consistent with this opinion.

#### COMMONWEALTH v. WILSON.

(Court of Appeals of Kentucky. Oct. 5, 1889.)

##### FORGERY—INDICTMENT.

An indictment charging that defendant, for the purpose of defrauding the commonwealth, made, forged, uttered, and put a survey plat and certificate, purporting to have been made by him, under an order of the court, as county surveyor, for one E., which survey was in fact never made, charges the crime of forgery, since, under Gen. St. Ky. c. 103, §§ 2, 3, such writing would, if genu-

ine, have entitled E. to a patent to the land therein described.

Appeal from circuit court, Harlan county.

“To be officially reported.”

P. W. Hardin, Atty. Gen., for the Commonwealth.

LEWIS, C. J. The offense charged in the indictment against the accused is forgery alleged to have been committed as follows: “The said Z. B. Wilson did, on the 30th day of Sept., 1886, in the county of Harlan, and state of Kentucky, unlawfully, and willfully, and feloniously, and with the fraudulent intent, and for the purpose of defrauding the commonwealth of Kentucky and Harlan county out of the vacant and unappropriated lands belonging to said county, make, forge, utter, and put a survey plat and certificate in the name of B. F. Engle, which survey plat and certificate is in the following words and figures, viz: ‘State of Kentucky, Harlan county—set: March 9, 1882, surveyed for B. F. Engle 200 acres of land, by virtue of an order from the Harlan county court for 200 acres, situated in Harlan county, and bounded as follows, [giving the boundary.] Z. B. WILSON, S. H. C. J. H. CALDISON. S. McKNIGHT, C. M. Z. B. WILSON, Marker.’”

It is further alleged that said Caldison and McKnight were not chainmen in making said pretended survey, which was not in fact made at all. Nor was a copy of any such survey recorded upon the surveyor's book by said Wilson, who was surveyor of said county, or any one else. But said plat, certificate, and survey, together with the names of said Caldison and McKnight, were, for the purpose aforesaid, forged. As a demurrer was sustained to the indictment the only question before us is whether the facts stated constitute a public offense.

By section 2, c. 109, it is provided that any person who wishes to appropriate any vacant and unappropriated lands may, on application to the county court of the county in which the same lies, and paying therefor such price as the court may allow,—not less than five dollars per hundred acres,—obtain an order of court authorizing him to enter and survey any number of acres of such land in the county,—not more than 200. And the party obtaining such order may, by an entry in the surveyor's book of the county, (describing the same,) appropriate the quantity of land it calls for in one or more parcels, as he may think proper; but no person shall enter, survey, or cause to be patented more than 200 acres of land in any one county. By section 3 it is made the duty of the surveyor to survey the entries in the succession, in point of time, in which they are made, in the presence of two disinterested housekeepers as chainmen, whose names must be placed at the bottom of the plat and certificate. Such survey must be made within six months after the date of the entry, and a plat and certificate of the survey must be made out by the surveyor and recorded in his books,

and the original thereof, and a copy of the order of the court under which it is made, must be deposited in the register's office within six months after the survey is made; and a patent may issue on the survey within three months after the survey is made, but the legal title shall bear date from the time of making the survey. It is, however, further provided that the register may receive plats and certificates of survey after the time mentioned for returning the same; but, in such case, the legal title shall take effect only from date of the patent. Forgery, as described in 4 Blackstone's Commentaries, 247, is "the fraudulent making or alteration of a writing to the prejudice of another man's rights." Extending the definition it may, with accuracy, be "the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability." 1 Bish. Crim. Law, § 572. It will be perceived that the charge in the indictment is that, September 30, 1886, the accused forged, uttered, and put a survey plat and certificate, purporting to have been made May 9, 1882, by him, as surveyor of Harlan county, for one B. F. Engle, which in fact was never made; and that the two persons (Caldison and McKnight) whose names were placed by him at the bottom of the pretended plat and certificate as chainmen did not act as such. The pretended plat and certificate, in the form it is set out in the indictment, was of apparent legal efficacy, and sufficient, under the statute, to authorize and require the register of the land-office to issue a patent to Engle, thereby divesting the commonwealth of the legal title, Harlan county of the beneficial interests, in the land, and preventing the appropriation of it by any other person. And, though it is not in express terms charged, a patent was actually issued to Engle. It is charged the plat and certificate was forged, uttered, and put with intent to defraud, which, adopting the definition referred to, is sufficient to describe, and, if proved, fix, the crime of forgery on the accused. But forgery, according to Lord Coke, "is property taken when the act is done in the name of another person." He, however, further says that "an offender may be guilty of a false making of an instrument, although he sign and execute it in his own name, in case it be false in any material part, and calculated to induce another to give credit to it as genuine and authentic, when it is false and deceptive." And an example is given in the books where one, having conveyed the title to land, afterwards, for the purpose of fraud, executes an instrument purporting to be a prior conveyance of the same land; for such instrument is designed to obtain credit by deception, as purporting to have been made at a time earlier than the true time of its execution. 1 Hale, P. C. 683; 1 Hawk. P. C. 336. In Bishop's Criminal Law (volume 2, § 585) it is said that, "plainly, the broad doctrine is not maintain-

able that it is incompetent for a man to commit forgery of an instrument executed by himself." And if it be forgery in the case referred to, where the deed was executed by the accused person, it clearly must be so regarded in this case. For not only was the plat and certificate, as charged, fraudulent, but, though made by the accused in person, purported to be not his individual, but official, act as surveyor, wherein the writing was false and deceptive, and whereby only would it have possessed legal efficacy if genuine and authentic. It seems to us, therefore, adopting and applying a reasonable and practical definition of the crime, the facts stated in the indictment constitute the offense of forgery; for the writing, as charged, was made with intent to defraud, was calculated to induce another to give credit to it as genuine, and if it had been so would have entitled Engle to a patent, and was made in the name of the accused in his official capacity, which was to a reasonable intent and of the same effect as if he had made it in the name of another surveyor. The judgment is reversed, with directions to overrule the demurrer to the indictment.

#### COMMONWEALTH v. HOWARD.

(Court of Appeals of Kentucky. Oct. 5, 1889.)

##### FORGERY—INDICTMENT.

An indictment charging that defendant, for the purpose of defrauding the commonwealth, uttered, made, and forged a survey plat and certificate purporting to have been made by him under an order of the court, as county surveyor, for one G., which survey was in fact never made, but which was certified to the land-office, and a patent issued thereon to G., charges the crime of forgery.

Appeal from circuit court, Harlan county.

"Not to be officially reported."

P. W. Hardin, Atty. Gen., for the Commonwealth.

LEWIS, C. J. The offense charged in the indictment against the accused is forgery, alleged to have been committed as follows: "That he did, on the 30th day of September, 1886, unlawfully, willfully, and feloniously, and with the fraudulent intent to defraud the commonwealth of Kentucky and county of Harlan, utter, make, and forge a survey plat and certificate for 200 acres of land in said county, together with the names of John Griffy and Samuel Howard as chainmen, which survey plat and certificate was certified to the register of the land-office of Ky., and falsely and fraudulently obtained a patent thereon in the name of William Gross,"—said survey plat and certificate being as follows: "State of Ky., county of Harlan—set: Surveyed for Wm. Gross, Jr., 200 acres of land, by virtue of an order from the Harlan county court for 200 acres lying in Harlan county, on the Little Black mountain, and bounded as follows, [giving the boundary.] SAMUEL HOWARD and JOHN GRIFFY, C. M. E. G. HOWARD, S. H. C. E. G. HOWARD, Mar." As a demurrer was sustained

to the indictment, the only question before us is whether the facts stated constitute a public offense.

For the reasons stated in the opinion this day delivered in *Com. v. Wilson*, ante, 264, involving substantially the same charge, and which opinion is referred to and is made part of this, we are of the opinion the court erred in sustaining a demurrer to the indictment, and the judgment is reversed, with directions to overrule said demurrer.

#### DEBO v. COMMONWEALTH.

(*Court of Appeals of Kentucky*. Oct. 19, 1889.)

##### GAMING.

1. Under Gen. St. Ky. c. 47, art. 1, § 6, articles seized by an officer, and found by a jury in a summary proceeding to have been used for gaming purposes, may be condemned and destroyed.

2. Act March 25, 1886, § 692, while it amends Gen. St. c. 47, art. 1, relating to gaming, does not, either expressly or by implication, repeal or modify the provision of section 6 as to such forfeiture and condemnation.

Appeal from circuit court, Henderson county.

"To be officially reported."

Gen. St. Ky. c. 47, art. 1, § 6, provides that if a jury shall, in a summary proceeding, find that the table or other things seized by an officer as being used in gambling were so used, they shall be forfeited and destroyed.

*Yeaman & Lockett and John Young Brown*, for appellant. *P. W. Hardin*, Atty. Gen., for the Commonwealth.

LEWIS, C. J. This is an appeal by the claimant of the property from a judgment condemning and forfeiting certain articles seized by an officer, and found by verdict of a jury to have been used, and intended to be used, for the purpose of gaming. The seizure and forfeiture for such cause, and by the summary proceeding had in this case, are authorized by section 6, art. 1, c. 47, Gen. St., which provides, also, for the punishment by fine and imprisonment and disfranchisement of a person found guilty of setting up, exhibiting, and keeping machines or contrivances used in betting or games of chance whereby money is won or lost. The act approved March 25, 1886, (section 692, Gen. St.) was intended, as the title of it indicates, to amend article 1, c. 47, but does not, expressly or by implication, repeal or even modify the provisions of section 6, for condemnation and forfeiture of articles used for the purpose of gaming, but leaves them in full force. Perceiving no error of law in the proceeding, the judgment is affirmed.

#### COMMONWEALTH v. LEWIS.

(*Court of Appeals of Kentucky*. Oct. 24, 1889.)

##### EMBEZZLEMENT—INDICTMENT.

By the laws of Kentucky each county has a right to dispose of vacant lands within its limits under the orders of the county court. *Held*, that an indictment against a county judge for embezzle-

ment in misappropriating the proceeds of vacant land, collected by him as county judge, must charge that he refused to pay over the same in the manner and for the purpose required by law.

Appeal from circuit court, Harlan county.  
"Not to be officially reported."

Abner Lewis was indicted for embezzlement. The court sustained a demurrer to the indictment, and the commonwealth appealed.

*P. W. Hardin*, Atty. Gen., for the Commonwealth.

LEWIS, C. J. The offense of which appellee was accused is embezzlement, charged to have been committed by him in feloniously and willfully misappropriating, misapplying, and converting to his own use and benefit \$1,000 proceeds of vacant land in Harlan county, collected by him as county judge. By statute each county has the right to dispose of vacant land within its limits, at a price to be fixed by the county court, not less than five dollars for 100 acres, and hold the proceeds for county purposes. And as such vacant land cannot be appropriated except in pursuance of an order of the county court of the county where it lies, and upon payment of the price fixed, the accused may be regarded, as stated in the indictment, the proper custodian, in virtue of his office, of the money so collected by him. But the charge, in general terms, as made in the indictment, that he appropriated the money for his own use and benefit, is not sufficient to constitute the offense of embezzlement. For as such custodian he had the right to hold it until required by law to account for and pay it over, and before that he would not be amenable to either a civil action, or criminal prosecution. It seems to us, to make out the offense, it is necessary to charge not merely that he had used the money for his own benefit, but had failed and refused to account for or pay it over at the time, in the manner, and for the purpose required by law, for, while he stands bound and ready to do so when legally required, there cannot be an embezzlement. The judgment sustaining the demurrer to the indictment is affirmed.

#### STRUSS v. MASONIC SAV. BANK.

(*Court of Appeals of Kentucky*. Oct. 26, 1889.)

##### PRINCIPAL AND SURETY—RELEASE OF SURETY.

Plaintiff, holding an overdue note given by S., on which defendant was surety, was induced by the false representations of S., and with knowledge that he was about to make an assignment, to surrender and cancel the note, and accept a new one, signed by S. alone, embracing the amount of the old note and other debts of S., payable in five years, and secured by an insufficient mortgage. Defendant was informed that the note on which he was surety had been canceled, and new security obtained from S. The next day S. assigned, and plaintiff then learned that the mortgage was not adequate security, whereupon it compelled the assignee to accept a release of the mortgage, but for nearly five months it did not notify defendant of the fraud, nor offer to transfer the mortgage to him. All the parties lived in the same city, and the mortgaged property and records were situated

there. *Held*, that plaintiff's conduct discharged defendant from liability on his suretyship.

On petition for rehearing. For former report, see 11 S. W. Rep. 769.

"Not to be officially reported."

*Brown, Humphrey & Davis* and *P. A. Gaertner*, for appellant. *Helm & Bruce*, for appellee.

**PRYOR, J.** In the case of *Gordon v. McCarty*, found in 3 Whart. 407, the action was on a bond given in the orphans' court for the distributable share of one of the distributees of the proceeds of real estate. The distributee could neither read nor write, and the obligor obtained a release from her that, if valid, discharged the surety. The defense to the release in that case was that the writing was not in fact the act of the distributee, and an action within 10 years could be maintained against the surety for the recovery of the money in the hands of the obligor. That case is unlike the one before us. Here, an ordinary business transaction with a bank, where one, being the indorser or the surety for the loan of money, is released by canceling the note. It was in fact destroyed, a new note executed, with the payments extended for a long period, and a mortgage given and recorded to secure its payment. Not only so, the mortgage was executed to secure other claims upon which the surety was not liable. It turned out that liens existed on the mortgaged property, and the obligor had made false representations in regard to that fact and the character of the title. The fraud was known to the bank on the next day after the mortgage was executed, and the bank permitted the surety to remain in ignorance of its purpose to hold him liable on the original obligation for five months, when the surety lived in the same city, and was well known to the officers of the bank. Under such circumstances, this of itself would release the surety. The security given was accepted by the bank, and held during this entire period, when finally, without the consent of the surety, the mortgage was canceled, at the instance of the bank, when it knew that the purpose of its execution was to release the surety. No court of equity would hold the surety liable under such a state of facts; nor will the inquiry (the facts being conceded) be made as to whether or not the surety, in the interval, could have secured himself, if notified of the fraud, as the bank was, the day after it was perpetrated. This court does not mean to hold that a lapse of five months from the commission of the wrong, without notice to the surety, would in every case release the surety; but under the circumstances of this case no liability on his part exists. Petition overruled.

#### BROWN v. CONNELL.

(Court of Appeals of Kentucky. Oct. 26, 1889.)

##### ERECTMENT—ACCOUNTING.

Plaintiff's father, when plaintiff was under two years of age, conveyed land, in consideration

of love and affection, to his wife and four children. He had no other property, and was in debt. A few months afterwards he mortgaged the land, his wife joining in the mortgage. The mortgage expressly provided that it should take precedence over the deed. The father afterwards sold the land to defendant, who paid off, with part of the purchase money, the claim of the mortgagee and another claim against the land. Plaintiff, having sued defendant for his share under the original deed, recovered, on the ground that the statutory limitation for attacking a deed for fraud had expired as to the original deed. *Held*, that plaintiff cannot be compelled to account to defendant for one-fifth of the amount paid by defendant to remove the incumbrances on the land.

Appeal from circuit court, Trimble county.

"To be officially reported."

Action by *W. E. Connell* against *Perry Brown* to recover an interest in land. Judgment for plaintiff, and defendant appeals.

*M. Mundy, Trout & Peak*, and *J. S. Morris*, for appellant. *Wm. Carroll* and *Joseph Barbour*, for appellee.

**HOLT, J.** John J. Connell derived from his father, Jesse Connell, a tract of land of about 283 acres. It was charged with the dower of his mother, Elizabeth Connell, in the estate of her husband. December 29, 1864, John J. Connell, for the recited consideration of love and affection, conveyed it to his wife and four children, the appellee, *W. E. Connell*, being one of them. The grantor was at the time considerably in debt. Some judgments had been lately rendered against him, and executions issued thereon. It does not appear that all of his indebtedness had been sued upon, but certainly some of it had, and his creditors were pressing him for payment. He probably had no property outside of this land liable to execution. March 6, 1865, he mortgaged the land to one *Calvert* for \$1,827.84, his wife joining in the mortgage. It was given, as it recites, "for cash paid by said Calvert for said John J. Connell on judgments, executions, etc., some of which were levied on the land herein conveyed. \* \* \* It is the express understanding that this mortgage is to have precedence over a deed made by John J. Connell to his wife and children, bearing date 29th day of December, 1864, and recorded in the Trimble county court clerk's office." In December, 1868, a portion of the land was sold under an execution in favor of one *Chalfant*, his debt having been created prior to the conveyance by Connell to his wife and children. Thus matters stood, when on August 19, 1875, Connell, by written agreement, sold the land to the appellant, *Perry Brown*, and conveyed it to him, November 1, 1875, for the consideration of \$9,041. Both his mother and his wife and the three children, who were then of age, as well as Calvert and Chalfant, united in the deed. The appellee was then but 12 years old. The claim of Chalfant appears to have been transferred to Calvert, and the claim of the latter, at the time of the conveyance to Brown, amounted to \$3,280.78. The appellant paid it out of the purchase money he had agreed to pay for

the land, and it is evident that this indebtedness of Connell was in existence when he made the deed to his wife and children. The appellant certainly knew of this deed before the conveyance was made to him in November, 1875.

This action was brought by the appellee to recover his one-fifth interest in the land, and rents for the use thereof by the appellant. It was defended by the latter, upon the ground that it was a voluntary conveyance of which he had no notice when he purchased, in August, 1875, and could not, therefore, affect him, as he was a purchaser for value; also that it had in fact been made by John J. Connell to defeat his creditors, and, being therefore fraudulent, it could not affect a subsequent purchaser for value, even if he had actual notice of its existence. The appellant also set up the payment by him of John J. Connell's indebtedness out of the purchase money, and claimed that, in case of a recovery of one-fifth of the land by the appellee, the latter should, upon the ground that he who seeks equity must do equity, be compelled to account for the one-fifth of the indebtedness so paid. The appellant also set up a claim for improvements made by him upon the land. The lower court rendered a judgment for the appellee for one-fifth of the land, and ordered its allotment to him. The appellant appealed to this court. It affirmed the judgment, holding, by the opinion to be found in 85 Ky. 403, 3 S. W. Rep. 794, that while a conveyance which is actually fraudulent as to the grantor's creditors is void as to a subsequent purchaser for value without regard to any notice he may have, either actual or constructive, of its existence, and one merely voluntary, and therefore only constructively fraudulent, is void as to such a purchaser, unless he have actual notice of its existence, yet the protection thus afforded is by the statute of limitation for a limited time only, and that after the lapse of 10 years from the making of the conveyance, whether it be actually or only constructively fraudulent, the title of the grantee cannot be assailed for such reason any more than if he had been an innocent purchaser for value. Chapter 44, Gen. St. art. 1, §§ 1, 2; and chapter 71, art. 3, § 6; *Jones' Adm'r v. Jenkins*, 83 Ky. 391; *Enders v. Williams*, 1 Metc. (Ky.) 346. Upon the return of the cause to the lower court a judgment was rendered defining what portion of the land the appellee should recover as his one-fifth, and allowing to the appellee a certain sum for rents, and to the appellant a certain amount for the permanent improvements made and taxes paid by him upon the land. The court refused, upon the motion of the appellant, to give him a lien upon the land for the one-fifth of the sum paid by him out of the purchase money upon the indebtedness of John J. Connell, and he has again appealed.

If this motion were sustained, it would practically reverse the former judgment of this court. The questions whether the con-

veyance by John J. Connell to his wife and children can be assailed by the appellant upon the ground that it was voluntary, and he had no actual notice of it when he purchased, or whether it was actually fraudulent, are *res adjudicata*. The security and stability of titles required that a time should be fixed by statute after which they could not be questioned for fraud, no matter when it might be discovered. This time having elapsed in this instance before the appellant's right was questioned, he stood in the attitude, as this court decided, of an innocent purchaser. This being so, no equity affecting him can be supported upon the ground that the deed to him was either actually fraudulent or voluntary, and the appellant was without actual notice of its existence when he purchased. The claim of the latter must at least rest upon the ground that the appellee does not occupy the position of an innocent purchaser, owing to the circumstances attending the execution of the deed to him; in short, that it was either fraudulent or voluntary, without actual notice of it upon the part of the appellant.

The appellee has done nothing to support the claim of the appellant to be substituted to the place of John J. Connell's creditors, whose debts were in existence at the making of the deed. He has been guilty of no fraud, and was not *sui juris* when the appellant voluntarily paid the indebtedness as a part of the purchase money for the land. Nor was he a party to the Calvert mortgage, and is not therefore bound by its recitals. Indeed he was not then two years old. The appellant took no assignment of any lien by which any debt on John J. Connell was secured, and he can, in any event, occupy no better position than the general creditors of John J. Connell, and they could not, after the lapse of 10 years from the making of the deed, have assailed it as either voluntary or fraudulent. If, therefore, it be true, as urged, that the appellant is entitled to stand in the shoes of such a creditor, whose debt he paid, yet he is remediless, just as the creditor would be if his claim had never been paid, and he were now asserting it. If the appellant were substituted in his place he could not look to the land, because the creditor could not do so; and, as the statute of limitation estops the appellant from assailing the deed as fraudulent, equally is he estopped as to the assertion of any defense based upon that alleged fraud. The appellant no doubt acted throughout in good faith; but his claim to relief is met by a statutory rule, intended to give repose and secure stability of title, which must prevail both at law and in equity, however much the latter might delight, *ex æquo et bono*, to afford relief.

As to the question of the value of the rents and improvements, the testimony is conflicting; and it is sufficient to say that it supports the action of the lower court in adjusting them. Judgment affirmed.

## HUGHES v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 24, 1889.)

## JUDGE—FORGERY.

1. Act Ky. March 9, 1888, authorizing a circuit judge other than the one regularly elected to preside for the latter when he is absent, or, if in attendance, cannot properly preside in any cause, and when the bar fails to elect a special judge, or shall so request, is authorized by Const. Ky. art. 4, § 28, authorizing the general assembly to provide by law for holding circuit courts, when from any cause the judge shall fail to attend, or, if in attendance, cannot properly preside.

2. An order entered of record stated that S., judge of the district, and G., of another district, having temporarily changed districts by authority of an act of the legislature, S. vacated the bench, and G., having been invited by the unanimous voice of the members of this bar to preside, took the bench. *Held*, that the recital sufficiently showed that the regular judge could not properly preside.

3. An indictment for forgery, charging that defendant did willfully and feloniously make, write, sign, and forge the name of C. to a paper purporting on its face to be a promissory note of said C. to S., and that said name was so signed, made, written, and forged by him without knowledge, consent, or authority of, and with intent to perpetrate a fraud on, said C. and S., and setting out the words and figures of the note, is sufficient.

4. Under the indictment defendant could be convicted though he himself may not have signed the paper, if, being present, he caused it to be signed.

Appeal from circuit court, Daviess county.  
"Not to be officially reported."

*Sweeney, Ellis & Sweeney*, for appellant.  
*P. W. Hardin*, Atty. Gen., for the Commonwealth.

Lewis, C. J. The offense of which appellant was convicted is forgery, charged in the indictment to have been committed substantially as follows: That he did willfully and feloniously make, write, sign, and forge the name of Johnson Cottrell to a paper purporting on its face to be a promissory note of said Cottrell to Schmidt & Co., the words and figures of which are set out, and that said name was so signed, made, written, and forged by him without knowledge, consent, or authority of, and with intent to perpetrate a fraud on, said Cottrell, and also on Schmidt & Co. The indictment contains a statement of all the acts necessary to constitute the offense of forgery, and the demurrer to it was properly overruled; but it is argued the lower court erred in instructing the jury to find the accused guilty whether he signed the name in person, or caused it to be signed by another, if done by him with the intent charged, and without consent or authority of said Cottrell. In our opinion it was the duty of the jury to convict him under the indictment, though he may not have signed it himself, if, being present, he caused it to be signed; for in either case he would be a principal in the crime, and punishable as such. Whether he was or not present when the note was signed was a question of fact, which, in the absence of the bill of evidence heard on the trial, must be presumed to have been correctly submitted to and determined by the jury; for with an incomplete record before us we cannot say the acts necessary to authorize the

instruction and the finding were not proved.

It appears from the transcript before us the following order was, during the same term of court, but previous to the trial of appellant, entered of record: "Hon. L. P. Settle, judge of this district, and Hon. M. C. Givens, of the 8d judicial district, having temporarily exchanged districts by authority of an act of the legislature, the Hon. L. P. Settle vacated the bench. Hon. M. C. Givens, having been invited by the unanimous voice of the members of this bar to preside over this court, then took the bench, and proceeded to the discharge of his duties." The act referred to was approved March 9, 1888, and is as follows: "If at any term of a circuit court the presiding judge thereof shall be absent, or, if in attendance, cannot properly preside in any cause for trial at such term, or if the bar shall decline or fail to elect a special judge, or shall so request, it shall be lawful for any other circuit judge of this commonwealth to attend and hold such term of the court, and while so engaged he shall have and exercise all the powers and authority of the regular judge of said court." The condition upon which another circuit judge than the one regularly elected may, according to the provisions of that act, preside at a term of a circuit court is that the latter be absent, or, if in attendance, cannot properly preside in any cause for trial at such term, and that there shall be a failure of the bar to elect a special judge, or the bar shall so request.

We think the recital in the order sufficiently shows that the regular judge could not properly preside, and the unanimous request for the other judge to preside made it lawful for him to do so. Section 28, art. 4, of the constitution, provides that "the general assembly shall provide by law for holding circuit courts, when, from any cause, the judge shall fail to attend, or, if in attendance, cannot properly preside;" and the scheme devised by the legislature, at the first session after adoption of the constitution, to carry out the provision of that section, was the election, by the attorneys of the court then present, of one of its members in attendance to hold the court for the occasion in place of the regular judge, and subsequently it was made lawful for the parties to agree upon one of the attorneys of the court to preside on the trial, and hold the court for the occasion. But the legislature may, in its discretion, adopt any other mode of holding circuit courts, upon either of the two contingencies mentioned, and provision for the judge of another district to hold the court in such cases is just as clearly within the meaning and intentment of the constitution as the selection of a special judge by attorneys; for the legislature is not restricted to any specific mode of accomplishing the object.

In our opinion the trial of appellant was in every respect legal and regular, and, no error having been committed to his prejudice, the judgment must be affirmed.



## REDMAN v. STOWERS.

(Court of Appeals of Kentucky. Oct. 26, 1889.)

## MALICIOUS PROSECUTION.

1. The petition, in an action for malicious prosecution, alleged that defendant maliciously, and without probable cause, procured a warrant, etc., and also that plaintiff was tried and acquitted. The answer admitted that defendant caused the arrest, but denied that it was done maliciously, and without probable cause, and also denied that plaintiff was tried and acquitted. *Held*, that the answer made an issue of fact involving a trial on the merits, and a demurrer was properly overruled.

2. The alleged malicious prosecution was for *kukluxing* defendant by whipping him in the night. It appeared that at the time of the whipping plaintiff occupied another room in the same house, and on cross-examination he stated that he heard the licks, and knew that defendant was being whipped, and heard a person who lodged in an adjoining room call to him, but that he made no response. On re-examination he was asked why he did not respond, and the question was disallowed. *Held*, that, though the jury might have inferred that the reason was that he was engaged in whipping defendant, yet the ruling will not be held prejudicial, as it cannot be said that he would have given any explanation which would be competent or material evidence.

3. For the same reason, a refusal of the court to permit a witness to state a conversation between those engaged in whipping and defendant will not be held prejudicial.

4. Plaintiff cannot recover if defendant had reasonable or probable cause for causing the arrest, even though he had malice, and though the charge was untrue.

Appeal from circuit court, Pendleton county.

"Not to be officially reported."

Action by E. Redman against W. L. Stowers for malicious prosecution. Judgment for defendant, and plaintiff appeals.

J. T. Simon and R. W. Hall, for appellant.  
L. T. Applegate, for appellee.

LEWIS, C. J. Appellant instituted this action for malicious prosecution, alleging in his petition that appellee maliciously, and without probable cause, procured a warrant from a magistrate charging him (appellant) with *kukluxing* him, (appellee), by whipping him in the night-time, he (appellant) being in disguise, and caused his arrest under said warrant, and confinement in jail upon the charge for two days. It is further alleged that a trial was had upon said charge before the magistrate, and appellant acquitted. It is admitted in the answer that appellee procured the warrant and caused the arrest upon the charge mentioned, but denied that it was done maliciously, and without probable cause, and also denied that appellant was tried and acquitted. As the answer contained a denial of each allegation of the petition, and thereby made an issue of fact that involved a trial upon the merits of the case, the demurrer was properly overruled.

It appears that, at the time appellee was assaulted and whipped in his own house, appellant occupied a room in the same building near to the one where the whipping occurred, and in his testimony, on cross-examination,

stated he heard the licks, and knew appellee was being whipped, and heard a person who lodged in a room adjoining his call to him, but that he made no response; and it is made a ground of reversal that upon his re-examination the lower court sustained objection made to his offer to state why he did not respond to the person who called him while the whipping was going on. Although the jury might have inferred the reason of his silence was that he was, when called, not in his own room, but engaged with others whipping appellee, as the latter testified he was, still as no avowal was made of what it would be, we cannot say that he could or would, if permitted, have given any reason or explanation of his silence that would have been competent or material as evidence, and consequently it does not appear to us he was prejudiced by the action of the lower court complained of. For the same reason, we cannot say appellant was prejudiced by the refusal of the court to permit another witness to state the conversation heard by him between those engaged in whipping and appellee, for it may or may not have had any relevancy to the question of appellant's presence and participation. As the verdict of the jury was for the defendant, it is not material how much the plaintiff was damaged, and in what his loss and damage may have consisted, and it is therefore unnecessary to consider whether the court did or not err in regard to testimony on that subject.

The court instructed the jury that if appellee had caused the warrant issued and appellant arrested and confined in jail, and that if they believed from the evidence it was done with malice, and without probable cause, to believe the charge they should find for the plaintiff the damages sustained by him; also, in their discretion, give punitive damages.

It is well settled that to maintain an action for malicious prosecution the *onus* is upon the plaintiff to show the warrant and the arrest were caused by the defendant to be issued and made, not only maliciously, but also without probable cause. It was therefore proper for the court to instruct the jury, as was done, that if they believed from the evidence the defendant had reasonable or probable cause for causing the arrest and imprisonment of the plaintiff on said charge they should find for the defendant, even though they found he had malice; and, as probable cause is a sufficient defense to such an action, it was not error in the court to instruct the jury to find for the defendant if it existed, even if they believed the charge to be untrue.

In our opinion the instructions given in this case fully and fairly presented the issue to be tried, and in such terms as made it plain what, in legal contemplation, was probable cause and what was malice, and they moreover embodied all the law applicable. Judgment affirmed.



## WILHELM v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 26, 1889.)

## LARCENY—INSTRUCTIONS.

On an indictment charging defendant with stealing goods of the value of more than \$10, it is error to charge as to grand larceny, and to refuse to charge as to the lesser offense.

Appeal from circuit court, Hardin county.

"Not to be officially reported."

*Irwin & Haynes*, for appellant. *P. W. Hardin*, Atty. Gen., for the Commonwealth.

PRYOR, J. The indictment charged the accused with stealing bacon of the value of more than \$10. On the trial an instruction as to grand larceny was given, and no instruction as to the lesser offense. The jury had either to find the accused guilty of grand larceny or acquit. They should have been allowed to say that the offense was petit, not grand, larceny. The judgment of conviction is reversed, with directions to award a new trial.

SOHNEIDER *et al.* v. HESSE *et al.*, (three cases.)

(Court of Appeals of Kentucky. Oct. 29, 1889.)

## RECORD ON APPEAL.

Where six months after a motion for new trial was denied, and after many extensions of time, against the objection of the appellees, a bill tendered was signed by by-standers, it will not be considered, except by consent of parties, when it is apparent that, if prepared in time, the judge would have signed it.

Appeal from Louisville law and equity court.

"Not to be officially reported."

*D. M. Rodman*, for appellants. *H. S. Barker*, for appellees.

PRYOR, J. The record in this case was brought to the superior court by the appellees, and a motion made to affirm as a delay case before the record was complete, and before the time for filing the record by the appellants had expired. The power to affirm the case without an appearance by the appellants may well be questioned, but, as the appellants did bring their record when completed to the superior court, and the record is now here, it is only necessary to determine whether, as that record is presented, the appellants are entitled to be heard on the merits.

It seems to us that there is no bill of evidence in the case, and that, from the pleadings alone, no reversal can be had. The case was decided by the court below and judgment rendered on the 12th of January, 1887; on the 31st of January the motion for a new trial was overruled; on February 2d the order overruling motion for a new trial was set aside; on April 4th the motion for a new trial was overruled, and two weeks given to file bill of evidence; April 18th time extended one week; May 2d bill tendered, and time extended to complete said bill until the 9th; on May 9th plaintiff objects to signing,

and time extended to complete bill until 16th; May 16th two weeks' time to complete bill; May 28d two weeks' time given; June 6th two weeks; June 20th one week; June 27th time extended to July 15th; July 15th time to August 1st; time extended to Oct. 3d; October 3d bill tendered signed by by-standers; on the 4th of April, 1887, the motion for a new trial was overruled, and the bill tendered, and signed by by-standers on the 3d of October, 1887,—a period of six months, lacking one day, the appellees were kept in court for the purpose of completing the bill. Such a practice cannot be indulged, and particularly when the appellants permitted the day on which the bill was to be filed to pass without any extension of time asked for or given on that day. Besides, the appellees were constantly objecting to such a dilatory proceeding, and we perceive no reason why such a bill of evidence could not have been reduced to writing in one or two hours, and still the period of six months passes by before the record is made complete by the bill of evidence. The bill by by-standers will not be read for two reasons: (1) It is apparent from the record that if prepared in time the judge would have signed it. (2) No bill of evidence will be allowed or considered where such delay accompanies its making up, unless by the consent of the adverse party. Judgment affirmed.

## PAGE v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 17, 1889.)

## MURDER—EVIDENCE—INSTRUCTIONS.

1. Where the commonwealth's attorney admits as true the facts to which it is alleged in an affidavit for continuance that an absent witness would testify, it is proper to refuse a continuance and allow the contents of the affidavit to be read to the jury as admitted facts.

2. In a murder trial, proof that deceased could not live, and that he said he could not live, and had given up all hope of recovery, is sufficient foundation for the admission of dying declarations.

3. The admission of a dying declaration that deceased "was shot for nothing," though it is incompetent, is not prejudicial to defendant, where the fact is otherwise satisfactorily proved, and where, according to defendant's own testimony, he could have avoided the homicide.

4. An instruction that if the jury find defendant guilty beyond a reasonable doubt, but doubt whether it was murder or manslaughter, they must convict of the lesser offense, is correct.

5. When accused himself has testified, the fact that he has sworn to an affidavit, that an absent witness would testify to certain facts, which the prosecution has admitted to be true, does not preclude the prosecution from impeaching his testimony, on the ground that it would be contradicting what it has admitted to be true.

6. Deceased, when shot by defendant, was engaged in a quarrel with one D. The court instructed the jury that they should acquit on the ground of self-defense and apparent necessity, if they believed that when defendant shot, if he did so, he believed, and had reasonable ground to believe, that he or D. was in immediate danger of great bodily harm from deceased, and that, in the exercise of a reasonable judgment, it was necessary to shoot him to avert such danger, real or apparent, "unless his own wrongful act, or the wrongful act of said D., made the harm to himself or D., or both, necessary or excusable on

the part of said" deceased. *Held*, that the instruction did not assume that any act of defendant or D. was wrongful, and stated, in substance, that defendant had no right to shoot deceased to protect D. if the latter was in fault, which was correct.

7. Nor is the instruction objectionable, where the following instruction applies the reasonable doubt in favor of defendant to the entire case, for failing to state that before the jury could act on the qualification they must believe, to the exclusion of a reasonable doubt, that some wrongful act of defendant or D. made the harm excusable on the part of deceased.

Appeal from circuit court, Harlan county.  
"Not to be officially reported."

*J. D. Black* and *N. B. Hays*, for appellant. *P. W. Hardin*, Atty. Gen., for the Commonwealth.

**HOLT, J.** While attending an election at the precinct where he voted, in November, 1888, Calvin Pace was shot and killed by his cousin, the appellant, Francis Pace. The deceased was engaged in a quarrel with one Day, which appears to have been provoked by the latter. Just as it ended, the appellant appeared in the road coming towards where the parties were with his gun. When he got within about five steps of the deceased, and without a word being said by either of them, he shot him. He died the next day. It is satisfactorily proven that the deceased was at the time standing quietly with a small pocket-knife in his hand, whittling, probably, and making no demonstration towards the appellant or any one. Indeed, it is probable he did not see the appellant when he shot him, and had no warning of his danger. It is true, the accused testified that the deceased advanced towards him two or three steps with the knife in his hand, and that he then shot him. He is supported in this statement by two other witnesses, one of whom says he was drunk at the time; and all three are not only contradicted in their statements by numerous witnesses, but impeached as to character. The wound upon the deceased was not upon the front of his body, but in the side; and his dying statement was that he had not said or done anything to the appellant, and did not see him, when he shot him. It is evident the killing was needless, and without excuse.

The appellant asks a reversal of his conviction for murder upon several grounds. Several witnesses stated that the deceased was a peaceable man. There was no objection or exception to this testimony, however, and the appellant cannot therefore now complain upon this score. He was indicted, and also tried, at the March, 1889, term of court. He asked a continuance upon his affidavit because of the absence of several witnesses. The presence of all of them was obtained, however, save William Hall, by whom the accused claimed he would prove certain threats by the deceased against his life. The affidavit disclosed that the proposed witness had been arrested and taken away by the United States authorities upon some charge, and no circumstances were stated showing a likelihood of obtaining his presence as a witness

at the next or any future term of the court. But, aside from this, the statements of the affidavit as to what he would prove were admitted by the attorney for the commonwealth to be true; and, the application for the continuance having been refused, they were so read to the jury upon the trial.

Section 189 of the Criminal Code provides: "The provisions of the Code of Practice, in civil actions, in regard to postponement of the trial of actions, shall apply to the postponement of prosecutions on application of the defendant, except that when the ground of application for a continuance is the absence of a material witness, and the defendant makes affidavit as to the facts which such witness would prove, the continuance shall be granted, unless the attorney for the commonwealth admit upon the trial that the facts are true." In 1886, our legislature passed an act providing, in substance, that after the indictment term the attorney for the commonwealth, in order to prevent a continuance on account of an absent witness, should not be compelled, unless the court thought it proper, to admit the truth of what the affidavit of the accused might state he would prove by him, but only that he would so testify if present; and that the accused could upon the trial read the affidavit as the deposition of the absent witness, subject to exception for incompetency, or contradiction by other evidence, or impeachment of the witness. Crim. Code, § 189. It is urged that this enactment is in violation of the constitutional provision, which guaranties to the accused "compulsory process for obtaining witnesses in his favor," and is therefore void. No such question, however, arises. The statements of the affidavit were read to the jury as admitted facts. This practice has been criticised, and has grown up within comparatively late years. The common-law practice required a witness in a criminal case to testify in open court. We recognize the fact that the production of the witness in court is more likely to lead to the fair administration of justice. The truth or falsity of his statement is then the more likely to be ascertained; and, while the speedy administration of the law is highly important to both the accused and the public, yet the great end of a court is to administer justice. This is undoubtedly more apt to be attained by the personal presence of the witness; and this has been the general policy of the law from the date of *magna charta* to the present. It subverts public policy, and guards individual right. If the manner of a witness adds weight to his testimony, the defendant should have the benefit of it; and, if it detracts, the same is true of the state. While the wisdom of the practice has been doubted, and it has often been said that it is not to be encouraged, yet the decided current of authority is that it is not error to refuse a continuance to a defendant in a criminal cause where the state admits that the statements in his affidavit of what he will prove by the absent witness are facts. It is true

that this was denied in the case of *Goodman v. State*, Meigs, 195; but it has been affirmed in *Browning v. State*, 33 Miss. 47; *Van Meter v. People*, 60 Ill. 168; *People v. Vermilyea*, 7 Cow. 369; *Wassels v. State*, 26 Ind. 30; *People v. Diaz*, 6 Cal. 248; and other cases. In such a case the truth of the statements go to the jury as admitted. It is their positive duty to so consider them. They are not open to controversy, and it cannot be said that the accused is deprived of his witness. This being so, he cannot be heard to say that he has been prejudiced. It is upon this ground that the decided weight of authority rests. In our opinion, it should be followed, and the more especially since the section of our Code above cited should not be declared unconstitutional unless it be so beyond question. It does not appear that the commonwealth was permitted, upon the trial, to impeach, either directly or indirectly, the truth of the statements in the affidavit as to what the absent witness would, if he had been present, have proven. It is true, a witness of that name was impeached; but the record shows that another person of the same name testified in the case, and we must presume the impeachment related to him. The accused testified for himself. He thereby placed himself in the attitude of any other witness in the case. He was then liable to contradiction or impeachment; and it cannot properly be said that the testimony impeaching him contradicted, either directly or indirectly, what the commonwealth had admitted to be true. *Lockard v. Com.*, 87 Ky. —, 8 S. W. Rep. 266. It is true, the accused had sworn to the affidavit as to what the absent witness would prove; but the attorney for the state had admitted the statements thereof as facts.

The foundation for the admission of the statements of Calvin Pace as a dying declaration was sufficiently laid. It is well settled that it is inadmissible as such unless made *in extremis*, and under a sense of impending death. If the least hope of recovery exists, it cannot be admitted as evidence; and being *ex parte*, and admitted from necessity, it must be clearly shown to come within the well-established rule. *Peoples v. Com.*, 87 Ky. —, 9 S. W. Rep. 509, 810. Here it was proven, however, that the dying man said, as also the circumstances of the case showed, that he could not live, and that he had given up all hope of recovery. The statement, in substance, was that when he was shot he was not doing anything, did not then see the accused, and that he was shot for nothing. A dying declaration must relate to the circumstances attending the injury. Only so much of it is competent as details the manner of it. So much of the statement as declared "he was shot for nothing" was incompetent; but it merely stated what was otherwise satisfactorily proven. Its non-introduction could not have produced a different result; and it cannot, therefore, be said that the accused was prejudiced by it. Even if the killing occurred as the accused says it did, yet it is

plain he could have avoided taking the life of his relative. The latter had a small pocket-knife in his hand. He was distant from the accused five or six steps; and, even if he did advance towards the appellant two or three steps,—and the evidence shows this to be untrue,—yet the accused could undoubtedly have gotten out of his way without endangering himself.

The jury were properly instructed as to the law of murder and voluntary manslaughter. The accused was given the benefit of the reasonable doubt, and the jury were informed that if they found him guilty beyond a reasonable doubt, but doubted whether it was murder or manslaughter, they must convict of the lesser offense.

In our opinion, the fourth instruction is not open to the objections raised to it. After telling the jury that they should acquit the defendant upon the ground of self-defense and apparent necessity, if they believed, from the evidence, that when he shot the deceased (if he did so) he believed, and had reasonable grounds to believe, that he or Daniel Day was then in immediate danger of great bodily harm at the hands of the deceased, and that, in the exercise of a reasonable judgment, it was necessary, or apparently necessary, to shoot him to avert such danger, real or apparent, this qualification was added to the instruction: "Unless his own wrongful act, or the wrongful act of said Day, made the harm to himself or Day, or both, necessary or excusable on the part of said Calvin Pace." This does not assume that any act of the accused or Day was wrongful; and it only tells the jury, in substance, that the appellant had no right to shoot the deceased to protect Day if the latter was in fault. This is undoubted law. It is also urged, too, that the instruction should have incorporated the idea of reasonable doubt; that the jury should have been told that, before they could act upon the qualification, they must believe, to the exclusion of a reasonable doubt, that some wrongful act of the accused or Day made the harm necessary or excusable upon the part of the deceased. This would have been proper, but it was substantially done. The succeeding instruction applied the reasonable doubt in favor of the appellant to the entire case; and the jury could not well have understood that they could find against him as to any material fact, unless they believed it proven beyond a reasonable doubt. The appellant has been fairly tried by his neighbors, and must suffer the consequences of his cruel and needless act. Judgment affirmed.

#### OVERALL et al. v. BLAND et al.

(Court of Appeals of Kentucky. Oct. 19, 1889.)

#### WILLS—UNDUE INFLUENCE.

1. On the issue of undue influence in procuring a will to be made, the jury were instructed that the fact that testatrix may have had spells or disease that affected her mind while they continued, or that may have injured her mind, will not inval-

idate her will, if at the time she made it she had mind and memory sufficient to make the will, and was not unduly influenced to make it. *Held*, that the instruction was not prejudicial as charging that it was essential, to invalidate the will, that the undue influence should have been exercised at the very moment that testatrix signed it, when undue influence was properly defined in another instruction, and the evidence introduced to show such influence was not confined to that particular time.

2. A refusal to allow witnesses who knew testatrix well, and detailed her conduct and peculiarities from their own observation, to testify as to their opinion as to whether she had mind enough to understand the paper in contest, or could have been taught to understand it, is not prejudicial to the contestants, where the same witnesses testified that in their opinion she had not mind enough to make a will, and understand its nature and contents.

Appeal from circuit court, Hardin county.  
"Not to be officially reported."

*J. P. Hobson, Wilson & Sprigg*, and *J. H. Vanmeter*, for appellants. *Bush & Robertson* and *E. Dudley Walker*, for appellees.

HOLT, J. The will of Maria Bland is assailed upon the grounds of incapacity and undue influence. A great many witnesses have testified *pro et con* in the case. A careful reading of the testimony satisfies us, however, that while the testatrix was occasionally subject to hysteria, and was in some respects peculiar in conduct, perhaps, yet she had capacity, within the meaning of the law, to make a will. She dictated its provisions, and the draughtsman, as well as the attesting witnesses, who had known her for many years, testify unqualifiedly to her then capacity. Moreover, letters subsequently written by her to the draughtsman relative to the paper unmistakably attest her capacity and knowledge of its contents. Many other witnesses who base their opinions upon circumstances detailed by them, and a long acquaintance with her, testify to her competency to execute the instrument. The evidence as to any undue influence over her is not of a satisfactory character. She was a maiden lady, and lived with her two brothers, E. U. and J. H. Bland. The evidence, so far as there is any, pointing to influence over her, relates principally to her brother E. U. Bland, who in the main attended to her business, and to whom she was undoubtedly much attached. It is no doubt true that he had that influence with her which a brother thus situated would ordinarily have with a sister; but influence, unless it be of a character which the testator is too weak to resist, and which deprives him of his free agency, will not invalidate. Several witnesses say that the testatrix was subject to her brother's control. Upon the other hand, there is evidence contradicting such a state of case; and in any event there is no evidence, of a satisfactory character, showing that the brother, if possessed of such influence, exerted it in any way or to any extent in the production of the paper in contest, or that it was the product of such a sinister influence. He so testifies, and there is no satisfactory evidence contra-

dictory of his statement. The paper, after a contest in each court, has been sustained in both the county and circuit court.

Several questions are presented by the appellants' counsel; but only two of them, in our opinion, require consideration. The evidence as to undue influence, while to our minds, as it was to the minds of the jury in the circuit court and the judge in the county court, not of a satisfactory character, yet was sufficient to authorize the question to go to the jury upon proper instructions. The jury were thus instructed upon this subject: "The fact that the testatrix may have had nervous spells or other spells or disease that affected her mind whilst they continued, or that may have injured her mind, will not invalidate her will, if the jury believe, from the evidence, that at the time she made the paper in contest she had mind and memory sufficient to make her will, as set out in the fourth instruction, and was not unduly influenced to make it." It is urged that this instruction, in substance, told the jury that they could not find against the paper unless they believed, from the evidence, that the undue influence was brought into exercise at the very moment the testatrix signed it, and that it limited the question of the exercise of undue influence to the time of the execution of it. The contestants, upon this idea, offered the following instruction, but it was refused: "If the execution of the paper in contest was procured by undue influence, as set out in the foregoing instructions, it is immaterial when such influence was exerted, if it operated upon the mind of Maria Bland at the time of the execution of the paper." If the contention of the appellants be true, then undoubtedly the jury were misinstructed. If a will be assailed upon the ground of undue influence, the inquiry is not merely whether the person exercising it was doing so at the time of its execution, but whether such an influence had been acquired, and was then operating upon and controlling the testator to the extent of destroying his free will. *Taylor v. Wilburn*, 64 Amer. Dec. 186. It is not necessary, of course, that threats or improper influence, exerted in any other way, should be resorted to at the time of the execution of the paper. It is enough if it be afterwards executed under a controlling influence previously put in operation, and which is still controlling the testator to the extent of destroying his free agency. *Davis v. Calvert*, 25 Amer. Dec. 232. In our opinion, however, the jury could not well have so understood the instruction; and especially in view of the fact that undue influence had been properly defined in a previous instruction. By it they were told: "Undue influence, in the meaning of the law, is such influence exerted over the testatrix as to constrain her to do against her will what she is unable to refuse, and to dispose of her property in a manner she would not have done if left to a free exercise of her own judgment and choice." The inquiry before

the jury for evidence showing undue influence over the testatrix had not been limited to any exercised at the very time of making the will. The testimony, so far as any was introduced, as to influence over her, was not confined to that particular time; and we cannot well suppose that the jury, either from its language or the conduct of the case, could have understood the instruction as is now contended by the appellants. Indeed, it is plain they must have understood it in the sense which the law requires in order to invalidate a will, although it does not, in express words, tell them that the exercise of the undue influence is not limited to the time of the execution of the paper, in order to invalidate it, but it is sufficient if it be then controlling the testator.

Several witnesses for the contestants were asked if, in their opinion, the testatrix had mind enough to understand the paper in contest by reading it, or could have been taught to understand it. These witnesses knew her well. They spoke from a personal acquaintance with her. They detailed her conduct and peculiarities from their own observations. We therefore think the question was a proper one, but the contestants were not prejudiced by the refusal of the court to allow it to be asked because these same witnesses testified in substance, that the testatrix had not mind enough in their opinion, to make a will, and understand its nature and contents. The appellants had, in substance, the benefit of an affirmative answer to the question; and it follows that, if it had been asked and answered in the particular form used, it would not have produced a different verdict, or aided in so doing. Judgment affirmed.

#### LOUISVILLE & N. R. Co. v. WILSEY.

(Court of Appeals of Kentucky. Oct. 24, 1889.)

##### EJECTION OF PASSENGERS—DAMAGES.

1. Plaintiff bought a ticket to a point on defendant's road. A wreck occurred on the way, and the train was delayed over night. Plaintiff, being sick, was unable to wait on the train, and asked the conductor if the check he had given him would be good for the next day, and was told it would not. The next day plaintiff boarded another train for his destination. After some dispute as to riding on the check, he offered the regular fare, but, on refusing to pay the extra price demanded when tickets are not bought before entering the train, he was ejected. *Held*, that plaintiff was entitled to damages for such ejection.<sup>1</sup>

2. While plaintiff, in such case, was entitled to more than nominal damages, a verdict for \$2,500 was excessive.

Appeal from circuit court, Rockcastle county.

"Not to be officially reported."

*Hill & Alcorn*, for appellant. *W. O. Bradley*, *F. H. Reppert*, and *A. Duvall*, for appellee.

<sup>1</sup>See, as to the rights of one who attempts to ride on a railway train without a proper ticket, and when he may recover damages for being ejected, *Railroad Co. v. Bambrey*, (Fa.) 16 Atl. Rep. 67, and note; *Wightman v. Railway Co.*, (Wis.) 40 N. W. Rep. 689, and note; *Railroad Co. v. Holdridge*, (Ind.) 20 N. E. Rep. 837, and note; *Thorpe v. Railroad Co.*, (Vt.) 17 Atl. Rep. 791.

PRYOR, J. This case comes to this court by an appeal from the superior court, and involves but one question that we propose to consider. The plaintiff had been ejected from the car of the Louisville & Nashville Railroad Company for an alleged failure to pay his fare from the town of Mount Vernon to the town of London. He boarded the train at the Danville junction a day or two before the trouble with the company originated, and paid the regular fare from that place to London. On the way to London a wreck had taken place on the road, causing the train to stop at Mount Vernon in the evening, and remain there until 4 o'clock the next morning. The plaintiff, being unwell, stated that he was in no condition to remain on the car until the wreck was removed, and inquired of the conductor if the ticket that had been taken up by him, for which a check had been placed in his hat as a substitute, would be good on the next day. He was told that it would not, and, after threatening to sue the company if more was demanded of him, left the train, and remained at an hotel during the night. On the next day he boarded another train belonging to the company destined for London, and, when pay was required of him, claimed that he had paid his passage the day before, but, after some conversation with the conductor, agreed finally to pay the regular price of a ticket, which was 85 cents; but the conductor required a greater sum, under a regulation of the company increasing the fare where the ticket was not purchased at the regular depot. This the plaintiff refused to pay, and he was removed from the train by its officers. The conductor knew, when he ejected him from the car, that he had paid his passage the day before, but persisted in requiring the plaintiff to leave or pay.

There was no reason for such a demand by the conductor, but, on the contrary, with a knowledge of the facts, he ought to have permitted him to travel on the check given him by the conductor the day before, or at least to have accepted from him the regular fare, instead of exacting a penalty, and destroying the evidence of the payment the day previous by tearing up the check that had been given him. The conductor may have supposed that he was discharging his duty in exacting payment, and under the circumstances could not have acted with any malicious purpose, or with the intention to injure the plaintiff; and therefore we think the damages awarded were excessive. That the plaintiff was entitled, as compensation, to something more than his loss of time, is manifest. He was doubtless humiliated and mortified by the action of the conductor, who ought to have known better than to have been guilty of such a wrong; still a verdict of \$2,500, in our opinion, was too much, under the facts proven. One party was determined to be carried to his place of destination upon the fare he had already paid, and the conductor was as much determined that

he should pay another fare, when he knew that the company's own action had caused the delay from which the whole trouble originated.

We have examined the cases carefully where compensatory damages have been awarded in this class of cases, and where greater indignity and insult have been offered than in this case, and the damages were for a much less sum, and still the question as to whether they were excessive was seriously considered. In the case of *Railroad Co. v. Ballard* (recently decided by this court) a verdict of \$3,000 was sustained for the action of the conductor in putting the plaintiff, a female, off the train after it had passed her station, in a lonely spot, late in the evening, and accompanied with acts of insult calculated to enhance the damages. There had been two verdicts for a like amount; the case having been once reversed by this court, and a new trial awarded. The plaintiff had to walk nearly a mile back to the depot alone, and from there to her home, and was confined to her bed on account of the excitement resulting from the conduct of the officers of the train. The case reversed is found in 85 Ky. 307, 3 S. W. Rep. 530. The case affirmed is in 10 S. W. Rep. 429. In this case the appellee, after being put off the train, got on board of a construction train, and returned to Mount Vernon, a distance of two miles. There was no malice alleged on the part of the conductor, and none proven. It is a question of compensation only. While the right of recovery is not confined to nominal damages, a less sum should have been awarded, as the facts are now presented. *Railroad Co. v. Cunningham*, 67 Ill. 316; *Same v. Johnson*, Id. 313; *Railroad Co. v. Flagg*, 43 Ill. 364; *Railroad Co. v. Milligan*, 50 Ind. 399. For the reasons indicated the judgment is reversed, and remanded for a new trial and proceedings consistent with this opinion.

#### PARKER v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 29, 1889.)

##### INTOXICATING LIQUORS—ILLEGAL SALE.

Where, under a local act prohibiting the sale of spirituous liquors in a certain county, it is provided that physicians may prescribe liquor as a medicine, and have it administered to a patient, the law is not violated when a physician goes to a drug-store with the husband of a married woman, whose condition requires whisky, writes a prescription with several ingredients including whisky, which the husband has filled and administers to his wife.

Appeal from circuit court, Rowan county.

"Not to be officially reported."

*Clarke & Saulsberry and Young, Mitchell & Young*, for appellants. *P. W. Hardin*, Atty. Gen., for the Commonwealth.

PRYOR, J. The power of the legislature to regulate and control the sale of spirituous liquors is unquestioned; and in the exercise of this power a law was passed, local in its character, prohibiting the sale and use of vin-

ous and malt liquors in the county of Rowan. It is argued that the act is unconstitutional, and for that reason the case was transferred to this court from the superior court. The physician has the right to prescribe liquor as a medicine, and to have it administered to his patient, under the act in question. The intent and purpose of the enactment was to prevent the sale and use of whisky as a beverage. The facts of the record show that the prescription was made in good faith by a regular practicing physician, and administered to his patient, a married woman, whose condition at the time required it. The physician went to the drug-store with her husband, there wrote the prescription, and it was filled for the husband, who paid the money for it, and administered it to his wife. The prescription was made up of several ingredients, and all in the same bottle. It appears that the whisky was gotten in good faith, for the purposes mentioned, and with no intention of violating the local option law. There is no proof to the contrary. The illustration by Blackstone as to the construction of penal statutes should apply here. A heavy penalty being imposed on any one for shedding blood in the street would not be held to apply to the physician who bled the man that had fallen with a fit in the public way; and so of this local law. While neither the physician, druggist, nor the husband had the right to purchase it to be used as a beverage, or to administer it to satisfy the appetite for drink, the physician, with the right to prescribe and administer it as a medicine, having done so by applying to the druggist to fill the prescription, all of which was done and administered in good faith, was not a violation of the spirit or meaning of the act. And the court, instead of instructing the jury to find for the commonwealth, should have instructed them, if they believed, from the testimony, that it was purchased and used in the manner proven, they should find the defendant not guilty. While all three of the parties—the physician, druggist, and husband—would have been liable if the liquor was obtained as a beverage, or to evade the local law, yet, upon the facts presented, there is nothing upon which to base a verdict of guilty. See *Com. v. Reynolds*, 12 S. W. Rep. 132, (appeal from Fleming, decided at the present term.) Judgment reversed.

#### COMMONWEALTH v. BRYANT et al.

(Court of Appeals of Kentucky. Oct. 24, 1889.)

##### CONSPIRACY—INDICTMENT.

An indictment charging defendants, in the exact language of Gen. St. Ky. c. 29, art. 36, § 3, with "unlawfully confederating and banding themselves together, and going forth armed," is sufficient, though it alleges that defendants' purpose was to rescue a person from jail, which, if accomplished, would be a distinct offense, and does not allege that such purpose was accomplished.

Appeal from criminal court, Pike county.

"Not to be officially reported."

*P. W. Hardin*, Atty. Gen., for the Commonwealth.

LEWIS, O. J. Appellees are accused in the indictment of the crime of unlawfully confederating and banding together, and going forth armed, committed by unlawfully confederating and banding themselves together, and going forth armed with guns and pistols, for the purpose of rescuing from the jail of Pike county one Bryant, who was there for unlawfully selling spirituous liquors in Pike county. The offense with which appellees are charged is described and made punishable by section 3, art. 36, c. 29, p. 468, Gen. St., in the exact language used in the indictment, and we are unable to see upon what ground the demurrer was sustained. The purpose for which it is charged they so unlawfully confederated and banded together and went forth armed was to rescue a certain person from jail, which, if accomplished, would have been a distinct offense. But it was not less an offense in the meaning and language of the law to do what they are charged in the indictment with doing, if done for an unlawful purpose, whether that purpose was actually accomplished or not. Wherefore the judgment sustaining the demurrer is reversed, and cause remanded for further proceedings consistent with this opinion.

#### BARNES v. GREEN'S ADM'R.

(Court of Appeals of Kentucky. Oct. 24, 1889.)

##### PROMISSORY NOTES—PAYMENT.

1. In an action upon certain notes, defendant cannot claim to be credited by the amount due him for services rendered the payee, where such services were rendered before the giving of one of the notes, and the execution of a lien to secure the same and previous notes, as they must be presumed to have been paid for.

2. An indorsement on a note, "June 22, 1881, credit, \$200," shows that the credit was not allowed for the delivery of 140 bushels of wheat of the crop of 1881, valued at \$140.

3. Plaintiff's testator and defendant's father made an agreement by which the former was to pay the latter \$50 per acre for all the land he should gain by straightening the division line between them. The line was straightened, but the quantity was not ascertained, nor was the money paid, during the life of such persons. The allotment to defendant, upon the division of his father's estate, of his own share, and those of certain other heirs which he had purchased, included the land so gained by Plaintiff's testator, which was reported by the person appointed by the court to survey the same to be three acres, but was stated from actual survey by two other surveyors to be seven acres. Held that, in an action upon notes given to plaintiff's testator, defendant was entitled to credit for the amount due, under the agreement, upon seven acres of land, as of the date of the first note.

Appeal from circuit court, Russell county.  
"Not to be officially reported."

W. S. Stone, for appellant.

LEWIS, C. J. Appellee instituted this action to recover on eight promissory notes executed to his intestate, W. M. Green, by appellant, and to enforce two separate liens on a tract of land to pay the debts. Various payments besides those credited on the notes are pleaded; and whether the court erred, and, if so, to what extent, in passing on those defenses, are the questions presented. The

first one of the notes was executed January 24, 1878, and the last one June 8, 1881, the others having been given at different times between those dates, and the consideration of each of them seems to have been borrowed money. All the credits claimed, except two to be hereafter considered, were, we think, properly disallowed, for they were accounts for labor and services rendered before June 8, 1881, when the note for \$486.20 was given, and a second lien on the land was executed to secure five other notes as well as that, and must be presumed to have been then, or at the dates of some of the other notes, settled and paid.

It seems to us the credit of \$140, value of wheat crop of 1881, sold by appellant to W. M. Green, ought to have been allowed; for it is clearly proved the wheat was sold, that it was worth \$1 per bushel, and there were 140 bushels. The only reason we can see for disallowing it must be that it was believed by the lower court to have been accounted for or credited by Green on one of the notes; but we think it was not, according to the evidence, so credited, nor otherwise settled and paid. Only three of the eight notes have any credits indorsed upon them. One, given June 28, 1878, for \$300, has indorsed upon it as of January 19, 1880, \$272.50 for wheat; one, of date April 25, 1879, for \$300, has a credit as of April 18, 1881, by cash, \$150; and the last one, of June 8, 1881, for \$486, has on it this indorsement: "June 22, 1881, credit, \$200." It is obvious the payments made on the first two do not relate to the wheat crop raised by appellant in 1881, and we think it also clear the credit on the last one of them was not made on that account. In the first place, the payment purports to have been made in cash, not in wheat; second, it does not correspond in amount with what Green was to pay for the wheat, which was \$140; and, third, it is not credible that the threshing, sacking, delivery at Green's barn, and weighing of appellant's wheat crop of 1881, to which the witnesses testify, could have occurred as early as June 22, 1881, when the credit of \$200 was indorsed on the note given June 8, 1881. The fact that Green died very soon after the wheat was delivered to him is consistent with, and persuasive of, the correctness of the theory that he never did account for or credit appellant by the amount he agreed to pay for it.

It appears that Ozias Barnes, the father of appellant, owned a farm on the Cumberland river, adjoining the land of W. M. Green, and the latter agreed to pay him at the rate of \$50 per acre for all the land he would gain by making the division line straight through the river bottom, which was done, but the quantity was not ascertained nor paid during the life-time of Ozias Barnes, who died intestate, leaving 11 children. By the judgment in this case, appellant was allowed a credit for \$109, and interest from January 25, 1878, the date of the first one of the notes; being six-elevenths of the value of the land, esti-



mated at about three acres. But it is contended for him that there are in fact about seven, instead of three, acres, and he is entitled to a credit for the whole amount due, instead of six-elevenths. The person directed by the court to survey and ascertain the quantity of land between the old and new division lines of the two tracts reported the quantity at a little more than three acres, and that was adopted by the lower court as the actual quantity. But two other persons, who are practical surveyors, testified they made a survey of the land, and not only state that there are really seven acres, instead of three, but both indicate wherein the other surveyor made a mistake in running lines of the survey. It seems to us, in view of the clear and reasonable statements of the two surveyors, there was such a preponderance of the evidence as to require the court to fix the quantity according to their estimate, instead of the report of the other, who was shown to have made a mistake. It appears that, in the division of the land of Ozias Barnes between his eleven children, the share of appellant, and five others previously purchased by him, were laid off in one tract, the boundary of which covers the small strip obtained by Green where the division line was straightened; and under judgment of the court the tract thus allotted was, by commission on behalf of the other five heirs, conveyed to appellant. It seems to us, therefore, that, as Green still continued after such division to claim, hold, and appropriate the strip of seven acres, his estate should be held accountable for the price he agreed to pay, which the lower court did do; and as appellant has thereby, and to that extent, lost part of the land allotted to him in the division, he is entitled exclusively to the value of the strip as fixed and agreed on between Green and Ozias Barnes. The lower court properly held the estate of Green liable for the land thus obtained by him, but erred in restricting the right of appellant to six-elevenths of the amount, and in determining the quantity of land to be three, instead of seven, acres. He is entitled to a credit upon the debts sued on for \$350 as of January 24, 1878, date of the first note executed to Green. It seems that Green held a certain promissory note of Rogers & Meadows as collateral security for payment of one of the notes sued on; that is, the one for \$90, given November 23, 1879, for which collateral, amounting to \$80, appellant was by the judgment allowed credit. It is, however, contended there was another note on the same parties proved to have been collected by Green, amounting to about \$50, which was improperly disallowed in the judgment as a credit. It seems to us that the same reason exists for disregarding that payment that applies to other rejected accounts heretofore referred to, and it was properly disallowed. But for the errors indicated the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

OSENTON v. NICHOLS.

(Court of Appeals of Kentucky. Oct. 29, 1889.)

PURCHASER PENDENTE LITE.

A purchaser of land from a party to an action involving the right to the land who takes a deed after judgment is rendered in the action, but before the execution of the commissioner's deed in pursuance of the judgment, takes a title subordinate to that of the commissioner's vendee.

Appeal from circuit court, Greenup county.  
"Not to be officially reported."

E. F. Dulin and E. B. Wilcott, for appellant. W. H. Wadsworth, B. F. Bennett, and T. H. Paynter, for appellee.

LEWIS, C. J. As, by the bill of revivor filed by Hannah Seaton in 1853, Henry Hardwick was made a party defendant to the suit of Seaton v. Trimble, etc., commenced in 1851, and duly served with summons, he was concluded by the judgment rendered therein in 1862. For, although by that judgment the suit was dismissed as to the claim of Seaton and other parties to so much of the Logwood tract of 3,000 acres as was embraced by the Grayson 1,200 acres taken therefrom, the title to the residue was at the same time adjudged to be in them, and a partition thereof directed to be made between them, commissioners being appointed for the purpose. It having thus resulted that Henry Hardwick was divested of whatever right or title he had or claimed to that part of 308 acres conveyed in 1839 by David Trimble to him, not covered by the Grayson tract of 1,200 acres, the deed therefor, made by him in 1863, pending execution of that judgment, and before termination of the suit, was ineffectual to invest appellant, his vendee, with either title to or possession of any part of the 3,000 acres outside the original boundary of the 1,200 acres, wherever that is. The land in controversy (45 acres) is included in the boundary of a tract of 254 acres allotted in the division mentioned, and conveyed by commissioners of court to Isaac Trimble in 1864, and by him to appellee in 1867. And it seems to us, as was said in the opinion rendered on the former appeal in this case,<sup>1</sup> that the location of the original line between the 1,200 acres and the residue of the 3,000 acres is decisive of the controversy. The first judgment was reversed because the lower court instructed the jury to find for the plaintiff, who was appellee, if the land in dispute was covered by the deeds of 1864 and 1867, without regard to the true location of the original line of the Grayson tract of 1,200 acres. That error was in the last trial avoided, the jury being plainly instructed not to find for the plaintiff, but for the defendant, unless the land was outside the Grayson tract as it existed before the division was made under the judgment of 1862, as well as within the boundary of the 254 acres. But it is now contended for appellant he was in adverse possession of the disputed 45 acres in 1867, and the sale and conveyance then made by Trimble to appellee

<sup>1</sup> Not reported.



was, *pro tanto*, champertous and void; that moreover such adverse possession had continued for more than 15 years before this action was commenced, and instructions on the legal propositions thus involved ought to have been given, but were erroneously withheld by the lower court. Appellee showed on the trial a regular paper title to the land in contest, emanating from a patent issued by the state of Virginia when Kentucky was a part thereof, to do which it was necessary to give in evidence the record of the suit of *Seaton v. Trimble*. And it seems to us in that view, as well as to show wherein Hardwick and appellant, his vendee, were affected by the proceedings in that suit, it was competent evidence, and the lower court did not, as argued, err in permitting it to be read to the jury.

On the other hand, appellant, being a *pendente lite* purchaser, was, as is well settled, as much bound by the judgment of 1862 as was his vendor, Hardwick. For, although the conveyance was made to him in 1863, that judgment was then in force and so continued, at least to 1864, when the commissioners' deed was made by order of court to Isaac Trimble. Consequently, whatever title appellant acquired to land outside the Grayson tract by the deed of Hardwick was subordinate to the title of Isaac Trimble; and moreover, holding subject to the judgment, he cannot be regarded as being, in any sense, in adverse possession previous to 1864. It does not appear that appellant has ever had the actual occupancy of, nor had inclosed any part of, the 45 acres, except 4 or 5 acres under fence, as to which appellee, by order of record made before submission to the jury, discontinued the action. Assuming, then, what appears from the evidence,—that appellant, under his purchase from Hardwick, took actual possession of that part of the 300 acres inside the Grayson tract,—his possession of that portion outside, except as to the 4 or 5 acres under fence, was only constructive, and consequently did not have the effect to oust Isaac Trimble, or appellee, who held under a title already adjudged superior to that of appellant, nor to give appellant title beyond his actual inclosure. The evidence of appellee is that at the time of the judgment of 1862 he was, under purchase from Henry Hardwick, in possession of the land which was allotted to Isaac Trimble, and, finding he could not hold, took a lease thereon from Trimble, and held as his tenant until he purchased it in 1867, and continued to hold and claim to the extent of his boundary thereafter. Accepting that evidence as true, which must be done, as it is uncontradicted, it is manifest the possession of appellant did not nor could avail to give him title, however long continued may have been his constructive possession and claim under the deed from Hardwick. Consequently, as the record stands, the only question proper for the jury to consider was where the line between the Grayson tract and residue of the 3,000 acres

was, for by that both parties are bound. And, the court having so instructed, the judgment upon the verdict must be affirmed.

LOUISVILLE & N. R. CO. v. WADE, (two cases.)

(Court of Appeals of Kentucky. Oct. 30, 1889.)

APPEAL—JURISDICTIONAL AMOUNT.

Act Ky. April 22, 1882, giving the superior court exclusive appellate jurisdiction in place of the court of appeals, except, among other exceptions, over "judgments for money or personal property, if the value in controversy be greater than \$3,000," gives the superior court jurisdiction of an appeal by defendant from a judgment against him for \$1,600, though plaintiff sued for \$5,000.

Appeals from circuit court, Logan county.

"Not to be officially reported."

Actions by Ella Wade against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals.

W. F. Browder, for appellant. G. W. Eichelberger, G. W. Merritt, S. A. Bass, and I. H. Goodnight, for appellee.

LEWIS, C. J. The amount sued for in this action by appellee is \$5,000 in damages for a personal injury, but the amount for which the judgment appealed from was rendered is \$1,600, and the question involved by appellant's motion to transfer the case to the superior court is whether this or that court has jurisdiction. Sections 2 and 3 of the act approved April 22, 1882, establishing the superior court, provides, in substance, it shall have exclusive appellate jurisdiction over the final orders and judgments of all other courts of this commonwealth the court of appeals then had, except, among other conditions enumerated, "judgments for money or personal property, if the value in controversy be greater than \$3,000, exclusive of interest and costs." By section 16 of the Civil Code adopted in 1851 it was provided that there should be no appeal to the court of appeals over final judgments and orders of other courts in actions or proceedings for recovery of money or personal property, unless the matter in controversy exceeded \$100 in value, or in behalf of the defendant when the judgment of the inferior court is against him for money or personal property not exceeding in value \$100, unless reduced below that amount by a set-off or counter-claim. According to the plain language of that section, the defendant in such action was not allowed an appeal to this court from a judgment against him not exceeding \$100, no matter what may have been the amount sued for, unless it had been reduced below that sum by a set-off or counter-claim pleaded by him. But, February 9, 1858, an act was passed as an amendment to the Civil Code, in these words: "The court of appeals shall have jurisdiction over all judgments for the recovery of money or personal property when the value in controversy is fifty dollars, or over that amount." The question, however, arising in the case of *Tipton v. Chambers*, 1 Metc. (Ky.) 565,

whether the effect of that act was to abolish all distinction between appeals by plaintiffs and by defendants in such action, and to confer jurisdiction in every case when the amount claimed by the plaintiff exceeded \$50, it was held that section 16 was not intended to be at all changed or affected, except as to the sum necessary to confer jurisdiction. And such was the uniform construction of the Civil Code, and practice of this court, until the adoption of the General Statutes, April 22, 1873; section 2, art. 22, c. 28, thereof providing that "no appeal shall be taken to the court of appeals from a judgment for the recovery of money or personal property, if the value in controversy be less than \$50, exclusive of costs," which was, May 5, 1880, amended by simply fixing the sum determining jurisdiction at \$100 instead of \$50.

As the present Civil Code contains no provision regulating jurisdiction of the courts, and the Code of 1851 has been repealed, the question before us must be determined according to the reasonable meaning and application of the words, "value in controversy," as used in the General Statutes, and act of 1882 establishing the superior court. In the case of *Tipton v. Chambers* the same question was before the court as is now presented; and although section 16 of the Code of 1851, then in existence, in express terms disallowed an appeal by a defendant when the judgment against him was less than the determinate sum, unless it had been reduced below it by a set-off or counter-claim, still we think the same reasoning then used to show that the legislature did not intend by the act of 1858 to change the rules of section 16 of the Code of 1851 is persuasive it was not intended by the General Statutes to make test of jurisdiction different from that so long applied by this court, and obviously reasonable and just. In that case the following language occurs: "No set-off or counter-claim was relied on in the court below, and the judgment is for twenty-five dollars. What, then, is in controversy? \* \* \* It is true he was sued for a larger sum than fifty dollars, [then the limit;] but he succeeded in defeating a recovery beyond the twenty-five dollars. Is there any amount now in controversy that can in any wise affect him, except that which was recovered against him in the court below? The plaintiff would have the right to complain because he was defeated in obtaining the sum he sued for, which was fifty dollars; but certainly not the defendant, unless it can be said that the amount which the plaintiff failed to recover is still in controversy, notwithstanding he does not complain of the judgment." Although the effect of that decision was to deny the defendant right of appeal to any court, it was distinctly held that the value in controversy, in the meaning of the statute, related, not to the sum sued for in the lower court, but to the amount for recovery of which the judgment attempted to be appealed from was

rendered; and it seems to us that, as the act establishing the superior court in terms makes the sum of \$3,000 a limit of jurisdiction in this class of cases, the same reason exists, and the same construction should be given to it. For while the plaintiff did sue for a sum within the jurisdiction of this court, and might have complained of and appealed directly here from the judgment for less, the defendant cannot complain that judgment has been rendered for a sum really within the jurisdiction of this court; for the controversy in regard to that part of the amount sued for in excess of \$1,600 has ceased, and is not now a subject of judicial investigation by this or the superior court. The result of adhering to the construction adopted in *Tipton v. Chambers* will be, not to deny the defendant his right of appeal, but simply to transfer the case from one to another appellate court; and moreover, as a different construction would tend in a considerable degree to defeat the purpose of the legislature in establishing the superior court, we feel constrained to sustain the motion to transfer.

#### STAFFORD v. BRUCE *et al.*

(Court of Appeals of Kentucky. Oct. 30, 1889.)

##### NEGOTIABLE INSTRUMENTS—INDORSEMENT.

1. Failure of the indorsee of a note to bring suit within 9 or 10 days after maturity, when, by statute, the court is always open to litigants and the cause may be placed on the trial docket within 30 days after summons, will release the indorser.

2. If the holder omits to bring suit because so requested by the indorser, and the latter agrees to pay the note without suit, the indorser is liable if he made the agreement before his liability was barred by the laches of the holder; otherwise he is not liable.

3. A letter from the attorney of the indorser to the holder, inviting him to aid in an equitable suit to foreclose a mortgage given by the maker of the note to the indorser to secure him thereon, by which suit the claims of other creditors might be made subordinate to that of the holder of the note, does not deprive the holder of the benefit of the waiver of his failure to bring suit within a proper time.

Appeal from court of common pleas, Jefferson county.

"Not to be officially reported."

Action by W. E. Bruce and others against Hugh Stafford on certain promissory notes. On appeal to the superior court, plaintiffs prevailed, and defendant appeals.

*Wm. Lindsay* and *A. E. Willson*, for appellant. *C. H. Gibson*, for appellees.

PRYOR, J. The Louisville Express & District Telegraph Company became indebted to the appellee Bruce & Co., evidenced by five promissory notes, payable at stipulated periods, and all of them indorsed or assigned by the appellant, Stafford. A return of *nulla bona* having been made by the sheriff upon executions issued on judgments obtained by the appellees against the company, the present action was instituted to recover of the indorser, Stafford, who pleads in defense the laches of the holder in prosecuting the obligor

to insolvency. The company and its chief officer resided in the city of Louisville; and by an act establishing the common pleas court, or an amendment to it, that court is always open for litigants; "and all summons executed in any action in said court twenty days, if executed in Jefferson county, or thirty days, if executed in any other county of the state, shall be sufficient to authorize the plaintiff or defendant to place the action on the trial docket for hearing," etc. Some nine or ten days elapsed after the two notes first maturing fell due, before suit was instituted; and, by analogy to cases heretofore decided by this court, such a delay must be regarded as laches on the part of the assignee, and as releasing the indorser from liability. The holder, to continue the liability of the assignor, must sue at the first term of the court, obtain his judgment, and have his execution issued, and returned "no property found." A failure to bring the action at the first term of the court releases the assignor. In *Green v. Page*, 80 Ky. 368, a delay of three days was held not to be unreasonable, but a delay of nine or ten days, without any excuse for not suing, should be held to discharge the indorser; and therefore, as to the two notes, no recovery against the assignor should be had.

It is claimed by the appellees, as to all these notes, that the assignor is liable because it was at his request that suits were not instituted, and his promise to pay without suit. The trouble as to the two notes mentioned is that the assignor was released before the 9th of January, 1885, when it is said this agreement was made; and therefore the mere agreement, or promise to pay without suit, cannot affect his liability on paper that had already ceased to exist. It was at best only a waiver on the part of the assignor of his legal rights, and the promise to pay can only affect the notes upon which his liability existed,—those due, and to become due. The jury, by a special verdict, said that Stafford agreed with the plaintiffs that he would pay the notes without suit against the maker, and requested the appellees not to bring suit. That the appellees were induced to delay by reason of these promises is manifest, we think, from the testimony. The appellant was a large stockholder in the company, and its president, or, at least, had been its chief officer; had taken a mortgage to indemnify him against these liabilities, as well as other obligations upon which he was bound. The company was insolvent, and the prosecution of an action against it would have only lessened the distributable share of each creditor; but, whether so or not, the jury, upon the testimony, has said that the delay in suing was attributable to the action of the appellant, and there was certainly proof in the cause authorizing such a conclusion. There was nothing in the subsequent conduct of the appellant or his attorney that deprived the appellees of the benefit of the waiver on the part of the appellant. The letter of the attorney is an invitation to the appellees to aid in an

equitable action to foreclose the mortgage to Stafford, by which the claims of other creditors might be made subordinate to those of the appellees. The object then seems to have been, on the part of the appellant, to hold on to the indemnity to save the appellees, and doubtless because of his previous promise to pay them without suit, although the contents of the letter would induce the belief that appellant was making an effort to avoid any personal liability. In view of the facts of this case, the appellees are entitled to a judgment for the amount of the three notes last maturing, with the interest. The judgment is reversed, with directions to enter a judgment accordingly.

#### GALVESTON, H. & S. A. RY. CO. v. WIEMERS.

(Supreme Court of Texas. Oct. 22, 1889.)

##### COSTS ON APPEAL.

Under Rev. St. Tex. art. 1482, providing that in appeals from a justice's court to a district court, if the judgment on appeal be against appellant, but for a less sum, he shall recover the costs of the appellate court, and if for the same or a greater sum he shall pay the costs of both courts, the interest pending the appeal should not be counted, in determining the amount of judgment, to ascertain the liability for costs.

Commissioners' decision. Appeal from district court, Medina county; THOMAS M. PASCHAL, Judge.

Action by F. J. Wiemers against the Galveston, Harrisburg & San Antonio Railway Company. Defendant appeals from a taxation of costs.

*S. B. Easty*, for appellant.

HOBBY, J. Judgment was rendered in the justice's court of precinct No. 8 of Medina county against the Galveston, Harrisburg & San Antonio Railway Company, and in favor of F. J. Wiemers, on January 17, 1886, for the sum of \$35, upon a cause of action accruing on August 11, 1884. An appeal to the district court of Medina county, prosecuted by the Galveston, Harrisburg & San Antonio Railway Company, resulted in a judgment against the appellant, upon the same cause of action, for the sum of \$30, with interest thereon from the accrual of the cause of action, August 11, 1884, to the rendition of the judgment, June 17, 1887, at the rate of 8 per cent. interest. This interest amounted to \$6.80, making the judgment aggregate the sum of \$36.80. Judgment was also rendered against appellant for all the costs incurred in both courts. Appellant's motion to retax the costs, and assess such as accrued in the district court against appellee, was overruled. From this ruling this appeal is prosecuted. The ground upon which the motion was made in the district court was that, the judgment of the court being for a less sum (\$30) than that appealed from (\$35) in the justice's court, the costs incurred in the former court should not have been taxed against appellant. The reply to this contained in the bill of exceptions is

that although the judgment against appellant in the justice's court was for \$35, and that in the district court was for \$30, "still the interest on said \$30 pending this appeal, added to said \$30, makes the same more than \$35, the amount of the judgment of the lower court, and therefore the judgment of the district court is greater," etc. To this conclusion of the court appellant excepted, for the reason "that the interest pending the appeal should not be counted, in determining the amount of the judgment, as to computation of costs." The statute (article 1432, Rev. St.) regulating the matter of costs in appeals from the justices' courts to the district court, and the construction of which becomes necessary in this case, provides, in substance, that in cases of appeal by the party against whom judgment was rendered, if the judgment of the court above be against him, but for a less sum, such party shall recover the costs of the court above; if for the same, or for a greater, sum, he shall pay the costs of both courts. In this case it is literally true that the judgment rendered in the district court was for a greater sum than that rendered against him in the justice's court; the former aggregating \$36.80, while the latter was for \$35. But it will be observed that the judgment upon the cause of action proper, and from which the appeal was taken, was a greater sum (\$35) than that recovered in the district court, (\$30,) and that it was only by the addition of the interest pending the appeal that the judgment in the district court was made to exceed the judgment appealed from. If the interest which accrued pending the appeal be deducted, the result is that the judgment in the district court is for a less amount than that complained of, and on account of which the appeal was prosecuted. The object of the statute referred to was evidently to prevent the prosecution of appeals from the justice's court to the district court, which were without merit, and frivolous. But it was not intended to restrict the right of appeal, in cases of erroneous judgments, but to prevent appeals merely for delay; and this is shown by the fact that when, on appeal, the judgment is not reduced, or is for a larger sum, the statute requires the appellant to pay the costs of both courts. On the other hand, if the merit of the appeal is shown in a reduction of the judgment complained of, then to the extent such judgment is reduced on appeal is the error in it shown; and, as the appellee's erroneous judgment has necessitated a resort to the appeal by the appellant to correct the error, the appellee should be taxed with the costs of this proceeding. *Bailey v. James*, 64 Tex. 547. If this be a correct construction of the statute referred to, then, however erroneous the judgment appealed from, as illustrated in a reduction of the amount in the district court, the object of the statute will be defeated, as is made apparent in this case, by the addition of the interest accruing pending the appeal to the judgment recovered in the district

court, making it equal to, or greater than, the judgment appealed from. In the present case, the result of the appeal from the justice's court to the district court was to develop the fact that the judgment recovered against appellant in the former court should have been \$30, instead of \$35. It was therefore for a less sum in the district court than was rendered against appellant in the justice's court. To show this error in the judgment in favor of appellee, a resort to an appeal was necessary by the appellant, and the appellee should be taxed with the costs of the proceedings in the district court. While appellee is entitled to interest pending the appeal, we do not think it should be added to the judgment upon the cause of action, so as to tax the costs of both courts against appellant. We think the judgment should be reversed, and here rendered that appellant pay the costs of the justice's court, and appellee the costs of the district court.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment reversed and here rendered.

*MACEY et al. v. WILSON et al.*

(Supreme Court of Texas. Oct. 23, 1889.)

APPEAL—REVIEW—ASSIGNMENTS OF ERROR.

Assignments of error that "the court erred in rendering judgment for appellee \* \* \* under the law and evidence in this case," and that "the judgment is contrary to the evidence, the burden of proof being upon appellee, she having failed to establish her claim in law and in fact," are too general to entitle appellant to a review by the supreme court of Texas.

Commissioners' decision. Appeal from district court, Llano county; A. W. MOURSUND, Judge.

*Davis & Martin* and *W. S. Maxwell*, for appellant.

ACKER, J. S. N. Macey was plaintiff in an execution against S. R. Wilson, husband of appellee Elizabeth Wilson, and the sheriff of Llano county levied the execution on certain lands. Appellee Elizabeth Wilson, joined by her husband, S. R. Wilson, brought this suit to restrain appellant and the sheriff from selling the lands, upon the ground that they were the separate property of Elizabeth Wilson. The writ of injunction was issued and served. The pleadings made the issue of fraud in the claim of Mrs. Wilson. The court tried the case without a jury, and adjudged the lands to be the separate property of Mrs. Wilson. The injunction was perpetuated. Macey appealed. There is no appearance for the appellees. The judge filed no conclusions, but there is a statement of facts in the record. The following are the only assignments of error: "First, the court erred in rendering judgment for appellee Elizabeth Wilson, under the law and evidence in this case; second, the judgment of the court is contrary to the evidence, the burden of proof being upon appellee, she having failed to es-

tablish her claim in law and in fact." The brief contains neither propositions nor statements under the assignments. Under the statutes, the rules, and many decisions of this court, we must hold that these assignments are too general to entitle appellant to a review of the proceedings and judgment in the court below. *Cattle Co. v. Chisholm*, 71 Tex. 523, 9 S. W. Rep. 479; *Ackerman v. Huff*, 71 Tex. 317, 9 S. W. Rep. 236; *Tudor v. Hodges*, 71 Tex. 392, 9 S. W. Rep. 443; *Houston v. Blythe*, 71 Tex. 719, 10 S. W. Rep. 520. Appellant having failed to point out any error in the judgment of the court below, we are of opinion that it should be affirmed.

STAYTON, O. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

**WALLACE *et al.* v. STEVENS *et al.***

(*Supreme Court of Texas. Oct. 23, 1889.*)

**DEATH BY WRONGFUL ACT—WITNESS—TRANSACTIONS WITH DECEDENT—INSTRUCTIONS.**

1. Rev. St. Tex. art. 2246, provides that no person shall be incompetent to testify because he is a party to a suit. Article 2248 provides that, in actions by or against heirs or legal representatives of a decedent, neither party shall be allowed to testify against the others as to any transaction with such decedent. *Held*, that this did not preclude defendants in an action by the widow of a decedent, in behalf of herself and children, for damages for his alleged wrongful killing, from testifying as to conduct and statements of decedent at the time of his killing, in a personal difficulty with defendants.

2. An instruction that if, at the time decedent was killed, he had abandoned the fight, and defendant "had no reason to believe, and did not believe," that he was in danger of losing life, or of serious harm, at decedent's hands, the killing would be wrongful, is erroneous, as requiring plaintiff to show, not only that defendant had no reason to believe that there was danger, but that he did not believe it.

3. Where there is evidence that one defendant only committed the wrong sued for, it is error to limit the liability to a joint wrong, though that is what the petition alleges.

Commissioners' decision. Appeal from district court, Johnson county; J. M. HALL, Judge.

*McKnight & McDonald, Brown & Fisher, and W. D. Harris*, for appellants.

COLLARD, J. This suit was brought by the appellant Mary A. Wallace, the widow of J. H. Wallace, deceased, for herself and for the use of the children of her deceased husband, for damages, actual and exemplary, resulting from the killing of the deceased by the defendants, L. H. and J. T. Stevens, in a personal difficulty. Over objections of plaintiff, the court permitted defendants to testify in their own behalf as to conduct and statements of deceased, and all that transpired between them and him pending the difficulty. Plaintiff assigns the ruling as error, because she says it is in violation of article 2248 of the Revised Statutes. Article 2246 provides that "no person shall be incom-

petent to testify on account of color, nor because he is a party to a suit or proceeding, or interested in the issue tried." Article 2248 makes exceptions to the general rule in article 2246, as follows: "In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with or settlement by the testator, intestate, or ward, unless called to testify thereto by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent." Following well-known rules of construction of statutes, the supreme court of this state, in discussing the foregoing statutes, has declared that, where a general rule has been established by statute with exceptions, the courts will not curtail the rule, or add to the exceptions, by implication. *Roberts v. Yarboro*, 41 Tex. 452. The exceptions to the general rule laid down by the statute above quoted do not, however, in terms or by implication, include the defendants to this action, so as to deny them the privilege of testifying. This is not a suit by the heirs or legal representatives of J. H. Wallace, deceased. Plaintiff does not sue for any right inherited from deceased; for any compensation he would have been entitled to. Plaintiff sues only for compensation for what she and the children of deceased have lost by the death of the husband and the father,—damages resulting to them which the law declares they are entitled to recover on account of their own loss. Deceased is not represented in this suit. The widow and children merely represent themselves, and sue upon their own claim, allowed by law. We think there was no error in permitting defendants to testify as they did.

The court instructed the jury as follows, upon the doctrine of self-defense: "To justify the killing of J. H. Wallace by the defendants, or either of them, there must have been some act then done by him, or some words then spoken, coupled with his acts, sufficient to produce upon the minds of the defendants, or either one of them, a reasonable apprehension that they, or one of them, were in immediate danger of losing life, or of suffering serious bodily injury, at the hands of Wallace; and the killing must have been done while such danger or apparent danger existed, for, if the killing was done after such danger or apparent danger had ceased, then it would be illegal and wrongful." This charge is correct, and is not complained of by plaintiff. *Blake v. State*, 3 Tex. App. 581; *Patillo v. State*, 22 Tex. App. 593, 3 S. W. Rep. 766; *Conner v. State*, 23 Tex. App. 386, 5 S. W. Rep. 189. The court also instructed the jury that "if, at the time Wallace was killed, he had abandoned the fight, and was fleeing from the fight, and the defendant J. T. Stevens had no reason to be-

lieve, and did not believe, that he or his father was in immediate danger of losing life, or suffering serious bodily harm, at the hands of Wallace, the killing would be illegal and wrongful." Plaintiff complains of this charge because "it makes the question of whether the killing was wrongful depend, not only on the real absence of the reasonable appearance of danger, but also on the actual absence of a belief of danger." This assignment of error is well taken. As a condition of recovery by plaintiff, it required her proof to show that Stevens had no reason to believe there was danger, and that he did not believe there was danger. Plaintiff was not required to show that he did not believe there was danger, but only that, from his stand-point, he had no reasonable grounds to apprehend it. There might have been no danger in fact, and nothing to produce in his mind a reasonable expectation or fear of it, and yet he might have thought there was danger. Plaintiff was not bound to clear his mind of such belief, in order to recover,—to show the actual state of his mind,—but what it ought to have been, viewing the facts as they should have reasonably appeared to him. If, at the time the fatal shot was fired, there was no danger, and Stevens had no reasonable grounds to apprehend immediate danger, to himself or father, the killing would have been wrongful, even though he may have believed differently.

We think the court should have instructed the jury specially as to the separate liability of J. T. Stevens. The petition alleged a joint wrong, it is true, but the jury may have concluded that J. T. Stevens only was guilty of wrong, in which case he would be liable, and it would have been correct to present the jury with that view of the case. It was error to limit the liability to a joint wrong under the facts. *Cooley, Torts, 126; Lavery v. Vansardale, 65 Pa. St. 507, and authorities cited.* The foregoing disposes of the material questions in the case. We are of opinion the judgment of the court below should be reversed, and the cause remanded for a new trial.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment is reversed, and cause remanded.

#### SCHMIDT v. TALBERT.

(Supreme Court of Texas. June 25, 1889.)

##### TRESPASS TO TRY TITLE.

1. Under Rev. St. Tex. art. 4806, providing that where defendant, in trespass to try title, claims the whole premises, and plaintiff shows himself entitled to recover part, plaintiff shall recover such part, the latter may, though his pleadings describe the land as "190 acres off the south end of the south half of section No. 20," introduce in evidence a deed describing the land as an undivided half interest in the south half of the section.

2. Plaintiff cannot dismiss an action of tres-

pass to try title where defendant has set up title, and alleged that plaintiff's claim was a cloud thereon, and prayed for removal of the cloud, as the answer was a plea in reconvention, by which affirmative relief was sought.

Commissioners' decision. Appeal from district court, Wilbarger county.

Trespass to try title, by Joseph Schmidt against J. H. Talbert, as administrator. Judgment for defendant, and plaintiff appeals.

Rev. St. Tex. art. 4806, provides that where defendant in trespass to try title claims the whole premises, and plaintiff shows himself entitled to recover part, plaintiff shall recover such part.

*Jackson & Beckett*, for appellant. *H. C. Thompson* and *F. P. McGhee*, for appellee.

LOCKER, J. Appellant brought this suit in trespass to try title, and described the land sued for as follows: "One hundred and ninety acres off of the south end of the south half of section No. 20." The defendant answered, setting up title in the estate of his intestate, and alleged that plaintiff's claim was a cloud thereon, and prayed for removal of the cloud. On the trial, the plaintiff offered in evidence the deed describing the land as an undivided half interest in the south half of the section. The defendant objected to the introduction of the deed upon the ground that it purported to convey an undivided half interest in the south half of the section, instead of 190 acres off of the south end of the south half of the section, as described in the petition. The objection was sustained, and this ruling is assigned as error. We think the deed should have been admitted over the objection urged against it. Being sufficient in other respects, the description would have sustained plaintiff's claim to the extent of an undivided half interest in the land described in his petition. Rev. St. art. 4806; *Hutchins v. Bacon, 46 Tex. 414; Williams v. Davis, 56 Tex. 255.*

On the exclusion of the deed, plaintiff asked leave to withdraw his announcement, which was granted. He then asked that the suit be dismissed, which was refused on the ground that defendant's answer was in the nature of a plea in reconvention, upon which he was entitled to a trial. It is contended that the court erred in this ruling, but we do not think so. The answer was a plea in reconvention, by which affirmative relief was sought. The plaintiff could not deprive the defendant of a trial of the case made by the answer by taking a nonsuit. *Egery v. Power, 5 Tex. 501.* Other questions raised are immaterial, and will not be discussed. For the error in excluding the deed we are of opinion that the judgment of the court below should be reversed, and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

## GRIFFITH v. LAKE.

(Supreme Court of Texas. Oct. 28, 1889.)

## ACTIONS ON CONTRACT—EVIDENCE—DAMAGES.

1. A party to an action on a contract cannot read letters purporting to have been written by himself to the other party as evidence that the contract was as he claims, in the absence of evidence that the other party received and acted on, or agreed to act on, such letters.

2. In an action for failure to deliver railroad ties under a contract of sale, evidence that plaintiff bought ties at other places than that to which defendant was to deliver them, for which he had to pay more than he was to have paid defendant, will not sustain a judgment for him for the difference in price.

Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

W. D. L. Borum and V. B. Harris, for appellant.

STAYTON, C. J. In this cause there was a controversy between the parties as to the terms of a contract made by appellant to sell and deliver railroad ties to appellee. As evidence that the contract was as appellee claimed it to be, the court, over proper objection, permitted him to read in evidence several letters purporting to have been written by him to appellant. There was no evidence that appellant ever received such letters, or in any manner acted or agreed to act upon them, and they should have been excluded. A party cannot make evidence for himself in such manner.

If the contract was as either party claimed it to be, the ties were to be paid for at a fixed price, delivered on board the cars at a point named, in Montgomery county, and from that place were to be transported, at cost of appellee, to Fort Worth or that vicinity. Under such a contract, for the purpose of proving that he had suffered loss by the failure of appellant to furnish ties, appellee made proof that he had bought ties at Fort Worth, or other places than that at which he was to receive ties from appellant, and that, for the ties so bought, he was compelled to pay more than he had agreed to pay appellant, and on such evidence appellee recovered a judgment for the difference between them and the price he paid. On such evidence no proper judgment could be rendered, for, if appellant had failed to deliver ties in Montgomery county, the difference in the price at which they could have been bought there, at the time of the failure to deliver, and the price agreed to be paid, would have furnished ordinarily the measure of damages. To make the price of ties at Fort Worth or in that vicinity the criterion would be to place on appellant the burden of the cost of transportation from Montgomery county. This he had not assumed, whether the contract was as contended for by the one or the other. For the want of sufficient evidence to sustain the verdict, the court below should have granted a new trial. For the errors of the court noticed, the judgment will be reversed, and the cause remanded.

## HUME et al. v. HERNSTADT.

(Supreme Court of Texas. Oct. 22, 1889.)

## BOUNDARIES—EVIDENCE.

Where there is evidence that a surveyor was mistaken as to where he was when he located a certain survey, it is proper to allow the survey to stand as he testifies he located it, without crediting his testimony as to where he was.

Commissioners' decision. Error from district court, Limestone county; SAMUEL R. FROST, Judge.

Trespass to try title, by E. Hernstadt against J. L. & G. T. Hume. Judgment for plaintiff, and defendants bring error.

L. J. Farrar, for plaintiffs in error. Burrow & Kincaid, for defendant in error.

COLLARD, J. The conclusion of the court below was that the line dividing the Martinez, the Taylor, the Plasters, and the Moore, on the north, from the Buckner, the Ford, the Punderson, the western W. G. McKenzie, and the eastern McKenzie surveys, on the south, should be established as plaintiff claimed it should be; that the Taylor survey extended south to this division line; but that the Plasters, while it called to extend south to the McKenzie and Punderson, was not, in fact, located on that line, but was actually run and located by the surveyor some 250 *varas* north. So, by the judgment of the court, the plaintiff below recovered the land claimed by him on the Taylor, and the defendants recovered the land south of the Plasters, as established by the court. The judgment of the court in effect finds a vacancy between the south line of the Plasters and the north line of the McKenzie and Punderson. This conclusion of the court is attacked by several assignments of error on the part of defendants below; all of which may be considered together as a denial of the court's findings. Both the parties insist that the disputed line is one continuous line, running north, 60 east, dividing the surveys above named; defendants insisting that the line is north, where the court fixed the south line of the Plasters, and plaintiff below insisting that it is south, where the court fixed the south line of the Taylor. If we consider only the evidence supporting the position of defendants, we should have to decide with them; but, if we take only the evidence for plaintiff, we could not avoid a decision in his favor. The evidence for defendants shows that the north-east corner of the western McKenzie survey is where defendants claim it to be. Philpot, surveyor, testified that, when he went out to locate the Plasters and the Hough in 1848, he had no difficulty in finding the bearing trees then standing,—a mesquite and an elm; and that now he finds the stumps of these trees, the mesquite in exact course and distance, and the elm in the right course, but not at the exact distance. He is corroborated by county surveyor Roberts, who now finds the stumps on the ground as stated by Philpot, and who also says that the corner so located is at or near where it should



be according to the east line of the McKenzie, as he thinks he finds it, by running from what he says is the south-east corner of the McKenzie. Philpot says there was in 1848, and he and others say there is now, an old marked line running from this supposed north-east corner of the McKenzie, which corresponded to the age of the McKenzie field-notes made in 1839. So he located the Plasters on this line, calling to begin 68 *varas* north, 60 east, of the McKenzie corner, running south, 60 west, passing the creek at 800 *varas*, instead of 780, as called for in the McKenzie field-notes; making a discrepancy of only 2 *varas* in the respective calls to the creek. He located the Hough survey on the west side of the Plasters, but it was abandoned, and is now covered by the Taylor, in part at least. This line on which the Plasters is located extends on westwardly, and, according to defendants, reaches the north-west corner of the Punderson, and the north-east corner of the Ford, witnessed by two post oaks,—trees called for in the Punderson and the Ford as one, “20 inches in dia., bearing N., 15 E., 37 *vs.*,” and the other, “18 inches in dia., brs. N., 30 E., 42 *vs.*,”—the large tree standing at the right course and distance; the smaller one fallen on the right course, but at a greater distance by 4 or 5 *varas* than called for. Roberts corroborates Philpot in this, and both say there is a cross on the standing tree. The Taylor south line is 250 *varas*, or about that, south of this line. Running from the south-west corner of the Taylor, 250 *varas* north, 30 west, and then about 600 *varas* north, 60 east, these post oak trees are reached. On this line running near the post oaks the creek is crossed but once, but running on the south line of the Taylor the creek is crossed several times. Both the Hough and Taylor field-notes call to cross the creek several times. Philpot cannot account for this miscall of the creek on his Hough field-notes, unless, as he says, he mistook some ravines or “dug-outs” as the creek. Philpot does not recognize the topography of the country, or identify the corner at the north-east of the McKenzie from memory, but from his calls, and what he now finds on the ground to correspond with them. The line from the post oak corner is traced at north, 60 east, on a variation of 8.15; while all the other lines in the same block of surveys made by the same surveyor in 1839, and his associates, are run on a variation of 9.30 or 10. The line running to the post oaks crosses two creeks where it is marked, and running on the course called for in the original field-notes of the McKenzie and Punderson, from the marks on one creek, brings the line on one side of the trees, and running from the marks on the other creek the line comes out on the other side of the oaks, from which it was supposed there were two old lines here, but, when the line is traced on a variation of 8.15, it is seen that there is but the one line. Running from the south-east corner of the western McKenzie, at what

is called the “Pepperwood Corner,” in a short distance the creek is crossed four or five times. The field-notes do not call for the creek where the line does cross, but at 500 *varas* calls to cross the creek, when in fact it only crosses a depression,—a shallow slough that has clay from a foot to a foot and a half from the surface. The pepperwood tree is not there, nor is the elm, as called for; but there is a pepperwood sprout in the right course, and a young elm near where the old elm was called to be, but on the wrong course. When the compass is set for the pepperwood, the call for the elm does not fit; and, when set for the creek, the witness trees are out of place.

Roberts and several other surveyors testify that there is an old marked line on the south of the Taylor and the Plasters. The south-east corner of the Buckner is found, and an elm that is taken to be the north-east corner of the Thompson, and the inner north-west corner of the Ford. Roberts says: “There is an old marked-line running N., 60 E., from the Martinez supposed S. E. corner, and it is marked also along the south line of the Plasters and the Taylor; and this is the line that corresponds with the plaintiff’s claim.” Again: “I know where the south line of the Taylor is on the ground. Its S. W. corner is well defined, and its south line marked. The Plasters south line is also marked on the ground, and is a continuation of the south line of the Taylor. This is the line claimed by plaintiff as the north line of the McKenzie and Punderson. When I first saw this line, it seemed to be old, but it seems to me not so old as the upper line claimed by defendants,” which is 250 *varas* northward. The Punderson and McKenzie were surveyed in 1839, the Taylor in 1857, and the Plasters in 1852; but it will be noted that the Plasters was not run here, according to Philpot. Gilbert testified that he was with one Starr, a surveyor, who was six or seven days testing the lines and corners of the Martinez. He says they commenced at the south-west corner of the Taylor for the south-east corner of the Martinez; ran the east line of the Martinez course and distance for its north-east corner, then the north line, finding it marked for more than a half mile, old marks; ran on course and distance for the north-west corner, where, finding no bearings, a stake was driven down to mark the place; ran down the west line to the north-east corner of the La Coste finding bearing; and then ran back course and distance for the north-west corner of the Martinez, which brought them to the stake, from which they marked off the places where the bearings ought to be, dug down in the ground at such places, and found roots of trees or stumps that were of the kind called for in the field-notes. They continued on the west line of the Martinez distance to the north line of the Buckner; then course and distance for the south line of the Martinez. At the north-east corner of the Buckner, and north-west corner of the Ford, on the line, found an old



stake. Examined for bearings. Found none standing, but found two mesquite stumps standing about three feet high that fit the calls for the bearings for course and distance. Ran on the rest of the south line of the Martinez, and were brought to the south-west corner of the Taylor, where they started from. Witness says this line was also tested from a known corner of the Ford, Buckner, and Thompson from the south, "and it came out in few *varas* of not quite reaching the line as indicated by the south line of the Taylor. They found two corners of the Thompson, three of the Ford, and the south-east corner of the Buckner." Witness states that he was at another time, with another surveyor, running these surveys from the north-east corner of the Thompson,—a well-defined corner,—and ran over the stake they had before found at the north-east corner of the Buckner.

We have recited sufficient of the testimony to show that there was ample proof to justify the court in establishing the disputed boundary where the plaintiff claimed it to be. There is nothing in the evidence of such character as would require the court to find that their theory of the facts proved was indisputably correct; on the contrary, there is an amount of the evidence which, if the court accepted it as true, would require him to find, as he did, that the north line of the McKenzie, the Punderson, the Ford, and the Buckner was not the line on which Philpot located the Plasters. Full credit was given to Philpot's testimony,—to the facts he testified to; but the court did not, in view of other facts, arrive at the same conclusion. When he located the Plasters, the court finds that he thought he was on the McKenzie north line, but that he was in fact above it. Hence the court properly allowed the Plasters to stand as he said he located it; but finding that the north line of the Punderson and Ford was further south, and that the Taylor was located on it, it was correctly decided that plaintiff should recover to that line. We conclude the judgment of the court below should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

#### DREY v. DOYLE.

(Supreme Court of Missouri. Nov. 4, 1889.)

BONA FIDE PURCHASERS—LANDLORD AND TENANT  
—NOTICE TO QUIT.

1. Under Rev. St. Mo. § 698, providing that no conveyance shall be valid except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record, the notice to a purchaser of real estate which will make his interest therein subject to a prior unrecorded lease, is a question of fact, and in an action by him against the lessee it is sufficient to instruct the jury that knowledge of such facts as would put an ordinarily prudent person upon inquiry in regard to defendant's title, and lead him to discover the truth respecting it, is

actual notice, and that knowledge of defendant's possession is evidence tending to show actual notice of his title.

2. An instruction that, to entitle a purchaser to protection against a prior unrecorded lease, it must appear otherwise than from the mere recital of the deed that he paid a valuable consideration, is properly refused, where in such deed he assumes the payment of an incumbrance upon the property, which, of itself, constitutes him a purchaser for value.

3. Where the vendee sends to the lessee a notice to quit, which is irregular in respect of the time for its expiration, the lessee waives the irregularity by replying that he holds a lease from the grantor, and intends to retain possession until its termination. BARCLAY, J., dissenting.

Appeal from St. Louis circuit court; AMOS M. THAYER, Judge.

Jos. S. Laurin, for appellant. John R. Christian and David Goldsmith, for respondent.

BLACK, J. This is ejectment for a lot in St. Louis upon which there is a livery stable. Doyle, the defendant, leased the property from Mr. Lucas for a period of five years, the term ending the last of May, 1884. The lease, though in writing, was never recorded. The evidence tends to show that at the expiration of the lease the parties agreed upon a renewal for four years upon the same terms, except the rents were increased from \$720 to \$840 per annum, payable monthly. Defendant continued to occupy the premises, paying the agreed rental. By a writing, which was never recorded, bearing date the 21st June, 1884, but in fact executed not earlier than 21st June, 1886, the lease was renewed for the further period of four years, thus reaching back and covering the two years for which there was no written lease. Mr. Lucas conveyed this and other property to Mr. Nelson by a deed executed and recorded on the 9th July, 1886. Nelson conveyed the undivided one-half to Hammitt, and these two persons conveyed the lot in question to plaintiff, Drey, by a deed dated the 14th and recorded the 28th July, 1886, for the recited consideration of \$20,000. Nelson and Hammitt were to have the July rents, which were collected by Turner, who was the agent of Mr. Lucas, and paid to them. This is the only evidence tending to show that they had any notice of the renewed lease. Turner had collected the rents for several years, and he says he did not know that defendant had a written lease. When plaintiff purchased he evidently knew the defendant occupied the property as a tenant on some terms. He says he saw defendant at the stable after he had made the purchase and paid part only of the purchase money; that he told defendant of the purchase, and asked the latter what rent he would pay; that defendant said he would pay the same he had been paying to Lucas, but not a cent more, unless better improvements were put upon the property; that defendant did not then claim to have a lease; and that he (plaintiff) first heard of the written lease after he had completed the purchase, and then through defendant's attorney. De-

fendant says he told plaintiff of the lease in the conversation at the stable just mentioned; that plaintiff and another person came to the stable in the preceding February to look at the property for a warehouse, and he then told them of his lease. This conversation is denied by plaintiff. On this evidence the court gave a number of instructions, one of which is as follows: "(No. 6.) By the term 'actual notice,' as used in the instructions, the jury are not to understand that plaintiff and said Nelson must have actually seen the written renewal of said lease, or been informed of its existence. Knowledge by them of facts, if they had such knowledge as would put an ordinarily prudent person on inquiry as to the nature of defendant's title, and lead him to discover the truth respecting the same, is equivalent to actual notice. And the court further instructs you that the fact, if it be a fact, that the defendant was in the open, notorious possession of the premises in controversy at the date of the respective purchases by plaintiff and Nelson, and that they were aware of such possession, if it appears that they were aware of such possession, is evidence tending to show actual notice of defendant's title."

The defendant takes the ground here that possession by him and knowledge thereof by these purchasers is actual notice to them of his renewed lease, and that the jury should have been so instructed in terms. The instructions asked by the defendant and refused by the court all proceed upon the theory that such possession and knowledge is evidence from which the jury could infer notice, and all this is embraced in the instructions given. Having asked no instructions presenting the theory of law now contended for, he is in no position to demand a reversal because the instructions given do not go as far in his favor as they might have gone. But the part of the instruction in question goes far enough. According to our statute, "no such instrument in writing shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record." Section 693, Rev. St. What then is actual notice, within the meaning of this act? This court said in *Vaughn v. Tracy*, 22 Mo. 420: "The former [actual notice] was actual knowledge or information; and the latter [implied notice] facts and circumstances not amounting to knowledge or information, from which the law conclusively presumed notice, and which it would not allow to be contradicted by contrary evidence. Actual notice, like any other fact, might be proved by direct evidence, or inferred from the facts and circumstances of the transaction; but however proved, whether by direct evidence, or inferred from other facts, it was actual notice, and clearly distinguishable from implied notice. \* \* \* We think the legislature here referred to actual notice as contradistinguished from implied notice, both of which were well-known terms in our

law when the act was passed; and we all concur in reversing the present judgment upon the ground that possession is not, as the circuit court seemed to suppose, as a mere matter of law, actual notice, within the meaning of our recording acts." That case came before this court again, and is reported in 25 Mo. 318. The plaintiff had been in possession of a mill-site, with an acre of ground attached, for eight or ten years, claiming under an unrecorded purchase. The defendant purchased a tract of which the mill-site was a part. He had never seen the land, but his declarations were put in evidence to the effect that his grantor told him plaintiff had a mill on the land and would have to move it now. The court, in effect, instructed that possession by one claiming to have previously purchased was sufficient evidence of notice of such purchase, if the possession was known to the subsequent purchaser at the time of his purchase. The instruction was disapproved, this court, among other things, saying: "The question of fact for the jury was whether the defendant purchased with 'actual notice' of the prior unrecorded conveyance to the plaintiff, or, in other words, whether he believed, when he bought the land, that his grantor had previously sold the mill tract to the plaintiff." And further on it is said: "But this possession and apparent ownership, even if brought home to the subsequent purchaser, do not constitute, in point of law, actual notice of the prior deed, within the meaning of the statute. It is evidence of such knowledge, and, under ordinary circumstances, ought, I think, to satisfy a jury that the party purchased with knowledge of the prior deed." *Maupin v. Emmons*, 47 Mo. 304, was an action of ejectment. Defendants were in possession under an unrecorded deed from Hammack. Plaintiffs claimed under a purchase upon execution against Hammack, and there was evidence tending to show that one of the plaintiffs knew defendants occupied the farm as owners. The court said: "The actual notice required by the statute is used in contradistinction to the constructive notice given by a record. It does not mean that there must necessarily be direct and positive evidence that the subsequent purchaser actually knew of the existence of the deed. Any proper evidence tending to show it, facts and circumstances coming to his knowledge that would put a man of ordinary circumspection upon inquiry, should go to the jury as evidence of such notice." The same doctrine is asserted in *Shumate v. Reavis*, 49 Mo. 333, and in *Whitman v. Taylor*, 60 Mo. 127. "Notice," it has been said, "may be either actual or constructive. It is actual when the purchaser either knows of the existence of the adverse claim or title, or is conscious of having the means of knowing, although he may not use them. Constructive notice is a legal presumption, and will be conclusive unless rebutted, and in many cases it cannot be gainsaid or denied even by evi-

dence of the absence of actual knowledge or notice." *Speck v. Riggis*, 40 Mo. 405; *Rhodes v. Outcalt*, 48 Mo. 867.

Some confusion has arisen in the use of the words "actual," "presumptive," and "constructive" in defining notice. This confusion in the use of the terms is not generally noticed by the text-writers. 2 Pom. Eq. Jur. § 593. According to some authors and courts notice is actual or constructive; and actual notice is divided into direct or positive, and indirect, implied, or presumptive notice; the difference between presumptive notice and constructive notice being that the former is an inference of fact which is capable of being explained or contradicted, while the latter is a conclusion of law which cannot be controverted. Bisp. Eq. (3d Ed.) § 268. This division furnishes a satisfactory explanation of the use of the terms.

Now from the line of former adjudications of this court it is plain to be seen that the notice which will postpone a recorded instrument, affecting real estate, to a prior unrecorded one, must be actual notice. Such notice may be shown by direct evidence, or it may be inferred from facts and circumstances. The question is one of fact, and is to be determined like any other fact. Circumstances coming to the knowledge of the subsequent purchaser, which would put a prudent person upon inquiry, should go to the jury as evidence of notice. In short any evidence tending to show knowledge of the prior unrecorded instrument should be received as evidence of notice. The inference to be drawn from the facts and circumstances is one of fact and not of law. Possession and knowledge thereof will, in ordinary cases, be good proof of notice of the title under which the party in possession claims. Such evidence, under other circumstances, will be of little value. While there is, in this case, evidence showing that these subsequent purchasers knew defendant occupied the property as a tenant on some terms, there is other evidence from which they might well have concluded that he had no written lease, and was, under our statute, a tenant from month to month.

We are cited to cases which hold that possession is "constructive" notice to the subsequent purchaser of the title under which the person in possession claims. But, placing no stress upon the different wording of the statutes in some of these cases, they are not in accord with the rulings of this court. The recording act is based upon a principle of sound policy, and ought not to be frittered away by new departures. The old ones go quite far enough. The recording act is designed to protect persons who act in good faith, and ought not to be made the means of committing a fraud. If the subsequent purchaser is conscious of having the means of knowledge of an adverse claim, and does not use these means of information, he ought to be charged with such information as a fair and reasonable pursuit of them would have

disclosed. He may not shut his eyes to circumstances which would put a prudent person upon inquiry. All this, we conclude, is asserted in the instruction given most favorably to the defendant.

The defendant asked and the court refused the following instruction: "(No. 10.) The court declares the law to be that the registration act is for the protection of *bona fide* purchasers; and, to entitle Nelson, who purchased by deed from Lucas, July 9, 1886, to such protection against an unrecorded lease, he must have paid a valuable consideration for the property, and this fact must be proven by other testimony than the mere recital of the deed that such consideration was paid." This instruction is material only in the event that the plaintiff is found to have been a purchaser with notice. If he was a purchaser with notice he may protect himself, under the purchase from Nelson, if the latter was a purchaser for value without notice. The only controverted question presented by the instruction is whether the deed to Nelson is evidence of the payment by him of a valuable consideration, for there was no other evidence upon that subject. This deed recited that Nelson had paid to Lucas in hand \$225,000, and contains the further statement that the grantee assumed the payment of an incumbrance on the property, evidenced by a deed of trust, amounting to \$135,000, as part of the purchase price. The assumption of debt due by the grantor, it is held in New York, is a valuable consideration under the recording act of that state. *Jackson v. Winslow*, 9 Cow. 13; 2 Pom. Eq. Jur. § 747. There was here an irrevocable agreement on the part of Nelson to pay the incumbrance, and that, of itself, constituted him a purchaser for value. The instruction was properly refused on this ground, and the question made, whether the mere recital of payment in this deed is evidence of payment, becomes an immaterial one.

Finally it is insisted that the notice to quit is defective, because it directed defendant to yield up possession on the 1st September, 1886, instead of the last day of August of that year. The rents became due on the first day of each month. The notice to quit bears date the 30th July, 1886. It begins by saying: "Pursuant to the statute in that behalf provided, I hereby give you thirty days' notice in writing of my intention to terminate your tenancy," and, after describing the premises, concludes, "and I require you to surrender up possession of said premises on the first day of September, 1886, pursuant to this notice." On the service of this notice defendant addressed plaintiff a letter saying, in substance: "I hold a lease from Mr. Lucas, which terminates May 30, 1888, and it is my intention to retain possession until that time." Conceding, for the purposes of this case, that the notice should have required defendant to quit on the last day of the rental month, which was the last day of August, still, excepting BARCLAY, J., we are of the opinion that de-

pendant waived the irregularity. Taylorsays: "Although the notice be irregular in respect to the time named for its expiration, yet if the tenant, at the time of the delivery of the notice, assents to the terms of it, his assent will waive the irregularity." 2 Tayl. Landl. & Ten. § 478. Here the defendant by his letter, written on receipt of the notice, places his right to retain possession alone on the ground that he had a lease from Lucas which would not expire until 30th May, 1888. This we think was a waiver of the irregularity. Besides this, when the notice was offered in evidence it was objected to because irrelevant, immaterial, and incompetent. No other objection was made. The objection made in this court is specific, and the objections made in the trial court are too general to entitle them to be heard here. The specific objections should have been made in the circuit court. *Shelton v. Durham*, 76 Mo. 436. We see no reason for disturbing the judgment, and it is therefore affirmed.

**RAY, C. J.**, absent; the other judges, save as before stated, concur.

**STATE *ex rel.* WINE, Collector, v. KEOKUK & W. R. Co.**

(*Supreme Court of Missouri*. Nov. 4, 1889.)

**CORPORATIONS—CONSOLIDATION—TAXATION.**

Acts Mo. 1869, p. 75, § 1, authorizes railroad companies whose lines connect with any company organized under the laws of an adjoining state to consolidate the stock, making one company of the two. Section 2 requires that the agreement be approved by the holders of a majority of the stock in each of the companies. Section 3 authorizes a new corporate name, and an exchange of the certificates of stock for stock in the new company, and requires a copy of the agreement and resolutions of consolidation to be filed with the state. Section 4 provides that the new company shall be subject to all the liabilities, and bound by all the obligations, of the company within the state, and entitled to the same franchises and privileges. *Held*, that the former corporation was dissolved, when consolidation was effected under the act, and a new one was formed; and since Const. Mo. 1865, art. 11, § 16, providing that no property should be exempt from taxation, with certain exceptions, not including that of railroad companies, took effect before the consolidation, the consolidated company could not avail itself within the state of an exemption granted by the charter of the former corporation before the constitutional provision was passed.

Appeal from circuit court, Scotland county; **BEN. E. TURNER, Judge.**

**F. T. Hughes**, for appellant. **John M. Wood** and **John C. Moore**, for respondent.

**BLACK, J.** This is a suit in the name of the state to the use of Wine, collector of Scotland county, to enforce the payment of state, county, school, and municipal corporation taxes levied on the property of the Missouri, Iowa & Nebraska Railway Company for the tax year ending in August, 1886. The defendant corporation became the purchaser of the railroad property after the taxes were levied, and the defense is that the property was exempt from taxation while owned

by the Missouri, Iowa & Nebraska Railway Company. The circuit court ruled against the defendant, and hence this appeal.

The legislature, by the act of February 9, 1856, (Acts 1856, p. 94,) incorporated the Alexandria & Bloomfield Railroad Company, with power to build a railroad from Alexandria, in Clark county, in the direction of Bloomfield, in the state of Iowa, to a point on the line between this and that state. The act provides that the construction of the road shall be commenced within 10 years after its passage, and completed within 10 years thereafter, and that "the stock of said company shall be exempt from taxation for a period of twenty years after its completion." It is alleged in the answer, and not denied, that the company was duly organized in 1864, and then commenced and proceeded to carry out its proper business and railroad operations under the act. The name of the company was changed to that of the Alexandria & Nebraska City Railroad by authority of the act of February 19, 1866, (Acts 1865-66, p. 222.) There are several sections in this act, and the fourth section provides that the whole or any section thereof shall be adopted by the board of directors, and shall be in full force from and after the adoption. It is alleged, and not denied, that the company adopted the first section, which authorized the change of name; but it does not appear that any of the other sections were adopted. The Alexandria & Nebraska City Railroad Company and the Iowa Southern Railway Company, a corporation organized under the laws of the state of Iowa, were consolidated on the 3d May, 1870, under the name of the Missouri, Iowa & Nebraska Railroad Company; thus forming one continuous line from Alexandria, on the Mississippi, in this state, to a point in the state of Iowa near Nebraska City, on the Missouri river. It was admitted upon the trial that the railroad was constructed and put in operation through Scotland county in 1871, and completed to the state line in December, 1872. It does not appear how much work had been done in this state before the consolidation. In 1886, and after the taxes in question had been levied, the entire consolidated road was sold, under a decree of foreclosure entered in the circuit court of the United States for the southern district of Iowa, to certain individuals, who conveyed it to the defendant corporation, the Keokuk & Western Railroad Company. The period of 20 years' exemption had not expired when the taxes in question were levied by the county court of Scotland county. The general question, therefore, is whether the property was exempt from taxation while owned by the consolidated company.

It was held in the case of *Scotland County v. Railroad Co.*, 65 Mo. 123, brought to recover taxes for the year 1872, that the exemption of the stock of a corporation is an exemption of the property represented by the stock. The court then proceeds to say:

"That the present defendant succeeded to all the privileges and liabilities of the Alexandria & Bloomfield Company is conceded. It is insisted, however, that section 16, art. 11, of the constitution of 1865, operated to repeal the exemption contained in the defendant's charter." It was then held that the designated section of the constitution did not, and could not, destroy rights existing when it was adopted, and that the legislature did not repeal the exemption by the tax law of March, 1871. As to the question actually considered in that case, it is sufficient to say we are satisfied with what was then said and ruled. The question whether the consolidated company succeeded to the right of immunity from taxation contained in the charter of the Alexandria & Bloomfield Company was then taken for granted, on what appears to have been a concession of counsel in this court; and that question we will now consider.

The consolidation of the rights, privileges, franchises, and properties of two or more railroad companies into one, where there is no provision of the statute or constitution to the contrary, leaves the portions of the road thus formed subject to the same rules of taxation that existed before the consolidation. That portion of new line which was exempt will continue to be exempt, and that portion which was subject to taxation will continue subject to taxation. This, we think, is the result of the following cases: *Railroad Co. v. Maryland*, 10 How. 376; *Tomlinson v. Branch*, 15 Wall. 460; *Banking Co. v. Georgia*, 92 U. S. 665; *Railroad Co. v. Virginia*, 94 U. S. 718. The Alexandria & Nebraska City Railroad Company was unquestionably exempt from taxation down to the time of the consolidation, namely, 3d May, 1870; and, under the rule of the cases just cited, the new company acquired that immunity, so far as concerns the Missouri property, unless the law under which the consolidation was effected by the voluntary act of the two corporations produces a different result. The sixteenth section of article 11 of the constitution of 1865, which went into operation before the date of the act under which the consolidation took place, provides: "No property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this state, to counties, or to municipal corporations within this state." The plaintiff takes the ground that, when two railroad companies are consolidated, they thereby surrender their charters, and the resultant company takes its powers and rights from the law which authorized the consolidation; in other words, that the old companies are dissolved, and that a new one springs into existence. If it be true that the Alexandria & Nebraska City Company was dissolved by the act of consolidation, and the new company took its powers from the act authorizing the consolidation, then it must follow that the new company is not exempt from taxation; for the legislature had been

deprived of the power to grant such immunity. Whether the old companies were dissolved must depend upon the terms and provisions of the act of March 2, 1869, (Acts 1869, p. 75,) under which the consolidation took place; and we therefore set out the important portions of it. Section 1 provides "that any railroad company, organized under the general or special laws of this state, whose track shall, at the line of the state, connect with the track of the railroad of any company organized under the general or special laws of any adjoining state, is hereby authorized to make and enter into any agreement with such connecting company for the consolidation of the stock of the respective companies whose tracks shall be so connected, making one company of the two, whose stock shall be so consolidated, upon such terms and conditions and stipulations as may be mutually agreed between them, in accordance with the laws of the adjoining states in which the road is located, with which connection is thus formed." By section 2, the terms and provisions of the agreement must be approved by the holders of a majority of the stock in each of the companies at a meeting called for that purpose, or by writing signed by them. Section 3 provides: After the terms of the consolidation have been agreed to in one or the other of the modes above set forth, "it shall be competent for the boards of directors in each of said connecting companies to carry the same into effect, and adopt by a resolution a new corporate name for the company which shall be formed by the consolidation, and to call in the certificates of stock then outstanding in each company, and exchange them for stock in the new company, as may have been agreed by the terms of consolidation; and a copy of said consolidation agreement and the resolutions of consolidation, and the name adopted for the new company, shall be filed with the secretary of state, and shall be conclusive evidence," etc. The fourth section is in these words: "Any such consolidated company shall be subject to all the liabilities, and bound by all the obligations, of the company within this state which may be thus consolidated with one in the adjoining state, as fully as if such consolidation had not taken place, and shall be subject to the same duties and obligations to the state, and be entitled to the same franchises and privileges under the laws of this state, as if the consolidation had not taken place."

In *Banking Co. v. Georgia*, *supra*, the legislature of Georgia had created two corporations,—the Central Company and the Macon & Western Company. Their charters limited the right of taxation to one-half of 1 per cent. upon their net income. The companies were consolidated under an act passed in 1872; and the question was whether there was a surrender of the charter of the Central Company. The court said: "It may be that the consolidation of two corporations, or amalgamation, as it is called in England, if full and complete, may work a dissolution of them both,

and its effect may be the creation of a new corporation. Whether such be the effect or not must depend upon the statute under which the consolidation takes place, and of the intention therein manifested." It is further held that there was no surrender of the charter of the Central Company, but the ruling goes upon the ground that the act only contemplated a merger of the property and franchise of the Macon & Western Company into the Central Company; the latter retaining its name and charter. In *Railroad Co. v. Georgia*, 98 U. S. 359, two railroad companies had been incorporated under the laws of Georgia,—one in 1847, and the other in 1856. By their charters they were exempt from taxation beyond a specific amount on their net income. They were consolidated under an act of that state passed in 1863, which gave them power to consolidate their stocks, and, when consolidated, to be known as "The Atlantic & Gulf Railroad Company." By that name the stockholders of the companies were empowered to sue and be sued, to purchase and enjoy real and personal property, and to exercise corporate powers. The act also declared that the immunities, franchises, and privileges granted by the charters of the two companies should continue in force, except so far as they might be inconsistent with the act of consolidation. Under an act passed in 1874, the property of the new company was taxed as other property. This act of 1874, it was held, would be void, as impairing contracts, but for the act of 1863; and the court, in considering the effect of the consolidation, said: "Did the consolidated companies become a new corporation, holding its powers and privileges as such, under the act of 1863? Or was the consolidation a mere alliance between two pre-existing corporations, in which each preserved its identity and distinctive existence? Or, still further, was it an absorption of one by another, whereby the former was dissolved, while the latter continued to exist? The answer to these inquiries must be found in the intention of the legislature, as expressed in the consolidating act. We think that intention was the creation of a new corporation out of the stockholders of the two previously existing companies. The consolidation provided for was clearly not a merger of one into the other, as was the case of *Banking Co. v. Georgia*, 92 U. S. 665. Nor was it a mere alliance or confederation of the two. If it had been, each would have preserved its separate existence, as well as its corporate name. But the act authorized the consolidation of the stocks of the two companies; thus making one capital in place of two. It contemplated, therefore, that the separate capital of each company should go out of existence as the capital of that company; and, if so, how could either have a continued separate being?" The court then goes on to say, in substance, that, as this new corporation took its powers and privileges from the act of 1863, it took them subject to the laws then

in force, and as a result the tax act of 1874 was held to be valid and binding on the new company. The same line of reasoning is pursued in the tax cases of *Railroad Co. v. Maine*, 96 U. S. 499, and in *Railroad Cos. v. State*, 63 Ga. 483. The effect of consolidating three railroad companies into one, says the court in *McMahan v. Morrison*, 16 Ind. 172, "was a dissolution of the three companies named, and at the same instant the creation of a new corporation." A recent text-book says: "The franchises of a corporation formed by the consolidation of several companies are derived wholly from the act of the legislature authorizing the consolidation." 2 *Mor. Priv. Corp.* (2d Ed.) § 944. The same doctrine is asserted in terms, more or less positive, in the following cases: *Clearwater v. Meredith*, 1 Wall. 38; *Shields v. Ohio*, 95 U. S. 323; *Lauman v. Railroad Co.*, 30 Pa. St. 42.

Now, the Alexandria & Bloomfield Company had, by its charter, a capital stock of \$2,000,000, divided into shares of \$100 each. The act of 1869 contemplates and provides for the surrender of the stock in both of the uniting companies; and accordingly we find it provided in the articles of consolidation that the stock issued by each of the companies, and outstanding, shall be surrendered, and shares of stock of the consolidated company issued therefor. The act speaks of the consolidated company as "the new company;" and the very process by which it is brought into being makes it a new company, and the effect of the consolidation was to dissolve both of the old companies. It is true, the act of 1869 does not specifically enumerate the corporate powers and privileges conferred upon the new company, but the corporate powers and privileges are granted by reference to the powers of the company in this state which unites with the one of another state. There is in this respect some difference between this case and that of *Railroad Co. v. Georgia*, 98 U. S. 359. But as said in *Railroad Co. v. Maine*, 96 U. S. 499, a new corporation may be as readily created by the union of two or more companies as by the union of individuals; and its powers and privileges may as well be designated by reference to the charters of other companies as by special enumeration. The conclusion is irresistible that the Missouri, Iowa & Nebraska Railroad Company is a new corporation, created under and by force of the act of 1869. Being thus created after the adoption of the constitution of 1865, the legislature had no power to grant to it exemption from taxation. The exemption, therefore, did not, and could not, pass to the new company. We cannot see that the fact that one of the consolidating companies was a Missouri, and the other an Iowa, corporation, affects the conclusion just stated. The new company, in this state, is entitled to the privileges and subject to the obligations imposed upon it by the laws of this state; and in Iowa it is a corporation of that state, and subject to the laws

thereof. By the legislature of both states, however, it is but one company.

We are cited to a number of cases which were suits on bonds, and involved the legality of subscriptions made by counties to railroad corporations. In some of the cases the subscriptions were made to this consolidated company, but we do not see that any of them are decisive of the question in hand. It must be kept in mind that exemption from taxation will not be recognized, unless granted in terms too plain to be mistaken. *Railroad Co. v. Guffey*, 120 U. S. 569, 7 Sup. Ct. Rep. 693; *St. Louis v. Trust Co.*, 47 Mo. 150, 155. Such an exemption is a personal privilege, and cannot be assigned except by legislative authority. *State v. Railroad Co.*, 89 Mo. 536. If the consolidated company is in any sense a new corporation, taking its powers to be a corporation and its privileges from the act of 1869, then it cannot in justice claim the exemption; for the legislature was powerless to make new grants of that charter. It seems to us the tax cases before cited are quite conclusive. The answer sets up the proceedings in the suit of Scotland County v. Railway Co., before mentioned, and reported in 65 Mo. 123. That suit was commenced in 1873 to recover county and school taxes levied for the year 1872. The judgment, which was for defendant, was affirmed in 1877. It is also alleged in the answer, and not denied, that James Secor and others, stockholders in the consolidated company, filed their bill in the circuit court of the United States for the eastern district of Missouri to enjoin the company from paying taxes levied by Scotland, Clark, and Schuyler counties, and to enjoin the county courts, judges thereof, and collectors of said counties from collecting any taxes levied upon the property of the company for the year 1881 or previous years; and that the temporary injunction was made perpetual on the ground that the property of the company was exempt from taxation. According to the answer, the bill was filed in 1881. The case seems to have been determined in 1881. 9 Fed. Rep. 809.

The taxes sued for here are for the year 1886, and they accrued long after those suits were commenced and determined. This suit is for a separate and distinct cause of action, and for this reason we do not see how the former judgments can be a bar to the prosecuting of this suit. *City of Davenport v. Railroad Co.*, 38 Iowa, 633. But we do not understand it to be claimed by the defendant, in this court, that those former judgments operate as a technical bar. The claim is that rights have been acquired on the faith of the ruling in the Scotland County Case, followed in the injunction case; and to make a different ruling at this time would be to impair the obligation of contracts, and therefore violative of the constitution of the United States. The answer to this is that this court did not then pass upon the question whether the exemption from taxation passed to the consolidated company. The question of law

was doubtless involved in the agreed facts in that case, but there were many other questions then controverted, and they were decided, and we adhere to what was then said in respect of the propositions of law which were actually considered. It seems to have been asserted on one side, and conceded on the other, in this court at least, that the exemption did pass to the consolidated company, if the exemption clause in the Alexandria & Bloomfield Company had not been repealed; and the court simply stated the question as not a controverted one in that case. All this appears from the decision itself, and we do not see how it can be said the question which we have been considering was decided in that case. The proposition that the legislature can, in the face of the constitution of 1865, exempt property from taxation, is not to be regarded as established because of a concession made by counsel in some former case. It cannot be fairly said there was a solemn adjudication upon the point we have been considering. The judgment is affirmed.

RAY, C. J., absent. The other judges concur.

STATE *ex rel.* CLOVER, Circuit Atty., v. LADIES OF THE SACRED HEART.

(Supreme Court of Missouri. Nov. 4, 1889.)

CORPORATE EXISTENCE—LIMITATION.

1. The charter of the Ladies of the Sacred Heart named no limitation to its corporate existence. It stated the purpose of the corporation to be to conduct a seminary of learning and an orphan asylum, and provided that it "by that name and style shall have succession." The charter, also, was specific in its grant of powers. The institution was purely a charitable one. *Rev. St. Mo. 1845, c. 84, § 1, par. 1*, provides that every corporation, as such, has power to have succession by its corporate name for the period limited in its charter, and, when no period is limited in its charter, for 20 years. It also gives power to make laws for transfer of stock, and makes other provisions which could not apply to charitable corporations having no shareholders. *Held*, that the corporate existence of the Ladies of the Sacred Heart was not limited to 20 years, but was made perpetual.

2. *Rev. St. Mo. 1855, p. 1026*, provides that all acts of a public, general, or permanent nature, revised at the present session, shall be taken as repealing the acts so revised. The corporation law of 1845 was revised in 1855. The latter statute contained the same provision as to limitation of corporate existence, and provided, in section 2, that "the powers enumerated in the preceding section shall vest in every corporation that shall hereafter be created." *Held*, that the second section did not destroy the effect of the first, but that the specified powers were made to apply to corporations then, before, and thereafter created.

Appeal from St. Louis circuit court.

Alex. J. P. Garische, for appellant. Hitchcock, Madill & Finkelnburg and Peter Taaffe, for respondent.

BLACK, J. This is a proceeding upon *quo warranto* in the name of the state at the relation of the circuit attorney of the eighth judicial circuit against the Ladies of the Sacred Heart, a corporation created and duly organized under the special act of the legislature of



the 7th December, 1846. The record discloses these facts: On the 12th March, 1827, John Mullanphy conveyed about 24 arpents of land to Philippine Duchesne, Octavie Berthold, and Lucilla Matheron, who were nuns of the order of the Sacred Heart, to have and to hold for 999 years, upon trust "for the sole use of said nuns and their successors, being nuns of the same order, for the establishment and maintenance of the charity herein specified, which trust shall remain so long as the said charity shall be kept up and dispensed according to the true intent and meaning hereof; that is to say, said nuns shall occupy said premises as a convent, and shall therein board, lodge, clothe, provide for, and educate all such indigent female children who are orphans, or whose parents are both indigent and helpless, not exceeding the number of twenty at any one time, as shall be designated by said Mullanphy during his life, or, in case of his death, by his three eldest female lineal descendants," or, in case of no designated lineal descendants, "then by the Roman Catholic bishop of the diocese wherein the city of St. Louis is or shall be situate." At the date of this deed the premises were, for the most part, outside of the limits of the city of St. Louis, and were covered with brush and timber, save less than one acre, upon which there was a small house. These trustees, their associates, and the respondent corporation have maintained on the premises a convent, an orphanage, a boarding-school, and a free day-school. The boarding-school was discontinued on these premises in 1872, but continued on what is called the "Withnel Property," acquired by respondent. By reason of the increased value of the property, the income exceeds the cost of supporting 20 orphans. By mesne conveyances the title to the Mullanphy property was vested in Madame Galloway, and she conveyed it to respondent on the 12th of December, 1871, some 25 years after the date of the charter; but the title in the mean time had been in persons who were members of the order, and also of the respondent, and was held in trust for respondent. The persons named in the special act as incorporators were members of the order. This order of the Sacred Heart, as distinguished from the respondent, has many institutions throughout the country; and one of its objects has been and is the education of young ladies as boarders, and in exceptional cases, like the one in hand, it supports an orphan asylum. The petition for the writ asks the court to adjudge the respondent guilty of unlawfully using corporate franchises, and to that end it is alleged that its charter expired in 20 years after the grant thereof; all of which is denied. Further allegations are made to the effect that the respondent has and does appropriate portions of the revenues of the trust property to purposes not contemplated by the trust, namely, the support of a seminary of learning for young ladies other than orphans. The court declined to go into a hearing of the issues on

this branch of the case until the question as to the expiration of the charter was determined, and on that issue found for respondent.

As the case stands before us, the only question is whether the charter granted on the 7th December, 1846, expired in 20 years. The charter is as follows: "Section 1. That Ellenor J. M. Gray, Mary Prudeom, Josephine Jaquet, and their successors, shall be, and are hereby, constituted a body corporate, in fact and in name, by the name and style of the 'Ladies of the Sacred Heart,' for the purpose of conducting a seminary of learning and an orphan asylum in the city of St. Louis, and by that name and style shall have succession, and be in law capable of suing and being sued, defending and being defended, in all courts and places, and in all manner of actions and cases whatsoever, and may have a common seal, and change it at pleasure, and by that name and style be capable in law of purchasing, holding, and enjoying, to them and their successors, for the purposes above mentioned, any real estate, in fee-simple or otherwise, and any goods, chattels, and personal estate, and of selling and otherwise disposing of the said real estate, or any part thereof, at their will and pleasure; but the operations of said corporation shall be confined to the promotion of the objects above mentioned. Sec. 2. Said corporation shall have power to make such constitution, by-laws, ordinances, rules, and regulations for the government of the same as they deem proper: provided, the same are not repugnant to, or inconsistent with, the laws and constitution of this state, or of the United States. Sec. 3. That nothing in this act contained shall be so construed as to prevent the legislature from altering, amending, or repealing the same at any time hereafter." The first paragraph of the first section of chapter 34 of the General Statutes of 1845, concerning corporations, provides: "Every corporation, as such, has power—*First*, to have succession by its corporate name for the period limited in its charter, and, when no period is limited, for twenty years." Page 231. The question is whether this general statute fixes the period of existence of the respondent at 20 years; no time being, in terms, stated in the charter. In considering this question, some general rules must be kept in view. Where special privileges in derogation of common right, or exemptions from the general law governing other persons, are claimed by a corporation, its charter must be construed strictly in respect of such alleged grants. Nothing is to be presumed in favor of the grant of such privileges. But no such question is involved in the present case, and the rule has no application here. This charter is to be construed like any other written instrument. We must look for the intention of the parties. 1 Mor. Priv. Corp. (2d Ed.) §§ 316, 323. A corporation whose charter does not limit its existence to a definite period of time continues, in legal contemplation, until it has



been dissolved by some prescribed method. Id. § 411. Aside from the first paragraph of section 1 of the general law of 1845, this corporation would have succession without limitation as to time. Again, it is conceded on both sides that the respondent is a charitable institution, and nothing more. It is therefore, in many respects, unlike an ordinary business corporation having shareholders. Most of the provisions of the general law can have no application whatever to charters like the one now in question. The first section says: "Every corporation, as such, has power," among other things, to make laws "for the transfer of its stock." The next section says: "The powers enumerated in the preceding section shall vest in every corporation that shall hereafter be created, although they may not be specified in its charter," etc. This provision in relation to stock has no application to this corporation; for it has, and under its charter can have, no shareholders. The same is true in respect of many other of the subsequent sections. It is therefore clear that, though the general statute does say that every corporation shall have the designated powers, we must look to the objects and purposes of the particular corporation to see whether it does or can possess all of them. We see no reason why we may not also look to the objects and purposes of the corporation to see whether the limitation of 20 years fairly applies to it.

Now, it can hardly be believed that the legislature, in creating this corporation for the purposes, in part at least, of rearing and educating orphans, designed to limit it to 20 years. Such an institute, with such a limitation, would end about as soon as fairly established. If this charter contained the words "perpetual succession," instead of simply the word "succession," then there would be no limitation as to time, notwithstanding the general law. It was so held in the case of a business corporation having a competent stock. *Fairchild v. Association*, 71 Mo. 527. The purposes of this corporation considered, it is believed we should reach the same result. If the charter on its face disclosed a purpose to administer the Mullanphy trust, there could be no occasion for doubt, for the trust is practically perpetual. The charter, however, is specific in the grant of powers; so that in these respects there is no need of reference to the general law. The legislature has by the third section, reserved the right to amend or repeal it "at any time hereafter." The charter bears evidence on its face of a determination on the part of the legislature to make it perfect and complete in and of itself, and without reference to the general law. In view of these considerations, and of the objects and purposes for which the corporation was created, we conclude the legislature intended to and did give to it perpetual succession. This construction carries out what seems to have been the purpose of the legislature; and it is enough to overcome the limitation in the general law

that it appears from the special charter, taken as a whole, and read like any other written instrument, that the legislature designed to give it unlimited succession. Indeed, it is a matter of some doubt whether the 20-year limitation in the law of 1845 applies to any purely charitable incorporated association.

Though what has been said disposes of this appeal, another point pressed by respondent will be noticed. Section 20, 2 Rev. St. 1855, p. 1026, provides: "All acts of a public, general, or permanent nature, revised at the present session of the general assembly, so soon as such acts shall take effect, shall be taken and construed as repealing the acts in force at the commencement of the present session of the general assembly so revised." According to the ruling in *Fairchild v. Association*, 71 Mo. 527, this section repealed out and out the general corporation law of 1845, and the general corporation law of 1855 took effect only from the time when that revision went into operation. Concede that the first section of the corporation law of 1845 (the one which contains the 20-year limitation) was repealed by the revision of 1855, and concede, further, that, because of the peculiar language of the repealing section, the re-enacted statute cannot be construed as a continuing law, still the statute of 1855 says: "Every corporation, as such, has power," etc.; following the exact language of the first section of the law of 1845. This language applies to corporations created previous to the revision of 1855, and leaves the respondent where it was before the repeal. The second section of the statute of 1855, like that of 1845, says: "The powers enumerated in the preceding section shall vest in every corporation that shall hereafter be created," etc.; but this does not destroy the force of the first section. The specified powers are made to apply to corporations then, before, and thereafter created. In the *Fairchild Case* the court had under consideration the thirteenth section of the general corporation law of 1845 and 1855; and that section only professes to act upon corporations thereafter created. There was no section making the same provisions apply to existing corporations. For the reasons before stated the judgment is affirmed.

RAY, C. J., absent. SHERWOOD, J., not sitting. The other judges concur.

#### POWELL v. ADAMS *et al.*

(*Supreme Court of Missouri*. Nov. 4, 1889.)

##### FALSE REPRESENTATIONS.

Plaintiff conveyed his hotel to defendants in exchange for stock in a tobacco company, and afterwards sought to set aside the deed on the ground that defendants had falsely represented the value of the stock. This action he dismissed, and executed to defendants a formal release, acknowledging the receipt of an additional sum of money, and admitting that he was fully satisfied. Before the settlement, he had been elected a director in the company, having access to its records and books

of account. Subsequently, upon the failure of the company, he again sought to set aside the deed on the ground of false representations. *Held*, that as at the time of the last settlement, he was in a position where, with ordinary prudence, he could have known the condition of the company's affairs, and, it did not appear that the settlement was induced by false representations, he was not entitled to recover.

Error to circuit court, Cole county; E. L. EDWARDS, Judge.

Plaintiff was the owner of a certain hotel, which he exchanged for stock in an incorporated company. He claims that he was defrauded in the transaction. This suit was brought to rescind his deed, and restore him to his antecedent position as owner of the property, and for other appropriate relief. The answer denied the fraud alleged, and set up an accord and satisfaction or settlement. The reply asserted that the alleged settlement was also fraudulently procured. The cause was tried by Judge EDWARDS, and resulted in a finding and decree for defendants, which plaintiff seeks to reverse by this writ of error.

*G. B. Maqfarlane and Crews & Thurmond*, for plaintiff in error. *Silver & Brown and John A. Hockaday*, for defendants in error.

BARCLAY, J. The facts developed at the trial are somewhat complicated, but the decisive point of the controversy is not obscure. Plaintiff parted with his hotel in exchange for stock in a tobacco company in September, 1884. During the next month, he brought an action against the defendants here and others, charging that the exchange was induced by false and fraudulent representations to him regarding the value of the stock, and claiming \$8,100 damages. In November following he dismissed his action for deceit, and executed a paper withdrawing all the charges of fraud. Afterwards, he complained to some of defendants that the stock was not as good as had been represented, and that something ought to be done about it. Negotiations then followed, terminating in February, 1885, with a formal release, in which, after reciting most of the foregoing facts, it was declared that the trade was fairly made, but that plaintiff was dissatisfied, in that he did not "think he got the full value of his property in tobacco stock." The document then proceeds as follows: "Now, therefore, the said parties have this day paid to the said Powell the additional sum of six hundred and seventy-five dollars for said Powell House, for the purpose of satisfying said Powell, the receipt of which sum the said Powell hereby acknowledges, and says and admits that he is now fully satisfied with said trade, and that he accepts said sum of money with the promise on his part, and a full understanding, that he is to treat the same as a full, complete, and perpetual settlement of the same for all time to come, and that he will not again express any dissatisfaction on account thereof to said parties or to others, or in call on or solicit for any other or fur-

ther concession on their part," etc. Plaintiff signed this instrument, delivered it to defendants, and accepted the \$675 mentioned in it. Prior to this settlement, plaintiff had been elected a director of the company, and had unlimited access to its factory, and to all its records and books of account. His son, who lived in Texas, had come, at his request, to confer with him regarding his affairs, and advised him in relation to the withdrawal of the first action mentioned. The company failed and ceased business in 1886, after which this suit was brought. These facts all appear from plaintiff's own witnesses. One statement let fall by himself at the trial deserves mention as bearing on the conclusiveness of the settlement in February, 1885. It was this: "After the first paper was signed, I was about the factory a good deal, and asked the book-keeper to give me a true statement; that the parties wanted money, and, if I could be satisfied that the concern was prospering, I might put some money in it. He told me he was not allowed to make a true statement; and if he did so, and made it to me, he would lose his position. The only statement I saw was one laid on the counter when other parties were present. I cannot tell what the difference between the assets and liabilities then was. All I could get from the bookkeeper in explanation of longs and shorts was that it was an overestimate. He didn't tell me it was a loss. He said they had overestimated what they had. It was that much deficient. I saw the company owed a good deal. Dr. Nesbit said the item of about \$27,000 long and short was there when he was there. He didn't say it was a loss. I understood Blake, the book-keeper, to say it was an overestimate."

This outline of the relative positions of the parties before the court is sufficient to show the obstacle that confronts plaintiff. He must first get rid of his last formal settlement with defendants before any investigation of antecedent equities can properly be had. He has kept the consideration then paid him, though offering, in reply, "to account to the defendants for said money, and now offers to account to the defendants therefor by deducting the same, with interest, from the rents which the court may find the defendants owe plaintiff for the use and occupation of the said hotel property since the 16th day of September, 1884, or in any other manner which to the court may seem equitable and proper." We lay aside all question of the sufficiency of this offer in the premises, and consider the merits of his effort to rescind this settlement. It is based mainly on the same grounds that formed his objection to the original transaction, namely, that he was led into it by fraudulent misrepresentations touching the value of the stock. He also claims that he misunderstood the meaning of the entry "longs and shorts" in the company's books, supposing it represented an asset, whereas it expressed "profit and loss," and, as entered, in fact, indicated a loss. This

he did not learn until later, being ignorant of book-keeping. But plaintiff's attitude towards the subject-matter of his agreements with defendants, and towards them, was very different at the time of the last settlement from what it was when the original exchange was made. When he executed the release, he was in a position where, by ordinary business vigilance, he could readily have known the exact condition of the company's affairs. He was a director in it, and had full liberty of access to its books. He had charged fraud upon defendants in his first dealings with them, and afterwards withdrawn the charge. He certainly was in a situation where common prudence demanded that any contracts with them in relation to that subject should be made at arms-length. No fraud in respect to the formal execution or delivery of the instrument of settlement is claimed. The fraud alleged is collateral, merely. The burden of proof is upon him to show it. He has entirely failed.

Fraudulent misrepresentation does not furnish ground for equitable relief unless, among other things, it formed a material inducement, at least, to the agreement sought to be rescinded. In the present instance, no satisfactory showing has been made that the settlement was induced by any such misrepresentation. Plaintiff appears to have been the first mover in bringing it about, and there was abundant evidence from which the trial court could properly find that he then had full notice of the condition of the company, and hence of the true value of the stock. He was evidently conscious of having the means of knowledge on those subjects, and the court could properly have found that he relied upon them, rather than on anything said by defendants, in the peculiar circumstances of the case. We think such findings proper deductions from the facts. We consider the compromise agreement, therefore, a complete defense to plaintiff's claim. We have not found it necessary to examine the equities of the original transfer of the hotel property by plaintiff. The settlement acknowledges its good faith, and, in the view we take of the latter document, it is unnecessary to go further. It is also immaterial whether the exclusion of the testimony of witness Penn was correct or not. That offer related to the first dealings between the parties, long before the settlement, and had no relevancy to the latter subject. It may be remarked that, in the trial of such causes by the court, it is usually the better practice to admit all evidence not clearly inadmissible, even though the court may afterwards exclude it, to the end that any difference of opinion between the trial appellate courts regarding it may not necessitate the delay and expense of a new trial. We are satisfied, in the present case, that the circuit court correctly found for defendants, and its decree is affirmed, with the assent of all the judges except RAY, C. J., absent, and SHERWOOD, J., expressing no opinion.

## TALBOTT v. STEMMONS' EX'R.

(Court of Appeals of Kentucky. Oct. 24, 1889.)

## CONTRACTS—CONSIDERATION.

The abandonment of the use of tobacco is sufficient consideration to support an agreement to pay the promisee \$500 if he would never take another chew of tobacco or smoke another cigar during the life of the promisor.

Appeal from court of common pleas, Bourbon county.

"To be officially reported."

*J. H. Brent*, for appellant. *Lockhart & Lyng*, for appellee.

PRYOR, J. This case comes from the superior court by an appeal. Mrs. Sallie D. Stemmons, the step-grandmother of the plaintiff, Albert R. Talbott, made with the latter the following agreement: "April 26th, 1880. I do promise and bind myself to give my grandson Albert R. Talbott five hundred dollars at my death if he will never take another chew of tobacco or smoke another cigar during my life, from this date up to my death, and, if he breaks this pledge, he is to refund double the amount to his mother. [Signed] ALBERT R. TALBOTT. SALLIE D. STEMMONS." The grandmother died, and this action was instituted by the grandson against her personal representative to recover the \$500, the plaintiff alleging that from the date of the agreement to the filing of this action by him he had not smoked a cigar or taken a chew of tobacco, etc. A general demurrer was filed to the petition, that was sustained by the court below, and the action dismissed. It is insisted by counsel for the personal representative that the agreement by the grandmother to pay the \$500 is not based on a sufficient consideration, either good or valuable, and, being a mere gratuitous undertaking, cannot be enforced. There is nothing in such an agreement inconsistent with public policy, or any act required to be done by the plaintiff in violation of law; but, on the contrary, the step-grandmother was desirous of inducing the grandson to abstain from a habit, the indulgence of which she believed created a useless expense, and would likely, if persisted in, be attended with pernicious results. An agreement or promise to reform her grandson in this particular was not repugnant to law or good morals, nor was the use of what the latter deemed a luxury or enjoyment a violation of either; and so there was nothing in the case preventing the parties from making a valid contract in reference to the subject-matter. In the classification of contracts by the elementary writers, it is said: "An agreement by one party to give, in consideration of something to be done or forbore by the other party, or the agreement by one to do or forbear in consideration of something to be given by the other, are such contracts, when not in violation of law, as will be held valid." Whether the act of forbearance or the act done by the party claiming the money was or not of benefit to him is a question that does not arise in

the case. If he has complied with his contract, although its performance may have proved otherwise beneficial, the performance on his part was a sufficient consideration for the promise to pay. The right to use and to enjoy the use of tobacco was a right that belonged to the plaintiff, and not forbidden by law. The abandonment of its use may have saved him money, or contributed to his health; nevertheless the surrender of that right caused the promise, and, having the right to contract with reference to the subject-matter, the abandonment of the use was a sufficient consideration to support the promise. Mr. Parsons, in his work on Contracts, (volume 1, 7th Ed., \*489,) says: "The subject-matter of every contract is something which is to be done, or which is to be omitted;" and, where the consideration is valuable, it need not be adequate. If, therefore, one parts with that he has the right to use and enjoy, the question of injury or benefit to the party seeking a recovery by reason of a full performance on his part will not be inquired into, because, if he had the legal right to use that which he has ceased to use by reason of the promise, the law attaches a pecuniary value to it. If this was an action to recover such damages as the party had sustained by reason of the violation of the covenant or promise, the verdict or judgment would doubtless be nominal only; but where the parties have agreed on the amount to be paid on the performance of certain conditions, when a compliance with those conditions has been alleged and shown, the sum agreed on must be paid. Whether or not the mother of the young man could recover the penalty imposed on his failure to comply with his undertaking is not necessary to be decided. It is sufficient to say that the abandonment of the use of tobacco was such a consideration as authorized a recovery of the sum agreed on. The judgment below is reversed, and remanded, with directions to overrule the demurrer, and for proceedings consistent with this opinion.

#### POWERS v. REYNOLDS.

(Court of Appeals of Kentucky. Nov. 2, 1889.)  
DISQUALIFICATION OF JUDGE.

An affidavit for transfer of a cause from the vice-chancellor's court to the Jefferson common pleas, made under Carroll's Code Ky. § 886, providing for such transfer upon an affidavit that the vice-chancellor will not try the cause impartially, which merely alleges that the vice-chancellor will not afford affiant a fair and impartial trial, is fatally defective.

Appeal from Jefferson common pleas.

"To be officially reported."

The application for transfer from the vice-chancellor's court was made under Carroll's Code Ky. § 886, which provides for such transfer upon the filing of an affidavit that the vice-chancellor will not afford the affiant a fair and impartial trial.

Matt. O'Doherty, for appellant. C. B. Seymour, for appellee.

PRYOR, J. As this case must go back for

another trial, it is not proper to discuss the merits of the controversy. When the case is again called for trial, the appellant will have an opportunity, if it can be done, to have the record properly made out of the proceeding in the Tennessee court against the appellee. After the pleadings had progressed to an issue, a motion was made by the defendant (now appellee) to transfer the case from the vice-chancellor's to the Jefferson court of common pleas. This motion was made on an affidavit filed by the defendant with the clerk to the effect that the vice-chancellor would not afford him a fair and impartial trial. The transfer was made over the objection of the appellant, and an exception reserved. When the discovery of this partiality or bias on the part of the vice-chancellor was made, does not appear; but whether discovered before or after the pleadings were made up is wholly immaterial. The affidavit was fatally defective, and a trial denied the appellant by the court in which she was entitled to have it. The judgment is therefore reversed for that reason, leaving all other questions raised undecided, and the case remanded for a new trial, and for proceedings consistent with this opinion.

#### WILLIAMSTOWN GRADED FREE-SCHOOL DIST. v. WEBB *et al.*

(Court of Appeals of Kentucky. Nov. 2, 1889.)

#### SCHOOLS AND SCHOOL-DISTRICTS.

1. Act Ky. April 15, 1884, (Acts 1883-84, vol. 1, p. 1292,) enacted for the purpose of establishing a graded free school which all the children within the school age in the territory therein named and constituted a common-school district, might attend free of charge, provided that such school should be under the charge of trustees, who were to prescribe the course of study and the qualifications of the teachers, and to levy a tax, and draw the district's *pro rata* from the school fund; and vested all the property of the former school-district in the new one. Held, that it was not in conflict with Const. Ky. art. 11, § 1, providing that the capital of the common-school fund, together with any sum raised in the state for purposes of education, shall be held inviolate, to sustain a system of common schools; and the interest and dividend thereon, together with any sum raised for that purpose by taxation or otherwise, may not be appropriated otherwise than in aid of common schools.

2. A notice that an election would be held on July 2, 1887, to determine whether a certain tax should be levied for the purpose of maintaining a graded school, is in substantial compliance with section 20 of such act, authorizing the opening of a poll "not oftener than once every year upon the question of establishing" such graded school-district.

Appeal from circuit court, Grant county.  
"To be officially reported."

Collins & Fenley, for appellant. Wm. Lindsay, M. D. Gray, R. L. Webb, and Wm. Garnes, for appellees.

HOLT, J. The legislature, by an act approved April 15, 1884, provided for the establishment of a graded free school in Williamstown, in lieu of common-school district No. 1 of Grant county, and to include the same territory. 1 Acts 1883-84, p. 1292. Among its other provisions, as amended by a subsequent act, it authorized the trustees of the then existing district, after giving cer-

tain notice as to time, place, and purpose, to hold an election on the first Saturday in June, 1884, to take the sense of the voters as to whether the proposed school should be established, and to also then vote for six trustees therefor, who should prescribe the qualifications of its teachers, select them, and in all other respects have exclusive control of the district. They were also authorized to levy an annual tax upon the property of the district, not exceeding 50 cents upon the hundred dollars, to carry out the purpose of the law; the amount of it to be entered upon the order book of the Grant county court "as soon as practicable each year after the county assessor shall have returned his assessment of the property in said county." All the property of the old district was to vest in the new one; and the trustees of the latter, in case of its establishment, were authorized to draw the district's *pro rata* of the common-school fund,—it to be used only for the payment of the teachers; and to this end the trustees were to ascertain the number of children within the school age in the district, and report the same to the common-school commissioner of the county, to be by him reported to the superintendent of public instruction. It was further provided by the twentieth section of the act: "The trustees of the common school in district number one in Grant county shall have power to open a poll not oftener than once every year upon the question of establishing this district, and the election of trustees, as hereinbefore provided for, until same shall be adopted, and no other election shall be held by them, but all subsequent elections, upon any and all questions, shall be held by the board of trustees hereby created." An election was held in conformity to the law on the first Saturday in June, 1884, resulting in a majority voting against the establishment of the school. Another election was had in 1887, with a contrary result. It was not held on the first Saturday in June, however, but upon the 2d day of July; that time having been fixed by the trustees of the then existing district for the election. Nor was the question then submitted to the voters, in the language of the law, whether or not they were in favor of establishing a graded free school; but whether they favored a tax of 50 cents upon each \$100 of property for such a purpose. The trustees who were then elected levied the said tax on July 11, 1887, basing it upon the assessment returned by the county assessor in December, 1886. These suits were brought by some of the tax-payers of the district, enjoining the collection of their portion of the tax by sales of their property. They insist that the act of the legislature is unconstitutional, and therefore void; that it abolishes their common-school district, diverts its portion of the common-school fund improperly, transfers its property to another corporation, and provides for the establishment of a school which is not "a common school," within the meaning of the law; and, if mistaken in this, that then no valid election was ever held, and

those claiming to be trustees had no power to levy the tax. Some preliminary questions were made by the appellants in the form of motions to dissolve the injunctions, and special demurrers to the petitions; but they did not reach the substance of the controversy, and, in view of the conclusion reached by us as to it, we need not consider them.

The question of the constitutionality of the law is important. It involves, upon the one hand, the existence of our graded schools, and, upon the other, the protection of our common-school system, which has for years been the pride of the state, as it furnishes to the indigent children of our commonwealth the means of obtaining an education without cost. Prior to the adoption of our present constitution, our common-school system was at times in peril. It seemed about to be deprived of a fund for its support. It was therefore provided by section 1, art. 11, of that instrument: "The capital of the fund, called and known as the 'Common-School Fund,' \* \* \* together with any sum which may be hereafter raised in the state by taxation or otherwise for purposes of education, shall be held inviolate for the purpose of sustaining a system of common schools. The interest and dividends of said funds, together with any sum which may be produced for that purpose by taxation or otherwise, may be appropriated in aid of common schools, but for no other purpose." Thus, by the organic law, the school fund was devoted to one purpose. The legislature has no power to divert it to any other. It must be used "in aid of common schools." If, however, this expression were construed to include any purpose which might incidentally aid them, the fund might soon be frittered away, and the purpose of the framers of our constitution not only be defeated, but our school system crippled, if not destroyed. Looking, therefore, to the history, design, and scope of this constitutional provision, it was properly defined in the case of *Collins v. Henderson*, 11 Bush, 74, to mean aid in defraying the expenses of schools actually kept according to law, to-wit, those under the control of trustees, kept by a qualified teacher, and which every child in the district within the school age, whether contributing to its expenses or not, might attend. Guided by this rule, which is unquestionably the proper one in a government resting for its strength upon the intelligence of the people, let us see if the proposed school can fairly be said to be in aid of our common-school system. The title of the act is "An act to establish and maintain a graded free school in Williamstown, Grant county." The first section of it also declares that the purpose is to establish "a graded free school;" and that the territory therein named "is hereby constituted a common-school district. \* \* \* The corporate name thereof shall be known as the 'Williamstown Graded Free-School District.'" All the children of the district within the school age are to have the privilege of attending free of charge, and the proceeds of

the property obtained from the old district are to be applied for "said school purposes." The school is to be under the charge of trustees, who in certain matters named in the act are to report to the common-school officers of the state. It is true, they are, by its terms, to prescribe the course of study, and the qualifications of its teachers; select them, and for that purpose appoint examiners. But the legislature certainly has the constitutional power to so provide, and their doing so does not deprive the school of its common-school character. If the legislature can declare that a person shall be qualified to teach a common school who has a certificate to that effect from a county commissioner or some other person, it can equally provide that the trustees of this school shall pass upon his or her qualifications. In our opinion, the act is not in conflict with our common-school system, but in aid of it. The school is essentially "a common school." There is no danger, as is suggested, of its being converted to a character foreign to a common school. The law expressly declares that the boundary included in it is made "a common-school district." This being so, the trustees are officers of "a common school;" and the school fund is not devoted, as was the case in *Halbert v. Sparks*, 9 Bush, 259, to the payment of teachers not under the control of such officers. The answer of the appellants must be taken as true, as the case went off upon demurrer. It avers that the course of study prescribed by the trustees includes the common-school course of study, and that it is being taught in the school. The fact that academic or higher branches are also taught should not deprive it in law of its common-school character. It is rather to be commended, because a means for an advanced education at home is thereby afforded to the children. In the case of *Trustees v. Harrodsburg Educational Dist.*, 7 S. W. Rep. 312, (decided by this court on December 1, 1887,) an act transforming an ordinary common-school district into a graded one was sustained as constitutional.

It is urged, however, that there was no valid election of trustees, or whether the voters of the district would accept the provisions of the law, and establish the school. If this be true, then those professing to be the trustees had no more right to levy the tax than any other individuals. It is not claimed that the notice of the election held on July 2, 1887, was not sufficient, save that it was not sufficiently descriptive. It notified the voter that it would be held for the purpose of determining whether the tax should be levied to establish and support a graded school, instead of saying, in the language of the act, that it was for the purpose of determining whether it should be established. In our opinion, however, this was a substantial compliance with the law. The voter could not well have misunderstood the purpose of the election. So, too, the submission of the question to him, when voting, whether he was for or

against the tax to establish the school, was in substance a submission to him of the question whether he was for or against its establishment. One of but little intelligence would have so understood it. The legislature had the power to establish the school without the approval of the voter. The act, however, subjected him to the liability of taxation; and for this reason, likely, his acceptance of its provisions was a condition precedent to its becoming operative. The seventh section of the act fixed the time of the first election that might be held, only. The twentieth section, *supra*, provides for future ones. It does not say when they are to be held, save the limitation of "not oftener than once every year;" and in our opinion a fair construction of the act left this to their discretion, subject to the limitation named.

This being our conclusion, it is unnecessary to consider what is called the "Curative Act" of the legislature of March 26, 1888, by which it purported to ratify and confirm the election of July 2, 1887, and the acts of the trustees, then elected, relating to the levy of the tax and the organization of the school. 2 Acts 1887-88, p. 443. It is not out of place to say, however, that the legislature had this power as to any mere irregularities attending the election. If, however, it had been void, it would have been beyond cure. The rule is that, if the thing wanting or omitted might have been dispensed with by the legislature at the outset, then it may do so by a statute enacted subsequent to the proceeding, which is assailed on account of the omission. If the irregularity consists in doing some act, or in the manner of doing some act, which the legislature might by the prior law have treated as immaterial, then it may make it immaterial by a subsequent law. *Cooley*, Const. Lim. 458. By the revenue law enacted May 17, 1886, the county assessor must begin to make his assessment by the 15th day of September in each year, and complete the list, and return it to the county court clerk, by the 15th day of December. 1 Acts 1885-86, p. 162. It is the assessment for the succeeding year. It is the list upon which the taxation for the subsequent year is based; and it was therefore proper for the collector of the tax now in question to adopt the assessment made in 1886 as the basis for its collection. The judgment below, enjoining the collection of the tax from the appellees, is reversed, with directions to overrule the demurrers to the answers, and for further proceedings consistent with this opinion.

#### LOUISVILLE WATER CO. v. COMMONWEALTH. (Court of Appeals of Kentucky. Oct. 30, 1889.)

##### SUIT FOR TAXES.

A suit for taxes cannot be brought against a water company in the absence of legislative provision for collecting the taxes by such method, especially where the legislature has made provision for such suit against railroad companies only.

Appeal from Louisville law and equity court.

"To be officially reported."

*Wm. Lindsay, T. L. Burnett, and Lane & Burnett*, for appellant. *Helm & Bruce*, for the Commonwealth.

HOLT, J. The property of the Louisville Water Company not having been assessed for state taxes for the years from 1882 to 1885, inclusive, the sheriff of the county, in obedience to statutory provision, returned a list of it for each of those years to the county court clerk, who entered the same upon the assessor's books, and certified it to the state auditor, and also to the sheriff for collection. The company refused payment, claiming that it was exempt from taxation under an act of the legislature. It is a corporation, and, as its name indicates, supplies the city of Louisville with water. The property assessed was that in use for this purpose. It could not, therefore, be seized and sold by a collecting officer, as this would deprive the city of water. Its safety, as well as the health and comfort of its citizens, required the exercise of the corporate franchise, and forbade interference with it by a sale of the means necessary to operate it. The sheriff thereupon brought this action in his own name, but subsequently, by an amended petition, united the commonwealth as a co-plaintiff, asking that the company be compelled to show cause, if any existed, why it should not, within a given time, pay the taxes into court, and, in the event it failed to do so upon the court's order, that it be placed in the hands of a receiver, and its receipts applied to their payment.

Various defenses were presented. But one question requires notice, however, as it is decisive of the case. The lower court, upon final hearing, was of the opinion that the company was liable to taxation, and ordered it to pay the taxes into court within a certain number of days. This it declined to do, and thereupon a receiver was appointed, and the company has appealed. It was held by this court, in the case of *Baldwin v. Hewett*, 11 S. W. Rep. 803, that taxes could not be recovered by suit in the absence of legislative authority; and, there being no statute to this effect in this state, save as to railroad companies, an action for such a purpose could not be maintained, even in the absence of any other adequate remedy. There an administrator had failed for several years to list and pay the taxes upon the assets in his hands, consisting altogether of choses in action. When the suit was brought seeking a recovery against him as administrator, he had distributed the estate, and it had been removed by the distributees out of the state. It is urged that this case differs materially from that one, that here the statute gives a lien upon the property for the payment of the taxes; and that the proceeding is *in rem*, no personal judgment being sought. If, however, no right exists to use the courts as a ve-

hicle for the collection of tax claims, we fail to see any difference between the two cases. It is said, however, that in the case cited an adequate remedy in fact existed, but was ineffectual, while here there is none whatever, and that in such a case the right to sue should be implied as a matter of necessity. We do not grant that such a difference exists between the two cases. If the administrator had still been in possession of the assets, no suit could have been maintained against him for the taxes, although the estate could not have been seized for them, as it consisted of choses in action. It is true, they might have been reached, in the manner provided by statute, by the summary mode of attachment by notice served upon those owing them, if the debtors could have been found, and a judgment obtained in the county court, but this would have been because the legislature had expressly provided such a mode of collection. Granting, however, that there is a difference between the two cases, and admitting for the sake of further discussion that the one cited is not altogether decisive of this one, yet it is certainly true that it is not any more an inherent power of a court to collect taxes than it is to levy them. It has been held by this court that a tax is not a debt within the legal meaning of the term, and therefore *assumpsit* cannot be maintained upon it, as is done in some states where it is regarded as an indebtedness. It comes upon the citizen *in invitum*, and its payment rests upon the duty he owes to the state in return for the protection extended by it to him. The exercise of the power of taxation is legislative in character, while the collection of taxes, when once authorized by the law-making power, is ministerial. The one is legislative and the other executive. Neither is a judicial act, and one department of the government should be careful not to encroach upon the domain of another. It is true, the judiciary may be called upon by the legislature to enforce the collection of taxes in a judicial way, but it has not done so in this state, save as to railroads, where suit has been authorized to recover them; and this exceptional case inferentially says that this remedy cannot be resorted to in other cases. The collection of taxes depends, and properly so, upon the remedies afforded by statute. Their speedy and prompt collection is necessary to the life of the state. The interest of the citizen demands that it should be done with as little expense as possible. If resort can be had to the courts, in the absence of statutory provision, then delay, expense, and abuse will certainly follow. But it may be said it is only in cases where there is no remedy, or it is ineffectual, that the right to sue for taxes should be implied. We are aware that it has been held by some courts, and said by some text-writers, that if no specific remedy be given by statute, or only an imperfect or inadequate one, then it is but reasonable to infer that a remedy by suit was intended by the legislature. This court has, however, never



assented to such a rule. Public policy, in our opinion, forbids it. Its adoption would burden the courts with litigation, and be likely to lead to abuse of such a character as not only to unjustly harass the citizen, but injure the state greatly more than it would suffer by the loss of taxes from its non-adoption. It would tend to confuse the powers of the different departments of the government, and there would be no limit to its exercise. If one delinquent could be sued because he had made a fraudulent transfer of his property, or another for some other reason, upon the ground that there is no remedy or adequate one, the state, in the end, would be the sufferer. Besides, it would violate a policy which has prevailed in this state from its earliest history. It is true, it has been said by this court, in some cases, that wherever a legal liability exists the law raises a promise, and *assumpsit* lies; that, if a right be created, and no remedy appointed, the usual remedy for that class of cases will be appropriate; that, when the statute creates a liability, and provides no specific remedy, the common law must afford it; and that when the chancellor finds a party with a legal right, but no remedy, he should furnish it. This is all true, generally speaking, and a review of the cases shows that they were general expressions, used in the argument contained in the opinions, and where questions unlike this one were presented. In the case of *Dry-Dock Co. v. Town of Portland*, 12 B. Mon. 77, the company was required by its charter to pay annually to the city of Louisville 50 cents on each \$100 of its capital stock. Subsequently the trustees of the town of Portland were authorized by the legislature to collect annually \$200 of the assessment. It was urged that they could not sue for it, but must collect it, as they did their ordinary taxes. The difference between that case and this one is manifest. There a certain sum was fixed by statute, and the fact that it was called a tax by the statute creating the liability did not preclude an action of debt to recover it. The cases of *Johnston v. City of Louisville*, 11 Bush, 527; *Railroad Co. v. Trustees*, 12 Bush, 233; and *Water Co. v. Hamilton*, 81 Ky. 517,—are not in conflict with the views above expressed. Expressions of a general character may be found in the argument in the opinions in those cases which seem to support a different view, but the question as now presented was not then before the court, nor was it decided. In the last-named case the water company sued out an injunction to prevent the sale of some property for its taxes. It was not sued for them. It voluntarily came into a court of equity, asking relief, and, under such circumstances, the court said: "The chancellor, having been appealed to by the appellant [the water company] for some sort of relief, should have taken cognizance of the case, and required the appellant by rule to pay the money into court, and, if not, to place the management of the corporation in the hands of a receiver, in order that the burthen might

be discharged." It is apparent that case is not this one. If, where a tax has been imposed, and no remedy or any adequate one furnished for its collection by the statute, it were in our opinion a correct rule to imply the right to sue for it on account of the silence of the legislature, yet we would not apply it in view of the fact that our legislature has expressly provided that a railroad corporation may be sued for its taxes. Gen. St. App. c. 92, p. 1021, § 5. This was equivalent to a declaration by it that, in the absence of such a statute, no such suit could be maintained. The judiciary should not, in our opinion, merely because of legislative silence as to the collection of a tax, imply to itself a power not inherent in itself, and the exercise of which will not only be confusing as to the powers of the different branches of the government, but likely to lead to great abuse. Indeed, in view of the legislation as to taxes owing by railroads, it cannot do so. We do not intimate whether, in this instance, the taxes are or are not owing, but merely decide that for the lack of legislation no action can be maintained looking to their collection. If, in such a case, the state is likely to lose any of its revenue, the legislature can, by additional legislation in the form of penalties for non-payment, or by authorizing suits for its recovery, provide against it, and will, no doubt, do so where in its wisdom it may be proper and necessary. Judgment reversed, with directions to dismiss the petition.

#### DUDLEY *et al.* v. GODDARD.

(Court of Appeals of Kentucky. Nov. 5, 1889.)

VENDOR AND VENDEE—NOTES FOR PURCHASE PRICE—HOLDER WITHOUT ASSIGNMENT.

In an action for money advanced, which was used by defendant in paying for land, the facts that plaintiff holds the purchase-money notes, though they have not been assigned to him, and that defendant has made payments to him, which have been credited on the notes, show, as between them, that plaintiff is holding the notes as security for his advances, and he is entitled to a lien as against the defendant's widow's claim for a homestead.

Appeal from circuit court, Fleming county.

"Not to be officially reported."

Action by W. H. Goddard against F. Dudley and the estate of Robert Dudley, deceased, to recover for money advanced to pay notes given by the latter for the purchase price of land in which the widow claimed a homestead. Judgment having been rendered for plaintiff, the defendants appeal.

W. G. Dearing, for appellants. J. P. McCartney, for appellee.

PRYOR, J. The facts of this record do not authorize the argument made by counsel for the appellants that the contract between Kelly and Foxworthy, the owners of the land, and Robert Dudley, the purchaser, is within the statute of frauds. A bond for title was executed, and delivered by the vendors to Dudley, and the latter executed his notes for the purchase money. This made the contract



complete, and the statute of frauds is not in the way of its being enforced. It is not pretended that the two notes last due have ever been paid. They are in the possession of the appellee, who presents them as claims against the estate of Dudley, and were executed for the purchase money of the lot adjudged to be sold. It would be inequitable to allow the widow a homestead as against these claims. That the appellee held the notes is evidenced by the fact of the credits indorsed, with the additional proof of the actual payment to him by Dudley of the amounts for which the notes are credited. While it is alleged in the amended petition that the claim was for money advanced for Dudley by the appellee, it is evident that the latter held these notes by purchase from the original vendors, and that payments were being made on them from time to time by Dudley, in discharge of the obligation. The notes were not assigned to the appellee, but, to aid Dudley, the appellee took them up, and held them as security for his money. A mere loan of money that is applied to satisfy a debt due on land gives to the lender no equitable lien on the land as an indemnity, but where the money is advanced by the one, and the purchase-money notes taken up by him, and payments made and credited on them from time to time by the debtor, it is, nothing else appearing, sufficient to show that, as between the creditor and debtor, the latter is holding the notes as an indemnity, and that the money was not advanced solely on the personal responsibility of the debtor. The judgment below is therefore affirmed.

#### BARNETT v. SALYERS.

(Court of Appeals of Kentucky. Nov. 7, 1889.)

##### VENDOR'S LIEN—DISCHARGE IN BANKRUPTCY.

1. It is not necessary, under the statutes of Kentucky, as between the vendor and vendee, that a lien on the land sold be retained by the vendor, as failure to do so only affects the rights of the vendor where third persons purchase from his vendee.

2. A debtor's discharge in bankruptcy cannot affect the right of a creditor to enforce a vendor's lien on lands of the debtor which were not listed as part of his assets, and in relation to which no proceedings in bankruptcy were had.

Appeal from circuit court, Menifee county.  
"Not to be officially reported."

Action by W. J. Salyers against John L. Barnett to subject land to the payment of a part of the purchase price. Judgment for plaintiff, and defendant appeals.

A. T. Wood and Thomas Turner & Son, for appellant. W. H. Holt, for appellee.

PRYOR, J. The appellee, Salyers, sold his land to Nelson Barnett, the brother of the appellant, and took in payment the land of Nelson Barnett, or, rather, exchanged the one farm for the other. The appellant wanted to purchase the farm of his brother, Nelson, (that he exchanged with Salyers,) and the latter declined to make any trade with him, giving his reasons for the refusal. Salyers

then proposed to so arrange it that the appellant could get it, and did so by the exchange of his (Salyer's) farm for it, and then took appellant's notes for the purchase money. He made to Nelson Barnett a deed reciting the consideration as paid in full, and the appellant took by assignment the title bonds that his brother held for the land that he (the appellant) obtained of Salyers, or, rather, of his brother, in this indirect way. Nelson Barnett held these bonds for title to his land. One of the bonds was executed by the appellant for the greater portion of it, he having once owned the land, or a part of it; and two of the bonds were given by other parties. The appellant paid all the purchase money to Salyers except \$145; and to recover this, Salyers instituted this action to enforce a lien on the land sold the appellant. He had passed the title to the land sold Nelson Barnett free from any lien; and it is now insisted by the appellant that no lien exists on his land, because there was none retained when the bonds were assigned him, and because there is no privity of contract between Salyers and the appellant, and, further, that the appellant has been discharged from the payment of the debt by the bankrupt court. As to the latter defense, it can avail nothing, as no personal judgment is sought, and there is nothing in the record showing that the bankrupt court, by any proceeding, had sold this land for creditors, or that it had ever been listed as a part of appellant's assets. The lien, however, is not affected by the mere discharge from personal liability; and that a lien exists is apparent. While the purchase-money note is not assigned to the appellee, Salyers, it was passed to him as the consideration for the land that the appellant purchased; and whether the contract was with Nelson Barnett or the appellee is immaterial,—the land is liable for its payment. It is not necessary, under our present statute regulating conveyances between the parties to the deed or contract, that a lien should be retained; and the failure to do so only affects the right of the vendor to enforce it where third parties have purchased from his vendee. So it clearly appears that the note was given for this land, and that it was purchased by Salyers so as to enable the appellant to get it, as his brother declined to sell it to him.

It is contended by the appellant, in defense of the recovery, that the title to this land is defective. It further appears, as to Salyers at least, that appellant was to take these title bonds, and look to the makers for title; and under the circumstances (although the proof is conflicting) it is unreasonable to suppose that Salyers would convey his land to Nelson Barnett, and then assume to make the title perfect to the land obtained by the appellant from Nelson, when it was all done to gratify the desire of the appellant to own the land of his brother, the greater portion of which he had sold him, and no doubt, from the proof, was familiar with the title when the bonds were assigned him. There is no reason for a

reversal, and the lien was properly enforced. Judgment affirmed.

HOLT, J., not sitting.

JESSE v. SHUCK.

(Court of Appeals of Kentucky. Nov. 5, 1889.)

NEW TRIAL—PLEADING—SPECIAL DAMAGES.

1. Civil Code Ky. § 841, providing that a new trial shall not be granted on account of the smallness of damages in an action for injury to the person or reputation, nor in any other action in which the damages equal the actual pecuniary injury sustained, does not apply where special damages are pleaded and proven.

2. Where special damages are sought to be pleaded for time lost and expense incurred, the amount of expense and length of time must be particularly set forth.

Appeal from circuit court, Shelby county.  
"Not to be officially reported."

J. S. Morris, for appellant. L. C. Wills, for appellee.

HOLT, J. This is an action of assault and battery. The evidence as to the difficulty is somewhat conflicting. The jury, however, found for the appellant, who was plaintiff below, a verdict of one cent in damages. They thereby pronounced the appellee guilty of the charge. They thereby said his act was unlawful. Upon this state of case, the appellant, while he concedes that the matter of general damages was entirely within their discretion, contends they were bound to allow him the special damages, which he claims were sufficiently pleaded and proven. Section 841 of the Civil Code provides: "A new trial shall not be granted on account of the smallness of damages, in an action for an injury to the person or reputation, nor in any other action in which the damages equal the actual pecuniary injury sustained." This statutory rule follows the common law, and, in actions for injury to person or reputation, forbids any interference with the verdict on account of the smallness of the damages awarded. It does not, however, apply as to special damages, when they are pleaded and proven, in such a case. General damages are such as the law implies or presumes from the doing of the wrong. There is no certain standard by which to measure them; and, as the best attainable means of arriving at them, the law leaves it to the jury to fix the amount. This is not so, however, as to special damages which really result directly from the wrong, and are not merely implied by law. They can be definitely ascertained. Evidence will measure them accurately. Where, therefore, they are pleaded, and the verdict is such as to show plainly that, as to them, both the proof, and the law as contained in the court's instructions, have been disregarded by the jury, a new trial should be granted. *Taylor v. Howser*, 12 Bush, 465. The special damages, in the form of doctor's bill, cost of medicine, and loss of time, were clearly proven. The jury

were instructed that, if they found for the appellant, they should find such sum as would compensate him for loss of time, and expense, if any, incurred in his cure.

If, therefore, the special damages were sufficiently pleaded, and the jury should therefore have been so instructed, then, as they disregarded, *in toto*, both the instruction and the evidence, a reversal must be ordered by reason of the lower court's refusal to grant a new trial. The petition, after averring the assault and battery, says that by reason thereof the appellant "was confined to his bed for ——— weeks, and suffered greatly in body and mind, and was put to and incurred considerable expense, to-wit, in the sum of ——— dollars, in securing medical attention, nursing, and medicine; and by reason of said assaulting, beating, and bruising this plaintiff lost ——— weeks from his business, and was damaged greatly, viz., in the sum of ——— dollars; and he says that by reason of said acts and doings of said defendant this plaintiff was damaged in the sum of five thousand dollars." It is blank as to the time lost, the expense incurred, and the damage resulting therefrom. It was necessary to aver the special damage, if a recovery was sought therefor. 1 Hil. Torts, 242. It was material to do so. This being so, the appellee had a right to have it so pleaded, that he could determine whether he would admit or deny the averments relating to it. If the petition had been taken *pro confesso*, by reason of a failure of the appellee to plead, the appellant, owing to the blanks in his petition, could, as to special damages, have recovered at most but a nominal sum; and this he did by the verdict. It cannot properly be said that the petition in this case states the facts as to the special damage, and that the amount thereof is a matter of inquiry upon the trial. The facts, being material to a recovery, must be so stated as to enable the defendant to plead understandingly as to them, and to determine whether he will or ought to deny them. Any resulting damage, not implied by law from the doing of a wrong, should be stated with particularity. Any other rule would authorize such a loose mode of pleading as to often lead to surprise and undue advantage. The extent of the particular damage sustained should be so pleaded as to apprise the alleged wrong-doer definitely of what is claimed. Chitty says: "Special damage must be stated with particularity, in order that the defendant may be enabled to meet the charge, if it be false; and if it be not so stated it cannot be given in evidence." 1 Chit. Pl. 898. In Newm. Pl. & Pr. 507, it is said: "In any action, as has been said heretofore, if the plaintiff desires to recover special damages, or for an injury which is not the necessary as well as natural effect of the wrong complained of, he must, in addition to the facts constituting the *gravamen* or gist of the action itself, allege, also, the facts showing the special injury, and the extent or amount of it. Thus, in an action

for an assault and battery, if the plaintiff seeks, not only to recover for the trespass itself, but also for the physician's fees, and other such incidental losses, which are the natural as well as proximate effects of the violence done him, he must allege the amount of the physician's bills necessarily paid out by him, and other such losses sustained in consequence of the beating or wounding." If trespass be brought for the taking of a horse, Chitty (page 396) says "nothing can be given in evidence which is not expressed in the declaration; and, if money was paid over in order to regain possession, such payment should be alleged as special damage." There are exceptions to this as to all other rules. A minute statement may in some cases tend to prolixity, and there it has been said a general one will suffice. 1 Chit. Pl. 308.

In some instances the special damage may not, as to amount, be definitely known to the pleader, as it is where money has been expended for medicine, or in the payment of physicians; but, as particularly in pleading is proper and necessary where special damages are claimed, good pleading requires that the pleader should make known to the defendant the extent and amount of his claim, that he may know how to plead to it; and the fact that, by section 126 of our Civil Code, "allegations concerning value or amount of damage, not accompanied by an allegation of an express promise, or by a statement of facts showing an implied promise to pay such value or damage," are not to be taken as true, although not traversed, does not alter the rule of pleading we have indicated as to special damages. Pleading without proof cannot avail. The general damages were entirely within the discretion of the jury; and, although they found the appellee's conduct was unlawful, yet, as no foundation was laid by pleading for a recovery of the special damages, although proven, the judgment is affirmed.

#### CAMPBELL COUNTY v. YOUTSEY *et al.*

(Court of Appeals of Kentucky. Nov. 7, 1889.)

##### HIGHWAYS—CONTRACT TO REPAIR.

1. In an action to recover on a contract with a county to keep its roads in repair, it appeared that the contract was let under a law providing that the contractor should report his work for inspection to the surveyor of each road-district, and, when they certified to the county judge that the work was properly performed, the latter was authorized to draw a warrant on the treasurer for its payment. *Held*, that adverse reports by the surveyor constituted no defense to the action, which was the only remedy left to the contractor when the differences arose with the surveyors.

2. Where specifications are embraced in an advertisement for proposals to do work, and a contract results on which suit is brought, the specifications, being the basis of the contract, cannot be excluded as evidence.

Appeal from circuit court, Campbell county.  
"Not to be officially reported."

Action by John S. Youtsey against the county of Campbell to recover for services rendered under a contract to repair the coun-

ty roads. Judgment for plaintiff, and defendant appeals.

*B. H. Kilpatrick and J. S. Ducker*, for appellant. *W. B. Baker*, for appellee.

PRYOR, J. Under a legislative enactment the county judge of Campbell county entered into a contract with the appellee Youtsey, by which the latter undertook and agreed to keep in repair the dirt roads of the county that were known as public highways, for the period of one year, for the sum of \$5,800. By an express provision the county judge is permitted to make the contract, and to accept a bond from the contractor for the faithful discharge of his duties. During the performance of the contract the county paid to the appellee more than half the sum agreed upon for his services, and declined to pay the balance after the expiration of the year because of the failure of the appellee to keep the roads during the year in reasonable repair. The appellee applied to the court of claims for the allowance, and this defense was relied on. This action was then instituted against the county by the appellee that his right of recovery might be determined, and a verdict and judgment rendered for the sum claimed. There was no demurrer to the petition, but an answer filed, placing in issue the manner of performance, and also a defense "that the contractor had failed to make a report of his work to the surveyor in each road-district, that it might be inspected, and, if properly performed, so that the surveyor could certify that fact to the county judge, who was then authorized to give the contractor an order on the county treasurer for the money." This mode of obtaining the money is provided for by the sixteenth section of the act. The surveyors, by their report to the county court, say that the contract had not been complied with, and if they are the final arbiters, as between the contracting parties, it ends this controversy. We are not disposed to so construe the provision of the act in question. It only provides the mode by which the county judge may be justified in paying the money to the contractor, and, where differences arise between the contractor and the surveyor, the only remedy left to the contractor is to resort to an action at law, unless the court of claims should make the allowance regardless of the surveyor's report. There were some objections made to the action of the court in rejecting certain testimony offered, necessary to be noticed. The county court, through its presiding officer, made a publication of the purpose to let out this contract for the repairing of the dirt roads, containing the specifications and manner in which the roads were to be repaired. These specifications were offered as evidence, and constituted the basis of the contract between the parties. The bond executed by the appellee for the performance of his contract refers to these specifications, and we perceive no reason for rejecting them. As to the payment of certain road orders by the county, reducing the amount

of recovery, it does not appear that it was the duty of the county to pay them, or that the contractor had ever directed the payment, and therefore these orders were properly rejected. While the roads may have been kept in reasonably good repair, the specifications required the work to be executed in a certain way, and this mode of repair might have been more lasting and beneficial to the county than the usual character of repairs done on dirt roads, and without these specifications the jury could not well determine whether the contract had or not been complied with. The judgment is therefore reversed and remanded for a new trial, and for proceedings consistent with this opinion.

**TEMPLE et al. v. BRITTAN et al.**

(Court of Appeals of Kentucky. Nov. 7, 1889.)

**PLEADING FOREIGN STATUTE.**

The averment in a petition that under the statutes of another state complainants are sole heirs of an intestate is not a sufficient allegation of the statutes of such foreign state, and need not be denied.

Appeal from circuit court, Logan county.  
"Not to be officially reported."

W. F. Browder, for appellants. J. J. West and W. L. Reeves, for appellees.

LEWIS, C. J. W. F. Barclay, administrator of the estate of Eleanor Stevenson, who died in 1885 at the age of about 12 years, instituted this action in the Logan circuit court for a settlement of his accounts and judgment directing to whom he shall pay the balance left in his hands after deducting proper charges and costs. The intestate was the only child of Edward S. Stevenson, who died resident of Logan county about the year 1874, and his wife, Camilla Stevenson, who died in December, 1880, and the contest about the estate is between appellants, brothers of Camilla Stevenson, and appellees, child and grandchildren of Edward S. Stevenson's sister, the former seeking to have distribution made according to the laws of the state of Tennessee, in virtue of which they claim the whole, and the latter to have it done in pursuance of statutes of this state, which require an equal division between the paternal and maternal kindred. How much, if any, of the estate, now consisting of stocks and bonds, was derived by the will of her father is a subject of controversy, and does not clearly appear, though the greater part of it was inherited from her mother. But, if distribution be made in the manner provided by statutes of this state, it does not make any difference whence the intestate derived the estate, for, being all personalty, it descends in the order it would have done if she had been of full age at date of her death. It is well settled that succession to the personal property of an intestate is governed exclusively by the law of his actual domicile at the time of death, and if it appeared from the record of this case the statutes of descent

and distribution of Tennessee are as contended for by appellants, and that the domicile of the intestate was there when she died, a reversal of the judgment of the lower court would be inevitable. But an insuperable obstacle in the way of such disposition of the estate as appellants ask is that the statutes of that state, having been neither sufficiently pleaded nor attempted to be proved, cannot be presumed to vary essentially from those of this state on the same subject, nor to require a distribution different from what is directed in the judgment appealed from; and as the original and only administration was granted by the Logan county court to the plaintiff Barclay, and no one has manifested a right or sought to have the estate remitted to Tennessee, for distribution or any other purpose, it seems to us the Logan circuit court, the jurisdiction of which is unquestioned, was bound to adjudge the distribution made according to the law of this state, the only rule by which it could be governed, without regard to the question of domicile. It is true, counsel contend that the pleadings concede the statutes of Tennessee to be such as he fully and particularly states them in his brief to be, but we perceive nowhere in the record an allegation of what they in fact are, nor attempt to set them forth. The allegation in the answer and cross-petition of appellants is in substance that, the infant intestate being domiciled in the state of Tennessee at time of her death, her estate passes to her heirs at law under the statutes of descent and distribution of that state, and they (appellants) are the sole heirs at law of said intestate, and as such they assert title. Such an allegation is not, as has been frequently decided by this court, equivalent to the statement of a fact, but amounts to no more than a mere conclusion or interpretation of the law by the party pleading, the correctness of which the court has no means of determining in the absence of the statutes, and, as it involves no issue of fact, it is not even necessary to deny it. *Larue v. Hays*, 7 Bush, 53; *Benkley v. Stewart*, (MS. opinion, Crittenden Co.) *Montgomery v. White*, 11 S. W. Rep. 10. But, even if the statutes of Tennessee had been alleged and proved to be in fact what counsel contends in argument they are, we would be inclined to the opinion that the evidence, which need not be referred to in detail, shows the domicile of the infant intestate was, in legal contemplation, in this and not in the state of Tennessee. Judgment affirmed.

**GAITHER et al. v. O'DOHERTY.**

(Court of Appeals of Kentucky. Nov. 9, 1889.)

**SPECIFIC PERFORMANCE.**

1. Specific performance of an entire contract for sale of land by three persons owning in severalty cannot be enforced at the instance of two of them, where the third has, since making the contract, and before action, sold his land to a third person, and the proof fails to show that the sale was

procured by the person who had agreed to purchase in order to defeat the contract.

2. When time is not of the essence of a contract for sale of land, and the vendors find their title defective, they are entitled to a reasonable time to perfect it, and tender a deed, and the fact that the title was not good at the date of the contract does not preclude an enforcement of the contract.

3. Where the contract for purchase of land shows three owners, but rather indicates that they are joint owners, and the purchaser does not know that they own in severalty, though such is the fact, he is entitled to a deed with a covenant of general warranty by each of the three as to the entire tract of land.

4. Under Civil Code Ky. § 92, providing that defect of parties is waived unless distinctly specified by a demurrer thereto, failure to make a party to the suit one who has a purchase-money lien on the land, and to whom, by the terms of the deed tendered under the contract, the consideration was assigned, though the notes were to be made directly to the vendors, is waived by failure to demur, where the defect appears by the filing of the tendered deed as an exhibit.

Appeal from Louisville law and equity court.

"Not to be officially reported."

Action by James E. Gaither and another against Matt O'Doherty, for specific performance of a contract for sale of land. Judgment for defendant, and plaintiffs appeal.

*Helm & Bruce*, for appellants. *O'Neal, Jackson & Phelps*, for appellee.

HOLT, J. In the spring of 1887 the appellant James E. Gaither owned two lots, the appellant P. P. Huston one, and R. H. Courtney one, each being 50 feet front and 200 feet deep, and one adjoining another, and all situated on Second street, in the city of Louisville. The lots of Courtney and Huston lay between the two lots of Gaither. Prior to March 26, 1887, the latter and Huston had placed their lots in the hands of a firm of real-estate agents for sale. It was thought a purchaser would more likely be found if all four of the lots, fronting 200 feet, could be sold as one lot. Gaither, therefore, obtained from Courtney, by telegram, and perhaps by letter, authority to place his lot on the market with the other three, and he accordingly placed it for sale with the same real-estate agents. It is urged that he had no authority to do this, by reason of the rule that an agent specially authorized to do a particular thing cannot delegate his authority. It was so given in this instance, however, that we do not think it was contemplated Gaither should in person do everything in the way of effecting a sale, but that it conferred upon him the power to place the property with a real-estate agent for this purpose. March 26, 1887, the appellee, Matt O'Doherty, made a written offer to the real-estate agents of \$61 per front foot for the entire 200 by 200 feet of ground, it to expire if not accepted on that day. It was, however, so accepted by the real-estate agents, who signed the indorsement of acceptance as "Agents for owners, James E. Gaither, Courtney, and P. P. Huston." The appellee was informed of the acceptance the next day. By April 7, 1887, he had obtained an abstract of title. It appeared from it that

Gaither and Huston had no record title. In fact, the title to the lot of the latter, so far as appeared of record, was in his vendor, one Marshall, who also had a lien upon it for unpaid purchase money. In addition to this the widow of a former vendor, Edwards by name, had a dower right in it, and it was also claimed that by reason of defective judicial proceedings he had never been divested of the title, and that it was still in his heirs. As to one of the Gaithers, the legal title was either in his vendors, Harbison & Gathright, or a previous vendor by the name of Franz. There were liens on it, also, for taxes, construction of public works, and unpaid purchase money owing to Harbison & Gathright. They had bought the other lot of one Moody, and on March 26, 1887, the deed from him had not been recorded, and they had made no deed to Gaither. There was also a purchase-money lien on it in favor of Moody, and one in favor of Harbison & Gathright, as between them and Gaither payable in one and two years thereafter. The appellants, upon being apprised of the state of case, went to work to perfect their titles. April 15, 1887, the appellee notified them that he considered the contract of purchase at an end, and that he would not take the property. By May 15, 1887, the appellants had perfected their titles. They had obtained deeds of release from the widow and heirs of Edwards, releases of the liens for taxes, etc., and former vendors, who had not conveyed prior to the appellee's purchase, either did so by deeds made directly to their vendees, or by uniting in the deeds from Gaither and Huston to the appellee, which, together with a deed to him from Courtney for his lot, were tendered to the appellee upon the day last named. He refused to complete the contract, and on June 9, 1887, this action was brought by the appellants Gaither and Huston to compel specific performance. Courtney did not unite in it, as he had conveyed his lot on May 19, 1887, to one Shanahan, and the appellants only sought to compel the appellee to take their three lots in accordance with the terms of the March 26, 1887, contract. Harbison & Gathright united in the deed from Gaither to the appellee; but while it provided that the notes of the appellee, which were to be given for the unpaid installments of purchase money, should be executed to Gaither, yet by way of paying Harbison & Gathright the purchase money still owing them, it further declared that its consideration was thereby assigned to them. While, therefore, they should have been made parties to the suit, yet, as the deed was filed as an exhibit with the petition, this defect of parties appeared, and advantage not having been taken of it by special demurrer it was waived. Civil Code, § 92.

A case was not presented where no one had sued who was a proper plaintiff. The notes were to be executed payable to Gaither. He was, moreover, an interested party, and adversely to the appellee. Mutuality of obligation and remedy as to a contract is the

general rule. If, however, a vendor is not at the making of his contract invested with such a title as he undertakes by it to convey, yet if time be not of the essence of the contract, and he is able when the time for performance arrives to make such a title, and tenders the deed, it will be enforced, although his title was defective at the date of the contract. Indeed, so far has this rule been extended that it may be regarded as settled that if he be not able even at the institution of his suit to make the title, and a rescission is therefore asked by the adverse party, yet, if he can perfect it within a reasonable time, he will be afforded the opportunity. *Smith v. Cansler*, 83 Ky. 367. In the case now before us the contract of purchase did not fix the time when a deed should be made. Some delay in doing so appears to have arisen from the appellee's desire to examine the title to the property, and then from the consideration of certain offers looking to a settlement of the matter without litigation. There does not appear to have been any neglect or unreasonable delay, under all the circumstances, upon the part of the appellants in perfecting their titles, and making a tender thereof to the appellee, and in the interim from the making of the contract the character of the property had not materially changed. It is true that owing to the wild spirit of speculation then prevalent in Louisville the value of the property may have changed somewhat, but this cannot be allowed to affect the rule above indicated. The specific performance of a contract by means of a court's power is not a matter of absolute right in a party. It is to be exerted, when it finds, in the exercise of a reasonable discretion, that general principles will not, owing to the circumstances of the case, furnish an exact measure of justice. It must always be in the power, however, of a party seeking the specific execution of a contract to carry it out upon his part. Here, however, this was rendered impossible by the conveyance by Courtney to Shannahan. The purchase of the appellee embraced the entire 200 feet front. The contract is an entirety. If enforced, it must be as a whole. It is now impossible for the appellants to comply as to the Courtney lot. To avoid this difficulty it is claimed either that the Shannahan purchase was in fact for the benefit of the appellee, and that his money paid for the lot, and that it is in fact held for him, or that the appellee procured Shannahan to buy the lot in order to defeat the appellants in the assertion of their rights, and thus by fraud obtain an undue advantage. They insist, if this be so, that then, although the contract of purchase was not several as to the property bought, they have the right to compel the appellee to take their portion of the property, and pay for it at the contract rate. It is a very old doctrine, and one consistent with common sense and right, that one cannot take advantage of his own wrong. If, therefore, one of the parties to a contract, in vio-

lation of his duty and obligation of fairness to the other contracting parties, fraudulently or to obtain an undue advantage, and to defeat the execution of the contract, procures one of them to do an act which *pro tanto* prevents the specific execution of it, this should not deprive the remaining innocent parties of the right to specifically enforce it as to their own interests, and according to its terms, if the subject-matter will admit of it. The vendee, who has thus fraudulently and wrongfully prevented the entire execution of the contract by inducing one party whose interest is in fact several from that of his co-contractors to so place himself that he cannot unite in executing it, should not be allowed to rely upon his own wrong-doing to defeat the right of the innocent parties to specifically enforce the contract as to their own severable interests. *Burton v. Shotwell*, 13 Bush, 271. The question then arises whether the appellee is shown to have been guilty of such conduct. This is a question of fact. The lower court found in his favor, and the chancellor's finding is, of course, entitled to weight. He is upon the ground, and has a better opportunity from all the surrounding circumstances to arrive at the truth of the matter.

Counsel for the appellants rely confidently upon many circumstances, which, they claim, show conclusively that the appellee was either the real purchaser of the Courtney lot, or that he, in fraud of appellants' contract rights, in order to obtain an undue and unconscientious advantage, conspired with Shannahan, and procured him to purchase the Courtney lot. Much testimony has been taken upon this question. We have examined all of it carefully. It is unnecessary to detail it here. In our opinion the circumstances relied upon by the appellants are insufficient to overthrow the positive testimony of the appellee and Shannahan, or to discredit them, both of whom testify, in substance, that the purchase was not for the appellee's benefit, and that he did not procure Shannahan to make it. In this statement they are sustained by some circumstances appearing in the record, which need not be detailed. This conclusion, supported as it is by that of the lower court, necessarily forbids the granting of the relief asked by the appellants. They are not now in a position to fully carry out the contract upon their part, and this is not the fault of the appellee. There is another reason, however, why the relief cannot be granted. If a party gives a bond for the conveyance of land without any stipulation as to the character of title he is to make to the grantee, he must convey with general warranty. The contract, in this instance, was an entire one. Each of the vendors undertook by its terms to convey to the appellee the 200 feet of ground. It makes no mention that it was owned in severalty. The appellee testifies positively that he did not know this when he entered into the contract. The language of the contract did not

so inform him. While from it there appeared to be three persons interested in the property, yet it did not appear that they owned in severalty, but one would rather infer from its language that they were joint owners. This being so, the appellee was entitled to a deed with a covenant of general warranty by all three of the vendors as to the entire 200 feet of ground. It is urged that by his subsequent conduct, upon learning that the property was owned in severalty, he waived this right, and recognized that separate deeds were to be made. In our opinion, however, the testimony does not show this sufficiently to authorize us in saying so, and it in fact appears that shortly after the purchase a joint deed with a covenant of general warranty was prepared and in fact executed by all three of the grantors, but was never delivered to the appellee, or even tendered to him, because Courtney finally refused to consent to it. He was unwilling to warrant the title of the property of Gaither and Huston. For this reason, therefore, as well as the one above indicated, the judgment of the lower court dismissing the action is affirmed.

#### HATFIELD v. COMMONWEALTH.

MAYHORN *et al.* v. SAME.

(Court of Appeals of Kentucky. Nov. 9, 1889.)

##### MURDER—JURISDICTION—EVIDENCE.

1. Defendant's brother was stabbed in a fray by one of those with whose murder defendant was charged. Certain officers, relatives of defendant, arrested the deceased persons, and while conducting them to the county seat to be tried were overtaken by defendant, who was an officer in Virginia, and others, who relieved them of the prisoners, on the ground that they should be tried where the offense was committed, and took them back, and afterwards over the line into Virginia, where they tied them and guarded them till they learned of the death of defendant's brother. The party then, without defendant, took the prisoners to the Kentucky side of the line and shot them, defendant meanwhile remaining with his gun on the Virginia side, two or three hundred yards distant, ready and near enough to give aid, should an attempt be made to rescue the prisoners. Defendant, after the murder, administered an oath to the party never to reveal the acts of any one connected with the affair. The indictment charged a conspiracy on the part of those shooting, and charged those not guilty of the actual shooting as being present aiding and abetting. *Held*, that defendant, though out of the state when the murder was actually committed, was guilty of an offense against the state of Kentucky, and could be convicted therein.

2. Defendant was sufficiently connected with the crime to be convicted as principal, and there was sufficient evidence of criminal intent.

3. The declarations of the party while in charge of the murdered persons, after they had been taken from the officers, were competent against each of them when spoken in reference to the purpose they had combined to accomplish.

"To be officially reported."

*W. M. Connolly, A. J. Auxier, R. M. Ferrell, and P. A. & J. S. Cline*, for appellants. *S. G. Kinner and P. W. Hardin*, Atty. Gen., for the Commonwealth.

FRYOR, J. The appellants, Valentine Hatfield, Doc Mayhorn, and Plyant Mayhorn,

were indicted, tried, and convicted in the Pike criminal court for the murder of one Tolbert McCoy. The verdict and judgment fixed their punishment at confinement in the state prison during life, from which they have appealed to this court. The two Mayhorns were tried together, and a separate trial had for the accused Valentine Hatfield. As the facts of both records apply to the one charge of murder, and the legal questions, in many respects, are identical, we will consider the case as if there had been no separate trial. At the August election in the year 1882 a personal difficulty originated between three of the McCoy boys and one Ellison Hatfield, the brother of the appellant Valentine Hatfield, in which Hatfield was stabbed or cut with a knife, and died in a short time from the effects of the wound. What caused this trouble between these parties is not disclosed by the record, nor was it proper for the court below, in the trial of these appellants, to have made such an inquiry. After the fight had terminated, between the McCoy boys and Hatfield, the McCoy boys were at once arrested by one who is termed in the record a "special constable," and named Floyd Hatfield, and placed in the custody of Tolbert Hatfield and Joseph Hatfield, two justices of the peace of Pike county. These officers of the law, in connection with the constable, all of them related to the man killed, thought it proper to carry the prisoners, the three McCoy boys, to the county seat to be tried, and had the precaution to have with them a guard to protect their prisoners against any attack that might be made upon them by the Hatfields, who had remained behind. They had not proceeded many miles in the direction of Pikeville before they were overtaken by Valentine Hatfield, one of the accused, Elias Hatfield and others, who, according to their own statement, wanted the law enforced, but, as a matter of public convenience, thought the officers of the law should try them in the magisterial district where the fight took place. The accused, Valentine Hatfield, was also an officer of the law, a justice of the peace, but lived in the state of West Virginia, a short distance from the Kentucky border. The officers of the law having these boys in charge seem to have had little hesitation in surrendering their jurisdiction to the Virginia justice of the peace, who, in conjunction with a *posse* of armed men, returned with these unfortunate young prisoners that they might have their trial, as the defense now contends, in the civil district bordering on and near the Virginia line. These parties had not gone far on their return before they were joined near the mouth of a branch by a man called Anse Hatfield, and his squad of men, and among them the two Mayhorns, (appellants,) who are the sons-in-law of the other appellant, Valentine Hatfield. This squad of men were armed with guns when they met these Kentucky justices, who had been divested of their jurisdiction by the Virginia justice, and after proceeding to the residence



of Jerry Hatfield the party obtained a rope and tied the three boys together, and in this condition carried them to the Rev. Anderson Hatfield's, where the party was entertained at dinner. While at the house of the Reverend Hatfield, Anse Hatfield stepped forth and directed "all of Hatfield's friends to form a line," and, from the testimony, although there is some conflict in the statements, these appellants all went into line; and, if doubt exists in this particular, that they were all present is a conceded fact. The prisoners were taken across the river, or the line bounding the two states, and confined in a school-house on the Virginia side. There they were guarded by armed men, the defendants being among the number, who now, on the stand as witnesses, protest against any criminal intent on their part, and averring their purpose to protect these boys from injury by others. They kept them confined in this room until they heard of the death of Ellison Hatfield, who, it was said, had been stabbed by the youngest of the McCoy boys, and then the clamor for human blood began. Tolbert McCoy was 21 years old, Phanner 19, and Randall 15. In the mean time they permitted the mother of the boys to visit them, and this old lady, seeing that human law was powerless to save her boys, on bended knees implored the interposition of Divine Providence for the protection of her offspring from the brutal resolves of these merciless men, and the appellant Valentine Hatfield, in mockery of her fervent appeals, required her, using the language of the witness, "to make less noise and leave." After hearing of the death of Hatfield, they took these boys from the school-house to the Kentucky side of the river, the two appellants, the Mayhorns, being along with the armed force, and, when reaching the spot where they were to carry into execution their murderous intent, they surrounded their victims for the purpose, as they proclaimed, of having "a shooting match," and, cocking their guns, blew the top of the smaller boy's head off, shot Tolbert some 15 times, and Phanner 11 times, and then made the night hideous by hooting as the owl, in contempt, doubtless, of the law and those who administer it.

The appellant Valentine Hatfield was not actually present when the wholesale murder was committed, but remained with his gun on the opposite side of the river, some two or three hundred yards distant, ready and near enough to give aid and assistance should an attempt be made to rescue the prisoners, and to administer an oath to each one of his forces on their return from the murder of this little boy that they would never reveal the action of any one connected with the brutal act. The oath was administered, and doubtless the greater portion of the band have proven faithful to their chosen leader. The indictment in this case charges a conspiracy on the part of these appellants, and many others who are indicted with them, to commit this crime, and those not guilty of the actual shooting as

being present aiding and abetting the commission of the offense. It is argued that what transpired with reference to the offense or the custody of these boys on the Virginia side of the line is incompetent, because it constituted an offense against the law of that state, and not that of Kentucky, and that the accused Valentine Hatfield, being on the Virginia side of the boundary line, could not in contemplation of law have aided and abetted a murder in Kentucky so as to bring him within the jurisdiction of the Kentucky courts; again, that he was not near enough to the parties on the 9th of August, when the wrong was perpetrated, to have aided and abetted in its commission, and therefore cannot be convicted as a principal; and, lastly, there is not only a want of evidence connecting him with the actual offense, but a want of evidence showing any criminal intent. It is not pretended that the courts of one state can enforce its laws beyond the state boundary, but it is well settled that, where one puts into operation the force or power that causes the injury, he is responsible where the wrong is perpetrated, although he may not be actually present. If either of the appellants had stood on the Virginia shore, and shot the deceased on the Kentucky side, the offense would have been against the laws of Kentucky. 1 Bish. Crim. Law, 111. Such legal questions, however, do not arise in this case. The appellants, or those living in the state of Virginia, came to this state and took from its jurisdiction the deceased, who was charged with violating the law of the state, and under the pretense of having them tried in a district convenient to the witnesses summoned, or who would likely be summoned, for the prosecution, took them from the custody of the officers of the law and transported them to the Virginia side of the line, where they were held as prisoners until the result of the stabbing of Ellison Hatfield could be ascertained, and, the latter dying from his wounds, the boys were brought back to Kentucky, and murdered on the night of the 9th of August, 1882, by a band of men under the leadership of Valentine Hatfield, who, from the inception of this reckless violation of the law to its conclusion, could at any time have stayed the hand of the murderers and saved the lives of these young men. From the time the officers of the law in Kentucky made to him, as this record shows, a willing surrender of their bodies, he, as the presiding judge of this murderous clan, follows them to the bank of Tug river, on the night of the 9th, and there with gun in hand awaits those coming from the scene of murder, that he may, in the darkness of the night, administer to each and all of them an oath never to reveal the names of those guilty of this heinous crime. He was as much a principal in the murder as the man who fired the gun that took the life of the 15-year old boy. These appellants had combined to do an unlawful act in conjunction with others, and that was to punish the deceased for his as-



sault on Ellison Hatfield, and to take his life if Hatfield died from the wounds received. Their declarations while in charge of their prisoners, after they had been taken from the law officers, were competent against each one when spoken in reference to the purpose they had combined to accomplish. The instructions in this case embraced the whole law. The one for murder is in the usual form, and so in regard to those present aiding and abetting in the act done. The case, so far as the appellants, the Mayhorns, are concerned, depends solely upon the testimony establishing their guilt. We forbear to discuss it further, and have recited the facts as detailed by the witnesses for the state, sustained in many instances by the testimony for the defense, showing that they were present during the entire period that these young men were in the custody of this lawless gang. While each one of the accused has testified as to his innocence of any purpose even to commit crime, and have been, to some extent, corroborated by others who were their friends and associates, it is sufficient to say that the jury, trying each case after hearing all the testimony, had no reasonable doubt as to their guilt, and, after a careful reading of the record, it would be difficult, in our opinion, for any rational mind to reach a different conclusion. The history of crime, whether committed in this state or out of it, will present no state of facts more clearly establishing guilt than is found in this record, applied to either or all the parties convicted; and to find a more cruel and inhuman murder we must leave our own civilization and resort to the annals of savage life. It is needless, however, to comment on the enormity of the crime, or the helpless condition of the young victims of this murderous band. The law has been enforced in these cases, and in its administration the appellants can truly say the jury, in inflicting the punishment by imprisonment for life, "has tempered justice with mercy." The judgment of conviction as to each one of the appellants is affirmed.

#### MOUNTS v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 9, 1889.)

#### CRIMINAL LAW — TRIAL — WITHDRAWAL OF PLEA.

A defendant on trial for murder, who, of his own motion, and without persuasion or promise on the part of the prosecution, enters a plea of guilty, is properly refused permission to withdraw his plea and enter a plea of not guilty after verdict and assessment of the maximum punishment, on the ground that the prosecution was permitted to prove the circumstances of the killing, where he did not then move to withdraw his plea, though *Crim. Code Ky. § 174*, provides that a plea of guilty may be withdrawn, and a plea of not guilty substituted "at any time before judgment."

Appeal from criminal court, Pike county.

"To be officially reported."

Elison Mounts appeals from a conviction of murder.

W. M. Connolly, for appellant. S. G. Kinner and P. W. Hardin, Atty. Gen., for the Commonwealth.

Lewis, C. J. It appears from the bill of exceptions that when the case was called for trial the attorney for the commonwealth announced the plaintiff ready, but appellant submitted a motion for continuance, based on an affidavit, and thereupon the attorney for the commonwealth admitted the defendant could prove the facts set out in his affidavit, and that it might be read in evidence to the jury. Such an admission is not sufficient to justify the court in requiring a defendant to go to trial in the absence of his witnesses, if it appear from his affidavit their evidence is material for his defense, and he has used proper diligence to procure their attendance. But, as the affidavit is not before us, we cannot say the statements contained in it were sufficient to entitle the defendant to a continuance. Moreover, it appears he withdrew the affidavit, and there, in open court, entered a plea of guilty to the charge of murder contained in the indictment, and the jury, having been duly impaneled and sworn, after hearing the evidence of one witness, returned a verdict of guilty, fixing the punishment at death. On the day following the verdict the defendant entered a motion to permit him to withdraw the plea of guilty and enter a plea of not guilty, accompanying which motion was a statement to the effect that he was induced to enter the plea of guilty, believing the jury would be merciful to him and spare his life, but that the attorney for the commonwealth introduced as a witness the mother of the person killed, and the character and manner of her testimony was such as calculated to arouse the passions and prejudices of the jury, and to induce them to inflict the severest penalty. He further stated that he believed, if permitted to withdraw the plea of guilty, and have a full and fair trial of the charge against him, his life will at least be spared. But the motion was overruled, as was also the one made for a new trial, which was based on the grounds of refusal of the court to permit him to withdraw the plea of guilty, and error in permitting the introduction by the commonwealth of the witness after the plea of guilty had been entered. Section 174, *Crim. Code*, is as follows: "At any time before judgment the court may permit the plea of guilty to be withdrawn and a plea of not guilty substituted." Though it is provided in that section the plea may with permission of the court be withdrawn at any time before judgment, obviously the intended effect of such proceeding, if occurring after the verdict of the jury has been rendered, is to retry the case, and, consequently, to authorize it to be then done, there must exist such reasons as would be sufficient to justify the granting of a new trial. A plea of guilty is inevitably followed by conviction of the offense charged in the indictment, and the only question left open in such case is the nature and extent of punishment to be inflicted, which is still within the legal discretion of the jury. Nevertheless, if the court, or attorney for the common-

wealth, by threats or promises, induces a defendant in a criminal prosecution to enter a plea of guilty, and he is thereby overreached or deceived, even in respect to the extent of punishment, permission should be given to him to withdraw the plea, and substitute a plea of not guilty, although a verdict has been rendered, and a new trial being granted for that purpose. But it appears the defendant in this case voluntarily, and of his own motion, without persuasion or promise by either the court or commonwealth's attorney, entered the plea of guilty, the nature of which he was aware of, and the only reason given for asking permission to withdraw the plea is that the attorney for the commonwealth was permitted by the court to introduce a witness who testified concerning the circumstances under which the murder charged was committed. We do not think the commonwealth can, by the voluntary act of a defendant entering a plea of guilty, be deprived of the right to introduce evidence bearing upon the question of punishment when the offense charged is of different degrees, or is punishable, in the discretion of the jury, in different degrees of severity, unless such plea has been entered upon the faith of a promise or assurance by the court or attorney for the commonwealth that the minimum punishment will be inflicted. In this case no such promise or assurance was given. On the contrary, it appears the attorney for the commonwealth gave notice that, notwithstanding the plea of guilty, he would insist on the introduction of the witness who did testify, and, although the record shows the defendant objected to the testimony of that witness when offered, no motion was then made for permission to withdraw the plea of guilty and substitute a plea of not guilty. It seems to us that as the defendant, of his own volition, took the risk of the jury inflicting the penalty of death for the crime of murder of which he pleaded guilty, it was not error to overrule his motion to withdraw the plea; and, perceiving no error of law in any other respect occurring during the trial to the prejudice of his substantial rights, we are constrained to affirm the judgment.

**CLAYTON *et al.* v. CLAYTON'S EX'R *et al.***

(Court of Appeals of Kentucky. Nov. 9, 1889.)

**PURCHASE OF DECEDENT'S PROPERTY BY ADMINISTRATOR—TRUSTS—ADVERSE POSSESSION.**

1. Where the widow of a decedent purchases land belonging to his estate at judicial sale, paying therefor with funds in her hands as his administratrix, for which she never accounts, she holds in trust for his heirs, in the absence of evidence that the estate was indebted to her; especially where she retains possession during her life, and does not account for the price of part of the land sold by her.

2. Her possession is not adverse to the heirs so as to give title by limitation, as it exists solely by virtue of her marital rights; especially where she has disavowed any other than a dower right.

3. Heirs to whom she conveys part of the land are properly required to account for the profit thereon, with interest, before being entitled to

share in the proceeds of a sale of the remainder of the land.

4. Attorney's fees of heirs who claim the remainder of the land under the widow's will, and resist a division, should not be paid out of the proceeds of the sale.

Appeal from chancery court, Kenton county.

"Not to be officially reported."

*M. J. Dudley and Chas. Eginton*, for appellants. *W. H. Mackoy and A. C. Ellis*, for appellees.

**LEWIS, C. J.** In 1865, John W. Clayton died intestate, leaving Sarah S. Clayton, widow; four children,—Mary J. Bullock, Charles W., James, and John; and Ella, Charles, and Cassius, children of a deceased son, William; and William and James, children of Henry, another deceased son. The widow was appointed administratrix of the estate, which, as appears from the inventory reported by her, amounted to \$3,439.80, and consisted of about \$60 worth of furniture, \$384 cash, and notes on four of the sons made up the residue. He died the owner and in possession of a lot of land in the city of Covington, fronting 95 feet, whereon was the dwelling-house; but the property was incumbered with a mortgage executed to secure payment of a debt of \$3,250 which he owed one Evans. The first transaction bearing on the questions involved in this case, which the record shows occurred after administration was granted, is a conveyance by Charles W. Clayton to Sarah S. Clayton of all his interest, as heir at law of John W. Clayton, or otherwise, in the lot of land mentioned, for the recited consideration of \$900. Next followed an action by Evans, to which the widow and heirs of the deceased John W. Clayton were made parties, to subject the lot to the payment of the debt mentioned; and in 1869 a judgment was rendered for a sale; and, when the lot was sold, Sarah S. Clayton became purchaser, at the price of \$3,548, amount of the Evans debt, interest, and costs, and a deed therefor was made to her by commissioner of the court. But she paid only the first installment of the purchase price, amounting to \$1,774; the second, being \$2,107, having been at her request paid or assured by James and John Clayton, two of the children, March 10, 1869, when she executed a deed conveying to them about 28 feet of the lot, which was by them, May 5, 1870, sold and conveyed to one Bick for the price of \$5,000. In 1877, Sarah S. Clayton sold about 5½ feet of the lot to one Crawford for \$666.66, which was used by her, and in 1885 she died, leaving a will, dated in 1877, by which she attempted to devise the residue of the lot of land to her daughter, Mary J. Bullock, and her children, and one-third thereof to her granddaughter, Ella Clayton. This action was instituted May 21, 1885, by appellants, John Clayton, a son, and James, William, Charles, and Cassius Clayton, grandchildren of John W. Clayton, against appellees, the executor and devisees of the will of Sarah S. Clayton, to obtain a judgment for

sale of the part of the lot not hitherto sold, and a division of the proceeds into five parts, excluding Charles W. Clayton, who conveyed his interest to his mother in 1865. By a judgment rendered in February, 1886, a sale was directed of about 61 feet of the lot, being that part left after taking therefrom 28 feet sold to John and James Clayton, and 5 feet sold to Crawford. June 17, 1887, the second judgment was rendered, in which it was determined (1) that Charles W. Clayton had no interest in the fund arising from sale made under the first judgment; (2) that John and James Clayton should not participate in the distribution, because the profit of \$2,900 made by them on sale of the 28 feet to Blick, and interest thereon from May 7, 1870, amounts to more than their share; (3) that the sale money, amounting to \$7,686.33, be distributed to the heirs of John W. Clayton, other than John, James, and Charles W. Clayton; but (4) there must be deducted from the fund, before distribution, such amount of the estate of her husband as Mrs. Sarah S. Clayton owned as widow, and used in paying debts of his estate. By the third and final judgment, rendered October 17, 1887, the exceptions to so much of report of the commissioner as stated Sarah S. Clayton was entitled, as widow, to \$1,127 of the personalty of her husband, being one-third, and that she had paid that sum on debts of the estate, were overruled, as was the motion of John and James Clayton for modification of the judgment of June 17, 1887. It was further adjudged that John and James Clayton be excluded from receiving any part of the fund for the reasons previously stated, and that there be deducted the sum of \$1,293 as of June 1, 1886, which belonged to Sarah S. Clayton, and passed by her will to her devisees, and that the balance of the proceeds of the sale of the lot by the commissioner be divided into three parts, and paid to Mrs. Bullock, and the heirs at law of William and Henry Clayton, the two deceased sons of John W. Clayton. The court also made an allowance of \$300, fees of attorneys of Mrs. Bullock and Ella Clayton, to be deducted before distribution of the fund.

It is clear to us that the widow of John W. Clayton must be treated as holding the lot of 95 feet in trust for the heirs of her husband, because the whole amount paid by her therefor belonged to his estate, and was in her hands as administratrix. After deducting from the amount shown by the inventory one-third, to which she was entitled as widow, there still remained in her hands as administratrix about \$2,290. All of which she ever paid on account of the estate of her husband was \$1,774; leaving a balance of about \$516, which, so far as the record shows, never was accounted for. It is true that, without right or authority, she accepted from Charles W. Clayton a conveyance to herself of his interest in the estate of her husband, in consideration of \$900; but at that time he was indebted to the estate \$1,400, evidenced

by his note then in her possession as administratrix. Moreover, she not only had full and entire possession and use of the lot and dwelling-house up to her death, but received from Crawford \$666.66 from a sale of 5½ feet, which was used by her, and never accounted for to the heirs. It is to be presumed she collected and used the whole of the third of the personalty she was entitled to as widow, for it was in her hands, and she had a right to appropriate it. There is no evidence that the estate of John W. Clayton was indebted to his widow at the time of her death, nor did she have any interest in the real estate that she could devise; and consequently the lower court erred, so far as it undertook to tax or deduct from the fund for which the lot was sold by the commissioner any sum whatever to satisfy any part of the devise to Mrs. Bullock and Ella Clayton.

The plea of limitation relied on cannot avail appellees anything; for Mrs. Clayton's possession was not, nor, from the nature of it, could it be, adverse to the heirs of her husband, taken and existing, as was the case, solely and in virtue of her marital rights, the enjoyment of which she could not be deprived of. Besides, in the deed to John and James Clayton, she disavowed any other than a dower right to the lot. There is some room for controversy about the meaning of the deed just mentioned, it being contended by one side that only 8 feet of the lot was intended to be conveyed in consideration of the payment by John and James Clayton of the last installment due to Evans, the remaining 20 feet being conveyed and accepted in satisfaction of their interest in the lot as heirs of their father, while they contend the whole 28 feet was conveyed for that consideration. But we do not think it makes any difference how it be construed; for if it be true, as appellants contend, that Sarah S. Clayton held the lot in trust for the heirs of her husband, she had no right to convey it to John and James Clayton absolutely; and we think the lower court did not err in requiring them to account for the profit they made by the sale to Blick, and interest on it, before being entitled to a distributive share of the fund in dispute.

We do not perceive any reason for taxing the common fund to pay the fees of attorneys employed by Mrs. Bullock and Ella Crawford, especially as they claimed the whole of it under the will of Sarah S. Clayton, and resisted a division between the heirs of John W. Clayton. For the reasons indicated the judgment is reversed on the appeal, and affirmed on the cross-appeal, and cause remanded for a distribution of the fund, and further proceedings consistent with this opinion.

JOLLY'S ADM'X v. CITY OF HAWESVILLE.

(Court of Appeals of Kentucky. Nov. 12, 1889.)  
MUNICIPAL CORPORATIONS—NEGLIGENCE OF OFFICERS.

As Gen. St. Ky. c. 1, § 5, making a city liable for damages to property by riotous assemblages of

people, is expressly limited to injuries to property, it does not modify the rule that a city is not liable for injuries to the person resulting from malfeasance or negligence of its police officers.

Appeal from circuit court, Hancock county.  
"To be officially reported."

W. S. Roberts and R. E. Duncan, for appellant. Henry Mason and G. D. Chambers, for appellee.

LEWIS, C. J. The cause of action stated in the petition of appellant, administratrix of James A. Jolly, is that the marshal of defendant, the city of Hawesville, negligently permitted numerous persons to congregate on the streets thereof with guns and pistols, and to engage in sham battles, pursuing and shooting at each other, in such close proximity as to endanger lives of those who were not, as well as of those, so engaged, which was continued from early in the morning until late in the evening of December 25, 1886, without any effort on the part of the marshal, though aware of it, to stop it; and that the deceased, son of the plaintiff, was on that occasion, while quietly sitting on the sidewalk, in no way participating in the disorderly proceeding, shot and wounded by a gun in the hands of one such person, that was loaded with powder and a hard wad, from which wound he suffered great pain, and died. It is further alleged that the marshal was appointed by, and subject to removal by, the city authorities, and that though, in virtue of his office, he had the power, and it was his duty, to suppress such disorderly and riotous assemblies as the one described, he willfully neglected to do so, whereby the plaintiff's intestate was shot.

To render a municipal corporation liable for the acts or negligence of its officers and servants, it is not sufficient that they are merely under its control, and subject to appointment and removal by it; for it is only "where a duty is a corporate one,—that is, one which rests upon the municipality in respect of its special or local interests, and not as a public agency,—and is absolute and perfect, and not discretionary or judicial in its nature, and is one owing to the plaintiff, or in the performance of which he is specially interested, that the corporation is liable in a civil action for the damages resulting to individuals by its neglect to perform the duty, or for the want of proper care or want of reasonable skill of its officers or servants, acting under its direction or authority, in the execution of such a duty." 2 Dill. Mun. Corp. § 980. "But police officers appointed by a city are not its agents or servants so as to render it responsible for their unlawful or negligent acts in the discharge of their duties." Section 975. As said by this court in the case of *Prather v. City of Lexington*, 13 B. Mon. 559: "The officers of a city are quasi civil officers of the government, although appointed by the corporation. They are personally liable for their malfeasance or non-feasance in office, but for neither is the cor-

poration responsible. Omissions of a duty imposed upon them by law, productive of prejudice to an individual, is not a corporate injury. The duty of the officers of the city is prescribed by the statute, from which, also, they derive their power. The corporation appoints them to office, but does not, in that act, sanction their official delinquencies, or render itself liable for their official misconduct." Such has been the uniform ruling of this court, (see *Pollock's Adm'r v. City of Louisville*, 13 Bush, 221; *Greenwood v. Louisville*, Id. 226; *Ward v. Louisville*, 16 B. Mon. 190;) and a different one would be not only perversion of the main design of creating municipal corporations, intended principally as auxiliaries of the state government, but open the door for actions against cities on account of every personal injury in any degree attributable to misfeasance or non-feasance of police officers, and thus impose burdens on tax-payers in no just sense at fault or liable. This long and well settled doctrine has not been modified by statute of this state, except to the extent that section 5, c. 1, Gen. St., makes a city liable for damages done to property therein by riotous and tumultuous assemblages of people; but the care and particularity with which the conditions of such liability are set out in the statute, and the restriction of it in express terms to cases of injury to property, shows the legislature did not intend to thereby authorize a recovery against a city for personal injury resulting from the malfeasance or negligence of police officers. We think the general demurrer to the petition was properly sustained, and consequently the judgment is affirmed.

LACY *et al.* v. ROLLINS *et al.*

(Supreme Court of Texas. Oct. 22, 1889.)

INCUMBERING HOMESTEAD—SURETIES ON OFFICIAL BONDS—UNDUE INFLUENCE.

1. Const. Tex. art. 16, § 50, protects the homestead from forced sale for the payment of all debts, and provides: "Nor shall the owner, if a married man, sell the homestead without the consent of the wife. \* \* \* No mortgage, trust-deed, or other lien on the homestead shall ever be valid," whether "created by the husband alone, or together with his wife." *Held*, that this does not render void a deed of trust executed by an unmarried man on his homestead.

2. After alleging the defalcation and insolvency of a public officer, R., and the liability of all of his bondsmen, plaintiffs, who were part of the bondsmen, alleged, on information and belief, that, at the time of executing a mortgage to defendants, the other bondsmen, to indemnify them against loss, R. was aged and infirm, and was importuned by defendants to execute the mortgage; that he did not execute it voluntarily, but as the result of undue influence, being disturbed and distracted; and that he did not intend to give defendants a preference. *Held*, that these allegations did not show such undue influence or fraud as to warrant setting aside the mortgage.

3. A mortgage given to sureties on the general bond of a county treasurer does not inure to the benefit of his sureties on the special bond required to be given for the safe-keeping and disbursement of the school fund.

Appeal from district court, Anderson county; F. A. WILLIAMS, Judge.

*Gregg & Reeves*, for appellants. *L. S. Hays* and *J. R. Bennett*, for appellees.

GAINES, J. The following is the statement of this case made in the brief of appellants: On November 12, 1886, John W. Richardson, as the county treasurer of Anderson county, executed his general bond in ten thousand dollars, upon which the appellants were sureties, and his school bond in forty thousand dollars, upon which the appellees were sureties. On December 17, 1888, it was discovered that Richardson had defaulted upon his general bond for three thousand dollars, and upon his school bond for \$6,000. On said date appellants Lacy and Gregg, acting for themselves and their co-sureties upon the general bond, obtained from Richardson a mortgage, with power of sale, to indemnify them against loss upon said bond. This mortgage included two tracts of land designated in plaintiffs' petition as (1) "Richardson's Homestead," and (2) as the "Wasp Nest." On December 19, 1888, said Richardson sold to the sureties upon both his bonds certain property, including the two tracts of land mortgaged to Lacy and Gregg, and at the same time appellants and appellees entered into a written contract to the effect that appellants, by joining in said purchase, did not surrender any prior rights acquired by them under the mortgage to Lacy and Gregg, and that appellees did not recognize any such prior right, but reserved the right to attack the same upon any ground except upon the ground of forfeiture of same by reason of appellants joining in said purchase. On March 6, 1889, appellees filed suit against appellants to cancel and annul the mortgage to Lacy and Gregg, upon the ground that the same was obtained by reason of undue influence exercised over Richardson, and also because one of the tracts of land was the homestead of Richardson, and could not be mortgaged by him, and upon the ground that it was inequitable that one set of bondsmen should obtain a preference over the other set. The cause was submitted to the court without jury, and judgment rendered annulling the mortgage as to the "Homestead" tract, and sustaining it as to the "Wasp Nest" tract. Both parties excepted, and gave notice of appeal, and the defendants, within the required time, filed an appeal-bond and assignment of errors. The plaintiffs afterwards filed a petition for writ of error, bond, and assignment of errors, and both branches of the case are brought up in one transcript. The appellees impliedly concede that this statement is correct. Appellants assign as error the ruling of the court which holds that the mortgage upon the homestead of Richardson was void. The mortgagor had been a married man, and had resided with his wife upon the tract of land now under consideration. At the time the mortgage was executed his wife was dead, but he still resided upon the property with a married daughter and her husband. He had no minor children nor unmarried daughters.

His son-in-law and daughter kept the house, and he boarded with them. He paid them no board, and they paid him no rent. The opinion of the court below seems to have been that since the land was the homestead of Richardson, and was as such protected from forced sale, he could not mortgage it, although he was the sole surviving constituent of the family recognized by the constitution. The correctness of the court's ruling depends upon the proper construction of section 50 of article 16 of our constitution. So much of that section as relates to this question reads as follows: "The homestead of a family shall be, and is hereby, protected from forced sale for the payment of all debts. \* \* \* Nor shall the owner, if a married man, sell the homestead without the consent of the wife, given in such manner as may be prescribed by law. No mortgage, trust-deed, or other lien on the homestead shall ever be valid except for the purchase money thereof, or improvements thereon, as hereinbefore provided, whether such mortgage, trust-deed, or other lien shall have been created by the husband alone or together with his wife; and all pretended sales of the homestead, involving any condition of defeasance, shall be void." The provision in reference to mortgages and other liens is not found in any previous constitution; and the construction had been that the mere exemption from forced sale did not preclude the husband and wife from giving a valid mortgage upon the homestead, provided it contained a power of sale, and did not require the interposition of the courts to aid in its enforcement. *Sampson v. Williamson*, 6 Tex. 102; *Jordan v. Peak*, 38 Tex. 429. The ruling was unsatisfactory to many of the legal profession; and the framers of the present constitution evidently considered that it was not in accordance with the general policy of the exemption laws to permit it to be incumbered by a deed of trust or mortgage, with a power of sale. It is clear, therefore, that the object of the provision in question was to protect the wife against a sale of the homestead, even where she and her husband had given a power of sale to secure a debt, and she had privily acknowledged the instrument under the forms prescribed by the statute for the conveyance of the homestead, or of her separate property. The restrictions upon the alienation of the homestead by the husband by voluntary conveyance in our former constitutions were solely for her benefit. The owner, "if a married man," was not permitted to convey without consent of the wife. If not married, he was not disabled to sell or incumber. Substantially the same provision as to a sale is carried into the present constitution, and it cannot be doubted that the owner of a homestead, if unmarried, can convey it at will. We think it reasonable, therefore, to conclude that it was not intended by the provision in question to prohibit a single man from giving a mortgage with a power of sale upon his homestead, provided he should see proper to do so.

It is true that a portion of the language of the provision is sufficiently broad to indicate that the intention was to prohibit the owner of a homestead from giving a mortgage upon it in any case, except for the special purposes named in the previous part of the section. The words, "no mortgage, trust-deed, or other lien on the homestead shall ever be valid, except," etc., are not only general, but very emphatic, and probably should be construed to prohibit an incumbrance by a single man did not the subsequent language show what was in the minds of the framers of the constitution when the section was adopted. The subsequent words, "whether such mortgage or trust-deed or other lien shall have been created by the husband alone or together with his wife," show clearly that incumbrances of the homestead by married men were contemplated in making the provision. We think the language should be construed as if it read, "no mortgage, trust-deed, or other lien, created by a husband, whether alone or together with his wife, shall ever be valid, except," etc. This construction comes as near meeting the literal terms of the statute as any that can be given. The policy of the provision, in our opinion, favors the construction we have placed upon it. A wife, who may be unwilling to consent to a conveyance of the homestead, might be induced to incumber it by the husband's holding out specious representations of his ability and purpose to discharge the lien, and thus her homestead might be sold for debt, contrary to the established policy of the laws of this state. Hence a prohibition upon her power to do this was necessary for her protection. On the other hand, our laws, however, left persons *sui juris* and unmarried free to make such voluntary disposition as they saw proper of their own property. They have undertaken to guard the wife, so far as the disposition of the homestead is concerned, against the action and influence of the husband, but have never attempted to protect single men against the voluntary incumbrance or alienation of their property, although it is not subject to forced sale. We conclude that the court erred in holding the deed in trust on the homestead in controversy void, and, for this error, the judgment must be reversed.

The plaintiffs below also sought to set aside the deed in trust upon both parcels of land, on the ground that they were obtained by undue influence. The following is the substance of the allegations in their petition in reference to this matter, as taken from their brief: After alleging the defalcation and insolvency of Richardson, and the liability of all the bondsmen, etc., plaintiffs alleged that they had no personal knowledge of the facts constituting fraud and undue influence, but alleged, on information and belief, and charged to be true, that at the time of the execution of the mortgage Richardson, who was aged and infirm,—being about sixty years old,—was importuned by defendants to execute the mortgage; that the mortgage

was not executed voluntarily, but was the result of undue influence exerted over him by defendants; that he was then in a disturbed and distracted state of mind over the discovery and publicity of his defalcations, and while in this condition he was prevailed on by defendants to sign the mortgage, which was written by defendant Gregg, who is an attorney at law, and was signed in his office; that it was not the intention of Richardson to give any preference to defendants over his other sureties, but it was his intention and desire, as his deed, subsequently executed, shows, to make over all his property, including his homestead, for the benefit of his sureties, and such intention and desire of Richardson was well known to defendants at the time they procured the mortgage from him, and that defendants knew, at the time the mortgage was signed, that Richardson was insolvent, and that all the sureties had become liable on both bonds. The court sustained exceptions to these allegations, and in this we think there was no error. The facts stated do not show such undue influence as will authorize the setting aside of a conveyance; and while it is alleged that the mortgagor did not intend to give a preference to defendants, it is not alleged that any fraud or deception was practiced upon him.

Appellees, in their cross-assignments of error, also complain that the court erred in refusing to hold that the mortgage did not inure to the benefit of the sureties upon both bonds. It is a general rule that a security taken by one surety to indemnify himself against loss on account of his suretyship inures to the benefit alike of all the sureties upon the obligation. *Glasscock v. Hamilton*, 62 Tex. 143. This rule is well supported upon principle, because there is an implied contract among co-sureties that they will bear equally the loss which may result by reason of the default of their principal. Hence it is but equitable to hold that whatever the principal pays, either directly to the debtor, or by way of indemnity or security of one of the sureties, should be credited to the whole debt, and should inure to the benefit of all alike. Even where different and successive bonds have been given to secure the same liability, the sureties upon both are liable to contribute to each other, although as between the sureties upon the one bond and those on the other there is no contract, either express or implied. *Brandt*, Sur. §§ 222, 234, et seq. If one of the bonds in this case had been given under the requirements of the law as an additional obligation to secure the performance of the same duty on part of the principal, the rule would have applied. But such is not the case. The one is the ordinary county treasurer's bond; the other is his special bond, required by law to be given for the safe-keeping and disbursement of the school fund. They are given to secure the performance by the principal of similar but distinct duties. By signing the general bond of the county treasurer the

sureties thereon took upon themselves no responsibility for the available school fund which should come into his hands; nor in signing the school bond did the sureties upon that bond assume any liability whatever for the other funds. To our minds the obligations of the two sets of sureties were as distinct as they would have been if the county treasurer and treasurer of the school fund had been different officers. We conclude that the cross-assignments of error are not well taken. For the error pointed out the judgment is reversed, and here rendered for appellants, W. M. Lacy and others, upon the whole case.

TRAMMELL v. FAUGHT, Tax Collector.

(Supreme Court of Texas. Oct. 22, 1889.)

TAXABLE PROPERTY—LEASEHOLDS IN SCHOOL LANDS.

Rev. St. Tex. art. 4691, provides that "property held under a lease for a term of three years or more," belonging to the state, or exempt by law from taxation in the owner's hands, shall be considered, for all purposes of taxation, as the property of the lessee. *Held*, that school lands, leased from the state for terms of six and ten years, under act Tex. April 12, 1883, (Gen. Laws, 18th Leg. 85.) whereby the state reserved the right to terminate the lease at any time by selling the lands, are not taxable against the tenant, as the contract under which he holds cannot be considered a "lease for a term of three years or more."

Commissioners' decision. Appeal from district court, Scurry county; WILLIAM KENDRICK, Judge.

*Cowan & Fisher*, for appellant.

ACKER, P. J. Appellant leased from the state certain school lands for terms of six and ten years, under the law approved April 12, 1883, (Gen. Laws, 18th Leg. 85.) Taxes to the amount of \$542.88 were assessed against appellant for these lands, and appellee, as collector of taxes for Scurry county, was proceeding to collect these taxes by sale of appellant's personal property, when he was restrained by injunction sued out in this case. The taxes were assessed upon the value of the freehold estate, as if appellant was the absolute owner of the lands, instead of upon the leasehold estates. A general demurrer to the petition was sustained, and appellant declining to amend, the injunction was dissolved, and the suit dismissed, from which judgment this appeal is prosecuted. Article 4691 of our Revised Statutes provides that "Property held under a lease for a term of three years or more, or held under a contract for the purchase thereof, belonging to this state, or that is exempt by law from taxation in the hands of the owner thereof, shall be considered, for all purposes of taxation, as the property of the person so holding the same, except as otherwise specially provided by law." Section 17 of the act of 1883, under which appellant leased the lands, provided that "all lands leased shall remain subject to purchase," etc., and the state thereby reserved the right to terminate appellant's leasehold estate in the lands at any time by

selling them to any one who might purchase under the provisions of the statute. The leases were conditional, subject to be determined at the will of the state, and we do not think the legislature intended that such uncertain interests in the lands owned by the state should be the subject of taxation against the tenant. We do not think the contract under which appellant held the lands can be held to be a "lease for a term of three years or more," and, unless it be such a lease, appellant is clearly not liable to taxation thereon. If appellant had held the lands under an absolute lease for a term of three years or more, his leasehold estate would have been subject to taxation upon such value as it would bring at a fair voluntary sale for cash, but he would not have been liable to taxes upon the value of the freehold estate in the lands. Rev. St. art. 4692, par. 4; *Daugherty v. Thompson*, 71 Tex. 192, 9 S. W. Rep. 99. We think the court below erred in sustaining the demurrer and dismissing the cause, and are therefore of the opinion that the judgment should be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment reversed, and the cause remanded.

McKENZIE v. ROSS et al.

(Supreme Court of Texas. Oct. 25, 1889.)

COMMUNITY PROPERTY—DESCENT AND DISTRIBUTION.

Under Rev. St. Tex. art. 1645, providing that "where any person having title to any estate of inheritance \* \* \* shall die intestate, \* \* \* and shall leave no surviving husband or wife, it shall descend and pass in parcenary \* \* \* to his children and their descendants," community property of a deceased husband and wife is properly divided equally between their children and children of their deceased children, though such deceased children died before the death of one of their parents.

Appeal from district court, Wood county; FELIX J. MCCARD, Judge.

*Giles & Hoke*, for appellant.

HENRY, J. This is a suit for the partition of community property belonging to the estates of Oliver P. and Amanda Mann, instituted by appellant, their only surviving daughter, against appellees, who are the only children of two deceased daughters, who both died after the death of their father, but previous to the death of their mother. The father died in 1877, and the mother in 1883. The cause was tried without a jury, and judgment rendered dividing the land equally between the daughter and grand-children. From this judgment plaintiff appeals, and claims that she is the sole heir of her mother, her sisters having died before their mother. This court has held that previous to the passage of the act of March 30, 1887, when the husband or wife died leaving the other surviving, grandchildren did not inherit community property against such survivor. Ar-



ticle 1658, Rev. St.; *Burgess v. Hargrove*, 64 Tex. 110; *Cartwright v. Moore*, 66 Tex. 55, 1 S. W. Rep. 263. The question before us now does not arise under this article, but under the following one: "Art. 1645. Where any person, having title to any estate of inheritance, real, personal, or mixed, shall die intestate as to such estate, and shall leave no surviving husband or wife, it shall descend and pass in parcenary to his kindred, male and female, in the following course, that is to say: (1) To his children and their descendants." The judgment is affirmed.

#### CITY OF AUSTIN v. EMANUEL.

(*Supreme Court of Texas. Oct. 29, 1889.*)

##### DAMAGES—EVIDENCE.

1. In an action against a city for loss of property by an overflow alleged to have resulted from the city's negligence in constructing a bridge, plaintiff alleged that he owned the goods, etc., described in an exhibit made part of the petition; also that the water destroyed all the goods, etc., mentioned in the exhibit. The exhibit contained an item, "\$269, money of Mrs. E." Plaintiff testified that the money was his own, but he had listed it as belonging to his wife, as he had set it aside to expend for her. *Held*, that evidence of the loss of the money was not inadmissible on the ground that the pleadings showed that it belonged to plaintiff, while the evidence showed that it belonged to his wife, as, even if the latter were true, the husband is authorized by Rev. St. Tex. art. 1204, to sue for his wife's property.

2. Testimony of the mayor, of the city engineer, who superintended the construction of the bridge, and of a member of the city council, that the bridge was built by the city, sufficiently supports a finding to that effect, though there was no evidence that the city council passed an ordinance authorizing the bridge to be built.

3. One of the findings of law was as follows: "The bridge being in part the cause of destruction of the house, etc., the city is responsible." Other findings showed that the bridge was the cause of the overflow, and that the overflow caused the loss of the property. It appeared that there was a building projecting into the water channel, but that the building had caused no injury to plaintiff till the bridge was constructed. *Held*, that the finding, if erroneous in the reason given, was not prejudicial.

Commissioners' decision. Appeal from district court, Travis county; A. S. WALKER, Judge.

Action by S. E. Emanuel against the city of Austin for damages for loss of property. Judgment for plaintiff. Defendant appeals.

*Geo. F. Poindexter*, for appellant. *Rector, Moore & Thompson*, for appellee.

ACKER, P. J. Appellee brought this suit against the city of Austin to recover damages for the destruction and loss of his homestead effects and personal property, including a stock of merchandise of the aggregate value of \$2,906.46. The property was destroyed by the water overflowing the banks of Waller creek, and plaintiff alleged that the overflow and consequent destruction of his property were caused by the improper and negligent construction by defendant of a bridge over Waller creek, on Mesquite street. Defendant answered, by general demurrer, general denial, and specially, that the bridge

was properly constructed, and that the damage was occasioned by the act of God. The trial was without a jury, and resulted in judgment for plaintiff for \$2,500. On the trial plaintiff and his wife testified that \$269 in money in plaintiff's house was lost by the overflow at the time the goods and merchandise were destroyed. Defendant objected to this evidence, upon the grounds that there was no allegation in the petition that the money was lost, and because the petition alleged that all property lost by the flood for which the suit was brought was owned by S. E. Emanuel, whereas the evidence showed that the money was the separate property of the wife. The objection was overruled, and this is assigned as error. It was alleged in the petition that "plaintiff owned and had in his possession in said houses the goods, wares, and merchandise and household goods described in Exhibit A, attached to and made part of the petition." It was further alleged that "the water destroyed all the goods, wares, and merchandise and household effects in said Exhibit A mentioned." The exhibit contained an item, "\$269, money of Mrs. Fannie Emanuel." There was no special exception, and we think the petition good on general demurrer. Defendant could not have been surprised by the evidence offered to prove the loss of the money, for it was plainly stated in the exhibit attached to the petition, which was expressly referred to as containing a list of property lost, the value of which was sued for. We think the court did not err in admitting the evidence of the loss of the money. *Powers v. Caldwell*, 25 Tex. 352. As to the ownership of the money, plaintiff testified that it was taken from his business; that it was his money, but he put it in the list of property lost in his wife's name, because he had put it aside for the purpose of taking his wife and daughter to Virginia. From this it appears that the money was in fact the property of plaintiff. But, if the evidence had shown conclusively that the money was the separate property of the wife, the husband had the right, and it was his duty, to sue for it, either alone, or jointly with his wife. Rev. St. art. 1204. We think the court did not err in the ruling here complained of.

It is contended that the court erred in finding as a fact that the bridge was built by the city of Austin, there being no evidence that the city council ever passed an ordinance authorizing the bridge to be built. The mayor, the city engineer, who superintended the construction of the bridge, and a member of the city council, all testified, without objection, that the bridge was built by the city. We think this quite sufficient to sustain the finding of the court. Under the third and fourth assignments it is contended that the court erred in finding that the bridge was improperly constructed, and was the proximate cause of the destruction of plaintiff's property. These were questions of fact, upon which there was some conflict in the



testimony, but we think a very decided preponderance of the evidence supports the finding of the court. The court's fourth conclusion of law is: "The bridge being in part the cause of destruction of the house, etc., the city is responsible." Under the fifth assignment it is insisted that the court erred in this conclusion, because the defendant would be responsible only in the event that its act was the proximate cause of the injury, and would not be responsible because its act was one of several concurring causes. The findings of fact that bear directly upon so much of this conclusion as is of law are the following: "Ninth finding of fact by the court: The construction of the bridge in its dimensions of culvert, and in failing to have culvert receive the current at right angles, was faulty, and the bridge operates as a dam in throwing back such of the current as cannot pass, needlessly increasing the danger from freshets to the property on the banks of the creek. Tenth finding of fact: The destruction of the goods of plaintiff was caused by the increased volume of water thrown upon the house by reason of the absence of means of passage obstructed by the bridge." These conclusions of fact are sustained by abundant evidence adduced upon the trial. There was evidence tending to show that a rock building erected on the bank of the creek above the bridge projected a few feet into the channel. This building was erected some time before the bridge was built, and, notwithstanding the fact that heavy rains had fallen, and great overflows occurred, since its erection, no injury appears to have resulted therefrom to the building occupied by plaintiff until after the bridge was built. It is probable the court had in mind the rock building above the bridge, and the effect it had upon the flow of water in the channel, when he wrote the fourth conclusion of law, the first sentence of which is a conclusion of fact rather than law, which we think is controlled by the previous findings of fact, to the effect that the improper and negligent construction of the bridge was the proximate cause of the destruction of plaintiff's property. If the court reaches a correct conclusion of law, it is immaterial that an improper reason for the conclusion is given, if the facts proved make a case that supports the conclusion of law. We think the error complained of is not prejudicial to appellant, and is not such as would justify reversal of the judgment. What we have said disposes of the sixth assignment, which is to the effect that the court erred in rendering the judgment, because the evidence shows that the property was destroyed by the act of God. The seventh, eighth, and ninth assignments relate to the amount of the judgment, which it is contended is erroneous, because the evidence does not sustain the finding of the court as to the value of the property destroyed, and because the court allowed plaintiff to recover the retail value of the merchandise. It appears that plaintiff testi-

fied to the retail value of the merchandise destroyed, which he placed at the aggregate sum of about \$2,100. There is nothing in the record, however, going to show that the court based its judgment on the value testified to by plaintiff. Several other witnesses placed the value of the stock of goods at from \$1,200 to \$2,000. The evidence shows that other goods destroyed, including the \$269 in money, were of the value of \$871.75. It seems that there was sufficient evidence to sustain the finding of the court as to the amount of the damages, without considering the testimony of plaintiff as to the value of the merchandise. We find no error that we think would justify reversal of the judgment, and are therefore of opinion that it should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

### CAIN v. WOODWARD *et al.*

(*Supreme Court of Texas. Oct. 22, 1889.*)

#### EXECUTION—RETURN OF WRIT.

1. A sale of land under an execution issued and levied after the death of the debtor on a judgment rendered against him during his life-time is voidable.
2. Under Laws Tex. 1873, p. 209, (Pasch. Dig. art. 3775,) requiring all executions to be made returnable on or before the first day of the next term of court, the clerk cannot, by an indorsement "returnable in sixty days," make the writ returnable after the expiration of the statutory limit.
3. A sale of land on an execution made after the return-day thereof is a nullity.

Commissioners' decision. Appeal from district court, Hamilton county; T. L. NUGENT, Judge.

Action by B. B. Cain against J. F. Woodward and others. A demurrer to the answer was overruled, and plaintiff appeals.

C. K. Bell and J. A. Eidson, for appellant. G. R. Freeman, for appellees.

HOBBY, J. The questions arising in this case in the order presented are—*First*. Whether an execution issued and levied upon land subsequent to the death of the defendant in execution upon a judgment rendered against him during his life-time is void. (This question arises upon appellant's demurrer to appellee's answer alleging this fact.) *Second*. Is a sale of land under an execution made after the return-day thereof void? *Third*. Can remote vendors of the land so sold, holding by mesne conveyances under the plaintiff in execution, who bought at his own sale, and whose heir subsequently conveyed by quitclaim, have any equity upon which to invoke the doctrine of subrogation?

With respect to the first question presented, it will be sufficient to say, without entering into an elaborate discussion of it, that it has been the subject of several well-considered cases in our state; notably that of *Taylor v. Snow*, 47 Tex. 467, in which the early case

of *Conkrite v. Hart*, 10 Tex. 140, where the principle was in effect recognized that such a sale was absolutely void, and other cases in accord with it were, after a thorough consideration, overruled, and the conclusion was reached that such a sale was not absolutely void. So, also, in *Thompson v. Jones*, ante, 79, (decided by this court at the Austin term, 1889,) this subject was again under consideration; and *Taylor v. Snow*, supra, cited with approval to the effect "that while a sale of property under execution, after the death of the defendant, is relatively void, and that the title acquired by the purchaser at such sale cannot be maintained against the administrator or parties acquiring their title under and through the administration; and that such sale may be avoided by any party having an interest in the property, if he should seek to do so in the proper time and manner,—this cannot be done where there has not been, and cannot be, an administration upon the estate in a collateral proceeding." As said in *Thompson v. Jones*, supra, we conceive the above authority to be conclusive of the question; and that there was no error in overruling the exceptions of the plaintiff, appellant, to the allegations of the defendant to the effect that the sale was absolutely void because made under an execution issued and levied subsequent to the death of John C. Watrons, defendant in execution.

The decision of the second question, whether the sale of land under the execution made after the return-day was void, necessarily requires the determination of the antecedent inquiry whether the law, by its own terms, as it then stood, definitely fixed the return-day of the execution, or whether the language "shall be made returnable," occurring in the law with reference to such writs, clothed the clerk with power, by an indorsement, to fix the return-day. The law applicable to this case provided that: "All executions shall be made returnable on or before the first day of the next term of the court," etc. Laws 1873, p. 209; Pasch. Dig. art. 3775. True, the proviso in this section authorized the writ to be made returnable by the plaintiff's attorney within 60 or 90 days; but this applied only to first executions under that class of judgments mentioned in section 1 of the act of 1873, (Pasch. Dig. art. 3772;) that is, final judgments rendered in the district court in counties where the term continued until the business was disposed of, or three weeks after overruling a motion for new trial. It is not pretended, however, that the writ under consideration comes within this class. It was issued on March 28, 1877; received by the officer April 3, 1877; levied on the land involved in this suit on the 4th day of April, 1877, and the sale occurred on the first Tuesday in May, 1877. The next term of the district court of Galveston county, to which the writ was returnable, began on the first Monday in April, 1877. Section 26, ordinance Const. 1876, fixing terms of district courts. It is obvious from this that the sale took

place about one month after the return-day of the writ, unless the indorsement, "Returnable in sixty days," which appears on the back of the execution, over the clerk's signature, can be said to have the effect itself of fixing the return-day 60 days from the 28th day of March, 1877, the date of the issuance of the writ. If such is the effect of the indorsement, the writ would have been returnable about the 28th May, 1877, and in that event the sale would not have occurred after the return-day. But our execution laws have been repeatedly construed by our courts as fixing, by their own phrasenology, the return-day of the writ. *Hester v. Duprey*, 46 Tex. 626; *Towns v. Harris*, 13 Tex. 507; *Bennett v. Gamble*, 1 Tex. 134. "All executions shall be made returnable on or before the first day of the next term," was the language of the statute. And if the clerk can, by an indorsement on the back of the writ, fix the return-day, he can thus render nugatory the language of the statute, which fixes the return-day "on or before the first day of the next term." We are of opinion that such is the time prescribed by the law itself for the return-day, except in the cases mentioned in article 3772, Pasch. Dig., and we do not think this can be in any manner affected or defeated by the indorsement of the clerk, as in this case, under the laws then in force. It is manifest from the record that the sale of the land occurred after the return-day, which was the first Monday in April, 1877, and, having so occurred on the first Tuesday in May, 1877, it was at a time when the execution was *functus officio*. Such being the case, the question recurs,—is such a sale void? That a sale of land under an execution made after the return-day thereof is a nullity, and the purchaser acquires no title thereby, is well settled in *Towns v. Harris*, 13 Tex. 507; *Young v. Smith*, 23 Tex. 598. The reason upon which the principle is founded that a sale of real property made under an execution after the return-day is void is that, unlike the levy of the writ upon personal property, a levy upon land vests no right of possession or property in the officer. Under it he has no power to turn the defendant out and take possession; but he can only enter for the purpose of the sale, and there must exist some lawful authority for the conversion and sale of the property. The execution authorizes the officer to pass the title, but not to change the possession. No such power is conferred by the execution after the return-day. Hence there is no power in the officer, in the absence of a *venditioni exponas*, to enter into possession for the purpose of a sale, and no power to pass title. *Young v. Smith*, 23 Tex. 599. We think, therefore, that the court did not err in holding the sale after the return-day void, and that it vested no title in the purchaser.

With respect to the last question raised,—that is, appellant's right of subrogation,—it is sufficient to say that no equities exist as between the parties to this suit upon which

to base the claim. We think there is no error in the judgment, and that it should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

INTERNATIONAL & G. N. R. Co. *et al.* v. BELL.

(Supreme Court of Texas. Nov. 5, 1889.)

MASTER AND SERVANT—APPLIANCES.

In an action against a railroad company for injuries received by an employe the court charged as follows: "(3) Railways are not bound to their employes to provide the best possible appliances, but they are bound only to supply such appliances as are in common use by well-managed railways, and which they have skillfully constructed and carefully maintained in repair. They are bound to furnish such appliances as are reasonably safe and suitable, such as a prudent man would furnish if his own life were exposed to the danger that would result from unsuitable or unsafe appliances;" and "(12) If the track, switch, and guard at the place of the injury were in ordinarily good condition as to safety and fitness, as defined in section No. 2 of this charge, then the plaintiff cannot recover." *Held*, that such instructions were erroneous, as leading the jury to believe that more than ordinary care was required of a railroad company in regard to appliances for the use of its employes.

Commissioners' decision. Appeal from district court, Travis county; A. S. WALKER, Judge.

Mazey & Fisher, for appellant. John Dowell, for appellee.

ACKER, J. Appellee was employed by appellant as a switchman in its yard at Austin, and had been so employed for about nine months on the 3d day of June, 1886, when, on that day, while engaged in uncoupling cars, his foot became fastened between the guard-rail and track-rail, and he was run over by a car, and received injuries that necessitated the amputation of his leg. This suit was brought to recover damages for the injury. Appellee alleged in his petition that, "owing to the insufficient manner in which the guard-rail was constructed, it prevented his foot from being withdrawn when accidentally inserted; that, had said switch on place where the rails come together been properly supplied with a proper and sufficient guard in it, then his foot would not have been caught in it." The defendant answered by general denial and special answer, setting up that its railroad was properly constructed of good material, after the usual manner of constructing first-class railroads; that plaintiff was familiar and well acquainted with said railroad, guard-rails, and switches at the place of the accident; and if there was any defect in the respect mentioned by plaintiff, or otherwise, he had full knowledge of such defects, or had equal means with defendant of discovering them, and continued in the performance of his duties without objection; and pleaded contributory negligence. There

was verdict and judgment for appellee for \$7,240.

Paragraphs 2 and 12 of the charge given by the court are as follows: "(2) Railways are not bound to their employes to provide the best possible appliances, but they are bound only to supply such appliances as are in common use by well-managed railways, and which they have skillfully constructed and carefully maintained in repair. They are bound to furnish such appliances as are reasonably safe and suitable, such as a prudent man would furnish if his own life were exposed to the danger that would result from unsuitable or unsafe appliances." "(12) If the track, switch, and guard, at the place of the injury, were in ordinarily good condition as to safety and fitness, as defined in section No. 2 of this charge, then the plaintiff cannot recover." It is urged that the court erred in giving these charges, because, while defendant was under obligations to use reasonable and ordinary care to furnish plaintiff with reasonably safe appliances for the performance of the duties of his employment, the duty extended no further, and the charge imposed a greater degree of care upon defendant than the law requires. The language of the charge is peculiar, and, while the learned judge who gave it may not have intended that it should be construed as requiring more than ordinary care on the part of defendant in furnishing appliances to plaintiff, it prescribes a novel test of diligence, which we think well calculated to mislead the jury. It is believed to be settled beyond controversy that the test of diligence required of a railroad company in furnishing and maintaining proper appliances for the use of its employes is that of ordinary care. *Railway Co. v. Oram*, 49 Tex. 341; *Railroad Co. v. Lyde*, 57 Tex. 509; *Railroad Co. v. McCarthy*, 64 Tex. 635; *Pierce, R. R.* 370; *Wood, Mast. & Serv.* §§ 344, 345. Ordinary care is such care as an ordinarily prudent man would exercise under the circumstances. *Railway Co. v. Oram*, 49 Tex. 341; *Railroad Co. v. Beatty*, 11 S. W. Rep. 858. Looking to the evidence as presented in the record before us, it seems probable that the jury may have been misled by the charge complained of, and we think the court erred in giving it. We are therefore of opinion that the judgment should be reversed and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment reversed and cause remanded.

JOHNSON v. MARTIN *et al.*

(Supreme Court of Texas. Nov. 5, 1889.)

PUBLIC WEAIGHER—CONSTITUTIONAL LAW.

1. Act Tex. April 12, 1888, § 1, which leaves it discretionary with the commissioners' court to order the election of public weighers, is not unconstitutional as a delegation of legislative power, as the commissioners' court has no power to revise or

amend the act in any way, it being complete as a law by legislative enactment, in accordance with constitutional forms, and the subject a matter of local regulation.

2. Act April 19, 1879, which creates the office of public weigher, and is entire, and a substitute for the act of 1875, and contains 10 sections, each section complete in itself, is not in contravention of Const. Tex. art. 3, § 36, providing that "no law shall be revived or amended by reference to its title; but in such case the act revived, or the section or sections amended, shall be re-enacted and published at length."

3. The act is entitled "An act to amend an act creating the office of public weigher, and regulating the appointment, and defining the duties and liabilities, thereof." *Held*, that section 8, which declares it to be unlawful to employ any one except the public weigher to perform his duties, and provides that any person violating such provision shall be liable to damages at the suit of the public weigher, is not in violation of Const. art. 3, § 35, which provides that a bill shall not contain more than one subject, which shall be expressed in its title.

4. The act of 1879 authorized the governor to appoint public weighers for specified cities and other incorporated towns as in his judgment might be deemed expedient. The act of 1883, which is amendatory thereof, provides that the governor shall make such appointment in every city which annually receives over 100,000 bales of cotton for sale or shipment, and vests a discretion in the commissioners' court to order an election in cities, towns, or railroad stations which receive less than that amount. *Held*, that the acts are not in conflict with Const. art. 3, § 56, which declares that the legislature shall not, except as otherwise provided, pass any local or special law "regulating the affairs of counties, cities, towns, wards, or school-districts."

5. Under Rev. St. Tex. final tit., § 20, which provides that "any law passed by the sixteenth legislature in conflict with any provision of this act shall be the law of the state, this act to the contrary notwithstanding," the act of 1879, passed by the sixteenth legislature, and amended by the act of 1883, is not invalidated by Rev. St. Tex. p. 587, art. 4081, etc., which was passed with the Revised Statutes, and requires the governor to appoint the officer.

Commissioners' decision. Appeal from district court, Lamar county; D. H. SCOTT, Judge.

*Hale & Hale and R. Wooldridge*, for appellant. *Burdett & Connor and J. M. Long*, for appellees.

COLLARD, J. On the 6th day of November, 1886, appellant brought suit against appellees for \$130,000 damages. Plaintiff's petition alleges that on the 4th day of November, 1884, he was duly elected public weigher for Lamar county, and that he qualified as such, and entered upon the duties of the office in the city of Paris; that defendants were then, and now are, partners engaged in buying cotton; that during the latter part of the year 1885, and the first part of the year 1886, the defendants unlawfully, and without instructions or consent from the owners thereof, employed one P. M. Spears and one A. B. Long to weigh bales of cotton in the city of Paris, and that said employees, under such employment, did weigh 18,000 bales of cotton in said city, brought to said city by the owners thereof for sale, and by them offered for sale; and that said cotton was not the property of said Martin, Wise & Fitzhugh, or either of them, or of the said Spears, or

the said Long,—to plaintiff's damage \$90,000. Plaintiff also alleged that during the latter part of the year 1886 the defendants so unlawfully employed the said P. M. Spears to weigh cotton in said city of Paris, and that he did weigh 8,000 bales, which were brought by the owners to said city, and offered for sale; that neither of the defendants nor the said P. M. Spears was a public weigher, or the deputy of a public weigher,—to plaintiff's damage \$40,000; making a total damage to plaintiff of \$130,000. On the 8th day of April, 1887, defendants answered *First*, general demurrer; *second*, two special exceptions,—the first of which is because there is no such office as a public (cotton) weigher in Lamar county, Tex., created by law, under the constitution and laws of Texas, and because the legislature could not delegate the power of creating said office to the commissioners' court of Lamar county; (2) because the statutes of 1879, approved April 19, 1879, and of 1883, approved April 12, 1883, are unconstitutional, and in conflict with sections 35, 36, and 56 of article 3 of the constitution. Upon hearing the demurrer and special exceptions, the court sustained them upon the ground that section 1 of the act of 1883 was unconstitutional and void, "in so far as it attempts to confer upon the commissioners' court the authority to create the office of public weigher, either by appointment, or ordering an election therefor;" so the court gave final judgment for the defendants upon the demurrer and exceptions. Upon this ruling of the court, the plaintiff appealed, and assigned errors.

Section 1 of the act of 1883, amendatory of the act of 1879, reads as follows: "The governor is hereby authorized and required to appoint five competent persons as public weighers in every city which receives annually over one hundred thousand bales of cotton on sale, or for shipment. In all cities or towns or railroad stations which receive annually less than one hundred thousand bales of cotton, the county commissioners' courts of the counties in which said cities or towns or railroad stations are situated, should the commissioners' court deem the same necessary to protect the sellers, may order an election at which all the qualified voters of the county may vote for one or more public weighers: provided, that the county commissioners' court may provide by appointment for cotton weighers to hold office until the next general election, and until their successors are qualified: provided that, if any election is held under the provisions of this act before the next general election, the terms of office of those elected shall expire at the next general election, or so soon thereafter as their successors are elected and qualified: provided, that in towns and railroad stations outside of county-seats the county commissioners' court may appoint one or more public weighers: provided, nothing herein contained shall be construed so as to prevent any other person from weighing cot-

ton, wool, or hides when requested to do so by the owner or owners thereof. All public weighers shall hold their offices for two years, and until their successors are appointed or elected, as the case may be, and qualified, subject to removal," etc. Section 2 of the act requires weighers so appointed to qualify and give bond. Gen. Laws 1883, pp. 83, 84. Section 1 of the act of 1879 required the governor to appoint public weighers in certain cities named, "and at such other incorporated cities or towns as in the judgment of the governor may be expedient, who shall hold his office two years, and until his successor is appointed and qualified," etc.

It is not unusual to provide for an office by a requirement that there shall be an election by the qualified voters for the officer. The offices of county attorney and sheriff are so created by our constitution. Const. art. 5, §§ 21, 23. This, however, is not the question before us. It is not contended by the appellee, in support of the judgment below, that the law would have been unconstitutional if it had been mandatory, that is, if it had commanded the commissioners' court to order the election; but that the law is unconstitutional because it left the expediency of ordering the election to the discretion of the commissioners' court, thereby delegating to them the legislative power. The position of the appellees is untenable. The law as it stands was enacted by the legislature in accordance with constitutional forms, and, as a law, was complete by the legislative enactment. The commissioners' court have no power to revise or modify the act in any respect. They merely have the right to put the law in force by having an election; to organize, by calling an election for the officer, who is to execute the law as it came from the hands of the legislature. It might be said that the law is to take effect upon the happening of a subsequent event; that is, the decision of the commissioners' courts that it is necessary in their respective counties. Such discretion to the counsel boards of subordinate branches or divisions of the government is not unusual, and is not unconstitutional. It is allowed to them because, in matters of local regulation, it may be fairly supposed "they are more competent to judge of their needs than a central authority." The legislature cannot merely propose a law to be adopted by the people; but, where there is affirmative legislation, its enforcement in counties, districts, or towns, when the law so provides, may be left to the option of such localities. It might not be allowed to submit a general law to the people of the state at large to all the electors. This has been held to be in violation of the constitution, which gives to the legislature the exclusive right to make such laws. See *Cooley*, Const. Lim. 145-147. But even this was held to be legitimate in some cases. *Smith v. City*, 26 Wis. 291, and cases there cited. The privilege of the electors of a district to be affected by a law to say whether they will accept its provisions, the law giving them the

right to accept or reject, is now generally permitted, and regarded as constitutional. *People v. Stout*, 23 Barb. 349; *Dome v. Wilcox*, 45 Mo. 458; *Bank v. Brown*, 26 N. Y. 470; *Ex parte Wall*, 48 Cal. 279; *San Antonio v. Jones*, 28 Tex. 82. In the last-above case cited, Chief Justice MOORE said: "The legislature may grant authority as well as give commands, and acts done under its authority are as valid as if done in obedience to its commands. Nor is a statute whose complete execution and application to the subject-matter is, by its provisions, made to depend on the assent of some other body a delegation of legislative power. The discretion goes to the exercise of the power conferred by the law, but not to make the law itself." *Id.* See authorities cited; and, *contra*, *State v. Swisher*, 17 Tex. 441. In *Werner v. City of Galveston*, Justice GAINES announces the correct doctrine, and it may be regarded as settled in this state by that case. He says: "It is a well-settled principle that the legislature cannot delegate its authority to make laws, by submitting the question of their enactment to a popular vote; \* \* \* but it does not follow from this that the legislature has no authority to confer a power upon a municipal corporation, and to authorize its acceptance or rejection by the municipality according to the will of its voters." See 7 S. W. Rep. 726, where the case is reported; also *Graham v. City of Greenville*, 67 Tex. 62, 2 S. W. Rep. 742.

It is also contended by the appellees in cross-assignment of error that the act of 1879 creating the office of public weigher is unconstitutional because it seeks to amend a law (Act 1875) merely by reference to its title. Const. art. 3, § 36, provides that "no law shall be revived or amended by reference to its title; but in such case the act revived, or the section or sections amended, shall be re-enacted and published at length." The act of 1879 contains 10 sections, each of which is complete in itself. There is no attempt to amend the law of 1875 by reference to its title. The act of 1879 is entire, and is a substitute for the act of 1875.

Section 8 of the act of 1879 declares it unlawful for any factor, commission merchant, or other person to employ any one other than the public weigher to perform his duties; and provides that any person violating the provision "shall be liable, at the suit of the public weigher, to damages in any sum not less than five dollars for each bale of cotton," etc. Appellee, by cross-assignment insists that this section of the act is in violation of article 3, § 35 of the constitution, which provides that a bill shall not contain more than one subject, which shall be expressed in its title. The act of 1875 is entitled "An act creating the office of public weigher, and regulating the appointment, and defining the duties and liabilities, thereof." The act of 1879 is "an act to amend an act entitled 'An act,' etc., giving the title of the act of 1875. Section 8 of the act of 1875 made it unlawful for any

person other than the public weigher, or his deputies, to weigh cotton, etc., and provided that any person offending against the law should be "fined five dollars for each and every bale of cotton," etc. The act of 1879 changed the above provision so as to give the public weigher a right of action for damages against persons violating the law, instead of punishing by fine. Mr. Dillon, in discussing this provision of the constitution, says: "This provision has been frequently construed to require only the general or ultimate object to be stated in the title, and not the details by which the object is to be attained. Any provision calculated to carry the declared object into effect is unobjectionable, although not specially indicated in the title." 1 Dill. Mun. Corp. § 28. The foregoing has been practically adopted in this state. *Ex parte Mabry*, 5 Tex. App. 93; *Cox v. State*, 8 Tex. App. 254. The provisions of the act said not to be embraced in its title are necessary to the enforcement of the main object of the law. Without some mode of redress to the public weigher, or some mode of punishment of persons violating the law and the rights of the officer, the law would be a dead letter. See *Austin v. Railway Co.*, 45 Tex. 266, 267.

The appellees also contend that the acts of 1883 and 1879 are in conflict with section 56, art 3, of the constitution. The section declares that the legislature shall not, except as otherwise provided, pass any local or special law "regulating the affairs of counties, cities, towns, wards, or school-districts," etc. Section 1 of the act of 1879 authorized the governor to appoint public weighers for Galveston, Houston, Sherman, Dallas, Austin, and Waco, and at other incorporated cities or towns as in the judgment of the governor might be deemed expedient. Section 1 of the amended act of 1883, as has been seen, required the governor to appoint in every city which receives annually over 100,000 bales of cotton on sale or for shipment; and in cities, towns, or railroad stations which receive less than 100,000 bales of cotton annually a discretion is given to the commissioners' court to order an election by the qualified voters of each county for the election of a public weigher. Plaintiff instituted his suit as an elected public weigher. There can be no question that the portion of the act of 1883 under which plaintiff was elected is not in violation of the section of the constitution quoted above. It is a general law, as we think is the entire section; and it does not attempt to regulate any of the affairs of any particular county, town, or city.

Appellees contend, also, that the only valid law creating the office of public weigher is the act in Rev. St. p. 587, art. 4081, etc., which requires the governor to appoint the officer, passed with the Revised Statutes, February 21, 1879, and took effect September 1, 1879; that the act of April 19, 1879, which took effect July 24, 1879, never became the law, and hence the act of 1883, which amends sections 1, 2, and 9 of the act of April 19,

1879, cannot have effect, because it did not refer to the statute in force; that plaintiff was elected under the act of 1883, and so alleges; that he is not, therefore, a public weigher, appointed as the law requires, and cannot maintain the suit. The Revised Statutes and the act of April 19, 1879, were passed by the same legislature,—the sixteenth,—and at the same session. Section 20 of the final title of the Revised Statutes provides that "any law passed by the sixteenth legislature in conflict with any provision of this act shall be the law of the state, this act to the contrary notwithstanding." It must be held that the act of 1879, as amended by the act of 1883, under which plaintiff was elected and sues, is the act in force. Because of the error heretofore pointed out in the judgment of the court sustaining defendants' special exceptions to plaintiff's petition, we conclude the same should be reversed, and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment is reversed, and the cause remanded.

#### FOSSETT v. McMAHAN.

(Supreme Court of Texas. Oct. 22, 1889.)

##### HOMESTEAD—EVIDENCE—ADVERSE POSSESSION.

1. An order of the probate court setting apart a homestead to the widow and children of a decedent is not a judgment or decree whereby the title to land is recovered, nor a partition of land, within the meaning of Rev. St. Tex. art. 4389, requiring all judgments and decrees deciding questions of title to land, or directing partition thereof, to be recorded, before they are admissible in evidence; and in an action against the widow and children for the land, where defendants show a deed to their decedent therefor, and that they have been in possession thereof for more than the period of limitation, the order setting apart the homestead is admissible, though not recorded, to show the extent of their claim.

2. Where the deed to decedent conveyed an undivided interest in the land, the widow and children can hold it to that extent under the homestead designation, though they have no title to the remainder, and their right is not disturbed by a subsequent administrator's sale of the land under order of court, unless such order was obtained in a direct proceeding to vacate the order designating the homestead.

Commissioners' decision. Appeal from district court, Bosque county; J. M. HALL, Judge.

*Gillette & Murrell*, for appellant. *Wm. M. Knight, Crans & Ramsey*, and *West & McGowan*, for appellees.

ACKER, J. Henry Fossett died in July, 1881, seised and possessed of 196 acres of land off of the south side of the Moses King 640-acres survey, on which he and his family, consisting of his wife, the appellant, and their children, had lived and had their homestead for 20 years. T. H. McMahan, who died in 1871, leaving nine heirs, owned 216 acres of the King survey north of and adjacent to the 196 acres owned by Fossett. In December, 1880, M. V. McMahan, one of the nine

heirs of T. H. McMahan, acting for himself, and as attorney in fact for his eight brothers and sisters, conveyed the 216 acres to Henry Fossett. In July, 1882, the county court of Bosque county, in which the administration of the estate of Henry Fossett was pending, made an order designating and setting apart, by metes and bounds, to appellant and her children, their homestead of 200 acres, so as to include a part of the 196 acres and a part of the 216 acres. In May, 1883, in pursuance of the order of the probate court, the administrator of Fossett's estate sold and conveyed to Robert Fossett, son of Henry and appellant, the 216 acres of land conveyed by M. V. McMahan to Henry Fossett. The order of sale was entered, the sale made and confirmed in the manner prescribed by law. All the other heirs of McMahan, except M. V. McMahan, conveyed their interests to A. G. McMahan, who brought this suit for the 216 acres of land, in December, 1887, against appellant and her minor children, Robert Fossett, and Whitworth and Baker, who held 100 acres under Robert Fossett through the sale by the administrator. The defendants answered by the plea of not guilty, and pleaded the three and five years' statutes of limitation. The trial was without a jury, and resulted in a judgment in favor of appellee, A. G. McMahan, for the 216 acres of land. Sallie E. Fossett alone appealed. The court filed conclusions. The record also contains a statement of facts. The deed from the McMahan heirs to Henry Fossett for the 216 acres of land was duly recorded on the 6th day of April, 1881; and Robert Fossett testified that appellant, with her children, "had resided upon, using and enjoying, the premises described and set apart to her and her children as a homestead for more than five years next before the commencement of this suit." There was no evidence tending to contradict this. It seems to have been conceded that M. V. McMahan had no power or authority to act for his brothers and sisters in making the conveyance to Henry Fossett. On the trial, appellant offered in evidence a certified copy of the order of the probate court designating and setting apart the homestead to her and her children, as a muniment of title, and in support of her plea of the five-years statute of limitation, to which appellee objected upon the grounds that it was not such deed or muniment of title as would support the plea of limitation, and that it was not duly recorded. The objection was sustained, and the evidence excluded, to which appellant excepted, and here contends that this ruling was error.

The order of the probate court designating and setting apart the homestead was not a judgment or decree by which the title of the land was recovered, nor was it a partition of land, within the meaning of article 4339 of our Revised Statutes, which requires all judgments or decrees of any court deciding question of title, or directing partitions of land, to be recorded in the county clerk's office of

the county where the land, or a part of it, may be, before such judgment will be admitted in evidence. It was not, therefore, necessary that it be so recorded before being introduced in evidence. Appellant introduced in evidence the deed from M. V. McMahan to her husband for the 216 acres of land, which was duly registered in April, 1881, and it was proven that she took possession of the 200 acres described in the order designating and setting apart the homestead, and that she had occupied and enjoyed its use for more than five years next before this suit was brought. If she had further proved payment of taxes, as required by the five-years statute of limitation, she would have needed no other muniment of title, and would have been entitled to judgment, on her plea of limitation, for so much of the land sued for as was included within her possession. The evidence was admissible to show the extent of appellant's claim, and the court erred in excluding it.

It is contended that the court erred in its conclusion that the sale by the administrator of Fossett, in May, 1883, conveyed the title to the land acquired by Henry Fossett by the conveyance from M. V. McMahan. It appears that prior to this sale appellant was in possession of the land designated and set apart by the probate court as the homestead of herself and her children, which included a part of the land described in the deed from M. V. McMahan to Henry Fossett, and in controversy in this suit. The fourth conclusion of the court is: "M. V. McMahan had no authority to act for his brothers and sisters and his deed only conveyed his undivided one-ninth interest in the land." There can be no question of the correctness of the conclusion that Fossett acquired one-ninth of the land in controversy by the conveyance from McMahan; and that his estate held this interest at the time the court of probate made the order setting apart the homestead is equally clear. To the extent that that interest was covered by the designated homestead, appellant would be entitled to hold, and the subsequent sale by the administrator could not disturb her right. After the probate court has entered an order designating and setting apart to the widow and children their homestead, no subsequent order of that court could disturb their right to the homestead so set apart, unless such subsequent order was rendered in a direct proceeding brought for the purpose of vacating the order setting apart the homestead. We think the court erred in the conclusion here complained of. Having found that the deed from McMahan to Fossett conveyed a one-ninth interest in the land sued for, and having also found that "any title Henry Fossett may have acquired, before his death, was conveyed out of his estate by the deed from his administrator to Robert Fossett," we are utterly unable to discover the grounds upon which judgment was rendered in favor of appellee for the entire 216 acres of land. For want of proof of



payment of taxes by appellant, we cannot render judgment here in her favor for so much of the 216 acres as is included in the boundaries of the designated homestead. For the errors indicated we are of opinion that the judgment of the court below should be reversed, and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

STITZLE *et ux.* v. EVANS.

(Supreme Court of Texas. Oct. 25, 1889.)

VENDOR AND VENDEE—RIGHTS OF VENDEE—RESCISSION OF CONTRACT.

1. Where a vendor conveys land, reserving in the deed a lien for the price, and retaining possession, failure to pay the debt at maturity does not forfeit the grantee's rights, and give the vendor a right to rescind.

2. When the vendee, in such case, has tendered the price, his title becomes perfect, and in an action against the vendor to recover the land it is proper to refuse to charge that, if the land was defendant's homestead at the time of the conveyance, plaintiff cannot recover, as the contract is no longer executory.

Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

*Hyde Jennings*, for appellants. *Irby Dunklin* and *Wallace Hendricks*, for appellee.

GAINES, J. On the 17th day of April, 1886, appellants conveyed to one Houghton the tract of land in controversy, for which the latter paid \$50 in cash, and executed his promissory note, payable on the 1st day of March, 1887, for the sum of \$350. The note was described in the deed, and a lien was expressly reserved to secure its payment. The note was not paid at maturity. On the 27th day of March, 1887, Houghton and wife conveyed the land to appellee. Thereafter appellee tendered to appellant Phillip Stitzle the amount of the principal and interest due upon the note. Under the agreement between appellants and Houghton at the time of the conveyances from the former to the latter, they were to retain possession of the land for one year. Appellee brought this suit to recover the land, and paid into court for benefit of appellants the amount of the alleged tender, and offered to pay any additional sum the court might decree to be due upon Houghton's note. The first assignment of error is that the court erred in overruling the demurrer to the petition. In support of the assignment, the proposition is submitted that "in an executory contract for the sale of land, where the vendor is in possession, and the vendee has defaulted in the payment of the purchase money, the vendee, in the absence of equities in his favor, cannot maintain an action for specific performance, or of trespass to try title." In the case of *Dunlap v. Wright*, 11 Tex. 597, it was held that when a vendor conveyed land to his vendee, and at the same time took a mortgage from the latter upon the premises conveyed, in order to

secure the payment of the purchase money, the paramount right to the land remained in him until the money was paid. The principle upon which the decision is placed is that the deed and mortgage, being contemporaneous, are to be taken as parts of the same transaction, and as but one contract. The mortgage reconveying to the grantor the title conveyed by the deed, the contract is construed as leaving the legal title in the grantor until the debt is discharged. A mortgage being deemed by this court a mere security for a debt, the correctness of the doctrine has been questioned, (*Burgess v. Millican*, 50 Tex. 397;) but it has been long recognized as settled law in this state. As a deduction from this, it was held, in both cases just cited, that, although the debts were barred by limitation, the vendee could not recover the land. With less reason to support it, the same doctrine has been applied to the case of the conveyance of land in which a lien is expressly reserved to secure the payment of the purchase money. The principle upon which this ruling is based is not at all clear, but the doctrine has been settled by numerous decisions of this court. Such a sale of land is frequently said to be executory, and we think the use of this expression has given rise to some confusion of ideas upon the law of the subject. If executory, we think that such a conveyance can only be so considered in the sense that the grantee's title does not become indefeasible until the purchase money is paid. This mode of conveyance has been in general use in Texas since the days of the republic; and we presume it has always been considered that upon the payment of the purchase money the grantee became invested with a perfect legal and equitable title, so far as it was in the power of the grantor to convey it. *Russell v. Kirkbride*, 62 Tex. 457. Under a bond for title, or a mere agreement to convey upon payment of the purchase money, the payment perfects the equitable title, but a conveyance from the vendor is required to pass the legal estate. It follows that an agreement to convey upon payment of the price, and a deed which expressly retains a lien for the purchase money, are two very different contracts. In the former, there remains something for both parties to do, to invest the vendee with the legal title; in the latter, the grantee has only to pay the purchase money. *Russell v. Kirkbride*, 62 Tex. 457. In an executory contract of the former class, time may be of the essence of the contract; and, upon the vendee's failure to pay to the day, his right may be forfeited. *Edwards v. Atkinson*, 14 Tex. 373; *Bigham v. Carr*, 21 Tex. 142. But we do not understand that when a deed is made, and a lien for the purchase money is expressly reserved, a mere failure to pay the debt at maturity forfeits the rights of the grantee. There is nothing in the naked reservation of a lien in the deed to indicate that time is an essential element of the contract. We therefore conclude that the short period which elapsed



between the time when the purchase-money note fell due and that when appellee tendered the money was not such a delay as authorized appellants to rescind the sale. The charges of the court complained of in appellants' second and fourth assignments of error are in accordance with the principles announced, and were not erroneous.

The appellants requested the court to charge the jury to the effect that, if they believed that the land in controversy was the homestead of appellants at the time of the conveyance to Houghton, they should find for defendants. The court refused to give the instruction, and in this there was no error. This is not like the case of *Jones v. Goff*, 63 Tex. 248, in which it was held that an agreement by the husband and wife to convey their homestead, though properly acknowledged, could not be enforced in a suit for specific performance. Upon payment or tender of the purchase money in this case, the title of the appellee became perfect. *Russell v. Kirkbride*, supra. Nothing remained for the grantors to do to complete it. The contract was not executory on their part. The tender of the purchase money of the land was made in current funds, but not in gold or legal-tender notes. It was not objected to on that ground. It was refused because appellant declined to carry out the contract. Under the circumstances, the tender was sufficient. *Haney v. Clark*, 65 Tex. 93.

Appellant Phillip Stitzle testified that before the conveyance of the land by Houghton to appellee, and after the maturity of the note, he and Houghton mutually agreed to rescind the sale; and the court charged the jury that, if they found such to be the fact, they should find for defendants. A motion for a new trial was made upon the ground that the verdict of the jury was contrary to the evidence in this particular. It is true that no witness directly contradicted the testimony of Stitzle as to this matter; but he was a party to the suit, and there were circumstances testified to by other witnesses which, if true, authorized the jury to discredit him. The jury were the judges of the credibility of the witnesses, and the verdict is not without evidence to support it. There being no error in the judgment, it is affirmed.

**STATE ex rel. NEVADA COUNTY v. STANLEY et al.**

(*Supreme Court of Arkansas. Nov. 2, 1890.*)

**FINES—LABOR OF CONVICT—CONTRACT OF SHERIFF.**

A contract by which a sheriff hires out to another the labor of a convict for 24 months to satisfy a fine and costs amounting to \$283.90, is contrary to public policy, and void.

Appeal from circuit court, Nevada county; C. E. MITCHELL, Judge.

This suit is on a bond for the hire of a person convicted of a misdemeanor, and hired out to the defendant, Stanley, for whom T. L. Milner, the other defendant, became

surety. Defendants demurred to the complaint, and the demurrer was sustained. Plaintiff appeals.

*W. E. Atkinson*, Atty. Gen., for appellant. *Smoot, McRae & Arnold*, for appellees.

**PER CURIAM.** There was no theory upon which the convict could have been required to labor 24 months in satisfaction of a fine and costs amounting to \$283.90, and the contract of the sheriff with defendant is therefore contrary to public policy, and void. The question of the liability of Stanley for the services of the convict during such time as she may have been lawfully detained is not presented or decided. Affirm.

**HATHAWAY v. WERNER.**

(*Supreme Court of Arkansas. Nov. 2, 1890.*)

Appeal from circuit court, Crittenden county; J. E. RIDDICK, Judge.

*O. P. Lyles*, for appellant.

**PER CURIAM.** The appellant has not complied with the rules by filing an abstract and briefs. The submission was inadvertently taken. It will be set aside, and the appeal dismissed. It is so ordered.

**KILLOUGH et al. v. PAYNE.**

(*Supreme Court of Arkansas. Nov. 2, 1890.*)

**PROMISE TO PAY DEBT OF ANOTHER.**

An oral promise by defendants made to secure the payment of a draft which represents an undisputed debt due them from the acceptors, to pay plaintiff for work done for the drawer, is without consideration, and void as a collateral undertaking, within the statute of frauds.

Appeal from circuit court, Cross county; J. E. RIDDICK, Judge.

Action for money had and received, by C. F. Payne against Killough & Erwin. W. E. Reeves, for whom plaintiff had performed work, gave defendants a draft on Edgar, Gage & Co. On presentation for payment, Edgar, Gage & Co. hesitated, alleging that plaintiff claimed that Reeves was owing him for hauling the materials in payment for which the draft was drawn. Thereupon, in consideration of the payment of the draft, defendants verbally promised to pay plaintiff if he would get an order from Reeves. Over seven months afterwards, plaintiff presented an order from Reeves, which defendants refused to pay, on the ground that Reeves was no longer dealing with them, and was owing them on account. Defendants assigned delay and the statute of frauds as a defense. Verdict and judgment for plaintiff, and defendants appeal.

*N. W. Norton*, for appellants. *Sanders & Watkins* and *J. D. Block*, for appellees.

**PER CURIAM.** There is no evidence tending to prove that Killough & Erwin received any money for the use of Payne. There was only a promise by them to accept the draft of

Reeves in favor of Payne. The consideration of this promise was the payment by Edgar, Gage & Co. of an undisputed debt due from them to Killough & Erwin, which was evidenced by a draft accepted by Edgar, Gage & Co. in favor of Killough & Erwin. But the payment of a sum which one is already legally bound to pay is not a valid consideration for a contract. There being no new consideration for the promise by Killough & Erwin to pay Payne's debt, it is a collateral undertaking, within the statute of frauds, and is void. *Chapline v. Atkinson*, 45 Ark. 67. Reverse and remand.

#### TRAMMELL v. ANDERSON.

(Supreme Court of Arkansas. Nov. 2, 1889.)

JUSTICE OF THE PEACE—EXECUTION—SCIRE FACIAS.

As Mansf. Dig. Ark. § 4108, expressly prohibits the issue of execution on the judgment of a justice of the peace after five years from the date of its rendition, the power to issue it cannot be revived by *scire facias*, or other proceeding peculiar to courts of superior jurisdiction.

Appeal from circuit court, Stone county; J. W. BUTLER, Judge.

Mansf. Dig. Ark. § 4108, provides that "executions for the enforcement of judgments in a justice's court, except when filed in the clerk's office of the circuit court of the county in which the judgment was rendered, may be issued by the justice before whom judgment was rendered, on the application of the party entitled thereto, at any time within five years from the entry of the judgment, but not afterwards."

*Blackwood & Williams*, for appellant. *Robert Neill*, for appellee.

PER CURIAM. Section 4108 of Mansfield's Digest contains a positive inhibition against the issuance of an execution upon the judgment of a justice of the peace after five years from the date of its rendition. We must construe the statute to mean what it plainly says, and hold that after five years the power of the justice of the peace to issue execution expires. The power may not be revived by *scire facias*, or in any other way peculiar to courts of superior jurisdiction, (*Hicks v. Brown*, 38 Ark. 469,) and no presumption of a legal right to issue the execution after the lapse of five years can be indulged, (*Freem. Ex'ns*, § 27.) The execution in judgment is void. Affirm.

#### BELL v. WILSON.

(Supreme Court of Arkansas. Nov. 2, 1889.)

FRAUDULENT CONVEYANCES—RES ADJUDICATA.

A plaintiff in ejectment, who claims under an execution sale on a judgment against the common source of title, cannot avail himself of a decree, in a suit to which he was not a party, adjudging that the deed from which defendant derives his title was a fraud upon the rights of creditors.

Appeal from circuit court, St. Francis county; M. T. SANDERS, Judge.

*W. G. Weatherford*, for appellant. *George Sibly*, for appellee.

COCKERILL, C. J. The plaintiff in an action of ejectment against Bell relied upon a sheriff's deed executed in 1881, in pursuance of a judgment rendered in 1879 against a Mrs. Moore, who was the common owner of title of both parties. Eleven years prior to the rendition of the judgment, the judgment defendant had conveyed the lands described in the sheriff's deed to her grandson, J. W. Moore. In a suit brought by one Allen, a creditor of Mrs. Moore, the St. Francis chancery court declared the conveyance by Mrs. Moore to her grandson a fraud upon Allen's rights as a creditor, set the deed aside, and ordered that the lands be sold to pay his debts. The decree was introduced in evidence by the plaintiff in this cause to show that the conveyance to the grandson, through whom the defendant claims title, had been canceled, and that the title was thereby divested from the grandson, and vested again in Mrs. Moore; and the court tried the cause upon that theory. But the decree established nothing, except that the conveyance was void as against Allen's right to enforce the payment of his debt. The plaintiff in the case, being a stranger to that suit, took nothing by the decree, and could build no estoppel against J. W. Moore or his grantee upon it. The conveyance was good between the parties, and against all the world except creditors of Mrs. Moore, who were in position to attack it for fraud. *Millington v. Hill*, 47 Ark. 301, 1 S. W. Rep. 547; *Bank v. Norwood*, 50 Ark. 42, 6 S. W. Rep. 323. If the plaintiff in this action occupied the position of a creditor entitled to attack the conveyance, he could avoid it upon proper proof. *Hershey v. Latham*, 42 Ark. 305; *Wait, Fraud. Con. v. § 51*. But the Allen decree, showing that the deed had been adjudged a fraud upon the rights of another creditor, in a suit to which the plaintiff in this action was not a party, did not prove that the conveyance was a fraud on his rights. Reverse the judgment, and remand the cause for a new trial.

#### FRENCH et al. v. WATSON et al.

(Supreme Court of Arkansas. Nov. 2, 1889.)

LIMITATION OF ACTIONS—INFANCY.

Where an action is barred by the statute of limitations, unless plaintiffs became of age within 8 years before the commencement thereof, plaintiffs must show affirmatively their infancy, to entitle them to the exception to the statute.

Appeal from circuit court, Desha county; JOHN A. WILLIAMS, Judge.

*W. G. Weatherford*, for appellants. *X. J. Pindall* and *James Murphy*, for appellees.

PER CURIAM. This is a suit by the heirs of Watson to set aside a deed made in the course of administration by the executors of his estate, upon the ground that one of the

executors had caused the lands to be purchased with his means for the benefit of his wife. The defense made by the wife's heirs was the statute of limitation. The sale was made in 1869, and the executors were discharged in 1873. The plaintiffs sought to evade the force of the statute of limitations by the fact of their minority until within 3 years of the institution of the suit, which was begun in 1883.

The ancestor, whose estate the executors administered, died in September, 1861, more than 21 years before the institution of the suit. The complaint alleges that the ancestor died, leaving the plaintiffs him surviving. The youngest child was therefore past 21 when the suit was brought; but as this plaintiff was a female, and came of age at 18, the suit was not brought within 3 years after reaching her majority. Only one witness testified to the fact of the plaintiffs' ages, and he did not undertake to give more than an approximate estimate of the age of each. Moreover, it is shown that his estimates are of but little value. He gives the date of the marriage of Mrs. French in the same general way that he testified to the other dates, as being about 1860 or 1861, when the will under which the plaintiffs claim shows that she was married at the time it was executed, in 1859; and the youngest child must have been born more than 9 months after the death of her father, to have reached the witness' lowest estimate of her age. The affirmative showing of non-age is required of the plaintiffs to bring them within the exception to the statute of limitations. There is little doubt from the affluence of the members of the family, that the exact ages of the plaintiffs could have been readily established. The burden was upon the plaintiffs to do that. We will not disturb rights that have remained so long unquestioned upon mere conjectures as to age. Every question of law mooted by the appellants was determined adversely to their contention in the case of *McGaughey v. Brown*, 46 Ark. 25, and the judgment will be affirmed.

#### MEMPHIS & L. RY. CO. v. KERR.

(*Supreme Court of Arkansas*. Nov. 2, 1889.)

#### RAILROAD COMPANIES—STOCK-KILLING CASES.

The extent of the duty of a railroad company as to stock on its track is that the engineer shall use reasonable care, after the stock is discovered by him, to prevent injury to it, and it is error to charge that it is negligence for a railroad company to fail to keep a lookout for stock.

Appeal from circuit court, Prairie county; M. F. SAUNDERS, Judge.

*U. M. & G. B. Rose*, for appellant. *J. S. Thomas*, for appellee.

HUGHES, J. This is an action to recover damages for the killing of a mule by the appellant's engine. The evidence for appellee tended to show that the mule was grazing upon the railroad track, and, when the train

approached within about 150 feet of it, it ran down the track about 75 yards, and was struck by the engine and killed; that before it was struck the whistle was sounded several times, but that the speed of the train was not checked. The evidence for the appellant tended to show that the engineer first saw the mule when it came on the track, about 150 feet ahead of the engine; that the engineer, upon first seeing it, sounded the whistle, and called for brakes, and that he was unable to check the train after he first saw it, so as to prevent the engine from striking the mule; that he was keeping a close lookout at the time. Verdict was given for plaintiff. A motion for new trial was overruled, and the railroad company excepted and appealed.

The court, by modifications of the instructions asked for by the appellant, charged the jury, in effect, that, if the proof showed that the servants of the company in charge of the train at the time were negligent in keeping a careful lookout, the company was liable. In *Railway Co. v. Holland*, 40 Ark. 336, this court, by Judge SMITH, said: "Ordinary care in the management of their trains is the measure of vigilance which the law exacts of railroad companies to avoid injury to domestic animals, and this means, practically, that the company's servants are to use all reasonable efforts to avoid harming an animal, after it is discovered, or might by proper watchfulness be discovered, on or near the track." If the intimation, *supra*, that a railroad company is liable if the engineer in charge of the train when stock is injured "might, by proper watchfulness, discover the animal, on or near the railroad track, in time to avoid injuring it," means that a railroad company owes to the owner of stock that stray upon its track a duty to keep a lookout to prevent injuring it, it states the rule too broadly. In *Railway Co. v. Kirksey*, 48 Ark. 366, 3 S. W. Rep. 190, it is held that a railroad company owes no duty to the owner of stock which has strayed upon its track, except to use ordinary or reasonable care at the time to avoid injury to it, and that the engineer is not bound to keep a lookout over the entire right of way, and to apprehend danger when an animal is discovered upon it. The question as to the duty of an engineer to keep a lookout for stock upon the track did not arise in the case. Each case should be determined upon its peculiar circumstances. The extent of the duty which a railroad company owes to the owner of stock upon its track is that the engineer in charge of the train at the time shall use ordinary or reasonable care, after the stock is discovered by him, to prevent injury to it, and this negatives the idea that the engineer is bound to keep a lookout for stock. Several states, among them Tennessee and Alabama, have by acts of their legislatures altered the rule by making it the duty of the engineer to keep a lookout for stock. There is an obligation due to others from railroad companies to preserve a strict lookout while

running their trains; and as the agents of the company, in the absence of circumstances leading to a different conclusion, are presumed to keep such lookout, it is a fair inference of fact for the jury that a watchful agent will see stock on or near the track, and they will then determine whether he has used ordinary or reasonable care to prevent injury to it. It is error for the court to instruct a jury that it is negligence for a railroad company to fail to keep a lookout for stock. Reverse and remand.

#### DEADMAN v. EARLE.

(Supreme Court of Arkansas. Nov. 2, 1889.)

##### CHATTEL MORTGAGES—FILING—SALE.

1. Mansf. Dig. Ark. § 4750, provides that, in order for a mortgage to become a lien on personal property against strangers, without being filed for record, the mortgagee shall indorse upon it that it is to be filed, but not recorded, and shall then file it with the recorder, who shall then mark it "Filed," with the time of filing on the back of it, and file it in his office, where it shall be kept for the inspection of all persons interested. In an action to recover possession of a horse, claimed under a chattel mortgage, it appeared that plaintiff sent his mortgage to the recorder, by an agent, with verbal instructions, but no indorsement on it, that it should be filed, but not recorded. The agent told the recorder that it was not to be recorded, and the recorder laid it aside, and waited to see the mortgagee. Afterwards the mortgagee saw the recorder, and directed him to record it. The recorder then marked it filed as of the day it was handed him, and recorded it. Held, that the mortgage was not filed for record until the instructions were given to record it.

2. Where a mule is sold on condition that the title shall remain in the seller until the purchase money is paid, and, before payment, the purchaser trades it for a horse, the seller does not thereby become the owner of the horse.

Appeal from circuit court, Cleveland county; C. D. Wood, Judge.

R. C. Fuller and Met. L. Jones, for appellant. Ratcliffe & Fletcher, for appellee.

BATTLE, J. This was an action instituted by appellant against appellee to recover the possession of a horse. Each party claims under a mortgage executed by Thomas McElroy.

Appellee sent his mortgage by an agent, and caused it to be delivered to the recorder, with instructions to file, but not to record, it. The words, "This instrument is to be filed, but not recorded," or words of like effect or substance, were not indorsed upon it. The recorder made no indorsement, but laid it away, and waited to see appellee. In the mean time appellant filed his mortgage, with the words, "This instrument is to be filed, but not recorded," indorsed thereon, and signed. After this, appellee saw the recorder, and directed him to file and record his mortgage. The recorder then marked it filed as of the day on which it was handed to him, which was a day prior to the day of

the filing of appellant's mortgage, and he then recorded it.

According to the foregoing facts, the mortgage of the appellee was not filed for record until he instructed the recorder to register it. The placing of it in the hands of the recorder, and verbally instructing him not to register it, was not a filing for record. *Bowen v. Fassett*, 37 Ark. 507. Instructions given by appellee to his agent, but not delivered to the recorder, were of no avail, as the recorder could only be governed by the instructions which he received. Appellee acquired no lien by the filing of his mortgage until the instruction to record was given. The antedating of the filing was of no effect.

In order for a mortgage to become a lien on personal property against strangers, without being filed for record, the words, "This instrument is to be filed, but not recorded," or words of like import, must be indorsed upon it, and signed by the mortgagee, his agent or attorney, and it must then be filed with the recorder. When this is done the statute provides that it shall be marked "Filed" by the recorder, with the time of filing upon the back of it, "and that he shall file the same in his office, and it shall be a lien on the property therein described from the time of filing, and the same shall be kept there for the inspection of all persons interested; and said instrument shall be thenceforth notice to all the world of the contents thereof without further record, except as" therein "provided." Mansf. Dig. § 4750.

Appellant alleges that appellee caused McElroy to be arrested for larceny, and while he was under arrest proposed to him that, if he would secure him in the payment of certain debts by a mortgage upon the horse in controversy, he would not prosecute him, and he should be discharged; and that while he was under arrest McElroy accepted the proposition, and executed the mortgage, and was thereafter discharged; and contends that the mortgage is void, because it was executed under duress, and is contrary to public policy. On the other hand, appellee insists that, if it be true the mortgage is void, he is entitled to recover the horse, because he says he sold a mule to McElroy on the condition the mule should remain his until the purchase money was paid; that it had not been paid; and that McElroy had traded the mule, and received the horse in exchange, without his consent.

But it is unnecessary to pass upon all these contentions. The purchase money was not due until long after the exchange was made. If it be true that appellee reserved the title to the mule until the purchase money was paid, McElroy had an interest in the mule which he could sell. He did not become a mere custodian of the mule. He had a right to sell him at such a profit as he could make. *McRae v. Merrifield*, 48 Ark. 160, 2 S. W. Rep. 780; *Vincent v. Cornell*, 18 Pick. 294; *Day v. Bassett*, 102 Mass. 445. His vendee would take only such interest as he had. All appellee was entitled to was his purchase money or the mule. He had

his purchase money or the mule. He had no right to the profit, if any was gained. When McElroy traded for the horse, the mule still remained appellee's, subject to the condition of the sale. By what means did the horse become his property? He could not treat the exchange as a wrongful conversion of the mule, and elect to waive the tort, and by ratification convert the horse into his own property. That would be entirely inconsistent with the rights acquired by McElroy through the conditional sale. But he did not make such election. On the contrary, he elected to treat the horse as the property of McElroy, and so continued to treat him until other persons acquired an interest in him. He sought to incumber him by a mortgage to secure McElroy's debts, and in the institution of this suit asked for the possession of him under that mortgage. The horse did not become the property of appellee by the exchange.

Reversed, and remanded for a new trial.

#### WILLIAMS v. RENWICK.

(*Supreme Court of Arkansas*. Nov. 9, 1889.)

##### PLEADING—ACTION ON FOREIGN JUDGMENT.

In an action on a foreign judgment, the answer alleged that the foreign court had no jurisdiction to render such judgment, but that it was rendered on a complaint which on its face disclosed that no cause of action existed, and that said court had no jurisdiction to render said judgment, or any judgment whatever. *Held*, that the answer did not allege want of jurisdiction, but only error in its exercise, and a demurrer was rightly sustained.

Appeal from circuit court, Little River county; R. D. HEARN, Judge.

Action by John S. Renwick against James H. Williams on a judgment obtained against the latter in South Carolina. Defendant answered the complaint, denying, in the first paragraph of his answer, any indebtedness whatever to appellee; and, in the second paragraph, alleging that the court of common pleas in South Carolina, which rendered the judgment sued on, had no jurisdiction to render such judgment, but that said judgment was rendered by said court upon a complaint for relief which upon its face disclosed that said plaintiff, the appellee, had no cause of action against appellant, and that said court had no jurisdiction to render said judgment, or any judgment whatever, against him, and that the same is void, and without force or effect. To this answer the court sustained a demurrer, and defendant appealed.

Dan W. Jones, for appellant. J. C. Head, for appellee.

PER CURIAM. The answer did not allege want of jurisdiction of the person or subject-matter of the controversy, but only error in the exercise of jurisdiction, if error at all. We cannot inquire into that subject. The demurrer was rightly sustained. Affirmed.

#### ST. LOUIS, I. M. & S. RY. CO. v. BIGGS.

(*Supreme Court of Arkansas*. Nov. 9, 1889.)

##### LIMITATION OF ACTIONS.

Where a railway company constructs its road-bed so that at times it causes the overflow of adjoining lands, there may be as many recoveries as there are successive injuries, and the statute of limitations begins to run on the happening of the injury complained of, and not from the construction of the railway.

Appeal from circuit court, Hempstead county; C. E. MITCHELL, Judge.

M. S. Biggs sued the St. Louis, Iron Mountain & Southern Railway Company to recover damages for the overflowing of her lands in 1885, caused by the defective construction of defendant railway through the Red River bottom. The railway had been built in 1873. Judgment for plaintiff, and defendant appeals.

Dodge & Johnson, for appellant. Scott & Jones, for appellee.

SANDELS, J. The alleged nuisance was constructed in 1873. The injury complained of was in 1885. It is argued by the appellant that the statute of limitations began to run against appellee upon the construction of the nuisance. *Railway Co. v. Morris*, 35 Ark. 622, and *Railway Co. v. Chapman*, 39 Ark. 463, are relied on as establishing this contention. The facts in those cases make them clearly distinguishable from this case. The rules applicable to the recovery of damages for the construction and continuance of nuisances in cases of this kind are stated satisfactorily to this court by numerous authorities, as follows: Whenever the nuisance is of permanent character, and its construction and continuance are necessarily an injury, the damage is original, and may be at once fully compensated. In such case the statute of limitations begins to run upon the construction of the nuisance. *Railway Co. v. Morris*, 35 Ark. 622; *Railway Co. v. Chapman*, 39 Ark. 463. But when such structure is permanent in its character, and its construction and continuance are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened, and there may be as many successive recoveries as there are successive injuries. In such case the statute of limitations begins to run from the happening of the injury complained of. *Roberts v. Read*, 16 East, 215; 2 Greenl. Ev. § 433; *Railroad Co. v. Hays*, 14 Amer. & Eng. Ry. Cas. 234; *Troy v. Railway Co.*, 23 N. H. 83; *Wood, Nuis.* § 865; *Wood, Lim.* § 180; *Ang. Lim.* § 300. This case falls within the latter class. Affirm.

#### INDIANAPOLIS JUNCTION RY. CO. v. BASS.

(*Court of Appeals of Kentucky*. Nov. 5, 1889.)

##### VENDOR'S LIEN—RELEASE.

1. One who purchases a portion of a tract of land from another, who holds a bond for title from a railroad company for the entire tract, takes subject to the company's vendor's lien; and a writ of

given him by the company's attorney, to induce him to purchase, stipulating that the title is safe, and that a deed will be made to the purchaser for such portion as he may buy, is not a release of such lien, especially when the attorney has no authority to release it.

2. On rescission of the sale of the entire tract to the first vendee, it is error to rescind the sale of the portion to the second vendee, and require the company to refund to him the amount he has paid to his vendor, and expended in improvements.

Appeal from circuit court, Ballard county.  
"Not to be officially reported."

Ejectment by D. Bass against John Dills for 613 acres, part of a tract of 713 acres, of land. Plaintiff claimed under a tax-sale. E. K. Benson answered, alleging that Dills was his tenant, and that he owned the land and had sold plaintiff 100 acres of the tract prior to the tax-sale. The Indianapolis Junction Railway Company also brought a suit, which was consolidated with the former action claiming a vendor's lien on the entire tract, which it had sold to Benson by title-bond. The trial court rescinded the contracts of sale between Benson and Bass, and between the railway company and Benson, and gave Bass a lien for the amount he had paid, superior to the railway company's lien, and directed sale of the land to satisfy his lien. The railway company appeals.

*Thos. H. Hines*, for appellant.

PRYOR, J. Warden & Bishop, as the agents of the Indianapolis Junction Railroad Company, sold to Benson and others a tract of land belonging to the company, and executed its bond for title, reciting the consideration to be paid for the land. Benson, after this, sold a part of the land to the appellee, Bass, for \$600; \$400 of which was in hand paid, and notes executed for the remainder of the purchase money. Bass held the bond of Benson for title, and in fact the bond to Bass was written on the back of the bond executed to Benson by the railroad company. It seems that Bass, before he purchased of Benson, wanted to know something of the title, or the right of Benson to sell, and a writing was given him by Warden, one of the attorneys for the railroad company, and who, together with Bishop, had executed the bond for title to Benson, to the effect that "the title was complete and safe, and the purchaser can have a deed for such portion as he may buy. The only thing necessary in buying of Benson is to have an assignment of the bond which he holds, and I will make a deed to him. Take care of this paper, as it will bind me as agent of the railroad." (Signed by ——— Warden.) "The contract between Benson and Bass having been rescinded, the chancellor below made the railroad company responsible for the \$400 paid by Bass to Benson, and also for the improvements he had placed on the land. This was done on the idea that Warden's statement that the title was all right, and he would make a deed, etc., was a surrender by the railroad company of its lien for the purchase money on that part of the land sold by Ben-

son to Bass. Not one dollar of the purchase money had been paid by Benson to the railroad company, and in this action the contract between the company and Benson was rescinded because of the insolvency of Benson, who was also a non-resident; and yet the railroad company is made to indemnify Bass against any loss sustained by reason of his purchase from Benson.

The attorney of the railroad company had no authority to release any lien held on the land, or any part of it; and, when Bass purchased of Benson, he took the land subject to the lien of the vendor. And, besides, no such power as a release of the lien was attempted by the writing, signed by the attorney, that, as Bass alleges, induced him to make the purchase. The attorney was only saying to any purchaser from Benson that the title was good, and a deed would be made when the purchase price was paid. It is not rational to suppose that he was releasing a lien that his client had, for the benefit of others, and the writing given by the attorney bears no such construction. It seems to us, however, the judgment rescinding the sale of the land to Benson was improper, under the circumstances, but that a judgment should have been rendered subjecting to the payment of the purchase money, first, that part of the land that had not been sold by Benson; and, if it failed to pay the lien, then to subject the 100 acres sold by Benson to Bass. If the balance of the tract pays the lien, then Bass would owe Benson the remaining \$200 due on his purchase; but it was certainly error to rescind the contract between Bass and Benson, and require the railroad company to pay Bass his money back, or the value of the improvements made on the land he purchased. If, on the return of the case, Bass is willing to pay the lien to the extent it affects his purchase, and the railroad company is willing to accept it, then it may obviate the necessity of selling the land. This cannot be done without the consent of both parties. The judgment below is reversed, and cause remanded, with directions to settle the rights of these parties as indicated in this opinion.

#### NEWBERT v. ZEDDIER et al.

(Court of Appeals of Kentucky. Nov. 14, 1889.)

#### HUSBAND AND WIFE—PROPERTY RIGHTS.

Where grantors attempt to convey land to a husband and wife jointly, the entire price being paid by the husband, but the deed is acknowledged out of the state, and never recorded therein, and afterwards a deed is made to the wife alone, the husband consenting thereto while sick and probably not mentally competent, and himself recording the deed, and it appears that the wife's heirs influenced her not to reinvest the husband with title to one-half the land, as she desired to do, they cannot, after her death, claim more than the interest which she derived under the first deed.

Appeal from circuit court, Greenup county.

"Not to be officially reported."

*Roe & Worthington*, for appellant. *T. H. Paynter*, for appellees.

LEWIS, C. J. Johanna Newbert, who does not appear to have had any children, died leaving a deed for the land in controversy executed by Stairs and wife in 1879, and recorded in the proper office; and appellees, alleging and proving themselves to be her only heirs at law, brought this action to recover the land of appellant, her surviving husband. It appears that, in 1877, Stairs and wife conveyed, or attempted to convey, the land to appellant and his wife jointly, the entire purchase price being paid by him. But that deed was acknowledged by the grantor only before a justice of the peace of the state of Ohio, and never was lodged for record in the proper office of this state. While it does not clearly appear that appellant was present when the deed of 1879 was executed, the evidence being contradictory on that point, it is proved that he knew before the death of his wife the deed had been executed, and in person lodged it in the county court clerk's office for record. There is, however, evidence tending to show, that he yielded to the request of his wife to permit the second deed made while he was sick, and probably not in such mental condition as to fully understand what he was doing. It further appears that she, a short time before her death, desired to reinvest him with title to one-half the land, and was probably prevented from doing so by appellees, who had and used influence over her to prevent it. As Stairs and wife were by the deed of 1877 divested of title to the land, the only force or validity the deed of 1879 has resulted from appellant's consent to the execution of it, and his own act in lodging it in the office, and causing it to be recorded. But as it appears she was convinced of the injustice of depriving him, under the circumstances, of his half interest in the land, anxious to waive any seeming right she may have acquired under the deed of 1879, and remove whatever obstacles there may have been in the way of his right and title to one-half under the deed of 1877, we do not think appellees, who used their influence over her to prevent her doing so, can equitably claim under her any greater interest than what she derived under the first deed. And consequently the court erred in giving to them more than an undivided half of the land, and the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

#### COMMONWEALTH v. MATTHEWS.

(Court of Appeals of Kentucky. Nov. 14, 1889.)

##### APPEAL IN CRIMINAL CASES — DYING DECLARATIONS — INVOLUNTARY MANSLAUGHTER.

1. Crim. Code Ky. § 335, provides that an appeal shall only be taken from a final judgment, except by the commonwealth; and that an appeal by the commonwealth from a decision of the circuit court shall not suspend the proceedings in the case. Section 337 provides that the attorney gen-

eral may appeal, if satisfied that prejudicial error has been committed, on which it is important that the court of appeals should pass. *Held*, that the commonwealth may appeal from decisions of the trial court in a case where the jury disagreed and were discharged, and the case has not been finally disposed of.

2. In a trial for manslaughter, evidence that defendant, some two weeks before the homicide, said that his father had killed his man, and he intended to soon, is incompetent to show malice.

3. Evidence that deceased, about 15 minutes after he was shot, while lying on the ground, said he hoped he would live long enough to take the gun home, and that he died in 20 minutes, sufficiently shows a consciousness of impending death to render the statement of deceased competent as a dying declaration.

4. Declarations of deceased that he and the accused were playing, and that it was an accident, were statements of facts, and not matters of opinion, and were competent as dying declarations.

5. On an indictment for involuntary manslaughter, the defendant should be convicted if he had reasonable grounds to believe, and did believe, that there was no danger in handling the gun as he did, and he did so with no intent to harm, but the killing, to the exclusion of a reasonable doubt, resulted from the careless use of the gun; but should be acquitted if the killing was accidental, and without carelessness.

Appeal from circuit court, Henderson county.

"To be officially reported."

*J. H. Powell* and *P. W. Hardin*, Atty. Gen., for the State.

HOLT, J. William Matthews was tried upon the charge of manslaughter for killing Henry Alocs by shooting him. The jury, failing to agree, were discharged, and there has never been any final disposition of the case. During the progress of the trial the commonwealth excepted to certain decisions of the court upon legal points, and by this appeal questions their correctness.

Its right to appeal, in the absence of any final judgment, is the first and principal question presented. It is claimed that the statute gives the right, and for the reason that the law may not only be properly administered in this but other cases. It is clear that a defendant can only appeal from a final judgment. Is this true of the commonwealth? Section 835 of the Criminal Code provides: "An appeal shall only be taken on a final judgment, except on behalf of the commonwealth. An appeal by the commonwealth from a decision of the circuit court shall not suspend the proceedings in the case. The decision of the court of appeals shall be obligatory on the circuit courts, as being the correct exposition of the law." Whatever may be thought of the policy of the rule, this provision plainly gives to the state the right to an appeal from any decision of the trial court, although it be not of a final character. Wherever the Criminal Code speaks of an appeal by the defendant, it is from "a judgment;" and when by the commonwealth, it is from "a decision." Moreover, it is expressly provided that an appeal by the commonwealth "shall not suspend the proceedings in the case," as may be done where the defendant appeals; and section 337



of the Criminal Code declares that the attorney general may take the appeal, if satisfied "that error has been committed, to the prejudice of the commonwealth, upon which it is important, to the correct and uniform administration of the criminal law, that the court of appeals should decide." We must not be understood, however, as intimating that this statutory rule is without reason. It is supported by it. When a final judgment is rendered against a defendant, he may, upon appeal, get the benefit of any error which has at any time during the progress of the case been committed against him, save those errors to which by the Code no exception can be taken. In short, he cannot be injured by the denial of the right to appeal save from a final judgment. Upon the other hand, if a defendant be tried and acquitted, he cannot, of course, be again tried, although his release may free a guilty man, and be the result of erroneous decisions of legal questions by the trial court. The injury to the state and the public is then beyond cure as to that particular case. Owing to this fact, doubtless, the legislature saw proper to give to the commonwealth the right to an appeal from a decision of the trial court, although not final in character. It gives no advantage to the state over the accused. He is amply protected, as we have already seen, by the right to appeal from a final judgment. It is, indeed, only fair to the public, and proper for its protection, because otherwise the guilty might escape by an acquittal resulting from legal errors. *Com. v. Cain*, 14 Bush, 525. If it be urged that the case now stands as if no trial had ever taken place; that the rulings of the court then made are now nullities; and that, therefore, the idea of an appeal from them is absurd,—the answer is that the legislature doubtless supposed, and with reason, that the same questions would arise upon a future trial, and that it was necessary to a fair administration of justice to allow the state to at once correct any error by an appeal.

As the case is yet pending, we shall not detail the circumstances of the tragedy, as we gather them from the evidence, further than is absolutely necessary to the consideration of the questions presented. It is contended by the commonwealth that the shooting was intentional, or, if not, that it was the result of such a reckless and careless use of the gun as to be criminal; while the accused claims that it was accidental, and occurred under such circumstances that, although the act was careless in itself, yet he had the right to suppose no injury could result. The general rule is that one who causes death by his negligence is responsible, whether he was at the time engaged in legal or illegal business. If the business be in character felonious, then he is guilty of murder. If legal, and homicide result from negligence in the discharge of it, it is manslaughter. This rule is, however, subject to exception; when, for instance, the act, al-

though careless in itself, be done under such circumstances that it could not reasonably be supposed injury would result. *Chrystal v. Com.*, 9 Bush, 669; *York v. Com.*, 82 Ky. 360.

Upon the trial the commonwealth offered to prove that the accused had about two weeks before the killing said that his father had killed his man, and that he intended to do so soon. This evidence was rejected. Waiving all questions on account of the indefinite character of it by reason of no person being named, or in any way to the least extent indicated, and the fact that it was spoken so long before the killing, yet the only purpose in proving it was to show malice, and the accused was only indicted for manslaughter. Clearly it was incompetent.

The accused was allowed, over the objection of the commonwealth, to prove, as a dying declaration, what the injured party said after the shooting as to the circumstances of it. It is urged that the proper foundation was not laid for its introduction, and that the statement was in itself incompetent. It was proven that about 15 minutes after he was shot the deceased, when lying upon the ground bleeding and suffering, said that he hoped he would live long enough to take the gun home, and that he died in about 20 minutes. The witness says that he did not say whether he believed he would die or recover, and that he (the witness) did not know whether he was conscious or not when he made the statement. It is well settled that a statement, to be admissible as a dying declaration, must be made when the party is *in extremis*, and has given up all hope of this life; but whether this be so or not may be determined, not only by what he may say, but by his evident danger, and all the surrounding circumstances. The injured party need not, in express words, declare that he knows he is about to die, or make use of equivalent language. *Peoples v. Com.*, 87 Ky. —, 10 S. W. Rep. 642. Tested by this rule, we think the statement in this instance was made under a sense of impending death, and that what the injured party then said also shows he was conscious, not only of it, but of what he was saying, as to the transaction. The statement, in substance, was that he and the accused were playing, and that it was an accident. To be competent as a dying declaration, the statement must not only relate to the immediate circumstances of the transaction resulting in the injury, but it must detail facts, and not the opinion of the declarant. In our opinion, the statement in this instance conforms to this rule. It is unlike the case where the injured party declared that he had been killed for nothing. This was purely his opinion and inference. Here the injured man said that he and the accused were engaged in play, and that the shooting was an accident. This, in our opinion, was the statement of a fact, more than the giving of an opinion, and the court properly permitted it to be proven.

The instruction as to involuntary manslaughter given at the request of the defendant is too general in terms and expression. The jury upon this question should, in substance, have been told that if they believed from the evidence the accused had reasonable grounds to believe, and did believe, there was no danger in handling the gun as he did, and that it was done without any purpose of harm upon his part, but further believed from the evidence, to the exclusion of a reasonable doubt, that the killing resulted from the careless use of the weapon, then they should find him guilty of involuntary manslaughter, and fix his punishment at fine and imprisonment in the county jail, in their discretion; but if they believed from the evidence the killing was accidental, and without carelessness, they should acquit him. This opinion is ordered to be certified to the lower court.

### MAHLMAN v. WILLIAMS *et al.*

(Court of Appeals of Kentucky. Nov. 14, 1889.)

#### LIABILITY ON SUPERSEDEAS BOND.

Two creditors of T. were attempting, in the same action, to collect their claims out of an indebtedness of a third party to T. Judgment was rendered that the claim of one of the creditors should be paid out of the indebtedness; and the other creditor appeared, and executed a *supersedeas* bond, conditioned to pay all costs, and satisfy the judgment, if affirmed. Pending the appeal, the debtor of T. became insolvent. The judgment was affirmed. *Held*, that the sureties on the *supersedeas* bond were liable for the amount of the judgment, and not for the costs of appeal only.

Appeal from circuit court, Kenton county.  
"Not to be officially reported."

*Tisdale & Gray*, for appellant. *O'Hara & Bryan*, for appellees.

PRYOR, J. John Brungs & Bro. and R. F. Williams were each asserting, in an action brought by John Brungs & Co., an indebtedness to them by one Benjamin Thomas, and attempting to secure their respective claims out of an indebtedness by the Boston Lumber & Manufacturing Company to Thomas. All of these parties were defendants to the action. On the trial of the case, it appearing that the lumber company was indebted to Thomas, the court below held that Williams' claim should be paid by that company, and adjudged that the company pay to Williams the sum of \$168.12, with interest; and to that judgment John Brungs & Co. excepted, and prosecuted an appeal to this court. They executed a *supersedeas* bond, with the appellant, Charles Mahlman, as the surety, superseding the judgment below, which on the final hearing in this court was affirmed. After the mandate of affirmance had been filed below, the appellee Williams instituted his action on the *supersedeas* bond against the surety, Mahlman, and recovered a judgment for his debt and costs; and Mahlman now says the judgment against him should not have been for a larger sum than the cost of the appeal in the case where the judgment

was superseded. The *supersedeas* bond recites "that the appellant, John Brungs & Co., had taken an appeal from the judgment of the Kenton chancery court rendered against them, in favor of the appellee, for \$168, with interest from Aug. 6, 1880, and cost. Now, we, John Brungs & Bro., principals, and Charles Mahlman, surety, do hereby covenant to and with the appellee Williams that the appellants will pay to the appellee all costs and damages that may be adjudged against the appellants on the appeal, and they will satisfy and perform the said judgment, in case it shall be affirmed, and any judgment or order which the court of appeals may render, or order to be rendered in the inferior court, not exceeding the amount or value of the judgment aforesaid," etc. The appellee Williams was served with the *supersedeas*; and between the rendition of the judgment below, in the case against Thomas and the lumber company, and the return of that case to the lower court with a mandate affirming the judgment, the lumber company became insolvent, and hence the action against the surety on the *supersedeas* bond.

The case of *Worth v. Smith*, reported in 5 B. Mon. 505, is relied on by the appellant (the surety) as fixing his liability at the mere cost of the appeal. In that case a number of creditors of a steam-boat were proceeding to subject the boat by attachment to the payment of their debts. The boat was sold by the commissioner under an order of court, with bond and security given for the purchase money. It was a proceeding *in rem*, and the fund was in court, subject to distribution; and the appeal was from the order giving Worth the priority in the distribution, and not from the decree subjecting the boat to the payment of Worth's debt. If such had been the case, and a bond executed preventing Worth from selling the boat, there could be no question as to the liability of the surety in the *supersedeas* bond for the damages sustained by reason of the *supersedeas*.

In the present case, two of the creditors of Thomas, with the latter and his debtor parties to the action, were claiming this fund that the lumber company owed Thomas; and the chancellor gave the appellee a judgment against the company for the money. Now, what does the surety of Brungs & Bro. supersede when he signs this bond? He stays the collection of that judgment, and prevents the appellee from collecting it. Here was a personal judgment; and whether against Brungs & Bro., or against the lumber company, if Brungs & Bro. prevented its collection, is immaterial,—the surety is liable. The object of Brungs & Bro. was to prevent the appellee Williams from collecting this money, under the judgment, from the lumber company; and this they did by executing the *supersedeas* bond, with the appellant as surety, and having the writ served on the appellee. The appellee could have had his execution issued on the judgment against the lumber company, and the effect of the appeal by

John Brungs & Bro. was to suspend the execution against the lumber company until the appeal was prosecuted, and decided by this court. We take it to be clear that where one has a personal judgment upon which he is entitled to an execution, and he is prevented by parties in interest from executing that judgment by the execution of a *super-sedeas* bond, the surety becomes liable; and certainly in this case, where it is alleged and proven that the judgment debtor became insolvent between the execution of the *super-sedeas* and the final termination of the action in this court. It is no answer to say that a rule might have been obtained against the debtor to bring the money into court. It was not, in the sense in which the term was used in the case of *Worth v. Smith*, "a fund in court," where the thing attached had been sold, and the proceeds in the hands of the court for distribution. A personal judgment against the garnishee in favor of the appellee would have been proper if he had not been a defendant to the action, but summoned in the ordinary mode, and to say that a personal judgment may be superseded under our practice, and the surety not liable, where no other defense appears than is found here, is a doctrine that cannot be maintained.

Judgment affirmed.

#### McFARLAND et al. v. BURTON.

(Court of Appeals of Kentucky. Nov. 14, 1889.)

BILL OF EXCEPTIONS—SETTLEMENT AND SIGNING  
—CLERK OF COURT.

1. Carroll's Civil Code Ky. § 334, provides that "time may be given to prepare a bill of exceptions, but not beyond a day in the succeeding term, to be fixed by the court." An amendment of May 12, 1886, provides that "if the judge of said court, for any cause, does not preside at the said term of the court, or no court is held, then the party offering the bill of exceptions shall have until the next term of the court to perfect and prepare the bill of exceptions." *Held*, that the amendment applies as well to a special judge, legally elected to try a case, as to the regular judge; and where such special judge is absent at the day set for filing a bill of exceptions, when it is tendered, it may be continued to the next term, and it is sufficient for him to sign it then.

2. The amendment, being purely remedial, applies as well to a case tried before as after its passage, where it is in force at the day set for filing the bill.

3. In an action against a clerk of court for failure to issue an execution when directed, the defense was that the record was lost, and therefore the costs could not be taxed and the execution issued. *Held*, that this was no defense without showing that defendant had exercised proper diligence in preserving the record, and it was error to refuse to permit the answer to be amended by alleging that plaintiff or his attorneys had possession of the alleged lost record at the time of directing the execution to issue, as this would be a good defense.

Appeal from circuit court, Daviess county.

"To be officially reported."

W. N. & J. J. Sweeney and G. W. Williams & Son, for appellants. Little & Slack, for appellee.

PRYOR, J. In this case there was a trial

by jury, and the preliminary question raised by the appellee is that what purports to be a bill of exceptions cannot be considered. Section 334 of the Code (Carroll's) provides: "And time may be given to prepare a bill of exceptions, but not beyond a day in the succeeding term, to be fixed by the court." By an amendment of May 12, 1886, that section is amended so as to read as follows: "If the judge of said court, for any cause, does not preside at the said term of the court, or no court is held, then the party offering the bill of exceptions shall have until the next term of the court to perfect and prepare the bill of exceptions." Acts 1885-86, p. 101. The special judge presiding gave until the sixth day of the succeeding term to file the bill of exceptions, and on the day named the bill was tendered and offered to be filed, but the judge then presiding was not the judge who tried the case, nor was the special judge present who presided when the trial was had. The appellant was therefore without remedy, unless the amendment of May 12, 1886, entitled him to file his bill at the next term. Prior to this amendment, as was said in *Hayden v. Ortkreis*, 83 Ky. 396, (decided in 1885,) the appellant might resort to a signing of the bill by by-standers; but the difficulty in obtaining the signatures of those who heard the trial, no doubt, suggested itself to the legislature, and the amendment to this provision of the Code was passed in the session of 1886, enabling parties to reach this court by any appeal based upon exceptions, where the trial judge fails to attend at the term when the bill is to be filed, or for some reason cannot preside. In that event the party offering the bill shall have until the next term to file it. So, when the appellant tendered his bill on the day fixed by the special judge who had tried the case, he found a judge on the bench unacquainted with the conduct of the trial; and, having done all that was required of him, the offer to file was continued until the next term, when the special judge trying the case, being present, signed the bill that was then filed, and is now a part of the record.

It is now insisted that the amendment of May 12, 1886, does not apply to a special judge, but to the regular judge; and that when the appellant tendered his bill of exceptions at the term following the trial of this case he should have had by-standers to sign the bill, and then tender it to the court. The difficulty in having a bill of evidence attested at such a late day by by-standers will be readily perceived; and, if the amendment is so construed as to make it apply to the regular judge only, this evil in the practice sought to be remedied must still continue. A special judge elected in the manner provided by the statute to try a case is the judge of the court, in the meaning of the amendment, and invested with all the powers of the regularly elected judge in the particular case, and this power and authority continues until the trial is ended. When, then, is the case, in contemplation of law, finally disposed of in so

far as it affects the right of the special judge to hear and determine it? If a trial is had, it is the duty of the special judge presiding to hear and make a final disposition of the case in the court below. Where there is a mistrial, or the case continued, in either event the judge, when abdicating the bench, loses all power over it, and, when called at a subsequent term, must be heard by the regular judge, if he can properly preside, and, if not, a special judge must again be chosen. If a special judge has the power (and this will not be questioned) to fix a day at the succeeding term of the court to prepare and file the bill of evidence, his authority or right to preside extends over the case until prepared for an appeal to this court; and, if otherwise, the unsuccessful party is left without a judge to sign the bill, or to determine the truth of what it contains. There is no refusal on the part of the special judge to sign the bill, but his absence prevents the party from doing more than to offer to file it on the day the special judge has said it should be filed. Although the amended act was passed after the trial, it was in force before the day for filing, and, being purely remedial in its character, applies as well to a case tried before as after its passage; the remedy existing when the offer to file was made. In our opinion, therefore, the bill of evidence was properly signed by the special judge, and must be considered by this court.

The appellee is seeking to make the clerk liable for his failure to issue an execution when directed by his attorney; and the defense is that the record was lost, so that the costs could not be taxed, and the execution issued. There was more than one trial in this case; and, while the interrogatories propounded to the jury in the first trial might have warranted a judgment for the defendant, still no appeal was asked for or granted from that trial which might have been considered on the final hearing, and the case must now be determined alone by what transpired during the progress of the trial resulting in the judgment complained of. A clerk is not an insurer of the records in his office, and would be released from liability by the wanton destruction of the office and its contents, when not within his power to prevent it, or from discharging a duty by reason of the act of others over which he has no control, and whose action he could not prevent; still, having the custody of records in which the entire public has an interest, and of such great value as cannot well be estimated, he must exercise a high degree of diligence in their preservation and safe-keeping,—such diligence as a prudent man would exercise when intrusted with the custody of such valuable papers. It is no defense to an action charging a clerk with a breach of official duty as to the custody of a record to say that it was taken from his office without his knowledge or consent, unless coupled with the averment of diligence on his part, and that within a reasonable time he had made diligent search for it, and was

unable to find it. The statement that it was the custom to permit attorneys to take records from the office, and impossible to prevent it, constitutes no defense whatever. It is the duty of the clerk to prevent this; and such a custom as permits records to be taken from the office by parties in interest, or others, instead of releasing the clerk from liability, fixes his responsibility for the damages sustained. It is the duty of the clerk to issue executions when ordered by the attorneys; and in this case an entry was made by the attorneys to issue the execution at once; and failing to do so, and the appellee losing his debt thereby, the clerk is responsible, unless he has some valid defense. It is not pretended that the reasonable discharge of other duties prevented the execution from being issued in proper time, but the defense is that the record was lost, and the attorney so notified as soon as, or in a day or two after, the order to issue the execution was made. Now, if abstracted by some one, or lost without the fault of the clerk, and such facts should be alleged, the excuse might be deemed sufficient; but facts must be stated showing a proper degree of diligence in the preservation of such papers. It is made the duty of the clerk, by statute, to tax the costs, and include them in the execution, that the entire debt and costs may be made; and, if he fails to do so, to the extent of this failure he is responsible for the damages sustained. This taxation could not well be made without the papers in the case. A mere statement that the papers are lost, and therefore the costs could not be included, or the execution issued, is not a sufficient response. The court must know the diligence the clerk exercised in preserving the record, and that the fault or loss could not have been the result of his own negligence.

There is testimony in the case conducing to show that the attorneys for the plaintiff, in the judgment upon which the execution issued, had the custody or possession of the record that was said to be lost, at the time the execution was directed to be issued; and during the progress of the trial the appellant offered to file an amended answer alleging that fact, and relying upon it as a defense to the action. The court refused to permit the amendment to be filed, and in doing so the court erred. If the plaintiff or his attorneys had taken the records from the office, and thus prevented the clerk from taxing the costs, so as to issue the execution, the fault is theirs, and not the neglect of the clerk; or, if negligence on the part of the clerk in permitting the record to be taken from his office by the plaintiff or his attorney, it was equally the negligence of the plaintiff or his attorney in not returning it, and such neglect as caused the loss, and for which the clerk should not be held responsible. An instruction should have been given to that effect, and the amended answer permitted to be filed; and instruction C, that was in effect an instruction to find for the plaintiff, should have been refused. The judgment below is reversed and

remanded, with directions to award a new trial, and for proceedings consistent with this opinion.

**BRYAN *et al.* v. HENDERSON.**

(*Supreme Court of Tennessee. Oct. 8, 1889.*)

**LIABILITY OF SURETIES.**

One of three partners bought out the others, giving them notes with sureties for their shares, the purchaser agreeing to pay all the debts of the firm, and acquiring all the assets. The outgoing partners gave the other a bond conditioned to convey to him the firm real estate. The purchaser failed to pay the firm debts, and the outgoing partners agreed to repurchase the realty for a fixed sum, which was to be applied on the firm debts, for which all the partners were liable, which agreement was performed. *Held*, that the real estate having been reacquired for a full price, and the proceeds applied on the firm debts, no right which the sureties on the notes had in the real estate was prejudiced, and their liability on the notes was not affected thereby.

Appeal from chancery court, Sevier county;  
HENRY R. GIBSON, Chancellor.

*Pickle, Turner & McMahan*, for appellant.  
*Mullendon Pendland*, for appellees.

**LURTON, J.** This is a bill filed to perpetually enjoin a judgment at law. A demurrer to the jurisdiction of the court to entertain the bill upon the facts alleged was overruled. Subsequently the bill was amended, upon leave granted in the decree overruling demurrer. The defendant, instead of again demurring, answered the bill amended, denying the facts upon which relief was sought. The action of the court in overruling demurrer to the original bill is now assigned as error. The demurrer ought to have been sustained. It is insisted, however, that, inasmuch as the bill was subsequently amended, the failure of defendant to demur to the amended bill is a waiver of jurisdiction. This would doubtless be true if the amendment had cured the defective bill, but in this case the amendment did not improve the bill. Treating the amendment as part of the original bill, the demurrer was well taken. In view of the fact that the amendment did not cure the fault pointed out by the demurrer, we would probably be justified in now reversing the action of the court in overruling the demurrer, notwithstanding the subsequent amendment; it being, in effect, no amendment at all, in the view we take of the merits of the bill. We, however, find it unnecessary to rest our decision upon this question. The facts, as we find them, which are necessary to be stated, are these: The defendant, J. T. Henderson, one George Lee, and J. C. Bryan were partners in a small village store. The firm owned a business house, in which they carried on business. They also owned a stock of general merchandise, and some book-accounts. They were indebted for goods bought for the use of the business in about the sum of \$1,000. Henderson and Lee sold out their respective interests in the firm assets, including the realty, to their copartner, J. C. Bryan. The terms

of the sale were that Bryan should pay to each of them the sum of \$425, and assume all the liabilities of the firm. The trade, as stated by the witnesses, was a lumping trade of all the assets, in consideration that the purchaser would assume and pay all the firm indebtedness, and pay in addition to each of them the sum of \$425. The legal title to the firm realty was in the selling partners, Henderson and Lee, and they gave to Bryan a bond in the sum of \$1,650, conditioned to be void when they should make a good warranty deed to the store-house and lot. Separate notes were executed for the share of the purchase money due to each of the vendors. Complainants became sureties upon their notes, and judgment having been obtained at law upon the notes payable to defendant, Henderson, they now seek to be relieved from liability. J. C. Bryan did not pay off the firm indebtedness assumed by him. In consequence of this Henderson and Lee, who were still liable, agreed to repurchase the firm realty, and to pay for it the sum of \$712; this purchase money to be applied in payment of such of the outstanding debts assumed by Bryan as he should designate. Upon the payment by them of this sum in debts designated by Bryan, he surrendered his bond for title, and it was canceled, never having been registered. This still left about \$300 of firm debts unpaid. Bryan remained the owner of the remnant of the old stock, and of the book-accounts, and still liable upon the notes executed to Henderson and Lee, and still bound to pay off the remainder of the firm debts assumed by him.

The contention of complainants, that these notes were alone given for the purchase money of the house and lot, and that the rescission of the sale operates as a payment of the notes, is unfounded in fact. The notes represented the money to be paid for the entire firm assets, in addition to which the purchaser was to assume and pay off the firm indebtedness. The charge in the bill that when the title-bond was surrendered it was agreed that these notes should be canceled is likewise unsupported by any competent evidence.

It is next insisted that the reacquirement by the vendors of the real estate, which at least in part was to be paid for by the notes on which complainants are bound, operates as an exoneration to the extent that the real estate forms a part of the consideration for the notes. It is undoubted law that, if a creditor does any act which operates to release or discharge any lien or security that he holds from the principal debtor, to the prejudice or injury of sureties, the sureties will be exonerated to the extent to which they have been injured. *Bond v. Ray*, 5 Humph. 492; *Renegar v. Thompson*, 1 Lea, 457; *Allen v. Henley*, 2 Lea, 141. This is upon the ground that sureties paying a debt are entitled to be subrogated to any lien or securities belonging to the principal debtor, and held by the creditor for the security of the debt paid by

them. If the creditor has released such lien, or returned such securities, or applied or permitted their application to the payment of other debts of the debtor, he has acted in bad faith, and the sureties are justly entitled to claim exoneration to the extent that they have been defeated in their right to subrogation. How far does this equitable principle operate to relieve these complainants? The title-bond is not conditioned to make deed upon payment of the notes executed. Indeed, there are no conditions named upon which deed is to be made. It does recite that the property which they bind themselves to convey has been sold for \$825, being the aggregate of the notes executed to both Henderson and Lee, after deducting their respective accounts due the firm. This recital is not conclusive as to the consideration, and, as before stated, the real consideration of the sale was not only the payment of \$825, but the payment, in addition, of all the outstanding indebtedness of the firm. The vendors testify that they retained the legal title to indemnify themselves against the firm debts assumed as a part of the consideration for the sale. As to these debts their real relation to Bryan was that of sureties; they being still liable to such creditors, notwithstanding their assumption by him. The proof does not, however, show that there was any agreement with Bryan that the legal title should be retained as a security for his performance of this part of his contract. Indeed, there seems to have been no express agreement as to when the legal title should be conveyed, or for what purpose it was withheld, but, in a court of equity, no express agreement was necessary. The rule is that, where one holds the legal title, he will not be required to convey it to the equitable owner until the latter has discharged all indebtedness growing out of the transaction, and relieved him from all liability for him. *Williams v. Love*, 2 Head, 79; *Mitchell v. Brown*, 6 Cold. 509. It cannot be contended that Bryan could have compelled the conveyance of the legal title until he had relieved the defendant from all liability upon the firm debts, which the former, as a part consideration for the purchase, had assumed to pay. Neither would the complainants, upon the payment by them of these notes, have been entitled to be subrogated to the lien of Henderson and Lee upon this property, so long as the latter were still liable as sureties of the purchasing partner upon the firm debts assumed by him. Their equity to be exonerated from the liability for J. C. Bryan was superior to the equity of complainants, as sureties upon these notes, inasmuch as the assumption of these debts was just as much a part of the purchase price of these lots as the notes upon which complainants were bound as sureties. Concerning the doctrine of subrogation, this court has said, in the late case of *Greenlaw v. Pettit*, "that the right of subrogation is a pure equity, and is allowed only in relief of a meritorious creditor, and only when and where it does not con-

flict with the legal or equitable rights of other creditors of the common debtor." 3 Pickle, 480, 11 S. W. Rep. 357. See, also, 3 Pom. Eq. Jur. p. 469, § 1419; *Gilliam v. McCormack*, 1 Pickle, 597, 4 S. W. Rep. 521. The property was reacquired by defendant for a full price, and this value applied upon the firm debts. It follows, therefore, that no right or equity which complainants had in or to this property has been impaired or prejudiced by the resale of it to the original vendors. They have applied it in payment of the purchase price at its full value, leaving their notes still unpaid. They are not entitled to any relief whatever by reason of this transaction. The decree of the chancellor must be reversed, and the bill dismissed, with all costs.

#### STAPLES *et al.* v. HANDLEY *et al.*

(*Supreme Court of Tennessee.* Oct. 15, 1889.)

##### LIS PENDENS—INJUNCTION BOND.

1. In a suit concerning the title to real estate, where the defense is that complainant acquired his interest after the property had become involved in litigation, it is necessary to show, in order to charge complainant with constructive notice of *lis pendens*, that the subpoena in the case had been served upon the defendants before complainant took title, but it is not necessary to allege such fact in the answer.

2. The only liability on a bond given in a suit to enjoin the sale of land under a decree is for such damages as were caused by the delay in the execution of the decree.

Appeal from chancery court, Morgan county; HENRY R. GIBSON, Chancellor.

*Henderson & Jourleman*, for appellants.  
*E. E. Young and T. A. Wright*, for respondents.

LURTON, J. As to strangers to a pending suit, the constructive notice of *lis pendens*, where only such notice is relied upon, begins with the service of the subpoena upon the mutual dependants to the suit pending. *Tharpe v. Dunlap*, 4 Heisk. 686; *Williamson v. Williams*, 11 Lea, 363. It is not, however, essential, when the notice of *lis pendens* is pleaded or relied upon in answer, that it shall be averred that the subpoena had been served at the time the complainant had acquired an interest in the property involved in the litigation. This fact must, however, be shown, for the *lis pendens* only commences with the service of subpoena. For this very reason, it is not necessary, in order to be allowed to prove and rely upon such *lis pendens*, to allege that subpoena had been served, for there was no *lis pendens*, as constructive notice, until such service.

The second assignment of errors is that the chancellor erred in giving judgment against complainants and the sureties on injunction bond for the amount of the decree enjoined. The debt was not the debt of complainants, nor was the decree against them. The only liability for which the injunction bond can be held is for such damages as were actually sustained by the wrongful suing out the in-

junction. *Moore v. Hallum*, 1 Lea, 511. It does not matter that the bond may have been in double the amount of the decree enjoined. The decree ordered sale of land claimed by complainants. Such damages as were sustained by the delay in the execution of the decree are the only damages which can be recovered. What they were not appearing, there should have been a reference. The decree of the chancellor will be modified to this extent, or remanded, if desired, for a reference, and decree for damages thus ascertained. The costs of this court will be equally divided.

**IRWIN v. BROWN et al.**

(*Supreme Court of Tennessee*. Oct. 5, 1889.)

**NAVIGABLE WATERS.**

Under Code Tenn. §§ 1439, 1524, providing for the erection of mill-dams across waters not navigable in the proper, legal, or ordinary sense, a stream is not navigable which is not of sufficient depth naturally for valuable floatage, such as rafts, flat-boats, and small vessels of lighter draft than ordinary. *FOLKES, J.*, dissenting.

Appeal from chancery court, Anderson county; *HENRY R. GIBSON*, Chancellor.

*C. J. Sawyer*, for appellant. *Fowler & Fowler*, for appellees.

*SNODGRASS, J.* The decree in this cause is erroneous. Hind's creek is not a navigable stream, under the law in this state, and the verdict of the jury, so finding, is without evidence to support it. A stream which is not of sufficient depth naturally for valuable floatage, such as rafts, flat-boats, and small vessels of lighter draft than ordinary, is not navigable in any sense, strict, legal, or ordinary, in Tennessee. *Stuart v. Clark*, 2 Swan, 9. It was error in the chancellor to instruct the jury that it was not necessary that a stream of water should be large enough to enable boats of any size to sail upon it, in order to be a navigable river in the meaning of the law. If a stream of water has a capacity for transportation valuable to the public, such as the transportation of saw-logs to a river, then such a stream is navigable, and no one has a right to obstruct that navigation. He should have instructed the jury on that point, as hereinbefore indicated. The policy of this state has been to encourage mills, as well as navigation. Our statute authorizes, through permission of the county court, (and that will be presumed when a mill-dam has stood, as has the one involved in this controversy, for more than 20 years,) the erection of mill-dams across waters not navigable in the proper, legal, or ordinary sense. Code, §§ 1439, 1524. If capacity to float a log was the criterion of navigability, perhaps no stream in the state could be dammed. It was not intended that such a construction should ever be given the statute, or it would be worse than void. It would have operated as a trap and snare to owners of mill property thus permitted and encouraged to build. The construction given in the case cited is both sound and sensible, and we

adhere to it. The decree must be reversed, and cause remanded for a new trial, with costs of this court against respondents.

*FOLKES, J.*, (*dissenting*.) I do not concur in the above. I am of opinion that the charge of the chancellor was correct, and that the judgment should be affirmed.

**WELCKER v. STAPLES et al.**

(*Supreme Court of Tennessee*. Oct. 17, 1889.)

**FRAUDULENT CONVEYANCES—ACTUAL POSSESSION.**

Where a judgment debtor conveys land to his wife and children for a recited consideration, a part of which is paid, and the vendees are in actual possession for seven years, such possession is presumed to be with the legal title, and the conveyance cannot be attacked for fraud.

Appeal from chancery court, Roane county; *HENRY R. GIBSON*, Chancellor.

*G. W. Henderson*, for appellants. *Welcker & McNutt*, for appellees.

*TURNER, C. J.* Joseph Meicke & Son, being indebted, for the benefit of creditors made a general assignment to complainant, Welcker, in trust. Thomas Staples, who was indebted to Meicke & Son by judgment in the sum of about \$104, conveyed his land to his wife and children for a recited consideration, part of which was paid. The assignee filed this bill, attacking said conveyance for fraud. The chancellor decreed for complainant. The land was sold, and purchased by Meicke, the senior member of the firm. The case is before us on writ of error. It clearly appears, for more than seven years prior to the filing of the bill the vendees were in the actual possession of the land, claiming it as theirs. The fact that the husband and father lived with them made no difference, as the possession is presumed to be with the legal title. Meicke, the purchaser, while not a party by name, is a privy to the suit. If complainant, his assignee, succeeds, a debt is paid to him, which is to be applied to the claims of his creditors, and for his benefit. He will have an interest in any surplus remaining of his assigned estate after the payment of his debts; therefore his title will fail on reversal upon a writ of error. Decree reversed, and bill dismissed, with costs.

**STATE v. HILL.**

(*Supreme Court of Missouri*. Nov. 4, 1889.)

**BILL OF EXCEPTIONS—TIME OF FILING.**

In Missouri, where the court has adjourned, after making an order allowing a certain time in which to file a bill of exceptions, it cannot extend the time by a similar order, at a subsequent term.

Appeal from circuit court, Daviess county; *CHARLES H. S. GOODMAN*, Judge.

Defendant was indicted and duly tried for embezzlement. The trial resulted in a conviction, and sentence to imprisonment for two years. Motions for new trial and in arrest were overruled at the April term, 1887,



of the Daviess circuit court. At the same term defendant took an appeal to the supreme court, and an order was entered extending the time to file bill of exceptions to the first day of the next (June) term. On the ninth day of the June term the court extended the time to July 15th. The bill was filed July 12th.

*W. T. Sullivan and John Leopard*, for appellant. *The Attorney General*, for the State.

**BARCLAY, J.** After the rulings were made on defendant's final motions, and his appeal was allowed, the court, at the same term, extended his time to file bill of exceptions to the first day of the next term. When that time expired, the court, then holding another term, made an order for a further extension, within which the bill was filed. It is now insisted, by the vigilant representative of the state, that we cannot properly consider the bill thus filed. The point seems well taken. The record in the cause having been closed at a previous term, the authority of the court thereafter to allow a bill of exceptions depended on the order to that effect made at that term, in accordance with the statute on that subject. The court could not properly, in the first instance, make an order at a subsequent term, after the cause had terminated, allowing a bill of exceptions to proceedings at the prior term. Any allowance of the bill at such a time would derive vitality only from the action of the court taken during the term when the cause was pending, by virtue of which the bill could be connected with, and by relation made part, of the record. We are of opinion that after the extended time has expired the court cannot properly make a further order of extension. It is hence necessary to exclude the bill of exceptions from consideration on this appeal. No suggestion of any error in the record proper has been made. We have carefully reviewed it, and fail to discover any. The indictment conforms to the statute, and the subsequent proceedings before Judge GOODMAN appear regular throughout. The judgment is affirmed, with the approval of all the judges, except RAY, C. J., absent, and SHERWOOD, J., expressing no opinion.

**CRAIG v. SCUDDER et al.**

(*Supreme Court of Missouri*. Nov. 18, 1889.)

**APPEAL—RECORD.**

Under supreme court rule Mo. No. 15, requiring appellants to make an abstract of the record in the cause, setting forth as much thereof as is necessary to a full understanding of all the questions presented to the court for its decision, the court cannot pass upon instructions, where they are not copied in such abstract, and their substance is not given therein.

Appeal from St. Louis circuit court; DANIEL DILLON, Judge.

Action by Archibald N. Craig against John A. Scudder and William H. Scudder for services rendered. There was a judgment for defendants, and plaintiff appeals.

*Smith & Harrison*, for appellant. *Krum & Jonas* and *Douglas & Scudder*, for respondents.

**SHERWOOD, J.** 1. Action on a contract for services rendered as clerk of defendants, and the simple issue presented by the pleadings was whether such a contract was made. There was evidence on this point *pro* and *con*, and the jury brought in a verdict for the defendants. What the instructions were we are not informed, and so cannot pass upon the propriety of their being given or refused. Our rule 15 requires that the appellant or plaintiffs in error make out "an abstract or abridgement of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for its decision." The instructions are not copied in appellant's abstract, nor is their substance given. The object of our rule is to avoid the necessity of recurring to the record in order to discover whether error has been committed. Under that rule, the abstract stands, and was intended to stand, as a substitute for and in lieu of the record, and we will not examine the latter, but rely upon the former, and upon that decide the cause. *Long v. Long*, 96 Mo. 180, 8 S. W. Rep. 766; *Bank v. Iron Co.*, 97 Mo. 88, 10 S. W. Rep. 865; *Flannery v. Railroad Co.*, 97 Mo. 192, 10 S. W. Rep. 894; *Jayne v. Wine*, 11 S. W. Rep. 969.

2. As to the evidence offered of the report of the referee, in order to show what one of the defendants swore on a former occasion and in another cause, such evidence is so clearly hearsay as to require no further comment. We affirm the judgment. All concur, except RAY, C. J., absent.

**BURGESS et al. v. BOWLES.**

(*Supreme Court of Missouri*. Nov. 4, 1889.)

**WIDOW'S ELECTION.**

Where a testator gives to his wife all his property so long as she remains his widow, she may, nevertheless, take such of it as the homestead and administration laws give her, without a formal renunciation of the will. Unless the estate given by the will exceeds that given by law, there is no consideration for an election, and she need make none.

Error to circuit court, Lincoln county; ELLIAH ROBINSON, Judge.

Action of ejectment by Martha Burgess and others against Susan J. Bowles. Judgment for plaintiff, and defendant brings error.

*Smith, Silver & Brown* and *R. H. Norton*, for plaintiff in error. *Martin & Avery* and *Dunn & Colbert*, for defendants in error.

**BARCLAY, J.** Vaden Giles died in 1872, leaving a will, as follows: "First, after all my lawful debts are paid and discharged, the remainder of my estate, real and personal, I give to my wife, Susan Jane Giles, as long as she remains my widow, to dispose of any portion of the estate for her support, if nec-

essary. I also constitute my said wife my lawful executrix, to sell and dispose of any property, personal and real, and pay off all lawful debts I owe. And if there be any property left after her death it shall be divided among my children." Plaintiffs are his children. Defendant was his widow. In 1875 she married Bowles. After defendant's marriage this action of ejectment was brought. The land in question was bought by Giles, and partly paid for during his lifetime. He resided on it with the defendant at the time he died, and for several months before. The deed to him as grantee was delivered to defendant after his death. As both parties claim through him as owner, there will be no need to consider any other question of title on the facts disclosed than that hereinafter discussed.

For the purposes of this case the land must be regarded as the homestead of deceased. It was within the legal limits regarding value and extent, and was all the realty he owned. He left some personal property. Defendant, while his widow, took possession of all this property, had the will probated, and paid off a number of his debts. In so doing she probably intended to act under the will, but, after her marriage to Mr. Bowles, she claimed the land by virtue of the homestead law. That is her claim now. The law in force when Giles died controls the rights of these parties. Under it the widow would take the same estate owned by the deceased in the homestead, his children being adults when this suit was begun. *Skouten v. Wood*, (1874,) 57 Mo. 380; *Register v. Hensley*, (1879,) 70 Mo. 190. Plaintiffs' counsel contend that, as defendant acted under the will, she must be taken to have elected the estate thereby created, and hence could not take under the homestead law adversely to that estate. Had she received any greater estate, real or personal, under the will, than that which she would otherwise have been entitled to take under the homestead and administration law, it would be necessary to meet and decide that question. But the doctrine of election can have no application where the property received under the will is not greater than the party would have the right to take under the law, without reference to any will. Plaintiffs did not establish in this case that it was greater. Without such showing, the homestead, the subject of this action, must be regarded as vested absolutely in defendant from Giles' death, (Wag. St. p. 698, § 5,) as well as his personal property to the extent defined by the administration law then in force, (Wag. St. p. 88, §§ 33, 35; *Cummings v. Cummings*, [1873,] 51 Mo. 261; *Hastings v. Myers' Adm'r*, [1855,] 21 Mo. 519.) If there was no property on which the will would operate, as against the widow's absolute statutory rights, there would be no consideration for an election by her, and the reason on which the doctrine of election rests would fail. No formal renunciation of the

will would be necessary, in such case, to confirm her title to the property which the law itself gave her. *Hasenritter v. Hasenritter*. 77 Mo. 162.

The result reached in the trial court was not in harmony with these views, so we all agree to reverse the judgment, and remand the cause.

#### HARRINGTON *et al.* v. CITY OF SEDALIA.

(*Supreme Court of Missouri*. Nov. 4, 1889.)

##### WITNESS—HUSBAND AND WIFE—INSTRUCTIONS.

1. Under the Missouri statutes the husband is not a competent witness in an action by the husband and wife for personal injuries to the wife.

2. A party cannot, on appeal, complain of instructions embodying principles advanced by himself, or which contain inconsistencies arising from those given at his request.

3. A plaintiff cannot complain of an instruction which requires the finding of facts unnecessary for a defense.

4. Where instructions, taken together, fairly present the rule of law, a judgment will not be reversed on account of the incompleteness or vagueness of one of them.

Appeal from circuit court, Pettis county; RICHARD FIELD, Judge.

Plaintiffs, Edward E. Harrington and Mary E. Harrington, are husband and wife. Their claim is for personal injuries to Mrs. Harrington, caused by a defective plank-walk in a street in Sedalia. The defense asserts her contributory negligence, and that the place where the injury occurred was not part of the public highway. An addition to the city had been laid out by plat, approved by the municipal authorities, and recorded by the land-owner. It represented the place in question as part of a dedicated street. Whether or not the city had opened it to public travel before the plaintiff was injured was an important issue in the case, upon which the evidence was conflicting. At the trial the court gave a number of instructions, some of which, with other material matters, will be noted in the opinion. A verdict for defendant resulted. Plaintiffs appeal.

*E. J. Smith* and *W. R. Aldrich*, for appellants. *Louis Hoffman*, for respondent.

BARCLAY, J. 1. Plaintiffs complain of the action of the court in submitting to the jury, by an instruction, the question whether the street where the injury occurred "was then and there necessary for the convenience and use of the traveling public," and in repeating that idea in other instructions given for defendant. This objection loses whatever force it might otherwise have when it is noted that the court had approved the same theory at the instance of plaintiffs themselves. We find recited in the fifth instruction for plaintiffs, among the facts necessary to a recovery, the following: "And, if the public convenience required a sidewalk on the north side of said portion of said street, then it was defendant's duty to maintain a sidewalk there in a safe condition for persons passing along the same;

and if you find that defendant neglected so to do, and that plaintiff, in walking along said walk at the time alleged, and in the exercise of reasonable care, fell and was injured because of such neglect, you will find for the plaintiffs." Parties cannot usually maintain objections here to instructions embodying the principles they themselves asserted in the trial court. *Tetherow v. Railroad Co.*, 98 Mo. 85, 11 S. W. Rep. 310.

2. It is next claimed that the court erred in using certain language in defendant's fourth instruction. We will indicate it by italics to show the context. "(4) If the jury believe, from the evidence, that the point where the alleged accident occurred, in Eleventh street, was at a point not usually traveled, and that the city had never opened said Eleventh street at that point for the convenience and use of the traveling public, and that the city had never laid down a sidewalk, but that the persons residing in said neighborhood had laid for their own use and convenience the planks mentioned by witnesses, and that there was sufficient and ample room in said street, at said point, so that plaintiff could have passed with ease and safety said street and point, without walking upon or touching said planks, yet that she nevertheless undertook to walk upon said planks, then she cannot recover, and your verdict will be for the defendant." This instruction required the jury to find many more facts than were necessary to a defense, and among them those italicized. If "the city had never opened the street at that point for the convenience and use of the traveling public," it would be fatal to plaintiff's case, according to their own theory. The instruction would have been good had it stopped at that point. Whether the added matter of itself would preclude a recovery is unnecessary to inquire.

3. Error is assigned on the court's declaration, at defendant's instance, that prior notice to defendant of the defect in the sidewalk was a necessary fact to warrant a verdict for plaintiff. Any vagueness there may have been in that statement, standing alone, was relieved by the fuller information in plaintiffs' instruction to the effect that if the jury believe, from the evidence, that said sidewalk was not in safe condition for use and travel thereon, and that it was permitted to remain so for such length of time as that, if said city and its officers had used ordinary care in observing the same, they would have known of its unsafe condition, then the city was bound to take notice of said unsafe condition. Plaintiffs have no tenable ground of objection on that score; for, in considering the two instructions together, the jurors would have a view of that subject quite as favorable to plaintiffs as the principles of law warrant.

4. Nor is there just cause to complain of the instructions submitting the issue of contributory negligence. Taken together, those given for plaintiffs and defendant fairly present the correct theory that, if the plaintiff

could have avoided injury by the exercise of ordinary care, she should not recover. This idea was expressed in several different forms, some of which, if isolated from the rest, might be subject to criticism. But instructions should be read as a whole, and where they thus fairly present the law a judgment will not be reversed on account of the incompleteness of some particular one.

5. It is suggested that there is a conflict in the instructions. One of those given on behalf of plaintiffs authorizes a verdict for them, whether the street, at the point in question, was necessary for the convenience and use of the traveling public or not. On the other hand, those given for defendant make it essential to plaintiff's case that the street was necessary for public travel there. This latter idea is also contained in one of plaintiffs' instructions, as has been already mentioned. So, whatever inconsistency there is in the instructions is contained in those given at the request of plaintiffs. They therefore cannot successfully assign it as error.

6. The plaintiff husband was sworn as a witness, but an objection by defendant to his competency was sustained. As the wife was the substantial plaintiff in the action, the husband was properly excluded from testifying, under our statute, on the subject. No error materially affecting the merits of the action to the prejudice of plaintiffs having been indicated, we all agree to affirm the judgment, except RAY, C. J., absent, and SHERWOOD, J., expressing no opinion.

#### RANNELLS v. ISGRIGG.

(Supreme Court of Missouri. Nov. 18, 1889.)

##### DOWER—INSANITY—APPEAL.

1. Under Rev. St. Mo. 1879, § 3186, giving a widow dower in lands whereof her husband, or any other person to his use, was seised of an estate of inheritance, the widow of a lunatic is entitled to dower in lands purchased by his guardian with assets of his estate; and it is immaterial that the assets used arose from a sale of the lunatic's lands to pay debts, and the investment by the guardian was unauthorized.

2. The act of the wife and husband in joining in the deed of the guardian, ordered to be executed to the purchasers of the land at a sale to pay the lunatic's debts, is a nullity, and does not bar her dower. *Rannells v. Gerner*, 80 Mo. 474.

3. In Missouri, an agreed case occupies the same footing as a special verdict; and, unless the court correctly pronounces its conclusions of law upon the facts, the judgment will be reversed.

Error to circuit court, Saline county; JOHN P. STROTHER, Judge.

Plaintiff, as the widow of Charles S. Rannells, brought her action for dower in the N. E.  $\frac{1}{4}$  of section 22, township 50, range 21, in Saline county. Formal proof being made of plaintiff's marriage and widowhood, the following agreed statement of facts, as well as evidence additional thereto, were introduced by plaintiff:

"It was then admitted and agreed upon by both parties that on the 11th day of June, 1859, Vincent Marmaduke was the owner of

the land described in the petition; and that on said day the said Marmaduke sold and conveyed the same, together with other lands, by warranty deed, to one E. Smith Clarkson. That the consideration for such purchase was fifteen thousand nine hundred and sixty dollars, for which such purchase money Clarkson executed to said Marmaduke his several promissory notes,—one for \$3,960.00, and one for \$3,000.00, upon both which Charles S. Rannells was surety; and three other notes for \$3,000.00 each, without personal security. That, for the purpose of securing the payment of all said notes, said Clarkson and his wife executed and delivered to said Vincent Marmaduke a mortgage on the lands described in the petition, with other lands. That in the year 1865 the executors of Meredith M. Marmaduke, deceased, were the owners of all said notes and mortgage. That in 1865 the said executors recovered a judgment in the St. Louis circuit court against Charles S. Rannells on the two notes on which he was surety, which judgment amounted to about nine thousand dollars. That in 1865 said executors instituted suit in the Saline circuit court against said Clarkson and wife to foreclose said mortgage as to the three three-thousand dollar notes, which were without personal security; and in October, 1866, judgment was rendered foreclosing said mortgage as to said three notes, said judgment being for the sum of fourteen thousand one hundred dollars. That in March, 1866, said Charles S. Rannells was duly adjudged by the county court of St. Louis county, Mo., to be incompetent, and incapable of managing his own affairs; and one Robert M. Renick was duly appointed by said court as guardian of the person and estate of said Charles S. Rannells, and said Renick duly qualified as such guardian, and entered upon the discharge of his duties as such; and that said Rannells remained incapable of managing his affairs, and said Renick continued to act as such guardian, from that time until the death of said Rannells, which occurred in 1877 or 1878. That on the 18th day of February, 1867, the said Renick, as such guardian, purchased of said executors of said Meredith M. Marmaduke, deceased, the said judgment of foreclosure of the Clarkson mortgage aforesaid, and paid therefor, in notes belonging to said estate of said Charles S. Rannells, which said notes were the proceeds of sales of land in St. Louis county which belonged to said estate of Charles S. Rannells, the sum of fourteen thousand four hundred and sixty-three and 16-100 dollars; and said judgment was there and then assigned and transferred by said executors to said Renick, as such guardian, by an instrument of writing, in which said Renick is described as guardian of the person and estate of Charles S. Rannells; and afterwards, in July, 1867, the said Renick, in his first annual settlement as such guardian, reported said purchase of said judgment, and the amount paid therefor, to the said county

court of St. Louis county, and claimed as a credit against said estate of said Rannells the said fourteen thousand four hundred and sixty-three and 16-100 dollars which he had paid, as aforesaid, for said judgment of foreclosure; and said credit was allowed said Renick, and said settlement accepted and approved. That at the May term, 1867, of the circuit court of Saline county the lands described in the petition, together with the other land in said mortgage, were sold under said judgment of foreclosure, and said Robert M. Renick, as guardian aforesaid, became the purchaser thereof. Said guardian did not pay any cash for said land at said sale, but bid the same in for the amount of the judgment of foreclosure aforesaid, which he then held as the guardian of Charles S. Rannells; and the sheriff of Saline county, the officer selling said lands under said judgment, executed to said Robert M. Renick, as guardian of Charles S. Rannells, a deed to the lands described in the petition, and the other lands described in said mortgage.

"The plaintiff introduced other evidence, as follows: A petition to the county court of St. Louis county by Robert M. Renick, guardian of Charles S. Rannells, filed July 27, 1869, praying for an order to sell real estate of said estate. The condition of the estate is set forth, and, among other things, the petition states: 'Your petitioner further states that there belongs to the estate of said Rannells the following tracts of land, situated in Saline Co., Mo., and near the town of Marshall, the county-seat of said county, viz.: The whole of section 22, township No. 50, range 21, and the east half of the south-east quarter of section 21, same township and range, and containing altogether 720 acres of land, for which the petitioner has been offered \$25 per acre. For the purpose above mentioned,—of paying outstanding indebtedness of said Rannells, and of providing for the maintenance of said Charles S. Rannells and his family,—there being sufficient personal assets in hands of your petitioner for these purposes, your petitioner therefore prays that he be permitted to sell the above-described real estate in the manner prescribed by law,' etc. The record of the county court of St. Louis county, which shows that, upon the filing of the above petition by said guardian, the said court found that the personal estate of said Rannells was insufficient for the discharge of his debts, and maintenance of himself and family, and ordered that the real estate described in said petition be sold at public auction on Tuesday, the 12th day of October, 1869, at the court-house door in said town of Marshall, upon the terms of one-third cash, and the balance in one and two years, with interest on deferred payments, etc.; said deferred payments to be secured by deed of trust on the premises sold; notice of sale to be given, etc.

"The report of sale by Robert M. Renick, guardian of Charles S. Rannells, to the county court of St. Louis county, dated October 28,

1869, which states that said Renick, as such guardian, in obedience to the said order of sale, did, on October 12, 1869, after giving notice, etc., sell the real estate mentioned in his petition for sale, and the said order of sale, and that Daniel P. Harrison and C. G. Page were the highest bidders for the north-east quarter of section twenty-two, (22,) township fifty, (50,) range twenty-one, (21,) Saline Co., Mo., and that they, and other purchasers of real estate sold at said sale, had paid some of the purchase money in cash, and were ready to pay the balance of the first payment, and execute their notes for the balance of the purchase money, as required by the order of sale, whenever the said county court shall approve of said sale, and order the guardian to convey the property so sold to the purchasers thereof upon their compliance with the terms of said sale. It was agreed by plaintiff and defendant that the above report was accepted and approved by said county court, and deeds ordered executed to the purchasers therein named for the land purchased by them, respectively; and that afterwards, at the March term, 1870, of said county court, said guardian, in his annual settlement filed in said county court at said time, charged himself with \$4,480.02, which he received for the land described in said petition from said Harrison and Page at the aforesaid sale thereof.

"Plaintiff also introduced in evidence a deed from Robert M. Renick, guardian of the person and estate of Charles S. Rannells, to D. P. Harrison and C. G. Page, dated November 1, 1869, and conveying the land described in plaintiff's petition. This deed was also signed and acknowledged by Charles S. Rannells and the plaintiff at the same time the guardian signed and acknowledged the same. Also a deed from D. P. Harrison to C. G. Page, and a deed from C. G. Page to Daniel Isgrigg, the defendant, each conveying the land described in plaintiff's petition; the first of which deeds is dated February 24, 1870, and the other March 4, 1871. It was then admitted by the defendant that he went into possession of the land described in the petition under the above deed from said Page to him, on the date thereof; and that he has ever since been, and yet is, in possession of said land, claiming title thereto, under and by virtue of said deed; and that no dower in said land had ever been set off to plaintiff. Plaintiff also introduced a demand on defendant for dower in said land, and the return of the sheriff, showing service of said demand on defendant on the 20th day of February, 1880. This was all the evidence."

Upon the foregoing agreed statements, etc., the trial court gave judgment for the defendant. Rev. St. Mo. 1879, § 2186, gives a widow dower in lands whereof her husband, or any other person to his use, was seised of an estate of inheritance.

*Boyd & Seabee*, for plaintiff in error. *Davis & Wingfield and Wm. H. Letcher*, for defendant in error.

SHERWOOD, J., (*after stating the facts as above.*) 1. The objection is made that this court cannot review the action of the court below, because this is an action at law, and no declarations of law were asked. This view is erroneous. The case was tried, in the main, upon an agreed statement of facts. What other evidence was offered, except mere formal proofs, was record evidence, and did not controvert the case made by the agreed statement. It has long been the rule in this state that an agreed case occupies the same footing as a special verdict. *Munford v. Wilson*, 15 Mo. 540; *Gage v. Gates*, 62 Mo. 412. In either case it becomes the duty of the trial court to pronounce the conclusions of law upon the facts found or proven, and unless this be correctly done the judgment will be reversed.

2. Under our statute, the guardian, Renick, was seised of the land in controversy to the use of Rannells; and, nothing more appearing, this gave his widow the right to be endowed of that land. Rev. St. 1879, § 2186. The judgment of foreclosure, by virtue of which the land was purchased by the guardian as such, was made with the notes which were the proceeds of the sales of certain lands in St. Louis county, which belonged to the estate of Rannells. This was in 1867. There is nothing to show that the "sales" which produced those notes were sales for the payment of debts of the estate of Rannells; on the contrary, such a sale does not appear to have occurred till two years afterwards, *i. e.*, in 1869, when the land now in dispute, having been acquired by Renick as guardian in 1867, was sold by him in the same capacity, under the order of the county court, for the payment of debts, and for the maintenance of Rannells and his family. By reason of the purchase by the guardian of the land with assets of the estate of his ward, a trust resulted in favor of the latter; and this is true, regardless of any election by the ward to that effect, or any capacity on his part so to elect. Such a trust results or arises by operation of law, and is altogether independent of any election. 1 *Perry, Trusts*, § 127, and cases cited; 2 *Pom. Eq. Jur.* § 1049, and cases cited. As it is not usual to have more than one sale of a ward's estate for the payment of debts, and as the only sale for that purpose, so far as the record reveals, took place in 1869, long after the purchase by the guardian at the foreclosure sale of land in suit, it may well be presumed that the word "sales," used in the agreed statement, referred to mere private sales, and not to those effected through the machinery of the county court. If this presumption be correct, then but little difficulty arises as to the proper disposition of the point under discussion. And even if the lands sold in St. Louis county were sold for the payment of debts, and the notes arising from the "sales" were exchanged, as in the present instance, for the judgment of foreclosure, and the land bought in under such judgment, this would not de-

feat the widow's claim for dower. The fact that such an exchange by the guardian was unauthorized, does not affect this question. If the husband, before being put in ward, had exchanged lands in St. Louis county for the lands in question in Saline county, this would not have barred his wife's dower in but one tract. 1 Washb. Real Prop. (5th Ed.) 208. Some of the authorities hold that, aside from statutory provisions and technical exchanges, she would be dowerable in both tracts. 1 Woerner, Adm'n, 233. Accepting the foregoing as correct, it is difficult to see how the act of the guardian in exchanging the proceeds of lands in St. Louis county for the proceeds of lands in Saline county could defeat the dower right of the widow, or render her tenure more precarious than if her husband, when fully sane, had made the exchange. Looking at the matter in this light, it must be held that the plaintiff was dowerable of the land in suit, and therefore should have prevailed in her action.

3. As to the effect of the plaintiff joining in the deed made by her husband and his guardian, this point is ruled in favor of the plaintiff, on the authority of *Rannells v. Gerner*, 80 Mo. 474. The judgment will be reversed, and the cause remanded, with directions to the circuit court to proceed in conformity with this opinion. All concur, but RAY, C. J., absent.

#### CITY OF KANSAS v. FORD *et al.*

(Supreme Court of Missouri. Nov. 18, 1889.)

##### APPEAL FROM INFERIOR COURTS—JUDGMENT.

The charter of Kansas City, (Sess. Acts Mo. 1875,) art. 7, § 6, provides that when any person is aggrieved by the verdict of a jury in the mayor's court he may appeal to the circuit court for Jackson county. The appeal shall be taken by filing an affidavit with the city clerk, and he shall within a certain time file a complete transcript with the clerk of the circuit court, which "court shall thereupon become possessed of the cause." *Held*, that the circuit court has no jurisdiction to render judgment in a case commenced in the mayor's court, where its records fail to show that any verdict was rendered in the mayor's court, or that any appeal was taken from such verdict.

Appeal from circuit court, Jackson county; TURNER A. GILL, Judge.

*Frank Titus*, for appellants.

BRACE, J. It appears from the records in this case that on the 24th of July, 1886, the city of Kansas passed an ordinance (No. 34,432) providing for the widening of Tracey avenue from Sixth street to Independence avenue, and prescribing the limits within which private property should be deemed to be benefited by the proposed improvement; that notices were issued and served upon certain owners of property to be taken for the purposes of such improvement, among whom were the appellants herein, Ford and Hunt, and a summons for a jury to assess the damages for such property was issued by the mayor under the provisions of the charter of said city, (article 7, § 2, p. 244; Sess. Acts

1875,) returnable March 23, 1887, on which day return was made of the summons, the jury impaneled and sworn, and, being unable to complete their labors, the proceedings were continued by order of the mayor until March 25, 1887, on which day the jury appeared in said court, and the ordinance and plat upon which the proceedings were being carried on was offered in evidence, and proof of publication made against certain parties. On the 1st of April, 1887, this jury was discharged, and the proceedings continued to the 12th of April, 1887, and on the 11th a summons was issued for another jury, returnable on the 12th, on which day the second jury appeared, was sworn, instructed to view the property, and being unable to complete its labors, the proceedings were continued until the 13th of April, 1887. On the 13th the jury and some of the parties appeared, a jurymen was discharged, and another sworn in his place; and it was ordered by the court "that this matter, and all proceedings herein, be continued until Monday, May 2, 1887, at 10 of the clock on the forenoon, at," etc.; and with this order ends the proceedings at the mayor's court, so far as this record shows. At the January term, 1888, and on the 10th day of March, 1888, this case opens up in the circuit court of Jackson county with the following entry: "In the matter of condemnation proceedings of Tracey avenue from Sixth street to Independence avenue, under ordinance of the city of Kansas. Now, at this day, comes defendant A. Ford, by attorney, and files herein his motion to quash proceedings, and said defendant A. Ford also files herein his special answer." One of the grounds of this motion was "that no valid judgment has ever been rendered therein before the mayor of the city of Kansas." On the 12th of March following this motion was overruled, a jury was selected, and thereafter a trial was had in said circuit court, which resulted in a verdict and judgment condemning the property of appellants, Ford and Hunt, for the public use set out in the ordinance. Their motions for a new trial and in arrest of judgment having been overruled, they appeal.

The only method by which the circuit court of Jackson county could have acquired jurisdiction to render the judgment appealed from in this case was by appeal from the verdict in the mayor's court under the provisions of the city charter, supra; section 6 of which provides that, "in case the city or any defendant to such proceedings shall feel aggrieved by the verdict of the jury, such party so aggrieved may, within twenty days from the time the verdict is confirmed by the common council, appeal to the circuit court in and for the county of Jackson, in this state. If the appeal is taken by either party, the same shall be taken and perfected by the filing with the clerk of the city within the time aforesaid such an affidavit as is required by law in appealing from the judgment of a justice of the peace. If any appeal is

so taken, the clerk of the said city shall, within six days from the taking of such appeal, file a complete transcript of the proceedings \* \* \* with the clerk of the circuit court, and said circuit court shall thereupon become possessed of the cause, and said cause, unless dismissed, shall be tried *de novo* in said court," etc. It failing to appear that any verdict was ever rendered in the mayor's court, or that an appeal was ever taken from any such verdict, it fails to appear that the circuit court had jurisdiction to render the judgment from which the appellants appeal to this court. Courts of general jurisdiction, when engaged in the exercise of special and limited statutory powers, are confined strictly to the authority given, and jurisdiction must appear upon the face of their proceedings. *Harris v. Hunt*, 97 Mo. 571, 11 S. W. Rep. 236; *Railroad Co. v. Campbell*, 62 Mo. 585; *Ellis v. Railroad Co.*, 51 Mo. 200. The judgment is reversed. All concur, except RAY, C. J., absent; BARCLAY, J., in the result.

#### REED v. BOTT *et al.*

(Supreme Court of Missouri. Nov. 18, 1889.)

##### FRAUDULENT CONVEYANCES—PLEADING.

Where a petition alleges that one of the defendants bought certain real estate, and had the same conveyed to his wife for the purpose of defrauding his creditors, and the evidence shows that the land was purchased by such defendant's father, who conveyed it to the wife, the plaintiff, who had purchased the land under a judgment against such defendant, is not entitled to a decree avoiding the conveyance, though the money paid for the land may have been the proceeds of defendant's labor, and the petition concluded with an allegation that the land in fact belonged to him. *BARCLAY, J.*, dissenting.

Appeal from circuit court, Scotland county; BEN F. TURNER, Judge.

*Berkheimer & Givens*, for appellants. *John A. Whitestide* and *Frank Hagerman*, for respondent.

**BLACK, J.** This is a suit in equity against John A. Bott and his wife, Mary E., to have a deed for 73 acres of land to her declared fraudulent, and to vest the title in the plaintiff. The plaintiff purchased the property in 1885, under a judgment in favor of Max Yesnor against John A. Bott, rendered in March, 1884, on a note dated in March, 1882. The defendants appealed from a decree in favor of the plaintiff.

The first objection made by defendants is that the proof does not support the cause of action stated in the petition. The petition states that "on — day of —, 1881, defendant John A. Bott purchased of L. K. and Nancy Wilcox the following real estate, [describing it;] that on the — day of September, 1884, John A. Bott paid the balance of the purchase price for the land, and, for the purpose of defrauding his creditors, instructed Wilcox and wife to execute a deed to Mary E. Bott, the wife of said John A. Bott; that the deed was made to her, the de-

fendant John A. Bott intending thereby to defraud his creditors." The petition goes on to say "that on the 30th September, 1881, John A. Bott made a contract of purchase of the land, receiving a bond for a deed in the name of John Bott,—which was in fact the true name of defendant John A. Bott, and not the name of his father,—whereby Nancy L. Wilcox and her husband bound themselves, upon the payment of \$375 in three years from the date thereof, with interest at the rate of 8 per cent. per annum, to convey said lands to John A. Bott. Afterwards, on the — day of —, 1884, said Nancy Wilcox and husband made and executed a warranty deed to Mary E. Bott; and afterwards, on the — day of —, 1885, they made a second deed to Mary E. Bott. And plaintiff shows that said property in fact belonged to J. A. Bott, and he, for the purpose (Mary E. Bott participating therein) of hindering, cheating, defrauding, and delaying his creditors, purchased the same, paid for it, and caused the deed to be made to his said wife," etc. The proof shows beyond all question that the bond for the title was made by Wilcox and wife to John Bott, who was the father of John A. Bott. John Bott says he made the first payment to Wilcox, namely, \$350, and this statement is not controverted. He also executed his note for the deferred payment of \$375, and when it became due he paid it, and had the deed made to Mrs. John A. Bott. The first deed to her was made in California, and was defective, if not worthless, and the second was made in correction of the first. Prior to 1881, John A. Bott was engaged in a mercantile business, and in that year his property was damaged by fire. He then compromised with his existing creditors, and went to the state of Texas. He returned to this state in one or two years; and Mr. Sisson, who was the father of Mrs. John A. Bott, conveyed to her some 200 acres of his home farm, reserving a life-estate therein. In March, 1883, Mr. Sisson leased his life-estate to John A. Bott at a small rental, the lessor to live on the farm with his daughter and her husband, John A. Bott; and his wife moved to this farm, and carried on a farming business until November, 1884, in the name of the wife. John Bott, father of John A. Bott, says he furnished Mrs. John A. Bott money to buy farming machinery, and agreed to let her have the Wilcox 73 acres of land at the price which he had agreed to pay for it; expecting to be repaid the money advanced, and for the land, out of the proceeds of the farm. There is still due him at least \$400. He had the Wilcox deed made to her, as he had agreed to let her have the land.

The plaintiff insists that John A. Bott was insolvent, and that he carried on this farm in the name of his wife to defraud his creditors, and that the payments made by John Bott were made from the proceeds of the labor of John A. Bott, and that in equity the land conveyed to Mrs. Bott belonged to her



husband, and was subject to his debts. Now, by reference to the petition, it will be seen that it proceeds on the theory that John A. Bott purchased the land from Wilcox and wife, that he made the first payment to them, that he was the obligee in the bond, and that he made the last payment to them from his own means. The proof does not support any of these allegations. The land was purchased and paid for by John Bott. If there is any fraud in the case, it is in the transaction by which the land was acquired from John Bott, and in the methods by which payments were made to him. This transaction is not set up in the petition at all. The petition is so framed as to exclude the idea that there ever was any such a transaction. It is insisted, however, that all these averments, which are not proved, may be disregarded, and that the decree can stand on the allegation that "the property in fact belonged to defendant John A. Bott." This averment is but the pleader's conclusion from the statements before made. A general allegation of fraud is not sufficient; the facts constituting the fraud should be set out and detailed in the petition. Bliss, Code Pl. (2d Ed.) § 211; Smith v. Sims, 77 Mo. 270. The plaintiff cannot state one cause of action in the petition, and recover upon another. Under the practice act, he may have other and different relief from that prayed for; but the decree, which is awarded him, must be warranted both by facts stated in the petition and by the proof. Newham v. Kenton, 79 Mo. 332; Baldwin v. Whaley, 78 Mo. 186; Ross v. Ross, 81 Mo. 84. As before stated, if there is any fraud, in fact or in law, in the case, it is in the transaction by which the property was acquired from John Bott, and the circumstances in respect thereto should be set out. The practice act is liberal in allowing amendments, and the pleadings and proof should be made to correspond. In remanding this cause, we suggest that, if it be again tried before a jury, issues be framed. It is quite out of the question to satisfactorily review a case where it has been tried in disregard of established rules of procedure. On the present state of the pleadings, we shall not attempt to pass upon the case presented by the evidence. The judgment is reversed, and the cause remanded.

RAY, C. J., absent. BARCLAY, J., dissents. The other judges concur.

STATE *ex rel.* BROADWATER v. SEIBERT,  
State Auditor.

(Supreme Court of Missouri. Nov. 18, 1889.)

#### APPROPRIATIONS.

Const. Mo. art. 10, § 19, provides "that no money shall ever be paid out of the treasury of this state except in pursuance of an appropriation by law, \* \* \* nor unless such payment be made, or a warrant shall have issued, within two years after the passage of such appropriation act, and every such law making a new appropriation, or continuing or reviving an appropriation, shall dis-

tinctly specify the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such sum or object." *Held*, that Sess. Acts 1889, p. 6, § 5, subd. 7, reappropriating a certain sum "to pay the balance due under the contract made for the enlargement of the capitol building," did not authorize a payment out the state treasury for services performed in completing a retaining wall on the capitol grounds, which was necessary to secure the foundation of the new addition, under a contract made two years after the passage of the act, though such contract would have been authorized under the original appropriation act.

#### Mandamus.

J. W. Zenely and Silver & Brown, for relator. John W. Wood, Atty. Gen., for respondent.

BRACE, J. By an act of the general assembly, approved March 9, 1887, the sum of \$250,000 was appropriated for the purpose of enlarging the main edifice of the state capitol building, by additions thereto, and the governor, the secretary of state, treasurer, attorney general, and superintendent of public schools, and commissioner of the permanent seat of government were constituted a board of commissioners, with authority to contract, in the name of the state, for the necessary materials, and for the performance of the work at a cost not to exceed the appropriation, and to employ a competent architect and superintendent to supervise the same, (Sess. Acts 1887, p. 17;) the contract to provide for the completion of the improvements on or before the 1st day of January, 1889. On or about the 1st of July, 1887, said board contracted for the improvements contemplated in said act, consisting in part of a large addition to the north end of the capitol, and adjacent to the bluff of the Missouri river. In order to secure the foundation for this addition, it was found to be necessary, after the contract was entered into, to construct a retaining wall around and along said bluff, and in the year 1888 said wall was, by said board, directed to be built, and work thereon was begun by the contractor for the same. The contract for this wall was a separate contract, independent of the one originally made in 1887, for the improvements contemplated in said act, and having reference to the retaining wall only. On the 1st of January, 1889, there remained unexpended of said \$250,000 appropriation the sum of \$21,854. The general assembly, by act approved May 21, 1889, (Sess. Acts 1889, p. 6, § 5, subd. 7,) appropriated \$7,500 "to pay the amount due for work and improvements on the walls and capitol grounds," and "to pay balance due under contract made for the enlargement of the capitol building, which balance was a part of the former appropriation of \$250,000, which lapsed and reverted to the treasury," reappropriated the sum of \$21,854.06. On or about September 1, 1889, said board of commissioners employed the relator to do certain work in and about making plans and specifications and surveys for completing said retaining wall. His account therefor, amounting to the sum of \$25, was thereafter ap-

proved by said board, and by them directed to be paid out of the fund to pay balance due under contract made for the enlargement of the capitol building, and thereafter, with such approval and directions indorsed, was presented to the auditor, who refused to audit the same, or to issue a warrant on the treasurer for its payment; whereupon the relator sued out the alternative writ of *mandamus* herein.

The cost of the work done on the retaining wall prior to September 1, 1889, was paid out of the \$7,500 appropriation, and, before the contract was made with the relator for the services charged for in his account, the same had been exhausted. There was, however, in the treasury more than enough to pay the amount of relator's vouchers of the unexpended balance of the \$21,854.06 reappropriation, at the time it was presented to the auditor. The constitution provides (article 10, § 19) that "no moneys shall ever be paid out of the treasury of this state, \* \* \* except in pursuance of an appropriation by law, nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such sum or object." It is obvious from the reading of the foregoing provision that a reappropriation is upon the same footing as the original appropriation as to the necessity of stating the object for which such reappropriation is made. That question must be determined by the terms of the act of reappropriation, and resort cannot be had to the first act for that purpose. By the terms of the reappropriation in this case the object stated is "to pay the balance due under the contract made for the enlargement of the capitol building." When this reappropriation was made there was nothing due the relator upon any contract for the enlargement of the capitol building, nor had there been any contract whatever made with him by the commissioners. Conceding that, under the act making the original appropriation, the commissioners had authority to contract for the services for which they approved relator's account, they did not so contract until after the time had elapsed within which he could have been paid, by virtue of such original appropriation, and the terms of the reappropriation limits the payment to such balance as may be due under the contract, *i. e.*, under the contract made before the passage of the act of reappropriation, upon which a balance was or might become due. By no proper construction can relator's claim under an original contract, made after the act, be brought within the terms of the reappropriation; and, there being no fund upon which the auditor was authorized by law to draw a

warrant, the peremptory writ prayed for will be refused. All concur, except RAY, C. J., absent.

### WADDELL v. WADDELL *et al.*

(Supreme Court of Missouri. Nov. 18, 1889.)

#### VESTED REMAINDERS—PARTITION—MULTIFARIOUSNESS.

1. A deed which creates a life-estate in the grantee, and provides that after his death the title in fee-simple shall "go and vest in his children and heirs at law equally, to be divided between them as tenants in common," creates a vested remainder in the children of the grantee in being at the time of its execution; and as the words "children and heirs at law," as used therein, constitute a class, the estate in remainder will open, and let in such of the same class as come into being during the continuance of the particular estate, who likewise take a vested remainder.

2. As such children take the land as tenants in common, a petition which joins all those living, and the heir of one deceased, as parties defendant in a suit for partition is not multifarious, though some of the tenants have purchased the interests of the others, such purchase not conferring an exclusive right to any portion of the land.

3. Where, as in such suit, the general right to the whole land is being litigated, the fact that the parties to the suit rely upon distinct and independent rights does not make the petition therein multifarious.

Appeal from circuit court, La Fayette county; JOHN P. STROTHER, Judge.

Suit by Hannah W. Waddell against James White Waddell, Hannah L. Groves, and her husband, Frank S. Groves, and John F. Waddell, Robert L. Waddell, Alonzo W. Waddell, Arthur K. Waddell, and Mattie E. Waddell, minor children of James William Waddell, for partition of certain land held by defendants' ancestor under a deed granting him a life-estate, with remainder to his children and heirs at law. The court sustained defendants' demurrer to the petition, and plaintiff appeals.

Wm. T. Woodwith and J. D. Shewalter, for appellant. A. F. Alexander and Wallace & Chiles, for respondents.

SHERWOOD, J. This proceeding is one for the partition of certain lands, and necessarily involved in the cause is the proper construction to be given to the deed therein mentioned. The clause of the deed thus brought in question is as follows: "To have and to hold the said real estate, with the appurtenances, to the said John J. Waddell, and to his heirs, forever, in trust, however, for the following purposes, that is to say: The said John J. Waddell, of the second part, is to have, possess, and enjoy the said several tracts or parcels of land hereinbefore conveyed, and to be seised of the same, to and for his own exclusive use, benefit, and behoof, for and during his natural life, doing nor suffering any unnecessary waste; the said lands and tenements, nor any interest in the same, to be liable for any debt or debts of the said John J. Waddell, which he has contracted or may hereafter contract; and on the death of said John J. Waddell the title, in fee-simple, to go and vest in the children

and heirs at law of the said John J. Waddell, equally, to be divided between them as tenants in common."

So that the chief question this record presents is whether the remainder created by the deed was vested or contingent. The subjects of vested and contingent remainders, and the difference and distinction between them, meet with frequent and elaborate discussion and illustration in the text-books, as well as in the reported cases. It is unnecessary, however, to go at length into the authorities in order to arrive at the proper result in this case, since our own reports furnish us with instances which suffice our present purpose, and serve well to illustrate the distinction between remainders vested and those contingent. Thus in *Jones v. Waters*, 17 Mo. 589, where land was devised by the testator to his wife for and during her natural life, and after her death to descend to her "children" by him, equally, share and share alike, it was held that these words created a vested remainder in the children, and that one of them who predeceased his mother had an interest subject to sale; and it was remarked that the devisees in remainder were ascertained by the will, and they were to have the enjoyment of the estate as soon as the estate for life ended; and that the devise of the remainder was not to such of the children as may be alive at the death of the mother, but to all of the children of the marriage. *Aubuchon v. Bender*, 44 Mo. 560, presents a case of the same deed, creating both kinds of remainder. There, by the terms of the deed, the grantor was to stand seised of the property to his own use during his life, and, after his death, "the use, benefit, usufruct, and title to the same shall revert and vest" in the five children named in the deed, "and such other children in lawful wedlock by him begotten as shall be living at the time of his death, and their heirs." And upon this it was ruled that, as to the five children named in the deed, a vested remainder was created, and as to those that should be "living at the time of his death" the remainder was contingent. In *Emison v. Whittlesey*, 55 Mo. 254, the conveyance was to the mother during her natural life, and upon her death the remainder in fee-simple absolute to vest in the children then living, etc.; and it was ruled that as at the time of the execution of the deed no one could tell that any of the children would survive their mother the remainder was only a contingent one. So, too, in *De Lassus v. Gatewood*, 71 Mo. 371, the clause of the will declared: "I give and bequeath unto my beloved wife \* \* \* all my property," etc., "to have and to hold \* \* \* during her natural life or widowhood; and, at the death or marriage of my said wife, \* \* \* all my estate, heretofore bequeathed, shall be equally divided between my children that are alive;" etc., and it was ruled that a contingent remainder was thereby created. Contrasting the foregoing cases with that at bar, there seems no ground to question that a

vested remainder was created in the children of John J. Waddell.

The petition alleges, and the demurrers admit, that at the time of the execution of the deed to John J. Waddell there were three children then alive of the marriage, to-wit, Martha G. Waddell, James William Waddell, and Mary Ellen Waddell; that two other children of the marriage were subsequently born, — sons, who died in infancy, and without issue; that Martha G. having married, died intestate, leaving as her child and heir at law Hannah Groves; that Mary Ellen intermarried with one Moore, died without issue, but testate, having devised her interest in the lands to her mother, the plaintiff, for and during her natural life, with full power to dispose of the same as she might choose. The words "children and heirs at law," as used in the deed, must be construed as constituting a class, and, when this is the case, the estate in remainder will vest in those who were living at the time of the execution and delivery of the deed, and will open and let in such of the same class as come *in esse* during the continuance of the particular estate; in which case all the authorities agree that the remainder is a vested one, equally as operative for the benefit of those *in posse* as for those in being. 2 Washb. Real Prop. (5th Ed.) 599, 600, 687; 4 Kent, Comm. (13th Ed.) 208, note 205, 206; *Moore v. Weaver*, 16 Gray, 305; *Gernet v. Lynn*, 31 Pa. St. 94; *Graham v. Houghtalin*, 30 N. J. Law, 552; *Wolford v. Morgenthal*, 91 Pa. St. 30; *Wager v. Wager*, 1 Serg. & R. 374. And the words "heir at law" may well be construed as being used interchangeably with "children," or as meaning "grandchildren" or "descendants;" and this is especially true where, as under our statute, the issue of a person entitled takes the share of his ancestor. Rev. St. 1879, §§ 2161, 2165.

There is no lack of authority in support of the position that if the words used in the context warrant it, and such construction will carry into effect the manifest intention that moved the execution of the deed or the signing of the will, that then such intention will be made effectual, and the word "heirs" will be construed as meaning "children," and *vice versa*, and "children" as "issue," "grandchildren" or "descendants," if the justice or reason of the case requires it. 4 Kent, Comm. (13th Ed.) 419; 3 Washb. Real Prop. (5th Ed.) 282; *Haverstick's Appeal*, 108 Pa. St. 394; *Warn v. Brown*, 102 Pa. St. 347. And the fact that a deed is the instrument requiring such liberality of construction, provided such construction is just and reasonable, and accords with the evident intent of the grantor, and it is consistent with the principles of law, should not be allowed to defeat such liberal and beneficial construction any more than if the instrument under examination were a will. *Huss v. Stephens*, 51 Pa. St. 282, and cases cited; *Wyth v. Blackman*, 1 Ves. Sr. 196; *Royle v. Hamilton*, 4 Ves. 437.

Having reached the foregoing conclusion, it is quite unimportant to discuss a point so strongly pressed by counsel for defendants as to the effect of the abolition of the rule in Shelley's Case, since the effect of our statute which accomplishes that result (Rev. St. § 3943) is not considered as having any appreciable bearing on the case at bar. The premises considered, we consequently hold that all the children of John J. Waddell, whether living at the time of the execution of the deed or born subsequently thereto, were equal sharers in the land conveyed by the deed of their grandfather, and took thereby a vested estate in remainder, and that the plaintiff, as the mother of Frank C. and Edward A., who died intestate and childless in infancy, acquired an interest in the land in dispute equal to that of the other brothers and sisters of the said decedents. The plaintiff also acquired a life-estate in the land in consequence of the devise made to her by her daughter, Mary Ellen Moore. But the plaintiff did not acquire by reason of such devise a greater interest than a life-estate. (2 Redf. Wills, 346,) because she had conferred upon her by the will of her daughter the power to dispose absolutely of the interest Mrs. Moore formerly held in the land; since the power conferred was not exercised, and, if exercised, would, of course, have defeated any claim now made by plaintiff.

Now, as to the petition being obnoxious to the charge that it is multifarious. This objection is not well taken, for two reasons: (1) Under the ruling already made, Martha G. Waddell took an equal interest in the land as the other children, and this interest descended to her daughter, Hannah L. Groves, and under the original deed the whole tract was conveyed in one body, and none of those entitled thereto have any exclusive interest in the same. They take as tenants in common, and not otherwise; and the fact that some of those tenants may have purchased interests of the others does not affect this point, nor confer upon the purchasers any exclusive right to any portion of the land. (2) Besides, here a general right to the whole land is being litigated, and, where this is the basis of the litigation, it matters not that the parties litigant should rely upon distinct and independent rights. *Donovan v. Dunning*, 69 Mo. 436; *Bobb v. Bobb*, 76 Mo. 419; *Rinehart v. Long*, 95 Mo. 399, 8 S. W. Rep. 559. The judgment will therefore be reversed, and the cause remanded, with directions to proceed in conformity with this opinion. All concur, but RAY, C. J., absent.

#### CORDIER v. BROWN *et al.*

(*Supreme Court of Missouri*. Nov. 18, 1889.)

#### DEEDS—PARTITION—ESTOPPEL.

A deed to a husband and wife, for their joint lives and the life of the survivor, gave the husband power to convey an undivided half of the premises in fee, with remainder over to the wife's heirs. The husband and wife conveyed an undivided half to defendant's grantor in fee. They

then conveyed the west half to their grantees, and he reconveyed the east half to them. *Held*, that the first conveyance by the husband and wife limited the interest of an heir of the wife, who would have taken an undivided one-third, had the husband not executed his power, to an undivided one-sixth in the entire tract; and, while such heir's rights were not affected by the subsequent partition deeds, yet where she subsequently attempted to convey an undivided one-third of the east half, and in her deed expressly recognized the conveyance of the west half, and adopted the dividing line between the two halves as thereby established, she was estopped to claim an undivided sixth of the west half.

Appeal from St. Louis circuit court.

*Martin, Laughlin & Kern*, for appellant.  
*Noble & Orrick*, for respondents.

BRACE, J. This is an action of ejectment, in which the plaintiff sues to recover an undivided one-sixth of certain premises in the city of St. Louis, described in the petition by metes and bounds, being the west half of a tract of 7½ arpents, conveyed by John Hogan and wife, who was the owner in fee-simple of said 7½-arpent tract, by deed dated February 10, 1853, to Guillaume Hauguel and Eulalie Hauguel, his wife; "to have and to hold the same unto them, the said Guillaume Hauguel and Eulalie Hauguel, for and during their joint natural lives, and the life of the survivor, with power in the said Guillaume Hauguel to convey in fee-simple, forever, or to mortgage or otherwise incumber, the one equal undivided half of said granted premises; and after the death of the said Guillaume and Eulalie Hauguel said granted premises, or so much thereof as shall not have been conveyed by the said Guillaume Hauguel, shall pass to and vest in the heirs of said Eulalie Hauguel forever." On the 4th of May, 1863, Guillaume and Eulalie Hauguel, by general warranty deed of that date, conveyed an undivided one-half of said 7½-arpent tract to Andrew S. Barada. On the 16th of March, 1864, Guillaume and Eulalie Hauguel, by a second general warranty deed of that date, conveyed, by metes and bounds, the west half of said 7½-arpent tract to the said Barada; and the said Barada on the same day, by quitclaim deed in which his wife joined, conveyed by metes and bounds the east half of said 7½-arpent tract to the Hauguels, "to have and to hold the same unto them, the said Guillaume Hauguel and Eulalie Hauguel, for and during their natural lives, and the life of the survivor, and after the death of both of them the said granted premises shall be vested unto the heirs of the said Eulalie Hauguel, the same as provided by deed of John Hogan." On the 12th of September, 1865, Barada and wife, by quitclaim deed, conveyed by metes and bounds the west half of said 7½-arpent tract to William B. Thompson, from whom defendants deraign title by mesne conveyances. Guillaume and Eulalie Hauguel were husband and wife. The former died in 1872; the latter in September, 1885. The plaintiff is a child of the said Eulalie by a former husband, and one of two children whom she left surviving her at her death, and who, with

the children of a third child, deceased, are her heirs at law. On the 14th of August, 1872, the plaintiff, by a general warranty deed of that date, conveyed to Charles H. Peck an undivided one-third of the east half of said  $7\frac{1}{2}$ -arpent tract. In this deed she described herself as "a widow, daughter of Eulalie Hauguel, wife of Guillaume Hauguel," and gave the following description of the tract in which she conveys such interest: "Commencing at a point in the northern line of United States survey No. 1,276, of the St. Louis common fields, confirmed to the legal representatives of Auguste Conde, eight hundred and twenty-six feet eleven and a half inches distant eastwardly from the eastern edge of Vandeventer avenue, the said beginning point being the north-east corner of a tract of three and three-quarter arpents conveyed to Andrew S. Barada by said Guillaume Hauguel and wife; thence eastwardly, with the north line of said survey No. 1,276, south six degrees, one thousand and ten feet and seven and a half inches, to a point; thence south, 27 degrees 25 minutes west, ten feet; thence north, 61 degrees west, three hundred and four feet, to a point; thence south, 29 degrees west, one hundred and eighty-three feet, to a point in the south line of said survey 1,276; thence west, with said southern line of said survey 1,276, north, 61 degrees west, seven hundred and seven feet one and a half inches, to a stone at the south-east corner of said tract of three and three-quarter arpents conveyed to A. S. Barada by said Hauguels; thence north, with the eastern boundary line of said Barada three and three-quarter arpent tract, north, 27 degrees 5 minutes east, one hundred and ninety-two feet six inches, to the point of beginning, containing three and three-quarter arpents, and being the east half of a tract of seven and a half arpents, heretofore conveyed to said Guillaume and Eulalie Hauguel by John Hogan and wife, \* \* \* the same being bounded north by United States survey No. 3,285, west by Barada, south," etc. Ever since the execution of the deeds by the Hauguels and Barada, on the 16th of March, 1864, Barada and his grantees have been in the exclusive possession of the west half of said  $7\frac{1}{2}$ -arpent tract, and the defendants at the commencement of this suit were so in possession, all claiming title under those deeds, of which each, by its reference in the description of the premises conveyed, shows that they were but parts of a single transaction intended to effect a partition of the  $7\frac{1}{2}$ -arpent tract between the parties. The boundaries in the deed of plaintiff to Peck correspond with those in the deed from Barada to the Hauguels.

It is quite too plain for argument, and apparent on the face of the *habendum* clause from Hogan to the Hauguels, that the estate of Guillaume and Eulalie was limited by that deed to a life-estate in the  $7\frac{1}{2}$ -arpent tract, and the power of the said Guillaume was limited to the power to convey in fee-simple an undivided half thereof. To hold that Guill-

aume, under the terms used by the grantor in that deed, had power to convey the whole tract in fee-simple would do violence to the grammatical construction of the sentence in which the power is granted, and would defeat the evident intent of the grantor to make provision for the heirs of Eulalie by settling upon them beyond peradventure an estate in fee-simple after the termination of the life-estates, in any event, to the extent of the one undivided half thereof. It is also evident that, if the said Guillaume had not executed the power in the deed, upon the death of him and his wife the plaintiff would have been entitled to an undivided third in fee-simple of the whole tract. But having executed the power by his conveyance to Barada of the 4th of May, 1863, of the one undivided half in fee-simple, by that act her estate was reduced from a possible undivided third in fee-simple to a certain undivided one-sixth of the whole tract upon the termination of the life-estates. By this conveyance Guillaume exhausted all the power granted him by which the quantum of plaintiff's interest in the  $7\frac{1}{2}$ -arpent tract could be by him or his wife affected. While the subsequent conveyances between the Hauguels and Barada had the effect of severing the right of possession of the common tract between them during the pendency of the Hauguels' life-estate, they in no way affected *per se* the plaintiff's right to an undivided sixth of the whole tract in fee-simple upon the termination of that life-estate. And this was the interest which the plaintiff, as one of the heirs apparent of Eulalie Hauguel, had in the whole tract at the time she came to make her deed to Peck, and but for that deed would have been her interest in the whole tract, the possession of which she would have been entitled to at the commencement of this suit. When she came to make that deed she could have conveyed to Peck in fee, subject to the life-estate, her undivided sixth interest in the whole tract, or her undivided sixth interest in either the east or west half, specified by metes and bounds. *Barnhart's Guardian v. Campbell*, 50 Mo. 597. She did neither, however, but undertook to convey an undivided third of the east half to Peck, and gave him a warranty of title to such third, when she was advised by the deed of Hogan, and the first deed of the Hauguels, the source of her title, that she only had an undivided sixth interest in the premises, unless by some other means she had acquired another sixth. Having thus in the first breath asserted her right to convey an undivided third in the east half, she sets about describing it by metes and bounds, and the very next breath is used to assert that the beginning point of the premises about to be conveyed is "the north-east corner of a tract of three and three-quarter arpents, conveyed to Andrew S. Barada by said Guillaume Hauguel and wife;" and then, after running eastwardly, then southwardly, then westwardly, she comes to a stone which she declares is the "south-east corner of said tract of

three and three-quarter arpents conveyed to A. S. Barada by said Hauguels;" and for her fourth line she runs "thence north, with the eastern boundary line of said Barada's three and three-quarter arpent tract, to the beginning,"—the identical dividing line erected by the Hauguels and Barada in their deeds, *inter sese*, conveying the east half to Hauguels and the west half to Barada; and she then winds up her description by saying the premises conveyed are the east half of the  $7\frac{1}{4}$ -arpent tract, bounded "on the west by Barada," *i. e.*, by Barada's west half of that tract.

Conceding that the deeds of partition between the Hauguels and Barada were outside the line of plaintiff's chain of title, and that she was therefore not bound to take notice of them, yet the contents of her own deed show she had actual notice of them, and, with actual knowledge of their contents, deliberately adopted the partition line which had been drawn by them between the east and west halves as the line which divided her land, as well as that of the Hauguels, from that of Barada, declaring that her interest was in the east half, and that the west half was Barada's; and, in connection with this declaration, asserting that she had an undivided third in fee-simple in the east half, which she could not have had except she intended by her deed to confirm the partition which had previously been made, and relinquish her interest in the west half. We think it must be held that she, by her voluntary deed, made for a valuable consideration, did thereby relinquish her interest in the west half, and confirmed and adopted the partition theretofore made, and that she now ought to be estopped from setting up a claim to an undivided sixth of said west half. The trial court so held, and its judgment is affirmed. All concur, except RAY, C. J., absent, and BARCLAY, J., not sitting.

#### GREEN *et al.* v. WALKER *et al.*

(Supreme Court of Missouri. Nov. 18, 1889.)

##### PARTITION—JURISDICTION—SPECIAL JUDGE.

1. Since in Missouri a partition proceeding is but a civil action, the circuit court has jurisdiction of an answer seeking to charge the interests of some of the parties with advancements made to them by the ancestor's executrix, under an agreement that they should be so charged, under Rev. St. Mo. § 3521, providing that an answer shall contain a general or specific denial of each material allegation of the petition, or a statement of any new matter constituting a defense.

2. Where, on writ of error to a court having jurisdiction of a cause, the record is returned signed by one as special judge, and reciting that the cause was tried before him in that capacity, it will be presumed, in the absence of evidence to the contrary, that he had proper authority.

Error to circuit court, Caldwell county; JOHN E. WAITE, Special Judge.

This is an action of partition to divide 180 acres of land in Caldwell county among the heirs of John Van Winkle, deceased. The parties are his children and grandchildren. Certain of the adult defendants filed an

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amended answer, presenting this state of facts: John Van Winkle left a will, (since duly probated,) by which he gave his widow, Mary, a life-estate in the property in question, (with power to sell the same if she should choose,) and remainder to his children equally upon her death, naming her executrix. During her life-time she made a number of payments as executrix to several of the children, upon an express written agreement with each that the same should be charged to and accounted for as an advancement upon final distribution of the estate. The answer prayed that each of these payments should be charged, in this proceeding, against the interest and share of the party receiving the same. Issue was taken upon this answer. The court found in favor of defendants thereon, and in the final distribution of the proceeds of the estate adopted the defendant's theory outlined above. The cause was tried at the February term, 1885, when the court made a finding determining the respective interests of the parties, that the land was not susceptible of partition in kind, and ordering a sale. No motion for new trial was filed by any of the parties. At the February term, 1886, final judgment of distribution was made upon the sheriff's report of sale, and plaintiffs filed a bill of exceptions, embodying the proceedings at the trial. Other material matters appear in the opinion.

W. A. Wood, for plaintiffs in error. C. S. McLaughlin, for defendants in error.

BARCLAY, J., (*after stating the facts as above.*) This case is here on writ of error issued at the instance of plaintiffs. No motion for new trial was made in the circuit court upon which it might have reviewed and corrected the rulings at the trial. They are not, therefore, the subject of consideration here, under our statute declaring that "no exception shall be taken in an appeal or writ of error to any proceedings in the circuit court except such as have been expressly decided by such court." Rev. St. 1879, § 8774. But several assignments of error refer to the record proper, which has hence been examined. It is claimed that there is no sufficient showing of the authority or jurisdiction of the special judge who tried the cause. The writ of error on which this hearing is based was directed to the circuit court of Caldwell county. A record in the cause has been returned, in response, by the clerk of that court. The bill of exceptions, filed during the February term, 1886, (at which the final judgment was rendered,) is part of that record. It is signed by John E. Waite as special judge, and recites that the cause was tried before him in that capacity. How he came to be special judge, or whether he ever was sworn, generally or in that case, does not affirmatively appear. His actions as special judge are part of the records of that court, however, and, in the absence of any showing to the contrary, will be presumed to have been correctly taken. The same presump-

tions of jurisdiction attach to the record of proceedings in circuit courts before special judges as before the regular judge. The present case is an action for partition,—one of a class which the circuit court has power by our laws to entertain and adjudicate. If the court erroneously permits its functions to be exercised, in any particular instance, by one not properly qualified to do so, that fact should be made to appear by the party relying on it. Where such a showing is wanting, we will presume that the official record of the circuit court has been made by one entitled to make it.

It is next urged that, in such an action, the trial court could not properly take jurisdiction of the defense presented by the special answer seeking to charge the so-called "advancements" against the interests of plaintiffs and some of the other parties to the cause. A partition proceeding is but an ordinary civil action in this state. In it the circuit court may lawfully consider any defense, whether legal or equitable in its nature, that could properly be interposed in an ordinary civil action under our Code of Pleading. Rev. St. 1879, § 3521.<sup>1</sup> In this instance the answer sought to charge the interests of some of the parties to the cause in the land in suit with certain payments, in the nature of advancements, made to them by their ancestor's executrix under an express agreement that they should be so charged. Such a defense the circuit court had the power to hear and determine. It exercised the power, and accordingly adjudicated the interests of the parties within the limits of the case made by the pleadings. Whether the evidence at the trial warranted the conclusion reached we do not consider, in the absence of a motion for a new trial in the circuit court. It is enough, in the present aspect of the case, to know that the trial court had jurisdiction to render the judgment between the parties before it. We find the record free of any error materially affecting the merits of the case to the prejudice of plaintiffs in error. The assignments of error already noted are the only ones having any bearing on their interests, or requiring comment. These views are shared by all my brother judges, except RAY, C. J., absent. The judgment is affirmed.

#### STATE v. CRAWFORD.

(Supreme Court of Missouri. Nov. 18, 1889.)

INDICTMENT—DATE—CRIMINAL LAW—EVIDENCE—SEPARATION OF JURORS.

1. Under Rev. St. Mo. § 1821, which provides that no indictment shall be deemed invalid, nor shall the trial judgment or other proceedings thereon be stayed, arrested, or in any manner affected, for stating the time imperfectly, or for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impos-

sible day, or day that never happened, an indictment is not fatally defective in that it charges the crime to have been committed on a day subsequent to that on which the trial occurred.

2. On trial for arson, evidence that defendant and his co-indictees were at the store which was burned, after business hours, and some time before the burning; that defendant was seen prowling about the place, taking note of localities and objects; that, in conversation with different persons, he made covert threats, "verbal intimations," and "declarations of intention," so called,—is admissible, as tending to connect defendant with the burning.

3. Evidence tending to show that a stranger to the trial had made threats against the person and property of the owner of the burned house is irrelevant.

4. A motion for a new trial, on the ground of newly-discovered evidence, is insufficient, where it is not supported by affidavit, as required by law of court, and where it is not shown what diligence was used in procuring the evidence, nor that it is material.

5. Rev. St. Mo. § 1909, provides that, with the consent of the prosecuting attorney and the defendant, the court may permit the jury to separate at any adjournment or recess during trial, in all cases of felony except capital cases, under proper instructions as to their conduct. Section 1910 provides that at the conclusion of the argument the jury "may retire under the charge of an officer, who, in case of a felony, shall be sworn to keep them together, \* \* \* and not permit any person to speak or communicate with them, nor do so himself, unless by order of the court, or to ask them whether they have agreed." Section 1906 provides that a new trial may be granted "when the jury has been separated without leave of the court, after retiring to deliberate upon their verdict, or has been guilty of any misconduct tending to prevent a fair and due consideration of the case." *Held*, that a person who took out a juror during the trial, and returned with him through a saloon, but who was not the officer sworn to take charge of the jury, will be presumed to have been a subordinate officer of the sheriff, qualified to take such juror in charge, in the absence of evidence to the contrary; and a new trial will be refused, as section 1910 will not be construed to mean that the sheriff has no right to give a juror in charge to another sworn officer.

Appeal from circuit court, Dallas county; W. I. WALLACE, Judge.

Indictment of J. A. Crawford for arson. Rev. St. Mo. § 1821, provides that "no indictment or information shall be deemed invalid, nor shall the trial, judgment, or other proceedings thereon be stayed, arrested, or in any manner affected, \* \* \* for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment or information, or on an impossible day, or on a day that never happened." Verdict of guilty, and defendant appeals.

Amos S. Smith and John S. Haynes, for appellant. The Attorney General, for the State.

SHERWOOD, J. The defendant was charged by the indictment with the crime of arson of the store-house of S. H. Burris, and his trial resulted in his conviction of that offense; his punishment being assessed at imprisonment in the penitentiary for the term of five years. From the judgment and sentence he appeals to this court, assigning frequent errors.

1. The charge that the indictment is fatally defective, for that it charges the crime to have

<sup>1</sup>The answer of the defendant shall contain: First, a general or specific denial of each material allegation of the petition controverted by the defendant. \* \* \* Second, a statement of any new matter constituting a defense or counter-claim.



been committed on a day subsequent to that on which the trial occurred, is answered by section 1821, Rev. St. 1879. The case of *State v. Burnett*, 81 Mo. 119, is an adjudication upon this section of the statute directly in point, and directly opposed to the contention of the defendant's counsel.

2. There was no error committed in admitting testimony that defendant and his co-indictes, Reeser, were at the store-house of Burris, after business hours, some time before the burning occurred. Evidence that the defendant was seen lurking about the scene of the alleged crime, taking notice of localities and objects; that, besides his proximity of vicinity to the *locus* of the crime, he had conversations with different persons, in which he made, in regard to the crime, covert, indirect, or vague threats, more properly designated as "verbal intimations" and as "declarations of intention,"—was all competent evidence, and it is the constant practice to admit such evidence in courts of justice. Treating of the subject of such "verbal intimations," an eminent text-writer says: "The verbal expressions under consideration are found to assume different shapes, according as they are the offspring of cold-blooded craft, or more violent and hasty malignity. In the former case, they are sometimes managed with great art. They are thrown out voluntarily and purposely, it is true, but in so obscure and intangible a form as to amount to nothing more than mere general intimations. They are, in fact, parts of a system of preparation, but of the most preliminary kind, intended to explore the way for more direct action in future. The criminal ventures no further than to hint at or obscurely allude to the act he has in contemplation. He proceeds warily, throwing out feelers, as it were, in advance, partly to sound the temper of those among whom he trusts himself, and partly to give an air of probability to the approaching event, and yet to disconnect himself from all apparent agency in producing it. Thus a man, meditating the murder of his wife, was heard to say: 'My wife is a queer body. I should not be at all surprised if she were to take herself off some fine morning.' Here, even the event itself is not directly mentioned. Departure or disappearance is all that is spoken of, and even that attributed to a cause which, to a stranger, might appear abundantly sufficient to account for it,—oddness or peculiarity of habits or character. In other cases, the intimations are given out in the form of reports, bearing indirectly upon the object in view, and intended to prepare the minds of friends and neighbors for the event. \* \* \* Care is generally taken, in uttering these intimations, to adapt them to the ideas and intelligence of those to whom they are addressed, or upon whom they are intended to make an impression. Thus omens, auguries, and predictions are relied on, among those whose habits and limited intelligence induce them to place confidence in such sources of knowledge. But, notwith-

standing the art which may be employed, they frequently fail of their intended effect, from the mere want of the 'art to conceal' it. Their essential clumsiness is sometimes manifest, \* \* \* and the result of their utterance is the very reverse of that intended; namely, to fix attention upon the party uttering them, and thus to establish between him and the event alluded to the very connection he seeks to avoid. Hence, when the event comes to happen, the expression anticipating it is at once remembered. There is what the civilians would call *damnum praedictum et malum secutum*,—a very pregnant and reasonable ground of suspicion. On this account, expressions of this kind often become important, as elements of circumstantial evidence, constituting a material link in the chain of precedent circumstances tending to fix a crime charged upon the party accused of its commission." Burrill, *Circ. Ev.* (3d Ed.) 333-335. Similar remarks are indulged in by the same and other authors as to "declarations of intention." *Id.* 338; Wills, *Circ. Ev.* 65. See, also, *State v. Dickson*, 78 Mo. 438; *State v. Grant*, 79 Mo. 113; *Carver v. Huskey*, *Id.* 509; *Oulbertson v. Hill*, 87 Mo. 553; *State v. McNally*, *Id.* 644; *State v. Guy*, 69 Mo. 430. And the presence or proximity of the defendant to the scene of the crime, taking note of the surroundings, is of value in frequent instances. Burrill, *Circ. Ev.* 350-399. All the incidents mentioned, though slight and unimportant in themselves, when considered apart from each other, may, when pieced together by skillful analysis, form a very strong chain of evidence. In such cases, "trifles light as air" frequently become of the gravest importance to the state, and of the most serious import and significance against the accused; forming, as they often do, such a web of circumstances as to afford the most satisfactory, if not conclusive, evidence of his guilt. *Hopkins v. Sievert*, 58 Mo. 201; *Massey v. Young*, 78 Mo. 260; 1 Starkie, *Ev.* 500, 501; *Best, Pres.* § 183; Burrill, *Circ. Ev.* 177-180.

3. There was no error committed in refusing to allow evidence to be adduced for the purpose of showing whether one Hogg had not made threats against the person and property of witness, whose store-house was burned. Such threats were wholly foreign to the case, *res inter alios*, and consequently had no bearing on the guilt of the accused. *Best, Ev. (Chamberlayne)* 489; Starkie, *Ev.* (9th Ed.) 36, 81, 82, et seq.

4. Regarding the instructions, those given on behalf of the state and those given on behalf of the defendant seem to place the matters of law arising upon the evidence very fairly before the jury, and there seems to be no just ground for exceptions on the score of instructions refused.

5. The motion for a new trial, on the ground of newly-discovered evidence, is insufficient, as not being supported by affidavit, as required by the well-settled law of this court; nor was it shown that such evi-

dence was material, nor what diligence was used to procure the same. *State v. Ray*, 53 Mo. 345; *State v. Laughlin*, 27 Mo. 111; *State v. Fritterer*, 65 Mo. 422.

6. There is but one point remaining for discussion: As to the separation of the jury,—was it lawful? There are three sections of our statute which must answer this question. They are as follows: "Sec. 1909. With the consent of the prosecuting attorney and the defendant, the court may permit the jury to separate, at any adjournment or recess of the court during the trial, in all cases of felony except in capital cases; and in misdemeanors the court may permit such separation of the jury of its own motion; but when the jurors are permitted to separate, after being impaneled as herein provided for, and at each adjournment, the court must admonish them that it is their duty not to converse among themselves, nor to suffer others to converse with them or in their hearing, on any subject connected with the trial, or to form or express any opinion thereon, until the cause is finally submitted to them. Sec. 1910. When the argument is concluded the jury may either decide in court or retire for deliberation. They may retire under the charge of an officer, who, in case of a felony, shall be sworn to keep them together in some private or convenient room or place, and not permit any person to speak or communicate with them, nor do so himself, unless by order of the court, or to ask them whether they have agreed upon their verdict; and when they have agreed he shall return them into court, or when ordered by the court. The officer shall not communicate to any person the state of their deliberations." "Sec. 1966. The court may grant a new trial for the following causes, or any of them: *First*. When the jury has received any evidence, papers, or documents not authorized by the court, or the court has admitted illegal testimony, or excluded competent and legal testimony, or for newly-discovered evidence. *Second*. When the jury has been separated without leave of the court, after retiring to deliberate upon their verdict, or has been guilty of any misconduct tending to prevent a fair and due consideration of the case. *Third*. When the verdict has been decided by means other than a fair expression of opinion on the part of all the jurors. *Fourth*. When the court has misdirected the jury in a material matter of law. *Fifth*. When the verdict is contrary to the law or evidence."

We have decided in a capital case (*State v. Murray*, 91 Mo. 95, 8 S. W. Rep. 397) that the separation of the jury, even when in charge of an officer, was good ground for a new trial. In the case at bar the jurymen Bennett, it is true, went to attend a call of nature, but he left the rest of the jurymen, who remained at the court-house in charge of the sheriff, and went away out in town with one Sharp, who was not the officer sworn to take charge of the jury, and then

returned with him, through the saloon of one Welch, to the jury-room. If Sharp was an officer under Burns, the sheriff, there was no good ground for granting a new trial because of the above circumstance. And it must be presumed, from the peculiar wording of the affidavit, and of Sharp's testimony, that he was an officer, but not the officer who was left in charge of the jury. Section 1910 cannot reasonably be construed as meaning that the sheriff in charge of a jury has no right to give the jury or any one of their number, in a case of exigency, in charge to another sworn officer. Besides, the sheriff is presumed to do his duty, and so is the lower court; and, in the absence of any showing to the contrary, it will be presumed that Sharp, who doubtless was well known to the court, was a subordinate of the sheriff's, and therefore as well qualified to take Bennett in charge *pro salute corporis* as if Sharp had been the high sheriff himself. This view of the subject renders any intimation unnecessary as to what our ruling would be were it shown that Sharp was unadorned with any official rank or designation. Therefore judgment affirmed. All concur, except RAY, C. J., absent.

#### STATE v. BULLING.

(*Supreme Court of Missouri*. Nov. 13, 1889.)

##### CRIMINAL LAW—SPECIAL JUDGE.

Rev. St. Mo. 1879, § 1878, provides that whenever defendant shall make application, supported by the affidavits of two or more reputable persons not of kin or counsel for defendant, for a change of venue for any of the reasons specified by statute, it shall be lawful for the court to order the election of a special judge "for the trial of the particular cause pending or to decide defendant's application for a change of venue." Section 1879 provides that the special judge shall take an oath "to hear and try the particular cause or motion pending without fear, favor, or partiality." *Held*, that as a defendant is entitled to only one application, based upon the disqualification of the judge, the word "or" will be construed to mean "and," and the election of a special judge merely "to decide the defendant's application for a change of venue" is unauthorized, and confers no jurisdiction, and any consent of defendant to the trial of a cause upon its merits by such special judge is of no avail. BARCLAY, J., dissents.

Appeal from criminal court, Buchanan county; FERMAN S. WINN, Special Judge.

Indictment against Louis Bulling for murder. Rev. St. Mo. 1879, § 1878, provides that "whenever, in any cause, the defendant shall make application by petition, under the oath and supported by the affidavit of two or more reputable persons not of kin or counsel for the defendant, for a change of venue for any of the reasons stated in the next preceding section, it shall be lawful for the judge" to order "the election of a special judge for the trial of a particular cause pending or to decide defendant's application for a change of venue," etc. Id. § 1879, provides that "the special judge \* \* \* shall, immediately after his election, take an oath to support the constitution of the United States and of the state of Missouri, and to hear and

try the particular cause or motion pending, without fear, favor, or partiality." Verdict of guilty, and defendant appeals.

*William B. Sanford*, for appellant. *John M. Wood*, Atty. Gen., for the State.

SHERWOOD, J. The defendant, indicted for the crime of murder, filed an application under the provisions of sections 1856, 1859, Rev. St. 1879, based upon the prejudice of the minds of the inhabitants of the county. He also filed at the same time an additional affidavit, under the provisions of section 1877, properly supported by other affidavits, alleging that the judge of the criminal court would not impartially decide his application for a change of venue on account of the prejudice of the inhabitants of the county. Whereupon, under an order of the court, duly entered, Ferman S. Winn was elected as special judge "to decide the defendant's application for a change of venue." The special judge thereupon took and subscribed an oath that he would support the constitution, etc., and that he would "fairly and impartially decide defendant's application for a change of venue here." These things happened on March 17, 1888, and so the oath of the special judge is dated. Afterwards the special judge denied the application for a change of venue from the county, and after taking what the record terms "a supplemental oath as special judge," which said supplemental oath, among other things, recited that said affiant would "hear and try the above cause without fear, favor, or partiality, and give the defendant a fair and impartial trial, and faithfully demean himself in office." These things occurred on the 24th of May, 1888, and such is the date of said supplemental oath. The trial of the cause then took place, resulting in the conviction of the defendant of murder in the first degree. He was sentenced accordingly, and appeals to this court.

1. When a defendant in a criminal cause files an application for a change of venue, based upon the prejudice of the inhabitants of the county, and no other or further affidavit is presented, the judge of the trial court hears the application himself, and, if proved to his satisfaction, he orders the cause removed to another county in the same circuit where such prejudice does not exist; but if the circuit judge denies the application for a change of venue, then he proceeds with the trial of the cause just as if no such application had been made. *State v. Whitton*, 68 Mo. 91. And the same result occurs if there be filed an additional affidavit, directed against the judge, which is defective by not being supported *alimunde*. *State v. Brownfield*, 83 Mo. 448. But if there be filed an application for a change of venue based upon the prejudice of the inhabitants of the county, and this be supplemented by the requisite affidavits that the judge of such court "will not afford him a fair trial, or will not impartially decide his application for a change of

venue on account of the prejudice of the inhabitants of the county," then, under the express terms of section 1877, from which the language above is quoted, such judge is "deemed incompetent to hear and try said cause," and must do his duty, as provided in section 1878, by ordering the election of a special judge "for the trial of the particular cause pending or to decide defendant's application for a change of venue." Taking the clause of the section just quoted in its literal sense, it would seem that two elections could be ordered,—one for the election of a special judge "for the trial of the particular cause pending," and another for the election of a special judge "to decide defendant's application for a change of venue." But this view will not bear close scrutiny. Under our rulings, the defendant is entitled to but one application based upon the disqualifications of the judge, (*State v. Greenwade*, 72 Mo. 298; *State v. Anderson*, 96 Mo. 241, 9 S. W. Rep. 636;) and the statute, when you get at its true meaning, intends but one such application. It matters not what disqualifying fact, as specified in section 1877, is alleged in the application; from that time forth, by the express terms of the section, the regular judge is rendered "incompetent to hear and try said cause." So that, if our former rulings be correct, that but one application as aforesaid is allowed the defendant, and if a literal reading of sections 1878 and 1879 is to prevail, then the defendant in a criminal cause, by filing an application based simply upon the allegation that the regular judge will not impartially decide his application for a change of venue on account of the prejudice of the inhabitants, etc., can thus disqualify the regular judge, and then, confidently relying on the one application theory, defy the further administration of the criminal law in his case! In view of the dangerous consequences arising from such a construction, it will not be adopted; but a more liberal construction—a construction which presumes that the legislature never intended to enact an absurd law; one incapable of sensible and practical operation—will be the construction which we shall adopt, and in furtherance of such a construction we shall presume that the word "or," as used in sections 1878, 1879, means "and." The use of such judicial license in construing statutes is permissible, as shown by the authorities.

Taking this construction as correct, then the sections under discussion are rendered harmonious; otherwise they cannot be reconciled with each other, nor with our rulings heretofore made. We shall therefore rule that where an application, based upon any of the causes specified in section 1877, is presented, it thereupon becomes the duty of the regular judge to order the election of a special judge "for the trial of the particular cause pending," and, if the application be sufficiently broad to include the last ground of disqualification mentioned in section 1877,

then that the regular judge shall also add the words to his order of election, "and to decide defendant's application for a change of venue." From these premises we draw these conclusions: (1) That the special judge in this case was elected for a purpose not contemplated or authorized by law; (2) that in consequence of this no rights or jurisdiction were conferred upon such judge by his supposed election; (3) that there was no healing power in the subsequent consenting of the defendant, if he gave any, for the trial of the case to proceed on its merits, with the special judge presiding thereat. Consent cannot confer jurisdiction.

There are numerous other errors assigned, but it is unnecessary to examine them. They are errors *coram non judice*, and therefore unworthy of notice. The judgment will be reversed, and the cause remanded.

BLACK and BRACE, JJ., concur. BARCLAY, J., dissents.

#### STATE v. GRIFFIN.

(Supreme Court of Missouri. Nov. 18, 1889.)

##### APPEAL—RECORD—BILL OF EXCEPTIONS.

1. Under Laws Mo. 1885, p. 219, amending Rev. St. Mo. § 8776, and providing that it shall not be necessary for the review of the action of any lower court, on appeal or writ of error, that the motion for new trial, in arrest of judgment, or instructions filed in lower court, be copied in the bill of exceptions, provided there be in the bill of exceptions a direction to the clerk to copy the same, and the same be copied, into the record, they will not be considered on appeal unless they are either themselves embodied in the bill of exceptions, or unless there is contained therein a direction to the clerk to copy them into the record, and they are so copied.

2. Laws Mo. 1885, p. 219, does not embrace within its terms the application for a continuance, nor the evidence, and they cannot, therefore, be considered by the appellate court, unless set forth in the bill of exceptions.

Appeal from circuit court, McDonald county; M. G. MCGREGOR, Judge.

J. F. Williams, Joseph Parks, and Kersey & Meighan, for appellant. The Attorney General, for the State.

SHERWOOD, J. The defendant was charged by the indictment with murder in the second degree. When tried he was convicted of that offense, and his punishment assessed at 10 years in the penitentiary, and, being sentenced accordingly, he appeals to this court. Section 8776, Rev. St. 1879, has been materially amended by the act approved March 31, 1885, (Laws of that year, p. 219.) The amendatory section, so far as necessary to quote, reads as follows: "But it shall not be necessary for the review of the action of any lower court, on appeal or writ of error, that the motion for a new trial, in arrest of judgment, or instructions filed in the lower court, shall be copied or set forth in the bill of exceptions filed in the lower court: provided, the bill of exceptions so filed contains direction to the clerk to copy the same, and the

same are so copied, into the record sent up to the appellate court." Under the well-settled practice and rule of this court, the evidence, the motion for new trial and in arrest, application for continuance and instructions, in short, all matters of exception not constituting part of the record proper, had to be incorporated in the bill of exceptions, or else they would not be noticed by this court; and the same rule applies in this regard in criminal as in civil causes. Sections 1921, 3635, 3636; State v. Shehane, 25 Mo. 565; Jefferson City v. Opel, 67 Mo. 394; Baker v. Loring, 65 Mo. 527; Stevenson v. Saline Co., Id. 425, Sturdivant v. Watkins, 47 Mo. 177; State v. Wall, 15 Mo. 208; State v. Treace, 66 Mo. 124; Blount v. Zink, 55 Mo. 455; State v. Marshall, 36 Mo. 400; Tower v. Moore, 52 Mo. 118; State v. Dunn, 73 Mo. 586; State v. McCray, 74 Mo. 303; State v. Robinson, 79 Mo. 66; McCarthy v. McGinnis, 76 Mo. 344. As already seen, however, section 8776, as amended by Laws Mo. 1885, p. 219, has so far modified and amended the rule heretofore prevailing that the motions for new trial, in arrest, or instructions, filed in the lower court, need no longer be copied or set forth in the bill of exceptions: "provided, the bill of exceptions so filed contains a direction to the clerk to copy the same, and the same are so copied, into the record sent up to the appellate court." In this case, the motions for a new trial, in arrest, and the instructions are not copied or set forth in the bill of exceptions, nor is there in the bill of exceptions any direction to the clerk to copy the same. So that neither under the old rule, nor yet under the new, can any notice be taken of such matters.

As already seen, the amendatory act does not embrace within its terms the application for a continuance, nor the evidence. Consequently a mere reference to these in the bill is not sufficient, either under the old rule or under the new. This being the case, the only point open for examination is the record proper. There is no fault to be found there; the indictment is exceptionally good; and even if we could look at the instructions, though no compliance has been had with the amendatory section above noted, it would avail the defendant nothing, because no exceptions were saved to the giving of any instructions on the part of the state. State v. McDonald, 85 Mo. 539, and cases cited. The rule in regard to saving exceptions is the same in criminal as in civil causes. Id. For these reasons judgment affirmed. All concur, but RAY, C. J., absent.

#### ENGELKE v. CHOUTEAU.

(Supreme Court of Missouri. Nov. 18, 1889.)

##### MALICIOUS PROSECUTION—EVIDENCE.

In an action for malicious prosecution, the petition alleged that defendant had maliciously procured and prosecuted an indictment against plaintiff. The evidence showed that defendant was a member of the grand jury which had found the indictment, but failed to show that plaintiff

was prosecuted under it, although it did show that defendant had employed an attorney to help prosecute another person who had been indicted jointly with plaintiff, and who had been tried separately and acquitted, a *nolle prosequi* being afterwards entered in case against plaintiff. *Held*, that defendant's demurrer to the evidence should have been sustained.

Appeal from St. Louis circuit court; ELIJAH ROBINSON, Judge.

*Hitchcock, Madill & Finkelnburg and Valle Reyburn*, for appellant. *Frank J. Bowman*, for respondent.

BRACE, J. This was an action for malicious prosecution, in which Charles P. Chouteau, John M. Glover, and Joseph Livingston were made defendants. The cause was dismissed as to Glover and Livingstone. The petition contained two counts. In the first count the defendants are charged with having maliciously procured the indictment of the plaintiff by the grand jury of the city of St. Louis for an alleged fraudulent conspiracy with one Edward P. Barrett to defraud one Alice Livingston and others interested in a certain corporation known as the Windsor Hotel Company, and with having after the finding of said indictment, without probable cause, maliciously prosecuted said indictment against the plaintiff. In the second count the defendants are charged with having maliciously caused the arrest of the plaintiff, and his prosecution upon a false affidavit and complaint for the same alleged fraudulent conspiracy. The defendant Chouteau answered denying all the allegations of the petition. On the issues joined between him and the plaintiff, the jury found for the plaintiff on the first count, and assessed his damages at \$7,500, and for the defendant on the second count. The defendant appeals.

At the close of the plaintiff's evidence the defendant asked an instruction in the nature of a demurrer to the evidence, and at the close of all the testimony asked a like instruction. The jury having found for the defendant on the cause of action set up in the second count of the petition, all questions arising upon the trial of that issue are eliminated from the case. The question whether the demurrer to the evidence upon the first count should have been sustained, if resolved in favor of the defendant, is decisive of the case, and will be first considered.

On the 18th of July, 1882, the grand jury of the criminal court of St. Louis returned into said court an indictment against Charles H. Peck, Edward P. Barrett, and Bernard H. Engelke, charging them with a fraudulent conspiracy to cheat and defraud Sallie A. Livingston, Joseph H. Livingston, and the Windsor Hotel Company of their and its property, by means of a certain promissory note, and deed of trust in the nature of a mortgage to secure the same, executed by the said Bernard H. Engelke in the name of said company, by him as president thereof, on the 27th of February, 1882, and by a subsequent sale thereafter made of said property under

said deed of trust. The defendant Charles P. Chouteau was a member of that grand jury. The offense charged in the indictment being a misdemeanor, it was certified to the court of criminal correction, under the statute, and was filed in the office of the clerk of that court on the same day that it was returned. On the 22d of July, 1882, the said Peck commenced a civil action against Chouteau, growing out of some transactions connected with the Vulcan Iron-Works, a corporation in which both of them had theretofore been interested. Depositions were being taken in this case from time to time between that date and the 1st of September following. On one occasion, about the latter date, when the parties were thus engaged, the fact that Peck had been indicted was alluded to by some one present. Peck, in a threatening manner, replied, "Yes; and Mr. Chouteau was at the bottom of it, and I will make him smart for it," or "somebody will have to suffer for it." Judge Madill, who was of counsel for Chouteau, and engaged in taking the depositions, replied to this remark: "Mr. Peck, that is a very broad statement to make." Judge Madill and Mr. Chouteau, after leaving the office of Mr. Woodward, where the depositions were being taken, went to Judge Madill's office, where Mr. Peck's language became the subject of conversation between them.

Judge Madill, in his evidence, thus states what then passed between them: "In reply either to an inquiry or a remark which he [Chouteau] made, I said that I construed the remark of Mr. Peck to mean that if the indictment were out of the way he would institute a suit against Mr. Chouteau; Mr. Chouteau having been a member of the grand jury which found this indictment. He asked me what I thought he ought to do about it. I told him I thought he owed it to himself and to the gentlemen who were associated with him on that grand jury to see that that indictment, when it came on for hearing, was fairly and properly presented to the court in which the indictment was found. He asked me what I would suggest in the way of securing that result. I said to him I thought he ought to employ some reputable lawyer, not a member of the criminal bar, who should see that what I had suggested was done; that is to say, that the case was presented in such a way as to develop what was in it, and thereby justify the action of the grand jury."

In pursuance of this suggestion, a short time after this interview the defendant employed Mr. John M. Glover. The extent of his employment was shown by the following evidence of Mr. Chouteau in a deposition, and as preserved in a bill of exceptions on a former trial in the case of Barrett v. Chouteau, 94 Mo. 13, 6 S. W. Rep. 215, introduced by the plaintiff. Mr. Chouteau was asked: "Question. Was you one of the grand jury that returned the indictment against Mr. Charles H. Peck, Mr. Engelke, and Mr. Barrett, on or about the 18th of July last? Answer. I

was. Q. Did you employ Mr. John M. Glover to prosecute the indictment against Mr. Peck, Mr. Engelke, and Mr. Barrett? A. I did not." The witness' attention was then called to the following answer made by Mr. Glover in a deposition given by him in this case: "I was last employed in the prosecution of Peck, Engelke, and Barrett under the indictment of conspiracy to defraud that was tried before Thoroughman;" and he was asked whether that statement was true or false: "Answer. Mr. Glover was not employed to prosecute any suit,—simply to see that the indictment was fully and fairly laid before the court; nothing more." In his examination in the Barrett Case, Mr. Chouteau was asked why he testified in his deposition, before he knew that Mr. Glover had given his deposition in the case, that he did not employ Mr. Glover to prosecute the indictment against Mr. Peck, Mr. Engelke, and Mr. Barrett, and his answer was: "It is because you couple the three names together. My employment of Mr. Glover was, as against Mr. Peck, nothing whatsoever with regard to the other two. Question. You had it in mind when you answered that there was but one indictment? Answer. That is my impression; there was only one indictment." Witness was then asked whether he did not employ Mr. Glover to prosecute that indictment. Witness answered that there was a severance of the parties, though not at the time when Mr. Glover was employed, and continuing said: "Mr. Glover was employed, as I stated before, as against Mr. Peck; but in regard to the two others, Mr. Barrett and Mr. Engelke, nothing—I knew nothing about these gentlemen. I had no cause of complaint against them." "Those names were never mentioned, either by myself or Mr. Glover. Question. Did you ever employ Mr. Glover to prosecute either Mr. Barrett or Mr. Engelke under that indictment? Answer. Never. Q. Do you know whether, as a matter of fact, either of them were prosecuted by him under that indictment? A. I do not. I mean by that, personally I know nothing about it."

On the 15th day of October, 1882, the following proceedings were had in the court of criminal correction: "State of Missouri vs. Barnard H. Engelke, Edward P. Barrett, and Charles H. Peck. On a charge of conspiracy. Now, at this day, comes the defendant Charles H. Peck, by his attorney, and files a motion for a separate trial herein; and afterwards, on the 25th day of October, 1882, the following proceedings were had in said cause, to-wit: Now, at this day, the court, being fully advised of and concerning the motion for separate trial as to defendant Charles H. Peck, doth order and determine that the same be sustained." A special judge was elected to try the cause, the regular judge being disqualified. The trial of this indictment, as against Peck, was begun on the 19th of December, 1882, and on the 21st the court gave the following instruction to the jury: "The court instructs the jury to acquit the defend-

ant Charles H. Peck, on the ground of there being a material variance between the deed of trust described in the indictment and the one offered in evidence by the state." The jury returned a verdict accordingly. The record then proceeds as follows: "Thereafter, on Friday, December 22, 1882, the following proceedings were had in said cause, Thomas Thoroughman, special judge, presiding: State of Missouri vs. Barnard H. Engelke and Edward P. Barrett. Now, at this day, comes the prosecuting attorney, and enters a *nolle prosequi* herein. It is therefore ordered by the court that the said defendants be discharged, and that they go hence without bail."

And this was all that was ever done under the indictment. Peck, Engelke, and Barrett were afterwards prosecuted upon an information by the prosecuting attorney, sworn to by J. H. Livingston, charging them with substantially the same fraudulent conspiracy set forth in the indictment, in which prosecution Glover assisted, having been employed for that purpose by Livingston, and which resulted in a verdict of not guilty. Upon this prosecution is based the second count in plaintiff's petition, with which defendants' employment of Glover had nothing to do, and so the jury found. There is not a *scintilla* of evidence in the whole case, as made by the plaintiff, tending to show that the defendant had anything to do with procuring the indictment against Peck, Engelke, and Barrett to be found, except the fact that he was a member of the grand jury by which it was returned, and the foregoing proceedings in the court of criminal correction is all the evidence tending to show a prosecution under said indictment that was introduced by the plaintiff; and, that evidence failing to show that plaintiff was ever prosecuted under the indictment, the defendant's demurrer to plaintiff's evidence ought to have been sustained as to the first count, and ought to have been sustained as to that count at the close of the whole evidence, unless that of the defendant disclosed a prosecution to some extent as charged in the petition. The defendant's evidence bearing upon this question is that of Mr. Chouteau and Mr. Glover. Mr. Chouteau testified: "Question. When you had the talks with Mr. Glover about employing him were you acquainted with either Barrett or Engelke? Answer. No, sir; their names were never mentioned. Q. Did you know them at all? A. I did not; I had never seen them. Q. You say their names were never mentioned between whom? A. Either by Mr. Glover, myself, or Judge Madill. Q. The employment of Mr. Glover then had reference— Witness. Exclusively to Mr. Peck. Q. Tell the jury with reference to which of these parties you employed Mr. Glover? A. Mr. Peck, exclusively." As to the motives which prompted him to employ an attorney to look after the indictment, so far as Mr. Peck was concerned, Mr. Chouteau says: "Question. I will ask the question: Please

state to the jury what the reason was that you came to employ Mr. Glover to look after the case of Peck in the court of criminal correction. State exactly what took place,—what induced you to take that action. *Answer.* I was induced to it by advice of counsel. *Q.* Under what circumstances did you come to speak to Judge Madill about this employment of Mr. Glover? Tell the jury. *A.* Judge Madill spoke to me first about it. Mr. Peck had made threats, and accused me of being at the bottom of this indictment. *Q.* Where, under what circumstances, were these threats made? *A.* It was in the office —We were taking depositions, in the office of Mr. Woodward. *Q.* In what case were the depositions being taken? *A.* This Vulcan Case. *Q.* State what was said and done by Mr. Peck at that time about this matter. *A.* Some one made an allusion to the indictment, and, looking around rather fiercely, said, 'Yes.' *Q.* Who? *A.* Mr. Peck made the remark, 'Yes; Chouteau is at the bottom of it,—of the whole thing; somebody will have to suffer for it.' *Q.* Was that statement true, that you were at the bottom of it? *A.* It was not; I had nothing in the world to do with it." Witness states that afterwards Judge Madill advised him to employ some reputable lawyer to see that the indictment was properly put before the court. "*Question.* Which case did you speak of? *Answer.* Peck. *Q.* The Peck matter? *A.* Peck only." Witness then relates his employment of Mr. Glover, and that he asked him to see whether the indictment was properly placed upon the records before the court. Witness says: "I repeated to him, [Glover,] as near as possible, the advice which I received from Judge Madill,—that owing to threats that had been made, it was due to myself, in self-defense and in vindication of my co-jurymen, that this case should be properly looked to." "*Question.* Before you went to serve on that jury did you hear that this Windsor Hotel matter was about to be brought before you as a juror? *Answer.* I did not. *Q.* What did you know, if anything, about the Windsor Hotel affair before you went on the grand jury? *A.* Nothing. *Q.* Which of the parties in charge of the hotel were you acquainted with, if anybody, after the time you went on the grand jury? *A.* None of them. *Q.* Did you know Mr. Barrett? *A.* I did not. *Q.* Mr. Engelke? *A.* I did not. *Q.* Mr. Livingston? *A.* I did not. *Q.* Mrs. Livingston? *A.* No, sir. *Q.* Had you any money interest in the hotel? *A.* I never had. *Q.* Did you ever, at that time or at any time? *A.* No time. *Q.* Did you subpoena any witnesses to appear before the grand jury? *A.* Myself, individually? *Q.* Yes, did you? *A.* No, sir. *Q.* What did you do, if anything, to bring that matter before the grand jury? *A.* Nothing. *Q.* Any one for you? *A.* No one."

Mr. Glover testified, in substance, that he was first spoken to by Mr. Chouteau some time after the indictment; that he knew

nothing of the matters before that time; that he was asked to look into the facts, ascertain what they were, and report the result; that thereupon he examined the testimony taken before Mr. Ryan, in the case of Livingston et al. v. Barrett et al., pending before Judge THAYER; also the chain of title to the property; also had interviews with Judge Krim; also examined the case of Peck v. Livingston et al.; also the minutes of the hotel company; also the account-books of the hotel; that before he took any steps in court Peck had procured a severance; that thereupon he tried the Peck case alone; that the cases against Barrett and Engelke were *nolle pros'd*, and although subsequently renewed, by way of information lodged in the court of criminal correction against Peck, Barrett, and Engelke, that Mr. Chouteau's connection with the matter ceased before this was done. Being asked whether he had ever been employed to look after the prosecution against Engelke or Barrett, witness says: "I don't think Mr. Chouteau mentioned Engelke or Barrett. He employed me to prosecute that indictment. He mentioned Peck only, and put it on the ground that Peck had threatened him with malicious action, and that he wanted the facts, whatever they were, good, bad, or indifferent, for the state, to appear." Referring to the first interview with Mr. Chouteau, Mr. Glover says: "I think that Mr. Chouteau said that he had nothing to do with it, but was charged with it by Peck, but he wanted me to find out the facts."

The defendant cannot be held to answer for his action as a member of the grand jury, even though the facts upon which the indictment was found were an insufficient foundation for such indictment, and were not such as would warrant its prosecution; and, the evidence wholly failing to show any connection of the defendant with any prosecution of the plaintiff under that indictment, plaintiff failed to prove the cause of action set out in the first count of his petition. Mr. Chouteau never employed Mr. Glover to prosecute the plaintiff, and Mr. Glover never did prosecute him, and, so far as the record shows, never appeared or did anything in the case against him upon the indictment. He did employ Glover to prosecute Peck, and Glover did prosecute the case against Peck upon the indictment, and for that prosecution has already answered in the courts. Peck v. Chouteau, 91 Mo. 138, 8 S. W. Rep. 577. On the whole evidence the court should have instructed the jury to find for the defendant, and for error in refusing so to do when requested the judgment is reversed. All concur, except BARCLAY, J., not sitting, and RAY, C. J., absent.

#### WILSON et al. v. SCHOENLAUB.

(Supreme Court of Missouri. Nov. 18, 1889.)

BUILDING ASSOCIATIONS—MORTGAGES—PAYMENT.

1. The laws of a building association divided its stock into four series of 500 shares each, to be



paid for in weekly payments of \$1. When the funds amounted to \$500, that sum was assigned to some share, which was then termed a "redeemed share," and the holder was thereafter required to pay interest on the amount monthly, besides the \$1 a week, until all the shares in that series were "redeemed." A shareholder had \$500 assigned to him, and gave his note for payment, secured by a deed of trust authorizing a sale of the property in case of default in the monthly or weekly payments. *Held*, that default in the payment of the dues was the default in the weekly payments referred to in the trust-deed, and authorized a sale of the property.

2. Where a note secured by a trust-deed is offered for sale, and the maker bids it in, but it is paid for by a third person, to whom the maker is already indebted, and to whom it is assigned with the trust-deed, it cannot be said the note was sold to the maker; nor will the subsequent execution of a mortgage by the maker to the assignee before sale, under the trust-deed, be construed as payment of the note, or as in fraud of creditors, so as to invalidate such sale.

Appeal from circuit court, Buchanan county; Jos. P. GRUBB, Judge.

Action of ejectment by James M. Wilson and others against Philip Schoenlaub, plaintiffs claiming through an execution sale, and defendant through a trust-deed. From a judgment rendered in favor of defendant, plaintiffs appeal.

*Vinton Pike and Jas. P. Pitt*, for appellants. *B. R. Vineyard*, for respondent.

BLACK, J. Robert Fleming is the common source of title in this action of ejectment brought to recover lots 10 and 11, in block 47, St. Joseph extension. The plaintiffs claim through an execution sale, and the defendant claims through a prior deed of trust. The case turns upon the questions made in respect of a trustee's sale made under that deed of trust. The deed of trust bears date 28th November, 1874, and by it Robert Fleming conveyed the lots before mentioned, and also lots 1 and 2, in block 53, of the same extension, to McLean, in trust to secure a note to the St. Joseph Building Association. The note is sufficiently described, and by it Fleming promised to pay to the association or order \$500, with interest at 10 per cent.; "said interest payable monthly on the first Monday of each month, and the principal payable at one dollar on Monday of each week, according to the rules and regulations of said building company." The deed recites that Fleming had redeemed one share of stock in the fourth series, for which he executed the note above set forth. It goes on to provide that if Fleming shall pay off the share of stock so redeemed, the interest due thereon, and all other indebtedness due the company, according to its constitution and by-laws, then the deed shall be void; but if the debt and every part thereof shall not be paid, as above set forth, then the trustee may sell, etc. The four lots were sold by the trustee on the 14th May, 1880, and Lewis Fleming became the purchaser. For authority to sell, the trustee's deed recites: "Whereas, default was made in the payment of said promissory note secured by said deed of trust, by reason whereof," etc.,

Lewis Fleming conveyed the two lots in question to defendant by a warranty deed dated 20th October, 1882.

1. Objection was made to the trustee's deed on the ground that it did not show any default authorizing a sale. This objection, as we understand it, is based on the theory that, by reference to the constitution and by-laws, it will be seen the note was never to be paid, that the deed of trust secured nothing more than the "payment of dues," and no reference is made to a default in that respect. Looking to the constitution and by-laws of the association, we find the stock was divided into four series, of 500 shares in each series, each share to be paid for by a weekly payment of one dollar. When the funds on hand amount to \$500, that amount is to be awarded to some share, the holder agreeing to pay interest monthly on the amount advanced, and the share upon which the "loan," as it is called, is made, is called a "redeemed" share; but the holder of it continues to pay one dollar per week and the monthly interest until all of the shares in the series are redeemed. For a failure to pay "dues" for six months the directory may cause the mortgaged property to be sold. The person receiving the \$500 has advanced to him the amount which it is contemplated he will be entitled to receive when there is money enough on hand to redeem all the shares of a particular series. But to entitle him to that amount in advance he must continue to pay one dollar each week, and to pay the monthly interest on the amount received in advance of other shareholders. These are the payments provided for in the note, and a default in making these payments is a default in the payment of the note. The recital in the trustee's deed is sufficient, *prima facie*, to show a default authorizing a sale. It is true, persons holding shares not "redeemed" must also pay the one dollar weekly, but that does not affect the question in hand.

2. Lewis Fleming claims to have purchased the note from the building association, and it is contended that this purchase amounted to a payment of the note. The further claim of plaintiff is that Robert paid this note to Lewis before the date of the trustee's sale. The evidence upon these questions is, in substance, this: The board of directors of the building association wound up the affairs of the company on the 6th November, 1877, by a sale of all of its assets. This was done by the written request of all of the shareholders, including those holding redeemed and unredeemed shares. Robert Fleming held three redeemed shares, and the company held his three notes, including the one before mentioned. There was then due upon these notes \$407.45. The secretary says Robert bid in these notes at \$375, and that Lewis paid the amount, and took an assignment to himself, which is indorsed on each note, and by it the company transferred each note to Lewis, stating that the interest of the company in each case is \$125. On the

28th December, 1878, Robert conveyed to Lewis a lot, other than those before mentioned, for the recited consideration of \$4,000; and on the 31st of the same month Lewis gave back a writing, which recited the last-named deed, and then says: "The conditions are such that the above-named Robt. B. Fleming, now owing the above-named Lewis V. Fleming various sums of money, and also security on notes for the above-named Lewis V. Fleming; one note in favor of Joseph Davis to the amount of \$400; one note in favor of Joseph Packard to the amount of \$1,200, with interest; also holding three notes of \$500 each, which were given to the St. Joseph Building Co. by the above-named Robert B. Fleming for money borrowed out of said company; the above-named Lewis V. Fleming having satisfied the above-named company for the said amount to keep the above-named Robert B. Fleming's property from being sold, as there were deeds of trust on said Robert B. Fleming's property to secure said notes; and, further, the above-named Lewis V. Fleming holds the individual note or notes of R. B. Fleming to the amount of two or three hundred dollars; one deed of trust against the above-named property to the amount of twelve hundred dollars, (\$1,200,) given to the Bartlett Brothers,—if after paying the above indebtedness there is any balance left, the above-named Lewis V. Fleming is to pay said balance to Robert B. Fleming, as to the amount set forth in a deed on the conveyance of said property, or after selling said property by the said Lewis Fleming to best advantage."

The secretary of the association does say that the three notes were bid off by Robert Fleming, Lewis being present; but the proof is undisputed that Lewis paid the amount, and the company assigned them to him. There is no pretense that the deeds of trust securing these notes were satisfied of record, or were intended to be satisfied. Had Robert been the purchaser of his own notes, then there would be some foundation for the claim that they were thereby paid; but it is manifest he bid them in for Lewis, and the latter had a right to take an assignment to secure himself. There is scarcely any evidence tending to show a payment, much less any evidence authorizing the court to declare a payment without any finding of fact. Such an instruction was asked, and it was properly refused. The agreement made by Lewis of date 31st December, 1878, does undoubtedly convert the deed made to him on the 28th of the same month into a mortgage, as between Lewis and Robert. We cannot see that it has or can have any other effect. It is awkwardly framed, but enough appears to show that Robert was owing Lewis, and that the latter was security for the former, and that the property conveyed was incumbered. It contemplates a sale of the property, the payment of these debts, and the payment of the balance to Robert. We see nothing in it to show that Lewis took the property in pay-

ment of the specified debts. He held the building association notes by assignment, and that carried the security. No fraud in these transactions is shown, and we see nothing in them to invalidate the trustee's sale as between the plaintiff and the Flemings, much less as between the plaintiffs and defendant. The judgment is affirmed. All concur, except RAY, C. J., absent.

#### McDONALD v. FROST et al.

(Supreme Court of Missouri. Nov. 18, 1889.)

#### CONSTRUCTION OF JUDGMENT.

A petition was filed to reform certain deeds and a mortgage, and to foreclose the mortgage. The judgment found the facts necessary to the relief sought, and, after providing for the reformation, and the recovery of the debt secured by the mortgage, directed "that the equity of redemption in said real estate first aforesaid be sold," and that special execution issue. *Held* that, while there was an omission of words usual to a judgment of foreclosure, it was apparent that a foreclosure was intended by the judgment, and a special execution was properly directed; and therefore, in a collateral action, a sale of the land under such special execution will be upheld.

Error to circuit court, Barry county; W. F. GEIGER, Judge.

This is an action of ejectment. The conflicting titles trace to Dempsey Summers as the common source. The trial court excluded a sheriff's deed offered by plaintiff as part of his chain of conveyance, thereby compelling him to take a nonsuit with leave. After the usual steps he brings error. The deed referred to is based on a judgment, the essential parts of which are as follows: "Ludwig Ullman and Charles H. Dyer, Plaintiffs, vs. William Davis, George H. Holt, John T. Johnson, Joseph A. Young, and O. D. Harbert, public administrator of Barry county, having charge of the estate of Dempsey Summers, Defts. Final decree and judgment. Now, at this day, comes on to be heard the above-entitled cause, and the defendants Davis, Johnson, Young, and Harbert having filed their answers herein, whereby it appears that the facts, as stated in plaintiffs' petition, are true, and it further appearing that the said defendant Holt has corrected the mistake by deed executed and delivered since the commencement of this suit, it is ordered by the court that this suit be dismissed as to the defendant Holt; and it further appearing to the court that the defendant William A. Davis, on the 6th day of March, A. D. 1871, granted, bargained, and sold to George H. Holt the following real estate situate in Barry county, Missouri, to-wit, [here follows description of the tract of land;] but, by mistake of said Davis and Holt, said Davis conveyed to said Holt the following real estate, to-wit, [here follows another description;] that afterwards, to-wit, on the 6th day of June, 1872, said defendant Holt, granted, bargained, and sold said real estate first described to Joseph A. Young, but by mutual mistake of said Young and Holt said Holt conveyed to said Young the

real estate last described; that on the 19th day of October, 1872, said defendant Young granted, bargained, and sold to defendant John T. Johnson the real estate first described, but by mutual mistake of said Young and Johnson said Young conveyed the real estate last described to said Johnson; that on the — day of October, 1872, defendant Johnson granted, bargained, and sold to one Dempsey Summers the real estate first described, but by mutual mistake the said Johnson conveyed the real estate last described; and that on the 26th day of October, 1872, said Dempsey Summers and his wife, Louisa Summers, granted, bargained, and sold defendant Joseph A. Young the real estate first described to secure the payment of a note executed by said Summers to said Young for the sum of one thousand and five hundred dollars, dated October 26, 1872, and due one year after date, with interest from date at 10 per cent. per annum, but by mutual mistake of said Young and Summers conveyed the land last aforesaid; and the court doth further find that on the 24th day of April, 1873, said defendant Young transferred and delivered to plaintiffs said note, and that said plaintiffs are the legal owners thereof; and the court doth further find that said note is yet due, and that said Summers, nor his administrator, said defendant Harbert, has not paid the same, or any part thereof, or the interest thereon: It is therefore ordered, adjudged, and decreed by the court that said mistake be corrected in said deeds, and the deeds be reformed to conform to the intention of the parties, and that the defendants William Davis, John T. Johnson, be divested of the legal title of the real estate herein first described, and that the legal title thereof be vested in Joseph A. Young, as mortgagee of said Dempsey Summers and his wife; that plaintiffs have judgment against said O. D. Harbert, administrator of said Dempsey Summers, deceased, for their debt for the sum of one thousand and five hundred dollars, and damages for the sum of five hundred dollars, and that the equity of redemption in said real estate first aforesaid be sold, and that this judgment bear interest at 10 per cent., and that special execution issue." The opinion states the other material facts.

*Norman Gibbs*, for plaintiff in error.  
*Thrasher, White & McCommon*, for defendants in error.

**BARCLAY, J.** (*after stating the facts as above.*) The decisive question here is as to the legal effect of the judgment in the prior suit of *Ullman et al. v. Davis et al.*, and of the sale predicated thereon. The proceedings in that cause were offered in evidence. They disclosed a petition to reform certain deeds in the particulars indicated in the decree, and to foreclose the mortgage mentioned therein. All the defendants had answered, admitting the facts stated in the petition. Thereupon the decree was entered. As that action was collateral to the present

one, any mere error or irregularity in the former would not affect its validity. The defendants therein confessed the allegations of the petition. The decree recites that, and finds the facts necessarily establishing the mortgage as a charge on the land in question. It then adjudges the correction of the mistakes of description in the various conveyances, "enters judgment" against the mortgagor's administrator for the debt and damages, and directs "that the equity of redemption in said real estate first aforesaid be sold, and that this judgment bear interest at 10 per cent., and that special execution issue."

In event of doubt regarding the exact meaning of a judgment or decree it is permissible to consider the antecedent record in determining its effect. The petition in the foreclosure suit states good causes of action: *First*, for the correction of descriptions in the prior deeds, and in the mortgage in question; and, *secondly*, for the foreclosure of the equity of redemption, and for the sale of the land to discharge the mortgage debt and interest. Upon the personal appearance of defendants, and their admission of the facts, the circuit court had undoubted jurisdiction to enter the decree prayed in the petition. Looking at the record in its entirety, there is little doubt that the court intended to do so. The formal entry, however, omits certain language usually adopted to express such a purpose. The words wanting we will indicate by italics: "And that the equity of redemption in said real estate first aforesaid be foreclosed, and the said real estate sold," etc. Defendants claim that this omission gives the decree the effect only of a general judgment for the amount of the mortgage debt, and deprives it of any force as a special judgment for the sale of the realty. But in construing the action of courts, as of other officials, it is well to bear in mind the presumption that they have rightly acted, in the absence of any showing to the contrary. Here the order for special execution is correct, if the decree be viewed as one of foreclosure and sale of the realty; while, on the other hand, it is entirely erroneous if the court intended its conclusion to be regarded as a mere general judgment for the mortgage debt and interest. The mortgagor being dead, his administrator was properly a defendant in either aspect of the case; but special execution for the "sale of the equity of redemption" might rightly issue against the latter to enforce a foreclosure decree, but not to enforce a general judgment. Rev. St. 1879, §§ 3301, 3307. Had the latter been intended by the court, no order for execution would have been entered, but only an order certifying the judgment to the proper probate court for classification as a demand against the estate. Id. § 2360. The informality here exhibited in the entry is of a kind that does not obscure the obvious effect and intent of the decree. Enough is expressed to disclose its purpose clearly. Under our code of practice we should always distinguish be-

tween mere form and substance. Id. § 3586. We consider that we do so in the present case by declaring this decree sufficient to support the sale upon the special execution issued under it. The trial court ruled to the contrary. Its judgment is reversed, and the cause remanded for further proceedings in conformity to this opinion; all the judges concurring, except RAY, C. J., absent.

### STATE v. DAY.

(Supreme Court of Missouri. Nov. 18, 1889.)

#### PERJURY—INDICTMENT—INSTRUCTIONS—EVIDENCE.

1. On a prosecution for perjury by one who swore on a trial for rape that he witnessed the act, and that the prosecutrix voluntarily yielded, it appeared that the prosecutrix was examined by physicians, at the instance of her father, to determine whether she had been in the habit of having sexual intercourse. *Held*, that evidence that the prosecutrix appeared to understand the nature of the examination, and that she made no objection, was objectionable as hearsay.

2. The indictment charged that defendant swore that he was on the road; that M. asked him to wait and see what took place; that M. then made indecent proposals to the prosecutrix in the rape case; that she objected, and said, if he would go home with her, she would consent; and that they then had sexual intercourse,—each of which statements the indictment alleged to be untrue, etc. *Held*, that an instruction that if an assault was committed, and defendant swore an assault was not committed, yet he could not be convicted, unless defendant also swore to every fact as alleged, was properly refused, as requiring the state to prove too much.

3. Under Rev. St. Mo. 1879, § 1418, providing that "every person who shall willfully and corruptly swear," etc., the omission of the word "willfully" is fatal to an indictment.

4. The question whether certain fugitives from justice could probably be obtained as witnesses in a criminal case by the next term of court rests in the sound discretion of the trial court, and, unless an abuse of discretion is shown, a refusal to grant a continuance to procure such witnesses will not be disturbed.

5. Where defendant in a criminal case is a witness, evidence as to his general reputation or character for morality is admissible.

6. Instructions to which no exceptions are saved will not be reviewed in a criminal case.

BARCLAY, J., dissenting.

Appeal from circuit court, Cedar county;  
CHARLES G. BURTON, Judge.

The indictment upon which the defendant was convicted, omitting immaterial portions, was as follows: That it then and there became and was a material question whether the said James Messick had assaulted said Margaret A. Lusk with intent her to rape and carnally know. That the said Frank Day, then and there in the trial of said issue upon said preliminary examination, upon his oath aforesaid, feloniously, corruptly, and falsely, before the justice of the peace aforesaid, did depose and swear in substance, and to the effect following, that is to say: "That the said Frank Day was on the road on the 2d day of May, A. D. 1885, [meaning thereby that he, the said Frank Day, was on the road near the place of the alleged assault at the time thereof.] That Jim Messick told me at that time to wait, and I could see a

circus. That Jim asked her to do it, and she objected, and said if he would go home with her he might have it, [meaning thereby that he, the said James Messick, asked the said Margaret A. Lusk to have sexual intercourse with him, and she then objected, and that she, the said Margaret A. Lusk, told James Messick that if he would go home with her she would have sexual intercourse with him.] That they laid down and done it, [meaning thereby that James Messick and Margaret A. Lusk then and there had sexual intercourse with each other, and that the same was done with the voluntary consent and free will of said Margaret A. Lusk, and that the said James Messick did not try to have sexual intercourse with the said Margaret A. Lusk forcibly and against her will.] "Whereas, in truth and in fact, the said Frank Day was not on the road on said 2d day of May, A. D. 1885, at or near the place of the alleged assault, at the time thereof, but, on the contrary, was not present nor in sight of said place; (2) and whereas, in truth, and in fact, the said James Messick did not tell him, the said Frank Day, 'to wait, and I could see a circus,' but, on the contrary, no such conversation was had then and there by and between the said James Messick and the said Frank Day; (8) and whereas, in truth and in fact, the said Margaret A. Lusk did not say that if he would go home with her he might have it,' but, on the contrary, no such thing was said by her; and whereas, in truth and in fact, they 'did not lay down and do it,' that is to say, have sexual intercourse with each other, but, on the contrary, the said Margaret A. Lusk did not then and there have sexual intercourse with the said James Messick, but refused so to do, and the said James Messick then and there forcibly, and against her will, tried to drag her into the brush, and throw her down, and have sexual intercourse with her, but did not succeed in doing so.' And so the jurors aforesaid," etc. The court refused to instruct the jury on behalf of defendant as follows: "The court instructs the jury that, even though they may believe from the evidence that on the 2d day of May, 1885, James Messick assaulted Margaret Lusk with intent to commit a rape upon her, and that, at the time and place mentioned in the indictment, the defendant testified as a witness, and swore that the said James Messick did not make any such assault, and though they may believe from the evidence that such evidence was untrue, yet they cannot convict the defendant unless they further believe from the evidence that the defendant also, at the same time, testified that he was on the road on the 2d day of May, 1885, and that James Messick asked her to do it, and she objected, and said if he would go home with her he might have it, and that they laid down and done it, (meaning thereby that they had sexual intercourse with one another,) and that the said testimony was also untrue." And to such refusal the defendant excepted. And the court also refused to continue the

cause till the next term for reasons hereafter given.

*Buller & Loy*, for appellant. *The Attorney General*, for the State.

SHERWOOD, J., (*after stating the facts as above*.) 1. The indictment was based upon section 1418, Rev. St. 1879, which declares that "every person who shall willfully and corruptly swear," etc. The word "willfully" was omitted from the indictment, and this renders it bad, under the following authorities: *Lembro v. Hamper*, Cro. Eliz. 147; *Anon.*, Id. 201; 2 Chit. Crim. Law, 812, 815, 316; 1 Chit. Crim. Law, 241; 2 Whart. Crim. Law, §§ 1245, 1286; Whart. Crim. Pl. (9th Ed.) §§ 235, 264, 269; *State v. Carland*, 8 Dev. 114; *State v. Davis*, 84 N. C. 787; *State v. Webb*, 41 Tex. 67; *State v. Delue*, 1 Chand. 166; *Juarqui v. State*, 28 Tex. 626; 1 Archb. Crim. Pr. & Pl. 286; 2 Bish. Crim. Law, § 1046, and cases cited; *State v. Morse*, 1 G. Greene, 508. And the concluding words of the indictment did not remedy the defect aforesaid. *State v. Herrell*, 97 Mo. 105, 10 S. W. Rep. 387; 5 Bac. Abr. p. 90, (H.) tit. "Indictment;" 3 Russ. Crimes, 36; *King v. Lara*, 2 Leach, 647; 2 Hawk. P. C. c. 25, § 110, p. 354.

2. It is insisted there was error in refusing to grant a continuance. At a previous term there had been a mistrial, at which time, under the practice then prevailing, an affidavit for continuance was filed, and read in evidence, which affidavit was based upon the absence of Evans and Messick, the latter of whom was the defendant on a charge of attempted rape on Margaret Lusk. At the next term, Evans and Messick being still absent, their whereabouts unknown, the court refused to further continue the cause, upon the ground that the two absent witnesses were fugitives from justice. The circumstances already detailed show it rested in the sound discretion of the court to say whether it was probable that the attendance of the absent witnesses could be secured at the next ensuing term. As no abuse of judicial discretion is shown, and as *prima facie* the ruling of the court was correct, this point must be ruled against the defendant.

3. The day of the preliminary examination of Messick for the alleged assault was July 16, 1885; the date of the alleged assault, the 2d day of May next preceding. Shortly after said first-mentioned date several physicians were employed by the father of Margaret Lusk to make a personal examination of her, to ascertain "if she had been in the habit of having sexual intercourse." These physicians "informed Margaret Lusk that they could tell, by examining her person, whether she had been in the habit," etc., "and that, if she had, it would militate against her." This conversation, upon objection of the defendant, was rejected by the court, but against his objection the witness was permitted to state that she "appeared to understand the nature of the examination, and that she made

no objection." This testimony was clearly hearsay, and utterly inadmissible upon any known rule of evidence. And the act of the girl in making no objection to the proposed examination was as much hearsay as though she had uttered a declaration to that effect, and that had been offered in evidence. Whart. Crim. Ev. (9th Ed.) § 223. Declarations of a person, in order to be received in evidence, must be contemporaneous, and, connected with the principal fact, constitute part of the *res gestæ*, or serve to illustrate such principal fact. 1 Greenl. Ev. §§ 108, 110, 123, 124; Whart. Crim. Ev. (9th Ed.) § 225; *People v. Beach*, 87 N. Y. 508; *Kirby v. Com.*, 77 Va. 681.

4. When testifying as a witness, the character of defendant may be shown to be bad on the score of morality. This is well settled in this state. *State v. Grant*, 79 Mo. 118, and cases cited. The admission of evidence, therefore, as to the general reputation or character of the defendant for morality, constituted no ground for reversal.

5. The instructions given on behalf of the state by the court of its own motion cannot be reviewed here, because no exceptions were saved to such instructions. The rule of the statute is that exceptions in criminal prosecutions stand on the same footing as those of civil causes. Rev. St. 1879, § 1921; *State v. Marshall*, 36 Mo. 400; *State v. Ray*, 53 Mo. 845; *State v. Williams*, 77 Mo. 310; *State v. Burnett*, 81 Mo. 119; *State v. McDonald*, 85 Mo. 539; *State v. Pints*, 64 Mo. 317.

6. As to the instruction asked by the defendant, and already set forth, it is sufficient to say that it is too broad in its scope; it required the state to prove too much. There were four distinct assignments of perjury, and the proof of any one of them which formed an apparent link in the chain of evidence, and tended to the acquittal or discharge of Messick, was sufficient; nor is it necessary, in such cases, that the false statement tends directly to prove the issue, in order to sustain an indictment for perjury. If it be circumstantially material, or tends to support and give credit to the witness in respect to the main fact, it is perjury. *State v. Wakefield*, 78 Mo. 549, and cases cited; 2 Whart. Crim. Law, §§ 1277, 1282, 1301, 1303, 1316, 1322, 1323, and cases cited; Whart. Crim. Ev. (9th Ed.) § 131.

7. It is claimed the evidence did not warrant the conviction. If the testimony of the girl and her father was true, there can be no doubt that the testimony of the defendant was willfully and corruptly false; but he was apparently sustained by other witnesses as to his whereabouts on Saturday afternoon, May 2, 1885, and in other important particulars, and there was some testimony which likewise tended to support the story told by the girl and her father. It was, however, a most remarkable circumstance that the father, though he saw his daughter struggling in the arms of her assailant, and was fully in-

formed of the whole matter by his daughter on the same evening of its occurrence, yet took no steps for the arrest of Messick until two months and upwards after the alleged offense was committed, and only then, it seems from the testimony of one witness, in order to vindicate the reputation of his daughter, in respect to whom and Messick ugly rumors had been in circulation in the neighborhood since the 2d day of May, 1885. But all these things were matters for the consideration of the jury, and they, speaking in a general way, are the sole judges of the sufficiency of the testimony. For the errors aforesaid the judgment will be reversed, and the cause remanded.

BLACK and BRACE, JJ., concur. RAY, C. J., absent. BAROLAY, J., dissents.

#### STATE v. JACKSON.

(*Supreme Court of Missouri*. Nov. 18, 1890.)

##### MURDER—INSTRUCTIONS—VERDICT.

1. On a trial for murder, error cannot be predicated on an instruction requiring the jury to find the issues "on the evidence introduced by the state," where the other instructions require the jury to find defendant guilty upon the evidence, beyond a reasonable doubt, and tell them that if, upon a view of the whole case, they have a reasonable doubt of the guilt of defendant, they should acquit.

2. Under Rev. St. Mo. 1879, § 1284, providing that, on trial of an indictment for murder in the first degree, the jury must inquire, and by their verdict ascertain, whether the defendant be guilty in the first or second degree, a general verdict of guilty, without specifying the degree, is void. Following *State v. Montgomery*, 11 S. W. Rep. 1012.

Appeal from circuit court, Gasconade county; RUDOLPH HIRZEL, Judge.

Webster Jackson was indicted for the murder of Alexander McVickers, tried, and convicted of murder in the first degree. Upon appeal the verdict was set aside, and a new trial ordered. Defendant was again tried, and convicted of murder in the first degree, and again appeals. During the trial, the court, on motion of the defendant's counsel, gave, among others, the following instruction: "(10) The court instructs the jury that in this case the state attempts to convict the defendant upon circumstantial evidence, and that, before the jury can find defendant guilty, they must believe from the evidence that the facts and circumstances proved by the state are inconsistent with any other rational or reasonable theory, and if, after considering the evidence, there is a reasonable doubt in the minds of the jury as to defendant's guilt, they should give him the benefit of the doubt, and find him not guilty."

James Booth and J. C. Kiskaddon, for appellant. The Attorney General, for the State.

SHERWOOD, J. 1. This cause has been in this court before, and is reported in 95 Mo. 623, 8 S. W. Rep. 749. A change of venue having been awarded, the defendant was tried in Gasconade county, resulting in his being adjudged guilty of murder in the first degree,

and sentenced accordingly. When this cause was here on a former occasion it was claimed, as it is now, that the evidence was insufficient to authorize a conviction; but, after a most patient examination of the evidence at that time, the conclusion was reached that the evidence was of such a character as to place it beyond our province to interfere. The evidence in the present record differs in no essential particular,—no particular which should have caused the triers of the fact to have returned a different verdict; and they, speaking within bounds, were the exclusive judges of the weight and probative force of the evidence. Our ruling on that point must therefore be the same as formerly announced.

2. As to the testimony of Hartley, a certain objectionable feature which it contained at the former trial, to-wit, that defendant told him that upon seeing the account of the murder, and that he was accused of it, "it wrecked his mind," etc., "so he went to stealing horses to pacify his mind," and which I regarded, and still regard, as wholly inadmissible, was eliminated from the second trial, as well as other evidence which this court held inadmissible, and consequently such evidence is not before us for our consideration; and the same line of remark is applicable to objectionable language formerly used by the prosecuting attorney.

3. The instructions given,—speaking of all of them but the tenth, which will be presently touched upon,—seem, when considered in connection with the tenth instruction, to have instructed the jury "upon all questions of law arising in the case which were necessary for their information in giving their verdict." The tenth instruction, it will be noticed, is numbered the same as one deemed erroneous by two of the members of this court, and now I am informed that three of my associates regarded the instruction as formerly given in that light; but such objections as were formerly urged against that instruction do not now apply, as those objections have been purged by the proper amendments. It is objected, however, that the present instruction, numbered 10, is faulty, in that "it required the jury to find the issues on the evidence introduced by the state, instead of all the evidence in the case." But this must be regarded as a mere verbal criticism, when attention is directed to the other instructions, which required the jury to find the defendant guilty upon the evidence, beyond a reasonable doubt, and told them that if, upon a view of the whole case, the jury had a reasonable doubt of the guilt of the defendant, they should acquit him. Besides, instruction No. 10 was especially asked for by the counsel for the defendant, as the bill of exceptions shows; so, even if there was error in it, such error was cured by reason of this action of the defendant's counsel, and by virtue of the provisions of section 1821, Rev. St. 1879, which forbids any judgment to be reversed "for any error committed at the instance, or in favor, of the defendant."

4. If the foregoing alleged errors were all the record herein contained, the judgment would have to stand affirmed; but there is a remaining point to be touched upon. The verdict in this cause was the following: "We, the jury, find the defendant guilty in manner and form as charged in the indictment. E. W. WILD, Foreman." Section 1234 of our statutes, which governs this cause, is as follows: "Upon the trial of an indictment for murder in the first degree, the jury must inquire, and by their verdict ascertain, under the instructions of the court, whether the defendant be guilty of murder of the first or second degree, and [persons convicted of murder in the first degree shall suffer death; those convicted of murder in the second degree shall be punished by imprisonment in the penitentiary not less than ten years.]" This section was amended to its present shape in 1879, from what was section 3, p. 778, Gen. St., and the brackets inclose such portion as was the original section. A section very similar in its operation to the one just quoted was section 1, p. 883, Rev. St. 1845, which reads as follows: "Upon the trial of any indictment for any offense, where by law there may be conviction of different degrees of such offense, the jury, if they convict the defendant, shall specify in their verdict of what degree of the offense they find the defendant guilty." In a subsequent revision this section was amended so as to read: "Upon the trial of any indictment for any offense, where by law there may be conviction for different degrees of such offense, the jury, if they convict the defendant of a degree of the offense inferior to the offense alleged in the indictment, shall specify in their verdict of what degree of the offense they find the defendant guilty." The section, as amended, is now section 1927, Rev. St. 1879. And upon that section, thus changed, it has been ruled that, while under the former law—the section as it stood before the amendment—it would have been necessary for the jury to have specified the degree of the offense of which the defendant was convicted, (referring to *State v. Upton*, 20 Mo. 397,) yet, in consequence of the statutory change, a verdict was good though it did not specify the degree of the offense charged; for that, under the amendment, such specification was once necessary where the conviction was for a degree of offense inferior to that charged. *State v. Matrassey*, 47 Mo. 296; *State v. Steptoe*, 65 Mo. 640. These decisions, of course, virtually affirm those which preceded them upon the statute before the amendment to the section as it stood in 1845, and prior thereto, occurred. There are two of those decisions; the first, that of *McGee v. State*, 8 Mo. 495, where the indictment was for murder in the first degree, and the verdict was: "We, of the jury, do find the prisoner, John McGee, guilty in manner and form as he stands charged in the indictment,"—and this court, after quoting the statute as already quoted, said: "The verdict of the

jury in this case is not in conformity to this provision, and the judgment should have been arrested. Under the indictment, the defendant might have been convicted of murder in the second degree, or of manslaughter, and the court could not, as the verdict of the jury stood, know what judgment to render." And the judgment was accordingly reversed. So, too, in *State v. Upton*, 20 Mo. 397, the indictment was for murder in the first degree, and the verdict was "guilty in manner and form as he stands charged in the indictment;" and the statute was held to be imperative, and the verdict fatally defective, because of the failure of the jury to find in what degree the defendant was guilty under an indictment on which he could have been convicted of the various degrees of homicide, and consequently the verdict was not such that the court could pronounce the sentence of the law upon. Our present statute, quoted at the outset, is substantially identical, so far as concerns murder, with the statute of 1845, and, of course, requires similar adjudication. In the recent case of *State v. Montgomery*, 11 S. W. Rep. 1012, the indictment being for murder in the first degree, the authorities were examined; and it was ruled that under the present statute a verdict in this form, "We, the jury, find the defendant guilty," did not ascertain whether the defendant was guilty of murder in the first or the second degree, and, in consequence, was worthless. It is very easy to see that the decision just mentioned is of controlling force in the present case, and that the verdict in that case and in this one must stand upon the same footing, if it be true, as shown by the cases cited, that a verdict such as in the case at bar does not designate the degree of the offense of which the defendant was adjudged guilty. Touching on this point, Mr. Bishop says: "The view sustained by most of the authorities, and probably best in accord with the reason of the thing, is that the legislature meant by this provision to make sure of the juries taking into their special consideration the distinguishing features of the degrees, and passing thereon. Hence, this provision is in the full sense mandatory; and, unless they find the degree in a manner patent on the face of the verdict, without help from the particular terms of the indictment, it is void. No judgment can be rendered thereon, but a second trial must be ordered." 2 Bish. Crim. Proc. (8d Ed.) § 595. Wharton says: "Where a statute requires in the verdict a designation of a degree, or the specific assessment of a punishment, a general verdict, without such designation or assessment, will be a nullity." Whart. Crim. Pl. (8th Ed.) § 752. These views of eminent authors are abundantly sustained by adjudications in many states, based upon statutes virtually the same as our own, and upon verdicts in no wise different from the one under discussion. Thus, in Alabama, the indictment was for murder in the first degree, and the verdict returned was: "We, the jury, find the de-



fendant guilty, and assess punishment in the penitentiary for life,"—and the prisoner was sentenced accordingly. The statute in that state reads: "When the jury find the defendant guilty under an indictment for murder, they must ascertain by their verdict whether it is murder in the first or second degree;" and upon this verdict and statute it was ruled that a judgment of conviction could not be rendered on a verdict of guilty which did not expressly find the degree of the crime, and that such had been the uniform ruling in that state since the introduction, in 1841, of those provisions into the Penal Code of that state. *Levison v. State*, 54 Ala. 520. In California the statute says: "The jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder of the first or second degree." In a cause where the indictment was for murder in the first degree, the jury returned a verdict finding the defendant "guilty of the crime charged in the indictment," and this verdict was held wholly insufficient to base a judgment and sentence upon, and that the verdict as returned had no more designating power than if the simple word "guilty" had been employed. *People v. Campbell*, 40 Cal. 129. In Ohio the statute provides "that in all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter;" and upon this statute, where the indictment was for murder in the first degree, and a verdict was returned of "guilty in manner and form as he stands charged in said indictment," it was ruled (*BARTLEY, J.*, delivering the opinion of the court,—one of great clearness and force) that the "degree of homicide is a fact which the statute requires to be specially found." And in that case the case of *McGee v. State*, supra, is cited with approval. *Dick v. State*, 3 Ohio St. 89. The supreme court of that state held on circuit that in a case of murder, where the jury did not specify in their verdict, etc., the court would refuse to pass sentence, and award a new trial, even without a motion on the part of the defendant. Upon a similar statute the same view obtains in Connecticut. *State v. Dowd*, 19 Conn. 388. The statute of Michigan is substantially a transcript of that of Ohio. A case of murder arose in that state, and the verdict returned was: "That they find the said Robert Tully and John Tully guilty in manner and form as the people have in their indictment in this cause charged,"—and it was ruled that, the imperative command of the statute (that the jury should determine the degree of the crime) not having been obeyed, the judgment should be reversed. *Tully v. People*, 6 Mich. 273. For similar rulings upon similar statutes and verdicts, see *Thompson v. State*, 26 Ark. 323; *Ford v. State*, 12 Md. 514; *State v. Reddick*, 7 Kan. 143; *Kirby v. State*, 7 Yerg. 259; *State v.*

*Moran*, 7 Iowa, 236; *State v. Redman*, 17 Iowa, 329; *Thomas v. State*, 5 How. (Miss.) 20; *State v. Cleveland*, 53 Mo. 564; *State v. Rover*, 10 Nev. 388; *Buster v. State*, 42 Tex. 315. The plain object of the statute is that the jury, being instructed by the court as provided in the fourth clause of section 1908, must—*First*, "inquire" what degree of homicide the defendant has committed; *second*, they must "ascertain" as a fact what that degree of crime is; and, *third*, they must report the result of their investigations in writing to the court, plainly stating the degree of the crime found by them. If this plain statute be obeyed, the result will be, as the legislature intended it should be, that the verdict of the jury shall speak, and speak plainly, for itself, and thus banish all reason or excuse for strained inferences, and ingenious or far-fetched conjectures as to what the jury meant. For the sole reason that the verdict in this cause is wholly insufficient—a nullity—the judgment must be reversed, and the cause remanded, and it is so ordered.

RAY, C. J.; absent. BLACK and BRACE, JJ., concur; BARCLAY, J., in the result.

#### STATE v. SNYDER.

(Supreme Court of Missouri. Nov. 5, 1899.)

CRIMINAL LAW—AUTREFOIS CONVICT—BILL OF EXCEPTIONS.

1. Rev. St. Mo. 1879, § 1920, provides that, where the punishment is alternative, the jury may assess it, and the court shall render judgment accordingly, except as otherwise provided. Sections 1930-1933 provide that, where the punishment is assessed in excess of the highest penalty allowable, the court may reduce it to the highest penalty, and, where assessed below the lowest penalty, the court may raise it to the lowest allowable, but may in any case reduce a penalty fixed by a jury. Section 1935 provides that proceedings for new trials may be had on the motion of defendant. Held that, where the jury has assessed the minimum penalty, the court has no authority, on its own motion, to set aside the verdict, and order a new trial.

2. A new trial, after a verdict has been thus set aside, is in contravention of article 3, § 23, Bill of Rights Mo., providing that no person can "for the same offense be again put in jeopardy of life or liberty."

3. Though defendant cannot be said to have suffered strictly legal punishment by his imprisonment, yet, as his term would long ago have expired had the court sentenced him at the proper time, he is now entitled to discharge under the rule that "the default of the court shall not prejudice any one."

4. Where a bill of exceptions signed by the bystanders is allowed by the judge to be filed, but he certifies that it is untrue, and it is supported by affidavits, there being no counter-affidavits, it is a sufficient verification of the facts, within Rev. St. 1879, §§ 8638-8640, providing that, where the judge refuses to sign a bill of exceptions, it may be signed by three bystanders, and, if true, he shall allow it to be filed; but when he refuses to allow it to be filed, and certifies that it is untrue, either party may take not exceeding five affidavits as to its truth.

Error to criminal court, Jackson county.

The plaintiff in error, John Snyder, was tried for assault with intent to ravish. The jury returned a verdict of guilty, and assessed

his punishment at six months' imprisonment in jail. The court, on its own motion, set the verdict aside, and ordered a new trial. He was again convicted, and the jury assessed his punishment at five years in the penitentiary. On the second trial, defendant pleaded former conviction, and, the plea being overruled, he excepted, and now brings error.

*T. H. McNeil* and *A. W. Farrar*, for plaintiff in error. *John M. Wood*, Atty. Gen., for defendant in error.

**SHERWOOD, J.** The crime for which the defendant was tried was an assault with intent to ravish a female child of 11 years of age, the trial resulting in a verdict being returned by the jury in these words: "We, the jury, find the defendant guilty, and assess his punishment at six months in the county jail. *P. H. PACKARD*, Foreman." This verdict the court, of its own motion, set aside, and entered an order forever disqualifying the jurors who composed the panel from sitting as jurors in said court. Afterwards the defendant was again put upon trial, whereupon he pleaded his former conviction, proved it by the record, objected to any evidence being introduced by the state because of such former conviction; and upon this objection being overruled, and evidence for the state being introduced, elicited, by cross-examination of the state's witnesses, evidence tending to prove that defendant was being tried for the same offense of which he had formerly been convicted in the same court as aforesaid; but the trial court disregarded said plea of *autrefois convict*, and refused to instruct the jury upon that point, as asked so to do by the defendant, to the effect that, if the defendant had been tried and convicted at the preceding term of the court for the same offense for which he was now being tried, the jury should acquit him, but instructed the jury to the contrary of the instruction just mentioned. The result of this second trial, so called, was that the jury brought in a verdict of guilty against the defendant, assessing his punishment at imprisonment in the penitentiary for five years.

1. The first verdict rendered by the jury was in accordance with section 1263, Rev. St. 1879, upon which the indictment was based. Under that section, the jury, having an alternative or discretion as to the kind or extent of the punishment to be inflicted, had the right to assess and declare the punishment in their verdict, and for this reason could have greatly increased or considerably diminished such punishment, and it was the duty of the court to have rendered a judgment according to such verdict. Rev. St. 1879, § 1929. There are several instances where the court is authorized to fix the amount of punishment to be inflicted: Where the jury find a verdict of guilty, but fail to agree upon or declare the punishment, or assess a punishment not authorized by law; in which cases the court is to assess and to declare

the punishment, etc. And where the punishment assessed by the jury is below, or exceeds, the legal limits; in the former of which two cases the court is to fix the punishment at the lowest limit prescribed by law, and in the latter the court disregards the excess of punishment inflicted, and sentences the defendant according to the highest limit of the law. And the court also has the power to diminish the punishment to be inflicted to the minimum provided by law, where the punishment assessed is greater than ought to have been inflicted. *Id.* §§ 1929-1933. These are the only instances known to our criminal law where a trial court can even apparently alter, lessen, or increase the punishment awarded to a prisoner by a jury. So that it will be seen that, aside from the instances enumerated, the prerogative of a jury in criminal causes as to finding verdicts of conviction is as impregnable in its exercise as is any given prerogative exercised by the trial court. Section 1965 of the statutes provides that "verdicts may be set aside, and new trials awarded, on the application of the defendant."

It was a maxim and practice of the common law that no man was to be brought into jeopardy more than once for the same offense. 4 Bl. Comm. 336. Our state constitution of 1820, art. 18, § 10, declared "that no person, after having been once acquitted by a jury, can for the same offense be again put in jeopardy of life or limb." And upon this provision it was ruled that an acquittal was a complete protection against any further action on the part of the state. *State v. Spear*, 6 Mo. 644; *State v. Baker*, 19 Mo. 683. In both of these cases, grossly erroneous instructions had been given for the defendant; but this was not allowed to change the result. See, also, *State v. Cowan*, 29 Mo. 332. Section 19, art. 1, Const. 1865, provided "that no person, after having been once acquitted by a jury, can for the same offense be again put in jeopardy of life or liberty." And section 23 of article 2 of our present bill of rights declares: "Nor shall any person, after being once acquitted by a jury, be again for the same offense put in jeopardy of life or liberty." So that it will be at once seen that at no time since our state organization have our citizens been unprotected by our organic law in the important right above set forth. These provisions of the three constitutions of this state, former and now existing, are here quoted, as well as the decisions based on the constitution of 1820, because the Kansas City court of appeals, where the present defendant applied for a writ of *habeas corpus*, expressed the opinion that we had, in terms, no such constitutional provision as that above quoted.

When the jury was charged with the deliverance of the defendant, that is, when they were impaneled and sworn, the indictment being sufficient, and the court being possessed of jurisdiction, his jeopardy began; and, when the jury brought in a ver-

dict of conviction, the plain and unavoidable duty of the trial court was to enter judgment and pass sentence accordingly. Cooley, Const. Lim. (5th Ed.) 399 et seq., and cases cited; 2 Kent, Comm. (13th Ed.) 12, and cases cited; 1 Bish. Crim. Law, (7th Ed.) §§ 980-982, 1014, 1016, 1048, 1045, and cases cited. And this duty the trial judge could have been compelled to perform by *mandamus*. State v. Knight, 46 Mo. 83; State v. Adams, 76 Mo. 605. In similar circumstances the writ of *mandamus* may be employed in criminal as in civil cases. 1 Bish. Crim. Proc. (3d Ed.) §§ 1402, 1403. Viewed in the light of the authorities cited, and of sound reason, there was no justification or excuse for the course pursued by the trial court in failing to enter judgment upon the first verdict, whether we follow the practice at common law, that defined by the statute, or the plain prohibition laid down in our constitution. Therefore the proceedings at the second trial, being against law, cannot be permitted to stand. The jurors were the sole judges of the heinousness of the offense, and of the punishment to be meted out therefor; and, so long as they assessed a punishment within the bounds prescribed by the statute, their verdict was beyond the control of any earthly power, so far as concerns setting it aside, and granting a new trial, in opposition to the will of the defendant. And such opposition will be presumed, where the record, as here, recited that the verdict was set aside by the court "on its own motion."

2. The next point in hand is whether the bill of exceptions signed by the by-standers has been sufficiently verified as to the allegations of facts therein contained. The trial judge, although he refused to sign the bill of exceptions, certified that the same was untrue, yet permitted the same to be filed. Upon such a state of facts, it has been ruled that the bill will be presumed to be true, notwithstanding the denial of its truth by the judge; his permission of its filing being regarded as countervailing such denial. Norton v. Dorsey, 65 Mo. 376. This ruling accords with Rev. St. 1879, §§ 3638-3640. But, apart from the foregoing decision, the affidavits filed fully supported the bill; and, as there were none filed *contra*, the certificate of the judge is unsupported, and must be held for naught.

3. The first and only legal verdict returned in this cause was returned September 15, 1887, since which time the defendant has been confined in jail; his application to be discharged by *habeas corpus* having been denied. It is now urged that he be discharged from jail on the ground that he has long since served out the six-months term awarded him by the verdict of the jury. As the defendant was not sentenced under the first verdict, he cannot, in strict law, be said to have undergone any punishment, as a judgment and sentence must always precede the punishment, in order that the latter may be legally inflicted. But does the fact, in this

case, that there was no sentence passed upon him preclude the defendant from now insisting upon his discharge? I am not of the opinion that it does, and for these reasons: If the defendant, on an erroneous judgment, had submitted thereto, and performed the sentence of the law, it is agreed that he could not again be punished, and the reason given for this conclusion is that he might have brought a writ of error, and reversed the judgment; but that he could waive this course, and, if waived, the performance of the sentence was an answer to any further liability arising from the same facts. In a word, if he made no objection to the erroneous and reversible proceedings, the state could not waive the objection for him, and punish him over again. Having paid his debt to the state, such payment was the end of the law. 2 Lead. Crim. Cas. 554; 1 Bish. Crim. Law, (7th Ed.) § 1023; Com. v. Loud; 3 Metc. 328; Vaux's Case, 4 Coke, 44; and other cases cited. In the present instance, the defendant, without any fault on his part, has been kept confined in jail,—the place to which the verdict of the jury consigned him as a punishment. There he remained from the 15th day of September, 1887, until long after the expiration of the term of six months,—the term of punishment assessed against him by the verdict which was set aside; a period of time greatly in excess of that term. Since that time he has been transferred to the state penitentiary, and is now there confined under the sentence illegally passed upon him, after being illegally tried the second time. Had the trial court performed its simple and plain duty by passing sentence upon the defendant on the return of the first verdict, he would long since have been discharged; but it is a maxim of the common law that "the default of the court shall not prejudice any one." 2 Hawk, P. C. 534. This being the case, even-handed justice demands that the defendant should no longer suffer imprisonment as the result of an act of judicial usurpation and oppression without equal in modern times. The judgment of the trial court which caused the issuance of the writ of error herein is hereby reversed, and an order herein will be entered in this court expressly commanding the judge of the criminal court of Jackson county that, on receipt of a copy of said order, he (said judge) do forthwith reinstate the original verdict in this cause as of the date the same was returned and set aside, to-wit, the 16th day of September, 1887; and that, this being done, he (the said judge) do forthwith enter judgment and sentence thereon as of said date last aforesaid. And a further order will be entered herein that two copies of said order, duly certified, be transmitted by the clerk of this court to the marshal of said criminal court, and that he (said marshal) be therein directed that without delay he do deliver one of said copies to said judge, and that upon the other of said copies he do forthwith make due and proper return thereof, and certify thereon

to this court how he has executed the same. And a further order will also be entered herein commanding the warden of the state penitentiary to discharge said defendant from his custody.

BLACK and BRACE, JJ., concur. RAY, C. J., absent.

*HALL et al. v. KLEPZIG et al.*

(Supreme Court of Missouri. Nov. 18, 1889.)

SHERIFFS' DEEDS—EVIDENCE—FORECLOSURE—PARTIES.

1. Rev. St. Mo. § 2392, provides that deeds for property sold under execution shall recite "the names of the parties to the execution, the date when issued, the date of the judgment, order, or decree, and other particulars, as recited in the execution." *Held*, that where a deed for property sold on execution contains the names of the parties to and date of the execution, and the date and amount of judgment, it may be shown by evidence *alibunde* that the judgment and execution were special, and against the property sold.

2. It is not error to refuse to correct a sheriff's deed by making the recitals conform to the judgment and execution, even though the mistake is satisfactorily shown.

3. Under Gen. St. Mo. 1865, § 4, p. 618, providing that in case of the death of a mortgagor, whether before or after action brought, his personal representative shall be made defendant, where the mortgagor is dead, his personal representative is the only necessary party defendant to the foreclosure suit.

Appeals from circuit court, Shannon county; JOHN R. WOODSIDE, Judge.

*Jas. Orchard and A. H. Livingston*, for plaintiffs. *E. A. Seay and L. B. Woodside*, for defendants.

BLACK, J. The plaintiffs, who are husband and wife, prosecuted this action of ejectment to recover in the right of the wife five-elevenths of 220 acres of land in Shannon county. James McCormack died, in 1858, the owner of and in possession of the entire tract. He left a widow, Elizabeth McCormack, and 11 children. Jasper McCormack, who was one of the heirs, acquired by purchase the interest of four of the children, thus giving him five-elevenths of the estate. These purchases were made about the year 1860. He died in possession of the land, in 1863, leaving the plaintiff Missouri A. Hall as his sole heir. In 1867, S. I. K. Barksdale and John M. Dougherty acquired by purchase the interest of the other six heirs of James McCormack; and they claim to have acquired the five-elevenths owned by Jasper McCormack, in the manner hereafter stated. In 1881, they conveyed the entire tract to the defendant Klepzig. John M. Dougherty and the heirs of Barksdale were made defendants to this suit, on their own motion. Besides a general denial, the defendants for a further answer allege that in 1860 Jasper McCormack purchased the dower interest of Elizabeth McCormack, and in consideration therefor gave her his note for \$200, secured by a mortgage on his undivided five-elevenths of the land; that in 1867, and after the death of

Jasper McCormack, Barksdale purchased the note and mortgage, and caused the mortgage to be foreclosed in the Shannon county circuit court by a judgment of foreclosure rendered on the 10th November, 1868, in a suit against the administrator of the estate of Jasper McCormack; that the mortgage property was sold under that judgment, and John M. Dougherty and S. I. K. Barksdale became the purchasers. The answer goes on to aver that by mistake the sheriff failed to recite in the deed to them the facts that the judgment was special and against the land, and that the execution was a special *fleri facias*; that Barksdale and Dougherty, believing that they had good title, made improvements on the land, to the value of \$6,000 or more, in fencing, clearing, and in the erection of buildings, including a grist and saw mill and a carding-machine. They pray that the sheriff's deed be reformed, and for other relief. These matters specially pleaded were put in issue by a reply. All the issues were tried by the court without a jury, and the court made a finding of facts, which, in substance, is that plaintiffs were the owners of the five-elevenths of the land; that defendant Klepzig, as grantee of Dougherty and Barksdale, was in possession, holding under a sheriff's deed made under a judgment in the circuit court of Shannon county in favor of Barksdale, and against the administrator of Jasper McCormack; that Barksdale and Dougherty, in the purchase of the note and mortgage from Elizabeth McCormack, and in the discharge of a demand allowed against the estate of Jasper McCormack in favor of J. R. Hill, paid out, including interest to date of trial, \$1,523. To this is added five-elevenths of the estimated value of improvements and taxes paid, making \$2,721. And it is adjudged that upon the payment of that amount within a designated time plaintiffs shall have possession, and, if the amount be not paid, defendant shall have execution therefor against the plaintiffs' five-elevenths of the land. Both parties appealed.

1. Under our statute, and a long line of adjudications thereunder, the administrator of the mortgagor is the only necessary party to a suit of foreclosure, and a foreclosure against the administrator cuts off the right of redemption of the heirs of the mortgagor. Gen. St. 1865, § 4, p. 618;<sup>1</sup> Tierney v. Spiva, 97 Mo. 98, 10 S. W. Rep. 493, and cases cited.

2. It has been held, where a sheriff's deed is not sealed, that a court of equity cannot by its decree aid the imperfect execution. Courts of equity cannot carry into effect by their decrees the incomplete execution of statutory powers. *Moreau v. Detchemendy*, 18 Mo. 522; *Moreau v. Branham*, 27 Mo. 351; *Wannall v. Kem*, 51 Mo. 150; *Ware v. Johnson*, 55 Mo. 500. The court did not, therefore, err in refusing to correct the sheriff's deed by

<sup>1</sup>In case of the death of the mortgagor or his assignee, or of the mortgagor, whether before or after action brought, the personal representative of the deceased party shall be made plaintiff or defendant, as the case may require.

making the recitals conform to the judgment and execution, even if the mistake was satisfactorily shown.

3. The note and mortgage from Jasper McCormack to Elizabeth McCormack, and the record of the mortgage, and the record of the judgment and the execution issued thereon, were destroyed by fire on the 31st December, 1871, at which date the Shannon county court-house was burned; so that the proof in respect of the contents of the mortgage, judgment, and execution rests on parol evidence. There is no dispute in the evidence as to the fact that Jasper McCormack purchased the dower interest of Elizabeth McCormack in 1860, and that he at that time executed to her his note and mortgage, but the evidence is conflicting as to whether the mortgage covered the five-elevenths interest owned by Jasper, or simply the dower interest which he acquired from Elizabeth. On this point the finding of the circuit court is not explicit, but it would seem the court must have found that the mortgage covered the five-elevenths interest of Jasper McCormack, and the weight of the evidence seems to be decidedly in favor of the position that the mortgage did cover his entire interest in the land. This being the fact, there can be no doubt but the suit by Barksdale against the administrator of Jasper McCormack was a suit to foreclose the mortgage, and that the judgment rendered was one of foreclosure, and that the execution was a special *fleri facias*. The defendant Dougherty was clerk of the circuit court of Shannon county at the time the judgment was rendered and execution issued, and he testified to these facts in clear and distinct terms; and, as to the character of the judgment and execution, his evidence is not contradicted. The fact will therefore be taken as established that the judgment was one of foreclosure, and that the execution was special, and followed the judgment. The sheriff's deed to Barksdale and Dougherty contains these recitals: "Whereas, on the 10th day of November, one thousand eight hundred and sixty-eight, judgment was rendered in the circuit court of the county of Shannon in favor of S. I. K. Barksdale, and against Joseph C. M. Smith, administrator of Jasper McCormack, deceased, for the sum of \$354.26, for debt, upon which judgment an execution issued from the clerk's office of said county in favor of the said S. I. K. Barksdale, and against the said J. C. M. Smith, administrator of the estate of Jasper McCormack, dated the 23d day of November, directed to the sheriff of the county, and the same was to me delivered on the 23d day of November, 1868, by virtue of which said execution I, the said sheriff, did, on the 24th day of November, 1868, levy upon and seize all the right, title, interest, and estate of the said Jasper McCormack of, in, and to the following described real estate situated in my said county, to-wit: \* \* \*" The plaintiffs insist that the recitals in this deed show a general judgment against an administrator

of a deceased person, and that the defendants are estopped from disputing these recitals. Reading the deed alone, it must be construed as founded upon a general judgment, and such a judgment should be classed by the probate court, and the subsequent proceedings had in accordance with the administration law. The real question here is whether this deed can be read in the light of the judgment and special execution issued thereon. By the statute, the officers who shall sell any real estate shall make to the purchaser a deed "reciting the names of the parties to the execution, the date when issued, the date of the judgment, order, or decree, and other particulars, as recited in the execution. \* \* \* which recitals shall be received as evidence of the facts therein stated." Rev. St. Mo. § 2892. This statute applies in case of sales under special executions. *Foulk v. Colburn*, 48 Mo. 228; *Lewis v. Curry*, 74 Mo. 52. It was said in *Wilhite v. Wilhite*, 53 Mo. 74: "The enumerated provisions of statute which would seem to be essential recitals are the names of the parties to the execution, the date when issued, the date of the judgment, the description of the property, and the time, place, and manner of sale. These inform everybody of everything necessary to be known, and all else may be regarded as simply directory." And it has been held sufficient if the recitals in the deed conform to the execution, though there may be a variance between it and the judgment. *Davis v. Kline*, 96 Mo. 401, 9 S. W. Rep. 724. In *Foulk v. Colburn*, 48 Mo. 228, the deed did not state when the levy of the attachment was made. It was held the failure to make a recital as to when the levy was made did not vitiate the deed, and that the writ of attachment and levy could be received in evidence to aid the deed, and to show that it related back to the date of the levy of the attachment. So, in *Lewis v. Morrow*, 89 Mo. 174, 1 S. W. Rep. 93, the deed did not show on what day of the term of the court the judgment was rendered, but the record was put in evidence, and from that the exact date of the judgment did appear; and it was held the objection to the deed was not well taken. In the present case, the deed contains all the essential recitals required by the statute. The names of the parties to the execution, the date when issued, the date and amount of the judgment, are given. The judgment and execution by authority of which the sale was made are accurately identified. Though the deed does not show that the judgment and execution were special, still these facts may be shown by the production of the record, and, if destroyed, by secondary evidence. We do not question the doctrine that a party is bound by the recitals in the deed under which he claims, but it has no application to the present case. The deed refers to the judgment and execution, and they are thereby made a part of the deed; and, since the deed contains all of the essential recitals required by the statute, the record may be introduced

to sustain as well as to overthrow the deed.

It follows from what has been said that if the mortgage from Jasper McCormack to Elizabeth McCormack covered Jasper's entire interest in the land, and the judgment in favor of Barksdale against the administrator was one of foreclosure, then the defendants have a perfect title, and the judgment should be for defendants. These questions of fact might and should have been tried under the general issue. Involved in them is a question of law only, and not of equity. The life-estate of Elizabeth McCormack expired by her death before the commencement of this suit; and if the mortgage from Jasper only undertook to convey the estate which he acquired from her, then we do not see how the defendants can be allowed for improvements in this suit. The remedy, if any they have at all, is under the occupying claimant's law. If the mortgage covered the entire interest of Jasper McCormack, and the foreclosure and sale should prove to be worthless, so that Barksdale and Dougherty would be treated as mortgagees in possession, then questions as to improvements would arise, about which we need express no opinion, in view of the conclusion reached as to the validity of the sheriff's deed.

The judgment is reversed, and the cause remanded for new trial. Since both parties have appealed, and in view of the conclusion reached, we are of the opinion the costs of this appeal should be taxed, the one-half to plaintiff below, and the one-half to the defendants; and it is so ordered.

RAY, C. J., absent. The other judges concur.

LOEB *et al.* v. AMERICAN CENT. INS. CO.  
(Supreme Court of Missouri. Nov. 18, 1889.)

FIRE INSURANCE—CONDITION OF POLICY—WAIVER.

1. If the local agent of an insurance company, on being requested by the owner of insured property to notify the company of the loss, which occurred the night before the request, informs the owner that he has already sent notice, which is true, and the notice is received in due course of mail, a requirement of the policy that the insured shall give immediate notice of loss is sufficiently complied with, though the notice did not purport to be given on behalf of the insured.

2. A provision in the policy that no agent has power to waive any of its conditions does not refer to a stipulation printed on the back of the policy requiring prompt notice of loss. Such provision only affects matters prior to the loss.

3. The evidence, in an action for loss by fire, on behalf of plaintiffs, showed that they were told by the local agent of defendant that they need not send proofs of loss, as an adjuster would soon call to settle the business. An ineffectual attempt to arbitrate was made by plaintiffs and other companies who had also written policies on the property, and defendant's general adjuster then stated that he was not going into the arbitration, but that he would settle the loss when the arbitration was ended. The proofs were made and furnished after the stipulated time, and when they were handed to defendant's secretary he said that it was unnecessary to furnish proofs; that the company knew all about plaintiffs' loss. The local agent did not deny making the statement attributed to him, but the secretary testified that he made no such

statements as to the necessity for proofs, but, on the contrary, told plaintiffs that they had forfeited their rights. It was not disputed that the proofs were retained without objection, and given to the general adjuster. Held evidence sufficient to justify a finding that defendant induced plaintiffs to believe that it intended to waive the delay.

BAROLAY, J., dissenting.

Appeal from circuit court, Linn county;  
G. D. BURGESS, Judge.

Action by Leon Loeb and Lazar Loeb against the American Central Insurance Company to recover on two fire insurance policies. Verdict and judgment for plaintiffs, and defendant appeals.

*Hitchcock, Madill & Finklenburg*, for appellant. A. W. Mullins, for respondents.

BLACK, J. This suit is based upon two policies of insurance issued by the defendant to plaintiffs, who are partners in a mercantile business at Salisbury, in this state. One policy is in the sum of \$2,800 upon a stock of merchandise, and the other in the sum of \$300 upon two one-story frame buildings. There was a verdict and judgment for plaintiffs upon both policies. The policies are alike, and it is stated on the face of each that the damage by fire is to be paid in 60 days after the loss shall have been ascertained in accordance with the conditions of the policy; the sixth being that "all proceedings after loss shall be in accordance with the terms and stipulations printed on the back of this policy, which are hereby declared to be a part of this contract, and are to be resorted to in order to determine the rights and obligations of the parties hereto." On the back is this stipulation: "In case of loss, the assured shall give immediate notice in writing thereof to this company, and shall within 30 days thereafter render to this company a particular account of said loss, under oath, stating \* \* \*." The defendant resists payment on these grounds only: *First*, a failure to give any notice of the loss; *second*, a failure to furnish proofs of loss within the 30 days. As to the latter the plaintiffs plead waiver.

1. The fire occurred on the 3d December, 1885, at about 1 o'clock A. M. The policy, it will be seen, requires the assured to give immediate notice of the loss. On the next day after the fire one of the plaintiffs went to Mr. Shotwell, who negotiated the insurance, and was the defendant's local agent at Salisbury, and requested him to notify the company of the loss. Mr. Shotwell then told the plaintiff he had already notified the company. The evidence shows that Shotwell had written a letter to the company giving full notice and information of the loss under the two policies. The letter does not, on its face, profess to be given for or in behalf of the plaintiffs, and the contention of defendant is that it is no notice given by the assured. It was held in *Stimpson v. Insurance Co.*, 47 Me. 386, that a notice of loss given by the local agent at the request of the assured was sufficient, though the local agent, in his letter to the company, did not disclose the fact

that it was written at the request of the assured. A written notice of the loss from the local agent, given from information communicated to him by the assured, was held to be a sufficient notice to the company in *Insurance Co. v. Helfenstein*, 40 Pa. St. 289. In that case the policy required notice to be given in writing by the assured. The plaintiffs in this case did not give any further written notice, because Shotwell said he had given the company notice. They adopted and relied upon his act and statement, and no intimation was made to them that the notice given was not sufficient. That the letter was received in due course of mail at the home office, in St. Louis, is not questioned. The notice given, under the above-stated circumstances, was a sufficient compliance with the terms of the policy.

2. The defendant makes the point that its agents had no power to waive any of the stipulations in the policy, and relies upon one of the conditions, which is in these words: "(7) No agent has any power to waive any condition of this contract." A full copy of the policy is not preserved in the record, but it seems this is one of the several conditions stated in the body of the policy. It has no reference to the stipulation, printed on the back, to the effect that the proof of loss must be furnished to the company within 30 days. The words "any condition of the contract" have reference to those stipulations which are a part of, and necessary to give validity to, the contract of insurance, and not to those matters which are to be performed after there has been a loss, such as giving notice and furnishing a verified account of the loss. It was said in *Rokes v. Insurance Co.*, 51 Md. 512: "In regard to the clause in the policy that provides, 'No waiver or modification of any of the terms or conditions of this policy shall be made in any event,' it is sufficient to say that it refers to those conditions and provisions of the policy which enter into, and form a part of, the contract of insurance, and are essential to make it a binding contract between the parties, and which are properly designated conditions; and that it has no reference to those stipulations which are to be performed after a loss has occurred, such as giving notice, and furnishing proofs of loss." *Wheaton v. Insurance Co.*, 18 Pac. Rep. 764, is to the same effect.

3. The proof of the loss on the goods was made out and verified on the 2d January, 1886, but the additional certificate of the officer nearest the place of the fire, required by the policy, was not procured until the 4th, and on that day the proof was transmitted to defendant, and received by it on the 5th, some 2 days after the expiration of the 30 days. The proof on the \$300 policy was not served on defendant until the 1st day of February, 1886, nearly a month after the stipulated time. There were four other policies issued by other companies on the stock of goods, and statements made by at least one of two

adjusting agents were put in evidence; but it did not appear that this agent had any authority to represent defendant, and these statements were excluded by an instruction. The plaintiffs testified that, after these adjusting agents left, they commenced to make out proofs of loss; that Mr. Shotwell, the defendant's local agent, told them to hold on, and not send the proofs yet; that an agent would be up from the home office, and settle the business. Mr. Shotwell says it is possible he may have made such a statement; that he can't say he was expecting an agent up from St. Louis. An arbitration was held between plaintiffs and the four other companies at the office of defendant, in St. Louis, which began on the 24th January, 1886, and lasted for a week or ten days. Both plaintiffs testified that they asked Mr. Rorick, who was the defendant's general adjusting agent, if he was going into the arbitration, and that he said: "No; I want to see you after the arbitration, to settle that loss with you." One of the plaintiffs testified, further, that he called at the office to see Rorick several times, and was told that he was not in, and that finally he went to a lawyer, and had prepared the proof of loss on the building, and then handed the proof to the assistant secretary, who said: "Why, it is no use for you to serve this proof of loss on this company. We know all about your fire." This was on the 1st February, 1886. The assistant secretary says he made no such statement; that he took the papers, made a note on them as to where the plaintiff said he could be found, and then laid them on the desk of Mr. Rorick. Mr. Rorick says he told plaintiffs they had forfeited all rights, and his company had nothing to arbitrate. The evidence of both plaintiffs is that he said nothing about forfeiture. The president of defendant says he presumes he had some conversation about the loss with the plaintiffs; that they were about the office for two or three days. The fact is undisputed that defendant did not return, or offer to return, these proofs. They were turned over to Mr. Rorick, and no objection was made because not furnished within 30 days. This objection was made known for the first time by the answer filed in this case, five months after the fire. On this evidence, the court, for the plaintiffs, instructed that if defendant received the proofs of loss, and held and retained them, and never notified plaintiffs of any objection thereto, and "that the conduct of the defendant, acting by its officers and agents, with respect to said loss, and the adjustment and settlement thereof, was such as to show a waiver as to the time of making and furnishing said proofs of loss, then the plaintiffs are not precluded from recovering, as to either count of said petition, on the ground that said proofs of loss were not received by the defendant company within thirty days after the happening of said fire." The court, at the request of the defendant, gave the following instruction: "(9) The jury are instructed that to



create a waiver within the time limited, to-wit, thirty days, in which the plaintiffs, by the policies read in evidence, are required to make and render to defendant their sworn proofs of loss, there must have been some act done or thing said by some agent of the defendant, having authority, that reasonably led the plaintiffs to believe that the defendant would not require a strict compliance in point of time, on their part, in furnishing said proofs of loss; \* \* \* and they are further instructed that silence alone on the part of the defendant and its agents is not enough to create a waiver of the time in which said proofs of loss were required, by the policies sued upon, to be made and rendered to the defendant."

The objection that the evidence did not justify the court in submitting the question of waiver to the jury is not well taken. The company's local agent directed a delay in furnishing the proofs of loss. The company not only received and kept the proofs, but at no time before filing the answer in this case made any objection because out of time. The evidence tends to show that the defendant's adjuster gave plaintiffs to understand that he would settle the loss, and for that reason would not go into the arbitration; and, when the last proof was furnished, the assistant secretary said it was no use to serve the proof on defendant, assigning as a reason that the company knew all about the fire, and not even intimating that the proof was out of time. True it is the adjuster says he told plaintiffs they had forfeited their rights; but he does not pretend to say that he assigned any reason why they had forfeited their rights. Besides this, it was for the jury to say who gave a correct version of the conversation. A waiver of the strict terms of the contract may be shown by the acts and conduct of the officers of the company; and receiving and holding the proofs, without objection made thereto, and turning them over to the adjuster, are acts inconsistent with a design on the part of the company to stand on the fact that the proofs were out of time. Says the court in *Brink v. Insurance Co.*, 80 N. Y. 112: "If a company intends to avail itself of the technical objection that the proofs are not filed in time, common fairness requires that it should refuse to receive them on that ground, or at least promptly notify the assured of their determination; otherwise, the objection should be regarded as waived." See, also, *Assurance Co. v. Hocking*, 115 Pa. St. 407, 8 Atl. Rep. 589. It is not necessary to examine minutely those cases where it is held that receiving and keeping proofs of loss without objection is, as a matter of law, a waiver of the objection that they were furnished out of time. Nor do we say this case comes within that class of cases, but we do say the evidence justifies the finding of the jury that defendant intended to and did waive and forego strict compliance with the terms of the policy as to the time in which the account of the loss was to be furnished.

It is difficult to see how the jury could have reached any other conclusion. An objection is made to plaintiffs' instruction on the ground that it does not sufficiently define what will constitute a waiver; but it will be seen that instruction, and the one given at the request of the defendant, are not in conflict, and, both taken together, present the law favorably for the defendant. The judgment is affirmed.

RAY, C. J., absent. BAROLAY, J., dissents. The other judges concur.

#### STATE v. CUNNINGHAM.

(Supreme Court of Missouri. Nov. 18, 1889.)

##### RAPE—CONSENT—JURORS—COMPETENCY.

1. The evidence showed that prosecutrix, while mentally weak, was not insane, but was able to attend to her household duties. About dark defendant entered her house, dragged her out, despite her resistance and protests, placed her in a wagon, which was driven by another man, lay down with her, and covered her and himself up with a tarpaulin. After driving for some time, they stopped at a saloon about two hours, prosecutrix remaining in the wagon in a state of apparent unconsciousness. Defendant then had intercourse with her. She appeared during all the time to be dazed, and she was in an advanced stage of pregnancy. After delivery she became insane, and hence unable to testify. Held that, though it did not appear that she resisted or that force was used when intercourse was effected, the evidence showed want of her consent; as resistance and force are only facts bearing on the question of consent, and, in case of mental weakness, less evidence of want of consent is necessary than where the female is of sound mind.

2. A juror stated on his *voir dire* that he did not know the defendant or the prosecutrix, but remembered reading of the case when it occurred, and thought it a hard case, and could not say that he had no opinion, but that his opinion would not prejudice him as a juror. On cross-examination he said that the newspaper report produced an opinion in his mind, which could be only removed by evidence, and that the defendant would have to prove his innocence. On re-examination he said that if the newspaper report were shown to be true he would retain his opinion, but that if the facts were shown to be different he would arrive at a different conclusion. If sworn as a juror, he would be governed only by the evidence, and would pay no attention to what he had read, that his attention would be drawn from the newspaper account, and that he could give defendant a fair trial. Held, construing his whole examination together, he was qualified. It being a question of fact, all doubts should be resolved favorably to the finding of the trial court, and as it did not clearly appear that the juror had such an opinion as to bias his mind, the decision favorable to his competency should be sustained.

SHERWOOD, J., dissenting.

Error to St. Louis criminal court; JAMES C. NORMILE, Judge.

Thomas Cunningham was indicted for, and tried and convicted of, rape, and sentenced to confinement in the penitentiary for 15 years. He brings error.

Chas. P. Johnson and Silver & Brown, for plaintiff in error. John M. Wood, Atty. Gen., and J. G. Lodge, for the State.

BLACK, J. The defendant was convicted of rape, committed upon the person of Mrs.

Gutting. Objections were made to several jurors for cause; and, as the ruling of the trial court upon the qualification of Mr. Wolsey presents the strongest case in favor of defendant's objections, the examination of the other jurors need not be set out. This juror, upon his examination by the state, testified: "I do not know the defendant, nor do I know Mr. or Mrs. Gutting. I remember of reading of the case in the newspaper shortly after the affair occurred. I thought it was a pretty hard case. I can't say but I have an opinion about the case. It would not prejudice me in the trial." *By counsel for defendant: "Question.* You did form some opinion at the time of the occurrence, did you, when you read it in the newspaper? *Answer.* Well, I thought it was a kind of a hard case, of course. *Q.* And you formed an opinion that it was a hard case? *A.* At that time; yes, sir. *Q.* Well, you have nothing to change the opinion, have you? *A.* Never thought of it since. *Q.* You have got that opinion yet? *A.* Well, I have got that opinion yet, as I read it in the paper; if evidence is proved to the contrary, I can give a just verdict. *Q.* In other words, if you went on the jury you would have to have evidence to change that opinion you have formed? *A.* Yes, sir. *Q.* If you were to take your seat now, you would have a bias or prejudice in your mind? *A.* Yes, sir. *Q.* A bias and prejudice that would require evidence to remove? *A.* Yes, sir. *Q.* In other words, the defendant would have to prove that he was innocent? *A.* Yes, sir." He states on re-examination by the state, what he means is that if the newspaper report is shown to be true then he would retain the opinion he had formed; but, if the evidence showed another state of facts, he would arrive at a different conclusion. *By the court: "Question.* Have you any prejudice in the case that would prevent you from giving him a fair trial? *Answer.* Nothing to prevent me from giving him a fair trial. *Q.* Then would or would you not pay any attention to what you read in the paper? *A.* No, sir. If I am employed as a juror, it would take my attention from the paper. If I am sitting as a juror, I judge by what is put forth. *Q.* In the court-room? *A.* Yes, sir." In answer to other questions, he says he could and would be guided by the evidence advanced on the trial. The examination of this juror is lengthy, but the foregoing presents the essential parts of it.

The statute provides that a juror may be sworn, though he has formed an opinion, if it be founded on rumor and newspaper reports, and be such as not to prejudice or bias his mind. The rule repeatedly asserted under the statute is, in substance, this: A juror who states on his examination that he has formed and expressed an opinion as to the guilt or innocence of the accused, and that opinion has been formed from rumor or newspaper reports, and that it would require evidence to remove the opinion, is not an in-

competent juror; provided it shall appear to the satisfaction of the court that such opinion will readily yield to the evidence in the case, and that the juror will determine the issues upon the evidence adduced in court, free from bias. *State v. Walton*, 74 Mo. 271, and cases cited; *State v. Bryant*, 93 Mo. 302, 6 S. W. Rep. 102. This rule, so often asserted by this court, is in accord with that where it is said: "The true doctrine is that if the juror's conceptions are not fixed and settled, nor warped by prejudice, but are only such as would naturally spring from public rumor or newspaper report, and his mind is open to the impressions it may receive on the trial, so as to be convinced according to the law and the testimony, he is not incompetent." 2 *Grah. & W. New Trials*, 378. Now, the opinion of the juror in this case was based upon what he had read in the paper over a year before the trial, since which time he had not thought of the matter. There is but one question left, and that is whether it appears the opinion thus formed is such as not to bias his mind in the trial of the case. Does it appear that the opinion is one which will readily yield to the evidence? This question, it may be observed, in the first place, is to be tried by the trial court as a question of fact; and the finding of the trial court ought not to be disturbed, unless it is clearly against the evidence. All doubts should be resolved in favor of the finding of the trial court. *McCarthy v. Railroad Co.*, 92 Mo. 536, 4 S. W. Rep. 516. Moreover, the question as to the qualification of the juror must be determined, not from a few catch-words drawn from him by a series of questions, but from his whole examination, including his demeanor while on the witness stand. When he says he would have a prejudice and bias which it would take evidence to remove, and the defendant would have to prove his innocence, he is evidently speaking of the case on the supposition that the circumstances as stated in the newspaper report should turn out to be true. His attention is called to the newspaper account, his opinion thereon, and then the direct and leading questions are asked which bring out the statements. When he is given an opportunity to make a full explanation, it appears he has no bias at all. He understood it to be his duty to disregard the newspaper reports, and this he says he could and would do. His notions of the case were nothing more than such as any one would form from reading a newspaper report, and it is but common information that such reports have little or no influence upon a fair-minded man when he is called upon to determine the fact in the light of evidence given under oath. If such a juror is to be rejected, it must be because he is an intelligent, honest, fair-minded man, and not because he has any opinion which would in the least sway his mind from an impartial consideration of the evidence.

Mrs. Gutting resided on an out-street in the city of St. Louis, with her husband and

two children. She had been subject to aberrations of the mind for four or five years, and for two years prior to the occasion in question she had, according to the testimony of her husband, spells two or three times a week, when she imagined the persons who came to the house came there to steal or carry off their property. In other respects she appeared to be well, and at all times attended to her household duties, taking care of the children. On the 7th December, 1886, she prepared breakfast for her husband as usual, and he left for his work. Cunningham, the defendant, was a street-vendor of produce, and in that capacity had been at the house on several occasions. About 6 o'clock in the evening of the day last mentioned he and Maher went to the house with a two-horse wagon, having high sideboards, but no cover. According to the evidence of Maher, who was jointly indicted with defendant, he went to the house to sell some butter, but did not go in. Defendant then left the wagon, and went into the house, and closed the door after him, and in a few minutes came out, dragging Mrs. Gutting by the arms. She had no covering on her head, and only a pair of stockings on her feet. In the struggle they fell down at the yard fence, when defendant raised her up, took her to the wagon, placed her feet on the hub, and then threw her over into the wagon. The defendant got in, and threw a tarpaulin over her and himself, and told Maher to drive on, which he did. She appeared to be dazed, and said: "What have I done? What is this for?" Another witness, who was 50 yards distant, says he saw the wagon in the road at the house, and heard the woman say: "I won't." That it was dark, and he heard and saw nothing more. Maher drove about a half mile, and stopped at a saloon, at what is called the "Half-Way House." He says he went into the saloon, leaving defendant and Mrs. Gutting under the tarpaulin, and that defendant came into the saloon in 10 or 15 minutes. They remained at the saloon about two hours, drinking with five or six other peddlers. Other evidence is that these peddlers, at the invitation of defendant, went to the wagon, one after another, and returned with straw on their clothes. One witness says the woman was lying down in the wagon motionless, and apparently in a state of unconsciousness. This shameful conduct over, Maher and defendant drove west about two miles, and the evidence of Maher is to the effect that on this drive defendant had intercourse with her. She said on this drive three or four times she wanted to go home. Maher drove back, but not to the house, and she found her way home. Defendant was then in a drunken stupor. Mrs. Gutting was alone when carried away by these men. She was then in the ninth month of pregnancy, and in twelve days gave birth to a child, since which time she has been wholly insane. Her husband says she came home about half past 12, in a bewildered

state of mind. She gave a broken account of what had happened, and did not know that any great wrong had been done. She was still without covering on her head and feet, though the weather was cold. On each arm there were from six to ten black marks, having the appearance of finger-marks. Defendant, testifying in his own behalf, says he drank beer with Mrs. Gutting on a former occasion when he stopped at the house; that on the evening in question she wanted beer, and got into the wagon of her own accord to go to the Mount Pleasant House for that purpose, but they stopped at the Half-Way House. He says she was a good woman, and he had no intercourse with her, with or without force, and that he made no improper proposals to her.

The objection made that it does not appear that force was used by the defendant, or that there was resistance on the part of the woman, cannot be sustained. The state must, of course, show force used on the part of the defendant, and that the woman did not consent. These questions of fact are interwoven, and the one is somewhat dependent upon the other. Whether the woman did or did not consent to the act is, in most cases, to be inferred from the surrounding circumstances; and hence resistance or want of resistance becomes an important element in the evidence. So the resistance to be expected depends much upon the physical and mental strength of the woman. The distinctions between the facts to be proved and the evidence adduced in proof of them should be kept in mind. The importance of resistance is simply to show two elements in the crime,—carnal knowledge by force by one of the parties, and non-consent thereto by the other. *State v. Shields*, 45 Conn. 264. According to *Com. v. McDonald*, 110 Mass. 405, the act must have been done without the woman's consent, and there must have been sufficient force used by the accused to enable him to accomplish his purpose, and when these facts are made to appear sufficient force has been shown. The case of *People v. Crosswell*, 18 Mich. 427, holds, and only holds, that when a man had connection with a woman of mature years, of good size and strength, who was in a state of *dementia*, not idiotic, but approaching to it, and no fraud or force was used, it was not rape. The evidence in the present case tends to show that Mrs. Gutting, though not insane, was of a weak mind. She was dragged from her house, and forced into the wagon, and carried off. It tends to show that she did resist until thrown into the wagon. There is abundant evidence of force, and that she did not consent to the outrage.

But, conceding all this, it is next urged that the crime was not committed when the force was used, and that the subsequent conduct of the woman furnishes conclusive evidence of acquiescence on her part. It is doubtless true, as a proposition of law, that if consent is given after the assault, and be-

fore the act is completed by penetration, it will not be rape. But a consent induced by fear of personal violence is no consent. 2 Bish. Crim. Law, (7th Ed.) § 1125. Submission from fear, or because the mind of the woman is overcome by fright, is no consent. *McQuirk v. State*, 4 South. Rep. 775. Though the witness Maher says Mrs. Gutting, during the drive to the saloon, made no outcry or resistance that he saw or heard, yet he says she and the defendant were covered up from his view, and that she, to use his language, appeared to be dazed when thrown into the wagon. Other evidence tends to show that while in the wagon at the saloon she was unconscious, and after leaving that place she wanted to go home. All this evidence tends to show that she was overpowered by the first brutal assault; and, if that be the fact, then her subsequent conduct falls far short of showing consent. On the contrary, the evidence, as a whole, tends to show that she did not consent, and whether she did or not was a question for the jury to determine. Nor do we agree to the proposition advanced by counsel for the defendant that there is no evidence of rape, except upon the theory that Mrs. Gutting was so insane as to be incapable of giving her consent. She was beyond all doubt, a woman of a weak and a disordered mind, but she had the mental capacity to attend to her household duties at all times, cared for her small children, and visited acquaintances with her husband. The mere fact that a woman is weak-minded does not disable her from consenting to the act. *McQuirk v. State*, supra. "A woman with less intellect than is required to make a contract may so consent to a carnal connection that it will not be rape in the man." 2 Bish. Crim. Law, (6th Ed.) § 1121. So long as the woman is capable of consenting, and does consent, the act is not rape, and this is true though the man may know that she is of weak intellect. All the evidence tends to show that Mrs. Gutting did have, when first assaulted, the strength of mind to consent or dissent, and there was no error in placing the case before the jury on that theory. Had this not been done, it is quite clear the defendant would be demanding a reversal on that account.

At the close of the evidence the court inquired if there were any instructions that either side specially craved, and counsel on both sides made a negative reply. Thereupon the court, it is conceded, gave such instructions as are usually given in cases of rape. But it is now urged that the court erred because it did not, of its own motion, submit the question of the sanity of Mrs. Gutting to the jury, and in not instructing the jury that if she was insane the defendant could not be convicted, unless it also appeared that he knew she was incapable of giving her consent. Our statute provides that "every person who shall be convicted of rape, \* \* \* by forcibly ravishing any

woman of the age of twelve years or upwards shall be punished," etc. "Rape" is generally defined to be the carnal knowledge of a woman by force and against her will. This and like definitions are compiled from the English statutes, and some text-writers hold that it is erroneous, in that the words "without her consent" shall be used instead of "against her will." 2 Bish. Crim. Law, (7th Ed.) §§ 1114, 1115. Wharton says: "The term 'against her will' was used in the old statutes convertibly with 'without her consent,' and it may now be received as settled law that rape is proved when carnal intercourse is effected with a woman without her consent, although no positive resistance of the will can be shown." 1 Whart. Crim. Law (9th Ed.) § 556. Carnal knowledge of a woman by force and without her consent is rape. *Commonwealth v. Burke*, 105 Mass. 377; *Reg. v. Fletcher*, 8 Cox, Crim. Cas. 181; *Queen v. Ryan*, 2 Cox, Crim. Cas. 115; *Reg. v. Jones*, 4 Law T. (N. S.) 154. "From this," says Wharton, "it follows that carnal knowledge with a woman incapable, from mental disorder, (whether that disease be idiocy or mania,) of giving consent, is rape." 1 Whart. Crim. Law, (9th Ed.) § 560. To constitute rape, the act must be intended to be done with force, and without the woman's consent; and, if done with these intentional elements, it can make no difference that the woman was insane, and that the accused did not know she was incapable of giving her consent. Unless this is so, an insane woman or an idiot is at a great disadvantage in the hands of a ravisher. But if the man does not know that the woman is *non compos*, and from her conduct is led to believe he has her consent, we do not see how the act can be rape. But in this case there is no evidence tending to show that the accused had intercourse with Mrs. Gutting upon the mistaken belief that he had her consent. His evidence is a denial that he had intercourse with her at all, or made any proposal to her to that end. The state's evidence, if worthy of belief, shows that this woman was forcibly and intentionally ravished. No such a defense as that now suggested was thought of on trial, or the defendant's able counsel would have suggested it to the court. There is no evidence upon which to base it. Indeed, under the authorities before cited, it might well be said that there is no evidence tending to show that the woman was incapable of giving her consent when first assaulted. The judgment is therefore affirmed.

RAY, C. J., absent. SHERWOOD, J., dissents. The other judges concur.

#### STATE v. MITCHELL.

(Supreme Court of Missouri. Nov. 18, 1889.)

#### MURDER—CONTINUANCE—INSTRUCTIONS.

1. On a murder trial, an application for continuance stated that defendant could not with safe-

ty proceed to trial without the testimony of a certain physician, who was, when last seen by affiant, living in L. county, Kan.; that defendant expected to prove by him that defendant was thrown from a horse, causing a serious injury to the brain, so that he had times of mental derangement, etc.; that affiant had written letters to those who, he had reason to believe, knew the address of the physician; that he had made diligent and earnest inquiry for the address, but was as yet unable to obtain it. The affidavit did not state the name of the witness, nor did it show that the defense of insanity was contemplated. *Held*, that the application was insufficient. *BRACE, J.*, dissenting.

2. Defendant requested an instruction that "where the intent was not to take life, but only to do great bodily harm, it is murder in the second degree, if death results." The court instructed as follows: "According to the evidence as adduced in this case, if you fail to find that defendant intended to kill deceased, \* \* \* you will find him not guilty." *Held*, that defendant could not complain, and the error, if any, came within Rev. St. Mo. 1879, § 1821, providing that no criminal proceedings shall be invalidated "for any error committed at the instance or in favor of the defendant."

3. An instruction that murder in the second degree embraces all cases of murder at common law in which there was no specific intent to kill, but in which the law presumes an intent to kill, and which are not made manslaughter or murder in the first degree by statute, is too abstract a statement of law, and would befog rather than enlighten a jury.

4. Unless the motion for a new trial assigns rulings on evidence as error, they will not be considered on appeal.

Appeal from circuit court, Jackson county; HENRY P. WHITE, Judge.

Defendant was indicted September 14, 1888, for murder in the first degree, and, after arraignment and plea of "not guilty," was tried and convicted. The homicide grew out of a dispute between deceased and defendant regarding an order for some wine. The former was a waiter at a variety theater, where the difficulty took place. The particulars of the said tragedy need not be detailed, in view of the questions presented on this appeal. Defendant, as a witness, admitted firing the fatal shot; claiming that he did not intend to kill, but merely frighten, the waiter. That there was abundant evidence to support the verdict is not questioned. When the cause was called, October 22, 1888, defendant moved for a continuance on the grounds stated in the following affidavit: "The State of Missouri, County of Jackson—ss.: Wm. G. Mitchell makes oath and says he cannot with safety proceed to trial without the testimony of a certain physician, whose name and residence are to said Mitchell at present unknown; that said physician was, when last seen by affiant, living in Clay Center, Kansas; that said affiant expects and has reason to believe that he can obtain the name, residence, and testimony of said physician on or before 17th day of December, A. D. 1888; that he expects to be able to prove by said physician that at the age of fifteen years he, the said Mitchell, met with a serious accident, to-wit, was thrown violently from the back of a horse, causing a serious injury to the brain of affiant, resulting in periodical mental derangement of said affiant, rendering him

at times of said mental derangements morally irresponsible; that affiant believes the above statements to be true; that he cannot as well and as readily prove said facts by any other witness; that said witness is not absent by any connivance, consent, or procurement of the said affiant; that the said affiant has written letters of inquiry to those whom he has reason to believe knew the address of said physician; that affiant has made diligent and earnest inquiry for address of said physician, but as yet is unable to obtain the same; that this affidavit for continuance is not made for vexation or delay merely, but to obtain substantial justice on trial of the cause." The record shows that this application for a continuance was overruled by the court, the prosecuting attorney admitting that if the absent witness were present he would testify as set out in the affidavit. The statement of evidence it contained was not offered by defendant at the trial. At the close of the testimony the court gave a number of instructions, but refused two requested by defendant. They are set forth in the opinion. The jury found defendant guilty of murder in the first degree. His motion for a new trial assigned but two errors,—the denial of the continuance and the refusal of the instructions he asked.

*Scotfield & Wagner*, for appellant. *The Attorney General*, for the State.

*BARCLAY, J.*, (after stating the facts as above.) 1. If the action of the court overruling defendant's application for continuance was proper, it is immaterial whether the reasons that induced the making of that order were sound or not. A correct ruling is not vitiated by reason of any erroneous views of the court in making it. The consent of the prosecuting attorney, in the present case, that the defendant might read the statement in the affidavit in lieu of the testimony of the absent witness, could not make the application better than it was without such admission. The affidavit did not state the name of the witness, or satisfactorily show ordinary diligence to obtain it. The evidence, to secure which delay was asked, could have no relevancy to any defense except insanity; and the application did not show that that defense was contemplated. In this regard, it nearly resembles the application in *State v. Pagels*, 92 Mo. 300, 4 S. W. Rep. 931, which this court held insufficient. In that case, too, the transcript shows the same admission (under section 1886, Rev. St. 1879) by the prosecuting attorney as appears in this record. This case and that last cited are therefore clearly distinguished from those in which this court has ruled the denial of a continuance to be error. Those decisions should be read in the light of the fact that the applications therein were clearly sufficient in law to require the postponement asked. In the case before us the application was wholly insufficient. No error was committed in denying it.

2. The instructions given by the court presented the law touching murder in the first and second degrees so fully that no objection was made in the motion for new trial to their correctness or completeness. The only complaint respecting the instructions is of the refusal of two asked by defendant. The first of these told the jury that "where the intent was not to take life, but only to do great bodily harm, it is murder in the second degree, if death results." On this point the instruction given by the court was as follows: "(7) According to the evidence as adduced in this case, if you fail to find that the defendant intended to kill the deceased at the time he shot him and wounded him, you will find him (the defendant) not guilty." This was certainly more favorable to defendant than his own refused request. If there was error in the court's statement of the law, it was in favor of, not against, the defendant. His counsel have made a very ingenious argument, endeavoring to show that the effect of such action by the court was to leave the accused in worse position than if the instruction had presented the law less favorably for him than it did. This argument, however, is met by the plain terms of the statute, to the effect that no criminal proceedings shall be in any manner invalidated or affected "for any error committed at the instance or in favor of the defendant." Rev. St. 1879, § 1821.

3. The second of defendant's refused instructions is a copy of part of the syllabus in *State v. O'Hara*, 92 Mo. 59, 4 S. W. Rep. 422. It declares that "murder in the second degree embraces all cases of murder at common law in which there was no specific intent to kill, but in which the law presumes an intent to kill, and which are not made manslaughter or murder in the first degree by statute." It is clear that such an abstract statement of the law should not be given as an instruction. What was murder at common law, and what cases were manslaughter by statute, could not properly be thus left to the jury. Instructions should not submit legal questions to the triers of fact. Such a declaration of law as that under review would befog, not enlighten, the jury. The court correctly refused it.

4. Some question has been made in the able brief for appellant regarding the admissibility of certain testimony given in the trial court. But, as the motion for new trial does not assign any rulings on evidence as error, we cannot properly consider them here.

5. We have not been able to discover, nor has there been called to our notice, any insufficiency or error in the indictment, or in any of the proceedings in the cause. The defendant appears to have been fairly tried. It is our duty to affirm the judgment. It is accordingly done; SHERWOOD and BLACK, JJ., concurring in this opinion.

BRACE, J., dissents in regard to the ruling on the application for continuance, and concurs on the other points. RAY, C. J., absent.

## MORGAN v. OLIVER.

(Court of Appeals of Kentucky. Nov. 19, 1889.)

## VENDOR AND VENDEE—RIGHTS OF PARTIES.

G. sold land by title-bond to defendant, who failed to pay the purchase money, and he afterwards, in 1872, made a contract with him, giving further time in which to pay, with the agreement that, if he failed to pay as agreed upon, the contract for the sale of the land should be regarded as rescinded. G. assigned his benefit under this contract to plaintiff, who, upon defendant's failure to pay, sued for possession. The land was placed in a receiver's hands, and rented to plaintiff; and, after several years, the court decided the case, holding that the rents due from plaintiff had extinguished the defendant's debt for the purchase money. Held, that the contract for the sale of the land to defendant was at an end when he failed to pay under his agreement of 1872, and plaintiff was entitled to possession.

Appeal from circuit court, Perry county.

"Not to be officially reported."

John L. Scott, for appellant. Robert Riddell, for appellee.

PRYOR, J. D. S. Godsey sold by title-bond a tract of land in Perry county, known as the "Willard Place," to the appellee, James Oliver, and held Oliver's notes for the purchase money. Oliver was otherwise indebted to Godsey, and had failed to pay for the land, or to discharge his indebtedness. In May, 1872, the appellee being desirous of having more time to pay this debt, and Godsey becoming restless at the delay of Oliver in making payment, an agreement was entered into by which Oliver stipulated that if he failed to pay \$300 by the 1st of May, 1873, to Godsey, he was to deliver to Godsey the possession of the land, and surrender his bond for title. In other words, the contract was then rescinded; Oliver further agreeing that if he failed to deliver the possession his entry on the land as purchaser should constitute no defense to a warrant of forcible detainer, etc. Godsey sold and transferred by assignment the benefit of the contract to the appellant, Morgan, who instituted this action in ejectment to recover the land. The appellee, Oliver, having failed to comply with his contract, and the case having gone to equity, the land was placed in the possession of a receiver, and rented out until the action terminated. The Godseys, two of them being interested in the land, were made defendants to the cross-action of the Olivers, in which it was alleged that the title to the land was defective, and the agreement to rescind obtained by fraud; and, after mingling with this litigation other actions and cross-actions in regard to matters foreign to the issue and with those having no interest in the subject matter, the litigation, after a long delay, terminated in a judgment for Oliver against Morgan, the court below holding that the rents had extinguished the debt, leaving a balance due the Olivers, for which the judgment was entered. While Morgan could not maintain an ejectment, no objection was interposed to the action, and the Godseys were brought before the court, and the right of Godsey or his assignee to rescind the contract determined. The land was

rented out by a receiver at a small sum for each year during several years, the rental value being about \$25 per annum. For one year it seems that Morgan agreed to pay about \$240 for the rent, in order, as is alleged in argument, to keep Oliver out of the possession. Morgan also proceeded to make valuable and lasting improvements on the land, and treated it as if he was invested with a perfect title, and the incumbrance caused by the litigation entirely removed. When the chancellor considered the case, after the lapse of several years from the institution of the action, the rent, including the exorbitant sum agreed to be paid by Morgan for the rent, had extinguished the debt, and left a considerable sum due the Olivers; and for this, as before stated, Oliver obtained a judgment, and Morgan's right to pay for his improvements was denied. If it was Oliver's land, the judgment is proper; if Morgan's land, the judgment should be reversed. That facts existed authorizing the appointment of a receiver is apparent; and Morgan's remedy, in order to prevent waste and a destruction of his property, was to have the land placed in the custody of some one who would preserve it, leaving the chancellor to determine whether Morgan or the Olivers were entitled to the possession. If a stranger had rented the farm, instead of Morgan, the latter would have been entitled to the rents, if he was entitled by the terms of the contract to the possession of the land; and the long delay in determining this question gave to the Olivers no greater right than they had when the action was instituted. James Oliver had been in possession several years before the action was brought. He had paid nothing, or comparatively nothing, on the land; and, having had possession prior to the agreement of 1872, he is by this judgment invested with title, and obtains the value of Morgan's improvements upon the idea that it was his land, and the rents agreed to be paid by Morgan had satisfied the entire debt. While facts might have existed presenting an equity for Oliver that the chancellor would have protected, as he entered as purchaser, still there is nothing in this case but the naked purchase, and the possession under it, and, to obtain delay, further time given in which to pay, upon the express agreement that if the payment was not made the contract was to be regarded as rescinded. In fact, the proof conduces to show that a part of the debt was remitted; but, whether so or not, under the circumstances, the contract of sale should have been treated by the chancellor as at an end, and the possession of the land restored to the assignee Morgan, and all the rent-notes canceled, because Morgan was in fact renting his own land. We perceive no such equity for the appellees as would permit the purchase money to be paid by the rents, unless the agreement of 1872 is entirely ignored. The judgment is therefore reversed, with directions to restore the possession to Morgan, if not already in his possession, and to cancel the bond for title from

Godseys to Oliver; and for proceedings consistent with this opinion. This is the only branch of the case appealed from.

#### DUDLEY *et al.* v. GODDARD.

(*Court of Appeals of Kentucky.* Nov. 19, 1889.)

##### APPEAL—REHEARING.

Where, on appeal, judgment has been affirmed for appellee on the whole case, a rehearing will not be granted him on the ground that his exceptions on a cross-appeal had not been considered.

Petition for rehearing. For former report see ante, 302.

"Not to be officially reported."

W. G. Dearing, for appellants. J. P. McCartney, for appellee.

PRYOR, J. We perceive no reason for a cross-appeal where the judgment is affirmed for Goddard upon the whole case. If such errors were made as against Goddard, entitling him to an affirmance, although the court below may have rendered a judgment for him on the wrong ground, or upon a pleading that did not justify it, still if other pleadings did justify the affirmance that were stricken from the record, to which proper exceptions were taken, this court will nevertheless affirm the judgment. If the appellee was seeking a reversal or other relief than that given him below, then a cross-appeal would have been necessary.

It is apparent from this record that the appellee paid the purchase-money notes, and held them at the instance of plaintiffs' intestate. His personal representative concedes that he held these notes, but the best evidence of that fact is that he now presents them with the credits indorsed as paid since this money was advanced for them. It is true that the holder might have placed them on the note without the payer's knowledge, but such a fact we cannot assume, in the face of testimony showing payments made by the intestate to the appellee, and the declaration by the intestate that it was appellee's property; nor can we assume, under the circumstances, that the notes were delivered to the appellee for the intestate, but his being the owner of the notes is entirely consistent with all the testimony offered. Petition overruled.

#### MOCOMB v. COMMONWEALTH.

(*Court of Appeals of Kentucky.* Nov. 19, 1889.)

##### BURGLARY—INTENT.

Where the evidence shows that defendant broke into the cabin where the females slept, and followed them thence to the main dwelling, which he also forcibly entered, the verdict of the jury, convicting him of burglary with intent to commit rape, will not be disturbed on the ground that the facts did not justify the finding of the intent as charged.

Appeal from circuit court, Christian county.

"Not to be officially reported."



*Forgy & Bell*, for appellant. *P. W. Hardin*, Atty. Gen., for the Commonwealth.

**LEWIS, C. J.** Appellant was indicted for and convicted of the offense of burglary, committed by breaking into a dwelling-house, with intent to commit rape upon the body of a female who was therein. Evidence of the breaking and entering the particular house, and following the two females who were there to another house, which was also forcibly entered, is full and uncontradicted. But counsel for appellant contends the jury was not authorized by the facts to find the burglary was committed with the intent charged, which is the only ground relied on for reversal. It is not shown, certainly, what was the intent of appellant in breaking and entering the houses, and, being deaf and dumb, he did not attempt to explain, and his conduct was certainly extraordinary,—particularly, in following the two females from the cabin where they slept to the main dwelling-house, occupied by half-dozen persons or more. But, as it is the province of the jury to judge of and determine questions of fact, we do not feel authorized to disturb the verdict, especially as there was evidence tending to show the intent of the burglary. Judgment affirmed.

#### EMBRY v. COMMONWEALTH.

(*Court of Appeals of Kentucky*. Nov. 21, 1889.)

##### MURDER—INSTRUCTIONS—CONTINUANCE.

1. On a trial for murder, where the evidence tends to show that the killing, though caused by defendant's recklessness, was accidental, it is error not to include in the charge an instruction as to involuntary manslaughter.

2. Where due diligence has been used, a continuance should be granted to procure the attendance of witnesses by whose testimony defendant expects to prove that the killing was accidental, and that he and deceased were on friendly terms.

Appeal from circuit court, Lee county.

"Not to be officially reported."

*Edward W. Hines, M. A. Edwards*, and *T. B. Blakey*, for appellant. *P. W. Hardin*, Atty. Gen., for the Commonwealth.

**PRYOR, J.** The negro William Embry was indicted in the Lee circuit court for the murder of Daniel Crouch, and sentenced to be hung. It seems from the evidence that the accused and the deceased, together with others, were engaged in loading a wagon with flour, and, the head of one of the barrels falling out, the deceased and the accused, in a playful and humorous manner, began to throw the flour on each other. The accused gathered up a handful of the substance and threw it on the deceased, when the latter said, "Don't throw no more of that flour on me, Will Embry," and Embry responded by saying, "Don't tell me not to do anything," and cast another handful in Crouch's face. Crouch then threw a handful into Embry's face, when Embry stepped to the water's edge, (they being at the river,) washed the flour from his face, and, returning, drew a

pistol from his pocket and pointed it at Crouch, with his finger on the trigger, saying to Crouch, "You won't tell me to do nothing;" Crouch responding, "Take that pistol out of my face." The accused then turned the pistol towards the ground, and, as some of the witnesses say, began to work the cylinder; and then, raising his arm up, with pistol in hand, "it went off," (to use the language of all the witnesses;) the ball passing through the head of the deceased, killing him instantly. The deceased was in a stooping posture, and as he raised up the pistol went off. The accused testified on the trial, and his statement differs but little, if any, from the statements of the witnesses for the state; the entire proof showing that both of the parties were in good humor. The accused swore that the shooting was accidental; that it was an old pistol, and he had no idea it would fire,—and, from his statement, was much disturbed at the taking the life of his fellow laborer. The accused, according to the testimony, was reckless in the use of the pistol; but, the facts conducing to show that the firing was unintentional, the severity of the punishment requires a careful consideration of the case. The accused was indicted at the September term of the court, and tried during the same term. He applied to the clerk of the court, before the indictment was returned, for a subpoena for witnesses who lived in an adjoining county, and was informed that no subpoena could be issued until the grand jury had acted on his case. As soon as the indictment was returned he had subpoenas issued for his witnesses, and one of them placed in the hands of the sheriff. His witnesses were Black Diamond and Stonewall Jackson, by whom he expected to prove that the shooting was accidental, and that himself and deceased were on friendly terms. The manner of the shooting the defendant himself had stated when examined as a witness, and the only reason for having the absent witnesses present was to show the friendship between the two, and the sorrow expressed at the time by the accused for the death of his friend. What effect the testimony of these absent witnesses may have had on the minds of the jury we are not able to say; and, as the life of the accused is involved in the issue, it is idle to speculate as to what would have been the result if all the testimony had been heard, and particularly when looking to the condition of the accused, and the circumstances surrounding him. Although an ignorant negro, he evidently saw the necessity of having his witnesses present, that the jury might fully understand the case, and to mitigate the punishment, if any had to be inflicted. He had no means of sending for his witnesses; was without money to employ counsel; and hence the necessity of giving to him as much delay as was reasonable, in order that his attorneys, who had been appointed to defend for him, might prepare his defense. He is entitled under the

law to a notice of 10 days to prepare his defense in a civil action, and, while a trial in a criminal case may be had at any time after the indictment, if the witnesses for the state and the accused are present, yet, when witnesses for the state or the accused are absent whose testimony might enlighten the jury on the issue to be tried, and due diligence has been used to obtain them, the case should be continued. The attorneys for the defense were acting, not from any employment by the accused, but from a sense of professional duty only; having been required to make defense for one so unfortunate as not to be able to procure the attendance of his witnesses, or to employ counsel. These attorneys have followed the case to this court; feeling, no doubt, that the responsibility for the result of this trial might attach to them, if no appeal was prosecuted. Without discussing the facts of this case, or even the law when applied to the facts, as there must be another trial, we can only say that an instruction presenting every phase of the case should have gone to the jury; and, therefore, an instruction as to involuntary manslaughter should have been given. Judgment reversed, and remanded for a new trial, and for proceedings consistent with this opinion.

#### VEAL'S ADM'R v. VEAL.

(Court of Appeals of Kentucky. Nov. 21, 1889.)

##### LIMITATION OF ACTIONS—TRUSTS.

In proceedings to settle an estate, decedent's wife was made defendant, and in her answer set up a note executed to her by her husband, and alleged that it was given for money which she had allowed her husband to receive from her father's estate, under an agreement that he would hold it in trust for her, and as her separate estate. The reply denied the making of the agreement, and pleaded the statute of limitation. *Held*, that the admissions of the reply, in not denying the relationship, the amount of money received from her father's estate, and the execution of the note, *ipso facto* established a trust in the wife's favor, and a demurrer to the reply was properly sustained.

Appeal from circuit court, Fayette county.

"To be officially reported."

*Beauchamp & Allen*, for appellant. *Kinhead & Darnall*, for appellee.

HOLT, J. October 1, 1865, Dory Veal executed to his wife, the appellee, (Susan Veal,) his promissory note for \$2,214.78, due one day thereafter. The consideration is not recited in the note. It says, "for value received of her." He died testate in 1888. He devised to her what the law gave her, merely, and to three of his several children the entire remainder of his estate. The will makes no reference to the note. The administrator *cum testamento annexo* brought this action to settle the estate. The appellee, being made a defendant, asserted the note by a proper pleading. Her answer, among other matters, avers that about the time a suit was brought to settle her father's estate her husband agreed with her that if she would allow him to receive what would be coming to her

from it he would hold it in trust for her, and as her separate estate, free from marital rights upon his part; that there was adjudged to her in said suit, as a distributee, the sum of \$2,214.78; that, by reason of the agreement, she by an answer consented and requested that the money be paid to her husband; that the master's report filed in the cause shows that the money was received by her husband; and that in evidence of the agreement he executed to her the note. The record of the suit to settle her father's estate was referred to as a part of her answer, and, by a consent order made in the court below, was made an exhibit in this one. It is not copied, however, in the transcript for this appeal. The appellant has chosen to bring up a part of the record. This he may do, but at his peril. We must, therefore, assume that all of the averments of the answer relative to what is shown by the record of the old suit would be sustained by it, if it were a part of the record before us. The reply denies that the agreement named between the appellee and her husband was ever made, and pleads the statute of limitation in bar of any recovery upon the note. A demurrer to it was sustained, and a judgment rendered, allowing the note as a debt against the estate. It is evident the estate is solvent. No question is therefore presented between the widow and creditors, and the inquiry as to error is confined to a consideration of the pleadings, the note, and its legal effect.

It may now be regarded as a settled rule in this state that such an agreement as that relied upon by the widow will be upheld in equity against the heirs or distributees of the husband, and, under proper circumstances, against even his creditors. *Maraman's Adm'r v. Maraman, 4 Metc. (Ky.) 84; Latimer v. Glenn, 2 Bush, 535.* It must, of course, be sufficiently established. Here it is urged that, the words used in her answer setting forth the agreement having been denied by the reply, the demurrer to it was improperly sustained, and evidence was necessary in support of it. In short, that the case should have proceeded to a trial upon testimony. The reply, however, by a failure to deny, admits that the appellee was the wife of the decedent; the amount coming to her from her father's estate; the receipt of it by her husband; and the execution of the note to her. This admission *ipso facto* establishes a trust in her favor. These admitted facts, in and of themselves, declare that the husband held the fund for the wife. No other reasonable interpretation can be given to them. They indubitably fasten a trust character upon the transaction. He certainly intended something by the execution of the note. It was certainly designed to have some effect. No satisfactory reason can be given for its execution, other than that he intended the fund represented by it to remain the separate estate of the wife. If this had not been the purpose, and the parties intended it to become the property of the husband, then no

note would have been given. As between the husband and wife, it was not necessary that the note, in order to create in her a separate use, should contain words to that effect; and the only reasonable construction which can be put upon the admitted facts is that the parties to the transaction designed a separate use in the wife. The presumption arising from them is conclusive. In and of themselves they establish it. This being so, the plea of limitation is not available. The husband is to be regarded as a trustee of the fund for the wife. He held it for her sole use. This fact he recognized by the receipt of it, and the execution of the note to her; and this trust relation continued until his death, and prevented the running of the statute. *Matson v. Matson*, 4 Metc. (Ky.) 262. The demurrer to the reply was therefore properly sustained, and the judgment allowing the note as a debt against the estate is affirmed.

#### CARTER'S ADM'R v. CARTER.

(Court of Appeals of Kentucky. Nov. 23, 1889.)

##### WILLS—CONTEST—COSTS.

On contest of a will, which is sustained, it is error to tax attorney's fees and costs of contestant against the estate.

Appeal from circuit court, Marion county.  
"Not to be officially reported."

The case was originally appealed to the superior court, where the judgment was affirmed.

*W. B. Harrison*, for appellant. *Avritt & Russell*, for appellee.

PRYOR, J. Sallie Carter, an unmarried woman, died, leaving a last will, by which she disposed of her estate. A sister of the testatrix contested the probate of that paper, and the result was a verdict and judgment sustaining the will. The court below, by its judgment, required the estate of the testatrix to pay the attorney's fees and costs expended by the sister of the testatrix in contesting the will. This was error. There was no more reason for allowing the heir at law her costs, if unsuccessful, in this litigation than there would have been in any ordinary action decided adverse to her claim. She may have had probable cause for doubting the mental capacity of her sister to execute such a paper, or to question the testamentary act upon other grounds; still, this will not authorize the court to require the successful party to pay the costs. The court and jury have said that no legal grounds existed for invalidating the paper, and this appellee, like any other unsuccessful litigant, must pay the costs of the litigation, such as are usually taxed in favor of the one party against the other in ordinary actions; each party paying their employed attorneys. An executor, who has been nominated as such by the will of the testator, must offer that paper for probate, and may expend, when done in good faith, what may be reasonable and proper for

that purpose; and in his settlement, although the paper may be rejected, will be allowed his necessary expenditures. If an executor is to be made individually responsible for his attempt to discharge this plain duty the law imposes on him, it would deter good men from assuming such a fiducial relation, and leave such testamentary papers in the custody of those willing to speculate on the results of litigation. On the other hand, if others than those to whom the testator has confided the control of his estate, or the law has imposed the duty of probating the will, are allowed to contest the validity of last wills and testaments at the expense of the estate, cases would often arise that are now unheard of where circumstances would indicate the necessity of contesting the capacity of the owner to dispose of what belongs to him. The judgment below is therefore reversed and remanded, with directions to set aside the judgment allowing costs and attorney's fees to the appellee, and for proceedings consistent with this opinion. *Gilbert v. Bartlett*, 9 Bush, 49.

#### MUDD v. MULLICAN et al.

(Court of Appeals of Kentucky. Nov. 23, 1889.)

##### BONDS—RIGHTS OF SURETIES.

A claim against the estate of his principal, by a surety, for payment of a bond which is not assigned to him, is on an account, and not on the bond.

Appeal from circuit court, Washington county.

"Not to be officially reported."

Petition for modification of opinion delivered by Judge PRYOR, reported, ante, 263.

*John W. Lewis* and *J. W. S. Clements*, for appellant. *W. C. McChord*, for appellees.

PER CURIAM. We are at a loss to know upon what legal rule counsel for the appellant bases his argument that the claim against the estate of Skidmore is on a replevin bond, and not in the nature of an account. There was no assignment of the bond to appellant, but only a receipt to him from the sheriff acknowledging the payment by the appellant. The estate or the executor then became indebted to the appellant for so much money paid as the surety. This account has been running for near 15 years, and is barred; as much so as a verbal promise upon a sufficient consideration would have been, if entered into between the parties. This case was argued here as if there was a cross-appeal, and one had been prayed in the court below; but this will not avail, because the Code requires the cross-appeal to be prayed here. But when no question is raised here until after a judgment or an opinion by this court, as to the cross-appeal, although it was argued at length by the appellee, ought the court to reopen the case, and deny to the appellee a reversal? It perhaps would be departing from the usual practice to rule that the reversal was proper when no cross-appeal

was granted. In this case, however, the appellant brought two suits,—one to recover one-half the land; and the other to subject the land, or appellees' interest in it, to pay this ancient debt. The cases were consolidated, and the entire subject-matter of controversy was the right of the appellant or the appellees to this land, and, if belonging to the appellees, the right of the appellant to subject it to the payment of this debt. The judgment may be, and perhaps is, severable; but the court has a discretion as to whether it will be treated as a several judgment, under the circumstances of this case. We are disposed to reverse the entire judgment, and, if a rehearing was granted, it would be made to apply to the whole case.

#### VON GUNDY v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 26, 1889.)

##### MURDER—INSTRUCTIONS.

1. On a trial for murder, where defendant has been jointly indicted with others, and it appears that deceased was killed by a blow on the head, in a difficulty with him and others, brought on by defendant, in which the co-defendants participated, an instruction that if defendant struck deceased, not in necessary self-defense, and deceased did not die therefrom, defendant was guilty of assault and battery only, is properly refused.

2. It is also proper, in such case, to refuse instructions based on the idea that where one of several co-defendants is shown to be guilty, but it is not shown beyond a reasonable doubt which one, the jury must acquit, where the jury are instructed that before they can convict they must believe beyond a reasonable doubt that defendant struck the fatal blow, or that one or more of his co-defendants did it, and he advised, aided, or assisted.

3. It is not necessary, to sustain a conviction in such case, to show a conspiracy between defendants, or any of them, to attack or injure deceased, where the indictment contains no such charge.

4. Where the jury are charged that they must believe beyond a reasonable doubt that the blow was struck with an instrument capable of producing death, an instruction on involuntary manslaughter is properly refused.

Appeal from criminal court, Kenton county.

"Not to be officially reported."

*Hallam & Myers and Weeden & O'Neal*, for appellant. *P. W. Hardin*, Atty. Gen., and *W. W. Cleary*, for the Commonwealth.

**HOLT, J.** Jacob Von Gundy complains of his conviction for manslaughter, and sentence of four years' confinement in the penitentiary for killing of Harry Terlau. The indictment is a joint one, for murder, against the appellant, Julia De Pugh and Thomas Flanigan; the last two being brother and sister. It charges that the appellant struck the fatal blow, the other two defendants being present, and advising and assisting, or that Julia De Pugh gave the mortal hurt, with the appellant and Flanigan present, aiding and abetting the killing. No conspiracy is charged. The single question presented is whether the trial court erred in giving or refusing instructions to the jury. It appears that upon the night of the killing, and shortly before the fatal difficulty, the appellant and one Deglow had some trouble at a dance, the former being the aggressor. He

left the room, threatening Deglow. There is evidence that this was repeated after he left the room, and that he, apparently with a view to violence, provided himself with a broken billiard cue. Previous to going to the dance-room he had been in company with his co-defendants at another dance, in an adjoining house. He rejoined them after getting the broken billiard cue; and all of them, together with others of their company, then entered a saloon underneath the hall where the difficulty had taken place with Deglow. After this the latter, in company with the deceased, and perhaps one or two other companions, came down-stairs from the hall, and went into the saloon; one of the number having proposed that they take a drink before going home. With this purpose in view, they went up to the bar; the appellant, Von Gundy, being then seated at a table with the other defendants, and perhaps others, in another part of the room. As they did so, the appellant got up, and advanced to the bar, Flanigan following him. Upon reaching there he made an offensive remark. It was of such a character that Terlau did not understand to whom it was addressed, and he therefore inquired, with some warmth. Von Gundy then said, in substance, to Deglow that he was wanting to fight him, and that the "kid"—referring to Flanigan—could whip him. Flanigan readily assented to this tribute to his ability; and after some further talk, in which the deceased appears to have taken no part, Deglow either drew back his beer-glass to strike Flanigan, or did strike at him; and the latter knocked him down. About this time the De Pugh woman, Amazon-like, advanced to the parties, beer-glass in hand; she having said, just at the beginning of it, that if any one laid hands on any of their party, to kill them. All the parties were drinking more or less. A general *mêlée* ensued. Just after Deglow was knocked down the deceased was struck a fatal blow upon the head, which fractured his skull, and resulted in a few hours thereafter in his death. It does not appear that he was taking any part in the fight, unless an effort, made about the time he was struck, to pull Flanigan off the prostrate Deglow can be so considered. There is evidence that the accused struck the deceased just as he fell to the floor; but whether with his fist, merely, or with something in his hand, does not clearly appear. Other witnesses say that the woman struck the deceased with her beer-glass. Both may have struck him; but, if but one of them, then whether it was one or the other matters not, as it is evident a blow from one killed him, and the other was aiding in the attack. The accused at once left the scene. He told an acquaintance the same night that he had gotten into the worst scrape of his life, and had killed a man by hitting him on the head. He went to a hotel the next morning in the city where the difficulty took place, and got a room to sleep a while, refusing to register or give his name, and then left the state,

but was arrested in Indiana, and brought back for trial.

It is perfectly evident the appellant brought on the difficulty which ended in the death of young Terlau; and, however much he may now regret it, or this court feel for his wife and children, he must atone to the offended law. It is unnecessary to consider the instructions as to murder, as the appellant was convicted of manslaughter only. The jury were told, in substance, that if they believed from the evidence, to the exclusion of a reasonable doubt, that the appellant, in sudden heat and passion, and not in self-defense, struck the fatal blow with a beer-glass, or other instrument capable of producing death, or that Julia De Pugh or Thomas Flanigan, or either of them, did so, and the accused, being present, in sudden heat and passion, and not in self-defense, advised or aided in the commission of the same, they should find him guilty of manslaughter.

Numerous instructions were asked by the appellant, and properly refused. It would not have been proper to have told them that, although they might believe from the evidence, beyond a reasonable doubt, the appellant, not in his necessary, or apparently necessary, self-defense, struck the accused, yet, if he did not die therefrom, they should find the appellant guilty of assault and battery only. The circumstances of the case did not warrant such an instruction. There was no assault and battery in it. The man was slain; and the instructions given limited the right to convict the accused either to his having done the deed not in self-defense, or to advising or aiding his co-defendants to do it. For the same reason the court properly refused the instructions, asked by the accused, based upon the idea that where some one of several defendants is shown to be guilty, but it is not shown beyond a reasonable doubt which one, an acquittal must result. The jury were distinctly told that before they could convict the appellant they must believe from the evidence, to the exclusion of a reasonable doubt, either that he committed the life-taking act, or that his co-defendants, or one of them, did it, and he advised, aided, or assisted him, her, or them in doing so.

It was not necessary to a conviction to show that any conspiracy had been formed between the defendants, or any of them, to attack the deceased, or do him injury. The indictment contained no such charge. It was sufficient if the appellant either struck the fatal blow, or, being present, advised or encouraged or aided another to do so.

The instruction as to involuntary manslaughter was properly refused. The jury had already been told that they must believe from the evidence, to the exclusion of a reasonable doubt, that the striking was done with some instrument capable of producing death. This being so, then, as the striking was intentional,—done with evil intent, and a purpose to do harm,—such an instruction should not have been given. It is evident

the blow was inflicted with such an instrument. Death resulted. The judgment is affirmed.

### GOSS *et al* v. FROMAN *et al*.

(Court of Appeals of Kentucky. Nov. 26, 1889.)

ILLEGITIMATE CHILDREN—EVIDENCE OF ILLEGITIMACY—ADULTERY.

1. A child was born on January 3, 1885. It appeared that the mother had left her husband's house on April 4, 1884, and never saw him again, he dying on June 8, 1884. The mother testified that she had sexual intercourse with her husband on April 3, 1884. The husband was afflicted with Bright's disease and dropsy from November, 1883, until his death. His attendant physician testified that he could not have had sexual intercourse after January, 1884, owing to his swollen condition. This physician visited him on March 31, and April 8, 1884, and frequently before and after, and found him growing worse constantly. The nurse who was with him daily, and slept with him, testified that his swelling did not abate between March 31st and April 8th, and that he did not have sexual intercourse with his wife on April 3d, nor at any other time for several months before. It appeared that husband and wife quarreled frequently before she left him; that the wife often said that he could not have sexual intercourse before his sickness; and that both said that they had ceased such intercourse for at least a year before his death. The wife had sexual intercourse with another man on April 4, 1884, and several times thereafter. A physician testified that the usual period of gestation is from 278 days to 280 days. Other witnesses testified that the husband was seen going about his business in April and May, and that no swelling was observed. *Held*, on claim by the child to the husband's estate, that the child was illegitimate.

2. Evidence is admissible of the conduct and statements of the husband and wife while living together, apparently, in that relation, tending to show non-access, as the presumption of access, from opportunity, is not conclusive.

3. In such case, evidence is admissible of adultery on the part of the wife as corroborating the evidence of non-access.

4. Under Gen. St. Ky. c. 31, § 18, and Id. c. 53, § 8, providing that if a wife voluntarily leaves her husband, and lives in adultery, she shall forfeit her dower and distributable share in her husband's estate, it is not necessary that the wife, in order to forfeit such rights, shall live constantly with one man in adultery during her abandonment of her husband, but it is sufficient if she has sexual intercourse with any man, or men periodically, or when convenient.

Appeal from Louisville law and equity court.

"To be officially reported."

*Burton Vance, Thos. H. Hines, J. M. Wilkins, Abbot & Rutledge, and Brown, Humphrey & Davie*, for appellants. *Helm & Bruce*, for appellees.

BENNETT, J. Minnie R. Froman is the widow of Solomon Froman, deceased. He died testate on the 3d day of June, 1884. Solomon White Froman, son of Minnie R. Froman, was begotten during the wedlock of Solomon Froman and Minnie R. Froman, and was born on the 3d day of January, 1885, about seven months after the death of the putative father, Solomon Froman. Solomon Froman's will made no provision for this after-born child, nor any provision for Minnie R. Froman, the widow. Solomon White Froman claimed the entire estate, under the

statute, as an after-born pretermitted child. The widow renounced the provisions of the will, and claimed her dowable and distributable share of the estate. Issue was joined as to the legitimacy of Soloman White Froman, and as to the forfeiture of the widow's dowable and distributable interest by reason of her abandoning her husband, Soloman Froman, and living in adultery. These issues were decided against the devisees under the will, and they have appealed to this court.

It is to be regretted that questions like these should ever arise in the courts of this commonwealth. Kentucky's matrons are famed for their high sense of virtue and exemplary conduct; and it is to be regretted that the conduct of Mrs. Minnie R. Froman was so radical a departure from this fair fame as to impel us to declare her son, Soloman White Froman, illegitimate. The proof is that Mrs. Froman left the house of her husband, Soloman Froman, on the morning of the 4th of April, 1884, and went direct to Bowling Green, to the house of a Mrs. Wilson, where she remained at least a week, and then returned to Louisville, and took boarding with a certain woman, and there remained as boarder until the death of her husband; never visiting or seeing her husband after she left his house on the 4th of April preceding, although she left him sick of a fatal disease, of which he died on the 3d of June. Mrs. Froman claims that her husband, Soloman Froman, on the morning of the 3d of April,—the day before she left his house,—sent for her to come to his room; that she went, and he then had sexual intercourse with her, getting her with child. If this story is to be believed, the appellee Soloman White Froman, having been thereafter born within the usual time of gestation, is the child of Soloman Froman. But is the story to be believed? Does not the proof disclose a state of case that utterly repels the truth of this story? Does not the proof show a state of case that repels any presumption of sexual intercourse whatever? We think it does. Let us see. We find that Soloman Froman on the 11th day of November, 1883, was afflicted with Bright's disease, and dropsy of the bowels, *scrotum*, and thighs. Dr. Griffith attended on him almost daily, and treated him for these diseases, until the 7th day of January, 1884, at which time he turned the case over to Dr. Holloway, and he attended on Froman almost daily, and treated him for these diseases, until his death. Froman continued to grow worse from the time Dr. Griffith commenced attending on him until he died. That his condition may clearly appear, we quote from Dr. Holloway's testimony, which is as follows: "He had *edema* of the lungs, or asthmatic breathing, and frequent paroxysms of asthma, excessive *bronchitis*. He had general dropsy. This dropsy was more generally displayed by the accumulation in his abdomen; by enlargement of the skin; by the dropsy of the skin of the abdomen, and the loins, back, and thighs; of the skin

of the thighs and legs, and by the general excessive accumulation of the fluid in the *scrotum*, and in the skin of the *penis*,—so much so that the *penis* proper could not be seen upon an examination; only the orifice. He had frequent attacks of vomiting, and obstinate constipation, with loss of appetite. He was mentally dull, unless when aroused by some special cause of excitement. He had what is called 'hebetude.' With or without anodynes, he aroused at my visits in a sleepy way in his bed or chair, and had to be questioned before he would give any answer about his case. When aroused by any special cause of excitement, he was more talkative, but confined himself to the subject that excited him; and then, when that passed away, he would relapse into his condition of hebetude. His urine was very scant, and when boiled with nitric acid it had the appearance of soiled boiled white of an egg. His case was plainly one of Bright's disease in its advanced stages." "This was his condition when I saw him in January, 1884. The dropsical condition of the *penis* and *scrotum* got steadily worse from the first time I saw him; only the orifice of the skin where the *penis* was could be seen. He could not have had sexual intercourse from the time I saw him in January, 1884. In his physical condition it was not possible for him to have emitted *semen* into a woman. It was not possible for him to have had connection with a woman at any time during my attendance upon him. The usual period of gestation is from 278 days to 280 days." In his second deposition, he says: "I am satisfied that he was not physically capable of performing the sexual act. I do not think that it was possible for him to enter a woman so as to bring the semen in the track in such a manner that the *spermatozoa* could find their way to the *ova*. I visited him from the 3d to the 9th of February, excepting the 8th; then from the 10th to the 15th, excepting the 14th. I visited him the 17th, 19th, 20th, 21st, 23d, 25th, 27th, and 1st of March; then the 4th and 7th of March, twice that week; then the 11th of March, once that week; then the 16th, 21st, 22d, 23d, and 27th of March; then the 31st of March and 8th and 11th of April; then the 16th and 19th of April; then 23d and 27th of April and 3d of May, 6th of May, and 10th of May. Then I visited him on the 11th, 13th, 14th, 15th, 16th, of May, and the 19th, 20th, 21st, 22d, 23d, and on the 24th; twice on the 25th; to the 31st, inclusive, twice every day; twice on the 1st of June; and twice on the 3d of June, the day of his death."

From what Dr. Holloway says, it was a physical impossibility for Soloman Froman to get his wife with child at the respective dates that he visited him. Is it possible that the swelling could have abated between the 31st of March and the 8th of April enough to enable him to have sexual intercourse at any time during said period? It may be possible, but it seems to us that such a conclusion

is wholly irrational. The doctor in his almost daily visits before and after said time, found him so swollen as to be incapable of performing the sexual act, and growing worse all the time. So it seems that there is no ground whatever for forming any rational conclusion that the swelling so abated within said time as to enable him to have had sexual intercourse. Such a conclusion would be wholly irrational. But we are not left to conjecture about this matter; for the nurse, who was in daily attendance upon Soloman Froman, and slept with him nightly, during said time, says that his swelling did not abate, nor did his condition at all improve. He also says that he knows Soloman Froman did not have sexual intercourse with Mrs. Froman on the morning of the 3d of April, nor at any other time for several months previous. It also appears that Soloman and Mrs. Froman lived like cats and dogs for several months prior to her leaving his house on the 4th of April; that he usually spoke of her as the "damned dirty bitch," and she of him as "the damned old son of a bitch." He accused her of poisoning him, and she said that she had poisoned him in order to get him out of the way. She also said, time and again, he could not, even before he was taken sick, have sexual intercourse; that she and he had ceased, for at least a year before his death, to have intercourse with each other. He said the same thing. It also appears from the proof that she had sexual intercourse with Ed Ward, in Bowling Green, on the night of the 4th of April, and several other times during her stay in that city, and afterwards with another. It also appears that during her marriage state, before and after her sojourn in Bowling Green, she wrote this Ed Ward unchaste and lascivious letters. The appellees did introduce proof to the effect that, in April and May, Soloman Froman was seen going about his business, and that no swelling was observed, and, from the way that he handled himself, no unusual swelling existed. These witnesses might be mistaken as to the time. Their recollection may be explained upon the ground of mistake as to time; but these doctors and nurses had reason to fix and recollect the time. There is scarcely any room for an honest mistake. Their story is either true, at least as to the swollen condition of this man, or it is a fabrication. From the high character of the physicians, and the apparent honesty of the nurses, the latter fact is wholly improbable.

But it is contended that the proof of the conduct of Mr. and Mrs. Froman towards each other; their expressions of hatred and fear of each other; their statements during the time that they lived together, apparently, as husband and wife, as to non-access,—are incompetent as tending to show non-access. It is also contended that, where parties have opportunities of access,—sexual intercourse,—the child begotten in wedlock is conclusively presumed to be legitimate. We do

not so understand the law as to either proposition. We understand the law to be that where the husband and wife have opportunities of access, there arises a very strong presumption that they did have it; but this presumption may be overcome by clear proof to the contrary, which may consist of proof that the husband was incompetent to have sexual intercourse, or from some cause he had declined to have sexual intercourse with his wife, or she with him. If such proof of conduct, declarations, etc., were not admitted as proof, it would be almost impossible to prove that the husband and wife had declined to have sexual intercourse with each other. It is a fact that husbands and wives, though living in the same house or on the same farm, have often so lived, not as husband and wife, but in fact in a state of separation; so, in the absence of proof of constant watch over them, night and day, it would be impossible to prove non-access unless the proof of conduct, declarations, etc., were admitted as evidence.

It is also contended that the proof of adultery on the part of the wife was incompetent. Where access is either expressly or impliedly admitted, such proof is ordinarily inadmissible, unless it is such proof as unquestionably establishes the fact of illegitimacy; as that of the adulterous intercourse by a white woman, having a white husband, with a negro, and the child born in the usual course of time thereafter was a negro. But where proof shows that the husband is not capable of performing the sexual act, or that the parties have abstained from performing the sexual act, then it is competent to prove adultery on the part of the wife as corroborating the main fact. If Mrs. Froman was shown to be, in fact, a virtuous woman, such fact would create the belief that there was some mistake or false swearing in reference to the incompetency or non-access of her husband, or else incline the chancellor to adopt the theory of the expert physicians, to the effect that though, from the swollen condition of Froman, he could not enter Mrs. Froman's person, yet in his effort to make the entry, his *semen* found its way into the *vagina*, and the appellee Soloman White Froman was the fruit. But the proof of her adultery drives away these conjectures and strained theories, made in behalf of chastity, and corroborates the proof of non-access.

We do not understand that, where the husband's access is either expressly or impliedly admitted or proven about the time the child is begotten, the child's legitimacy is in all such cases conclusive. The presumption, in such cases, is only conclusive where proof may be introduced, *pro* and *con*, as to the question of legitimacy. No probabilities can be weighed and considered. The fact of illegitimacy, in such case cannot be established by the weight of evidence. Nothing short of some fact thoroughly established, and which, when established, cannot be explained away, as the case just mentioned of a white woman



having a negro child, will be allowed to prevail against the presumption. The proof of the illegitimacy of the child, begotten in wedlock, is a direct attack upon the mother's virtue, and an accusation of a wanton violation of her marriage vows, and is a stigma upon the child, and taints its blood, if the charge be true. Therefore, to hold that the mother, thus assailed, could not support her own innocence and honor, and the purity of the blood of her child, by her oath that she was true to herself and offspring by keeping sacred what is enjoined by both divine and human law, and upon the keeping of which the refinement and elevation of the race depend, would be a harsh rule indeed. But, while she is allowed to do this, and in dubious cases she should do this, she should not, upon cross-examination, be allowed to withhold any part of the truth. The whole truth should come, although she would have to disclose acts of adultery.

The General Statutes<sup>1</sup> provide, in substance, that if the wife voluntarily leaves her husband, and lives in adultery, she shall forfeit her right of dower and distributable share in the husband's real and personal estate. This statute does not mean that she shall constantly live with one man in adultery during her abandonment of the husband, in order to forfeit her right of dower or distributable share; but if she admits any man or men to her periodically, or whenever it is convenient or opportunity is afforded, during said abandonment, such conduct constitutes a living in adultery, within the meaning of the statute. It is clear from the proof in the cause, that Mrs. Froman's conduct was as above described, in consequence of which she forfeited her right to dower and distributable share in Solomon Froman's estate. The judgment is reversed, with directions to deny Solomon White Froman any interest whatever in Solomon Froman's estate, and to deny Mrs. Froman any dower or distributable share in said estate, and for further proceedings consistent with this opinion.

#### BLEDSE et al. v. MITCHELL.

(Supreme Court of Arkansas. Nov. 9, 1889.)

##### LANDLORD'S LIEN—NOTICE.

In an action to enforce a landlord's lien on some cotton, defendants testified that they bought it without knowledge that the seller owed plaintiff rent, or was plaintiff's tenant. Plaintiff's witness testified that he told defendants that he thought plaintiff had a mortgage on the cotton, but did not tell them that he had a rent claim thereon. *Held*, that the evidence did not warrant a decree for plaintiff, as it failed to show notice to defendants of the lien.

Appeal from circuit court, Poinsett county; J. E. RIDDIK, Judge.

Action in equity by Enoch Mitchell against W. L. Bledsoe and F. F. Tillery, partners, to enforce a landlord's lien for unpaid rent on two bales of cotton bought by defendants of

plaintiff's tenant. Defendants testified that they did not know that plaintiff had a lien on the cotton, or that the party from whom they bought it was plaintiff's tenant, or that he owed plaintiff any rent. A witness for plaintiff testified that he told defendants that he thought plaintiff had a mortgage on the cotton, but did not tell them that plaintiff had a rent claim thereon. The court found that defendants bought with knowledge of the lien, and decreed a judgment for plaintiff, from which defendants appeal.

*Sanders & Watkins* and *J. D. Block*, for appellants.

PER CURIAM. The decree in this cause cannot be sustained, because the proof fails to show notice to the defendants of the lien of Mitchell. Reverse, and dismiss the bill.

#### PUMPHREY et al. v. PUMPHREY.

(Supreme Court of Arkansas. Nov. 2, 1889.)

##### DOWER—ELECTION BY WIDOW.

Mansf. Dig. Ark. §§ 2583, 2584, provide that "if land be devised to a woman, or a pecuniary or other provision be made for her by will, in lieu of dower," she may elect, and shall be deemed to have elected, such provision, unless within one year after her husband's death she shall enter on the lands to be assigned as dower, or commence proceedings for recovery or assignment thereof. Sections 2594-2598 provide that if a husband devise or bequeath to his wife any portion of his real estate the widow may elect, and must, within 18 months after the death of the husband, execute a deed of release to the heirs,—otherwise she will be deemed to have chosen under the will; also, that the record of the deed shall be sufficient notice of the renunciation of the provision of the will. *Held*, that where a husband devises land and personalty to his wife she is entitled to 18 months to execute the release; and the former statute applies where the husband makes a settlement other than by will, or where he bequeaths personalty alone, or where a provision is made for the wife by another than the husband.

Appeal from circuit court, Grant county; J. B. WOOD, Judge.

Action by Sarah T. Pumphrey against one Pumphrey and one Carroll, her husband's executors, to have dower allotted in the estate of her husband, and to secure what she claimed as her homestead rights. Judgment was rendered by the probate court against appellants and others, and they appealed to the circuit court, where judgment was again rendered against them; and from that judgment they prosecute this appeal.

*Thos. B. Martin*, for appellants. *Ratcliffe & Fletcher*, for appellee.

COCKRILL, C. J. The controlling question on this appeal is whether a widow to whom lands of which her husband died seized have been devised, and personal property bequeathed, by the husband, must, if she desires to take dower under the statute, make her election to do so by entering upon the land to be assigned as dower, or by bringing suit for its assignment within a year after the death of her husband, as provided by sections 2583, 2584, Mansf. Dig., or whether she may do so

<sup>1</sup> (Chapter 81, § 13, and chapter 53, § 3.)

by executing to the heirs a deed of release and quitclaim of the lands devised within 18 months after his death, under authority of sections 2596-2598. The case comes within the terms of either set of provisions, if we look to one without recurring to the other, and the question is, how shall the statute be construed, when all are viewed together? Both the 12 and 18 month limitations are found in the fifty-second chapter of the Revised Statutes of 1838, under the title of "Dower." As the chapter was never published in the session acts of the legislature, we take it to be one of those enacted by the general assembly at the suggestion of the revisors who were appointed to prepare a code of civil and criminal laws under the act of October 6, 1836. The first 17 sections, including the 12-month limitation in question, were copied without material change from the Revised Statutes of New York. They prescribe what lands the widow shall be endowed of, and then provide that if land shall be given or assured in jointure to an intended wife, or a pecuniary provision made for her, in lieu of dower, to which she assents in the manner pointed out by the statute, she shall not be entitled to dower in his lands. *Mansf. Dig.* §§ 2579-2581. It is then provided that if the jointure or pecuniary provision in lieu of dower is made, without the woman's assent, before marriage, or if made after marriage, she shall have the right to elect whether she will take dower in the lands, or the provision that was intended to be in lieu of it. *Id.* § 2582. Then follow the provisions which give rise to this appeal, viz.: "Sec. 2583. If land be devised to a woman, or a pecuniary or other provision be made for her by will, in lieu of her dower, she shall make her election whether she will take the land so devised or the provision so made, or whether she will be endowed of the lands of her husband. Sec. 2584. When a woman shall be entitled to an election under either of the two last preceding sections, she shall be deemed to have elected to take such jointure, devise, or pecuniary provision, unless within one year after the death of her husband she shall enter on the lands to be assigned to her for her dower, or commence proceedings for the recovery or assignment thereof."

Now, if the land is devised to a woman by her husband, the case will plainly fall within the letter of these provisions, if there is nothing else in the statute to indicate a contrary intention; and she would be required to make her election within 12 months after her husband's death, to entitle her to dower. That is the construction the statute has always received in New York. But provisions were added to our law which are not found in the New York statute, and which do not readily harmonize with all that we have borrowed from it, and from that cause confusion arises. Personal property was not the subject of dower at common law, and the New York statute did not extend the right to that species of property. For

that reason, the provisions in relation to the widow's election which we borrowed from the New York statute (which was in turn founded on St. 27 Hen. VIII.; 4 Kent, Comm. 56) do not profess to bar dower, on failure to renounce the will, in any thing except lands. But in our act provision was made, subsequent to these sections, for dower in personal property. It was further provided that if the husband should devise land or bequeath slaves to his wife, and die seised thereof, the provision should be taken in lieu of dower, unless the will declared otherwise; and the bar was not limited to dower in lands, but plainly extends to every species of property of which the widow may be endowed. But, since personalty has been made the subject of dower, doubtless an equitable estoppel would arise to the claim of dower in personalty under sections 2582, 2583, as well as under the subsequent sections. This would be in analogy to the relief given by the courts of chancery from the strict legal construction of St. 27 Hen. VIII. The statute, instead of vesting the widow's right to elect between the land or slaves offered by the husband's will and her right to dower upon the general provisions of sections 2583, 2584, which were broad enough to cover it, specifically prescribes a different time and mode by which she shall evidence her dissent in such cases. It was to be done within 18 months after the death of her husband, by executing to the heirs a deed of release and quitclaim of the lands and slaves provided for her by the husband's will. Sections 2594-2598. Recording the deed was declared to be notice of the widow's renunciation of the provisions of the will. The abolition of slavery has removed the only species of personal property to which these provisions of the statute related, and a devise of lands is all that is now embraced within their terms. We have, then, two several provisions of the same act, apparently prescribing different limitations within which the widow may make her election to take dower instead of the benefits of the will. It is argued that the provisions may be reconciled by construing the 12-month limitation as prescribing the period within which the widow must manifest her election to take dower by entry or suit, and the second as allowing her the full period of 18 months within which to execute to the heirs a release of the lands devised to her. The result of that construction would be only to make a failure to execute the deed within 18 months revoke a previously declared renunciation. But the statute manifestly intends that executing and recording the deed in the manner and within the time prescribed by the statute shall in itself constitute a complete renunciation of the benefits of the will. If it is necessary that the execution of the deed of release should be coupled with the entry or suit prescribed by section 2584 in order to perfect a renunciation, why prescribe that the filing of the deed for record should be notice of the renunciation? The

entry or institution of suit, which, it is argued, are the only evidence of renunciation, would be notice in themselves. As if to emphasize the fact that the execution of the deed in the manner and time prescribed by statute should be regarded as a renunciation, and to distinguish it from the other methods prescribed in section 2584, the statute denominates it a "renunciation by deed." Sections 2597, 2598. But renunciation by deed is confined by the terms of the statute to a devise of lands by the husband to the wife. If a settlement is made by the husband upon the wife other than by will, whether of lands or personalty; or if personalty is bequeathed by the husband to the wife in lieu of dower; or if land is devised, or a jointure or other provision in lieu of dower is made, by another than the husband, such as would put the widow to her election under the English statute,—conditions not likely now to arise,—the limitation of 12 months on the right of election is the only one found in the statute to govern; and the intention to renounce the provision made in lieu of dower in either of these contingencies should be evinced within the time and in the manner pointed out by section 2584. The unambiguous, specific direction of the statute as to the time and manner of making the renunciation when the husband devised land to the wife is inconsistent with the previous general provision as to election contained in that section, and to that extent the general provision must yield to the special. But, as the former covers a wider range than the latter, both may stand and have operation in the manner indicated. It follows that, when lands of which the husband died seised are devised by him to the wife, the widow may within 18 months after his death make her election between the testamentary provision and dower. As one year is the limitation where the testamentary provision of property other than lands is intended to stand in lieu of dower, what shall be the limitation where the husband devises and bequeathes lands and personalty, as was done in this case? The widow renounced the provision of the will by executing to the heirs a deed which was acknowledged and recorded 16 months after the death of her husband. The circuit court declared that her election was in time. That conclusion follows from the construction we have placed upon the statute. When the widow is put to her election between her husband's devise and dower, she must renounce all the provisions of the will, if she wishes to take dower. She cannot take the bequest under the will and get dower in the lands, or hold the lands under the will and get dower in the personalty. *Bolton v. Sigler*, 29 Ark. 429. If compelled to make her election as to the bequest within 12 months, she would be debarred of the 18-months privilege which the statute grants her. Her right to dower in lands is certainly of equal dignity with her dower right in personalty; and there is nothing in the act from which we

should conclude that it was the intention of the legislature to abridge the former right merely because a bequest of personalty is coupled with the devise of land. The provisions of the statute have heretofore been adverted to by the court, but no attempt has been made to reconcile them. *Bob v. Powers*, 19 Ark. 424, is the first case in which either provision is mentioned. That was a suit by a negro for his freedom, determined in 1858. His claim of manumission rested in part upon a will. The point settled by the court was that the executor should hold the slave until the time for the widow's election to renounce a legacy left her by the will had expired. The opinion says that 18 months is the period allowed for that purpose; but the time within which the election should be made was not material in that case,—one year from the death of the testator not having expired when the cause was tried in the circuit court, and more than 18 months having elapsed when it was remanded for a new trial by this court. It was not essential, therefore, for the court to compare the two provisions, and ascertain which should govern; and the one-year provision was not adverted to. In the case of *Bolton v. Sigler*, 29 Ark. 418, on the other hand, the court regarded the 12-month limitation as applicable to the case of a pecuniary provision for the wife made by the husband's will in lieu of dower. The case is in consonance, we think, with the meaning of the statute on that point. The judgment will be affirmed.

#### GOSNELL v. STATE.

(*Supreme Court of Arkansas*. Nov. 9, 1889.)

##### LICENSING DENTISTS—CONSTITUTIONAL LAW.

Act Ark. April 4, 1887, providing that dentists practising within the state shall within three months after the passage of the act obtain a certificate from the board of examiners, is a proper exercise of the police power of the state, and is constitutional.

Appeal from circuit court, Franklin county; G. S. CUNNINGHAM, Judge.

*J. V. Bourland*, for appellant. *M. E. Atkinson*, Atty. Gen., and *T. D. Crawford*, for appellee.

HUGHES, J. Upon an indictment under the act of the general assembly of 1887, (page 259,) regulating the practice of dentistry in this state, appellant was convicted and fined, and appealed to this court. The proof showed that he was a resident of the state, and had been, and was at the date of the passage of the act, practising dentistry in Franklin county; and that he failed to procure a certificate from the board of dental examiners authorizing him to practice the same, in accordance with section 5 of said act, within three months after the passage of the same; and that he practiced dentistry on the 10th of April, 1888. The act was approved 4th of April, 1887. The board was appointed the 6th day of May, 1887, and organized the

28th of said month. After the first meeting, there was no other meeting of the board before the finding of the indictment. By resolution at their first meeting, the board fixed their annual meetings at such time and place as the State Dental Association might hold its annual meetings. The substance of a resolution passed by the board at its first meeting, calling on all dentists to come forward and register, was published in the *Arkansas Gazette*. On the 14th of July, 1887, appellant applied by letter to the secretary of the board to register, and was informed that the time had expired for registration, and that he would have to come before the board and be examined. He afterwards applied to be registered as of July 14, 1887, and was not permitted to register. It is contended that the act deprived appellant of a right to follow a lawful occupation; that it is unreasonable, unwise, and unconstitutional. Whatever may be thought of the hardships the act might work, it was not impossible for the appellant to have complied with section 5 thereof, which provided that "every person engaged in the practice of dentistry or dental surgery within this state at the time of the passage of this act shall, within three months thereafter, cause his or her name and residence and place of business to be registered with said board of examiners, upon which said board shall issue to such person a certificate, duly signed by a majority of the members of said board, and which certificate shall entitle the person to whom it is issued to all the rights and privileges set forth in section 1 of this act." It is not to be presumed that the board would not have acted upon the registration of the name of the applicant. Had it failed to act, it might have been compelled to do so by *mandamus*. A number of states have acts regulating the practice of dentistry and medicine, with provisions similar to the act we are considering, and yet we have found no case in which any of these acts have been declared unconstitutional. On the contrary, they have been repeatedly held to be constitutional by the highest courts. Indiana has a "dentistry act" very similar to this, except that the applicant must show that his diploma is from a college of good repute, or that he has continuously practiced since 29th May, 1879, or he must be examined by the board. See Acts 1887, p. 58. The board is required to meet annually at the time and place fixed for the meeting of the Indiana State Dental Association, or oftener, at the call of any three members of said dental association. The validity of the legislation was called in question in *Wilkins v. State*, 16 N. E. Rep. 198, upon grounds other than those urged here; but the same reasoning applies. The court say: "The legislative judgment that the welfare of the public requires that those practicing the dental profession shall possess the necessary skill and learning, and shall obtain a certificate, is probably conclusive; but, if it were not, the court must take judicial knowledge that it is a profession requiring

skill. The fact that the dentist employs his professional skill upon an important part of the human body is, of course, known to every one, and cannot be unknown to the courts. As this is known, it must follow that it may also be judicially known that one unskilled in the profession may injure the person who employs him. As this is so, then, as we have seen, the legislature may prescribe the qualifications of those permitted to practice the profession. The board of examiners established under the law is the lawfully constituted authority, and from it the certificate required by law must be obtained. The legislature, as the law-making power, has authority to prescribe the method of procedure. Its authority does not end with declaring what qualifications he who enters upon the practice of that profession shall possess. As it has plenary power over the whole subject, it alone must be the judge of what is wise and expedient, both as to the qualifications required and as to the method of ascertaining those qualifications. The courts cannot exercise any supervisory power over the legislature, as long as it keeps within the limits of the constitution. \* \* \* Doubt must be resolved in favor of the validity of the statute. [Citing cases.] As the legislature has exclusive power over the entire subject, it is our duty to uphold the statute, as it comes to us from the legislature with the executive sanction." In *State v. Dent*, 25 W. Va. 1, the constitutionality of a similar act, regulating the practice of physicians and surgeons, was considered. The court say (pages 20, 21:) "Of course, the courts have no right to decide or consider whether the legislature has acted wisely in determining what are the requisite qualifications which one must possess before he can practice medicine, or whether the legislature has adopted a wise mode of determining whether such qualifications are possessed by one who wishes to practice medicine. This is obviously a purely legislative question. \* \* \* If this court should, under any such law and general declarations as to what should be proper functions of government, undertake to declare void an act of the legislature which, according to our notions, violated these indefinite fundamental principles of government, simply because we deemed the legislative action, though within the scope of their authority, arbitrary, unjust, or oppressive, we would ourselves be clearly usurping authority; and I cannot see that the situation of our citizens would be improved by being subject to the arbitrary and unlimited control of the courts. On the contrary, it seems to me that this would constitute the worst of all tyrannies." This case, upon error to the supreme court of the United States, was affirmed. 129 U. S. 114, 9 Sup. Ct. Rep. 231. This doctrine was thus expressed in *Hedderich v. State*, 101 Ind. 564, 1 N. E. Rep. 47: "Whether a statute is or is not a reasonable one is a legislative, and not a judicial, question. Whether a statute does or does not unjustly deprive the citizens

of natural rights is a question for the legislature, and not the courts. There is no certain standard for determining what are or are not the natural rights of the citizen. The legislature is just as capable of determining the question as the courts. Men's opinions as to what constitute natural rights greatly differ; and, if the courts should assume the functions of revising the acts of the legislature on the ground that they invaded natural rights, a conflict would arise which could never end, for there is no standard by which the question could be finally determined." Judge Cooley says: "Nor can a court declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited, or such rights guaranteed or protected, by the constitution." Cooley, Const. Lim. (5th Ed.) 197. At another place this author says: "The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power." Id. 201. In *Richardson v. State*, 47 Ark. 564, 2 S. W. Rep. 187, which was an indictment for practicing medicine without registration as required by statute, Judge SMITH, said: "Such legislation is a valid exercise of the police power of the state. The object is to protect the public health against the impositions of charlatans and empyrics, who pretend to exercise an art requiring skill without a previous special training." It is competent for the legislature to regulate the practice of dentistry and dental surgery in such way as will not deprive the citizens of the right to follow a lawful avocation. While it was and is unlawful to practice dentistry or dental surgery, after the lapse of three months from the passage of the act, without the requisite certificate, the appellant may make his application and proof that he was practicing at the date of the passage of the act, and thereupon he will be entitled to a certificate authorizing him to practice. Affirmed.

#### HAAS *et al.* v. KRAUS.

(Supreme Court of Texas. Nov. 12, 1889.)

##### FRAUDULENT CONVEYANCES.

1. On attachment of certain property as that of plaintiffs' judgment debtor, defendant claimed it under a conveyance from the debtor, which plaintiffs alleged was fraudulent. The conveyance was of a stock of goods, and accounts, made at a time when defendant knew the debtor to be insolvent, gave defendant power to carry on the business in his discretion, and was made to secure certain debts of the grantor mentioned in it, and the grantor supposed that the property conveyed was largely in excess of such debts. *Held*, that the question of fraud in such conveyance should have been submitted to the jury.

2. But it was proper to refuse to declare such conveyance void in law.

Commissioners' decision. Appeal from district court, El Paso county; T. A. FALVEY, Judge.

*Millard, Patterson & Bailey and Hunter & Foster*, for appellants.

HOBBY, J. The appellants, who were the plaintiffs in the court below, caused several writs of attachment to be levied on the property involved, as the property of Ben F. Levy, against whom each had obtained a judgment. The property, which was in appellee's possession, was claimed by him under an instrument executed by said Levy to secure a debt alleged to be due by him to Isaac Levy, and one due the State National Bank of El Paso, and by the terms of which appellee was constituted trustee. Appellants attacked this instrument upon the ground that the property therein mentioned was conveyed by the grantor, Levy, with the intent to delay and defraud his creditors. It is obvious from this that the principal issue was whether the instrument, in connection with all the facts developed, showed that the conveyance of the property was made by the grantor with the intention above stated. Such being the *status* of the case, the court instructed the jury that, "if they believed Levy executed the instrument conveying the property to J. L. Kraus; that he accepted the trust, and took possession; that Levy owed the National Bank and Isaac Levy the sum mentioned; and that the assignment was made for the purpose of paying said debts, with the assent of the creditors mentioned; and the property transferred was not greater in amount than the debts,—they would find for the claimant. If they did not believe that Levy executed the instrument, but that the property at the time of the levy was the property of Ben F. Levy, and in his possession, they would find for the plaintiffs." A charge was asked by the appellants to the effect that, "if they believed that the transfer set up by defendant of the property from Ben F. Levy was made by him with the primary intent of placing such property in such position that it could not be levied on by his creditors, such intent would render the transfer fraudulent and void as to plaintiffs." As there was nothing in the charge of the court presenting this issue, it should have been given, if there was any evidence tending to support the averment of plaintiffs that the conveyance of the property was fraudulent. The evidence established the fact that Ben F. Levy was insolvent at the time of the execution of the instrument; that he was indebted to each of the appellants in the amounts of the judgments respectively obtained by them against him. The instrument was a conveyance by Ben F. Levy to "J. L. Kraus, of El Paso county, of all of the former's stock of goods, wares, furniture, fixtures, etc., situated in the Mindy building on El Paso street, including all of his property in said building, except two horses and one wagon, exempt by law; also all of Levy's notes and accounts set out in a list attached, giving said Kraus possession, with full power to sell and dispose of said goods, wares, etc., on such terms as to him may seem best, and

full power to collect said notes, etc., in trust, to secure and pay off certain indebtedness that I owe as follows: A debt due by me to Isaac Levy, of Chicago, Ill., amounting to about \$715.00, and a debt due the State National Bank of El Paso, amounting to about \$2,600. And said Kraus shall apply the proceeds of the property above conveyed, and of the notes and accounts above transferred, after paying all just expenses of this trust, to the payment of said debt in the following order: He shall pay off first the principal and interest of the entire debt of Isaac Levy; and, second, the principal and interest of the debt of said bank." This instrument stipulated that Kraus should manage and sell said property, and collect said notes and accounts, under the direction of the officers of the said bank, for the benefit of the beneficiaries named. Kraus, the trustee, was Levy's clerk. The property was conveyed about 5 o'clock P. M. The first attachment was levied about dark of the same evening. After the assignment he took possession, and was in possession when the levy was made. An invoice of the goods showed them to be of the value of about \$1,880.15. Articles amounting to about \$65 were omitted. The understanding was that Kraus was to sell as best he could, using his discretion; and until he could dispose of the goods in bulk, or job lots, he carried on the business as other merchants. Kraus did not know Isaac Levy. Knew that Ben F. Levy was insolvent. The list of claims annexed to the instrument amounted to more than \$2,400. Levy thought these claims were of full value when he assigned. The goods were sold for about \$1,600 or \$1,700, which the bank received. No one represented the first beneficiary, Isaac Levy, at the time of the transfer. He knew nothing of it until after the attachment was levied, when he accepted by letter. The instrument in this case, we think, was a mortgage with the power to sell. It conferred upon the trustee large discretionary powers, and conveyed what was supposed by the grantor to be goods and property \$1,000 at least in excess of the debts it purported to secure. It provided that the business might be carried on for such time, and in such manner, as in the judgment of the trustee was beneficial. This fact of itself, it has been held, would have the effect to delay and postpone other creditors for an indefinite period without their consent. *Bump, Fraud. Conv. 415. In Jackson v. Harby, 65 Tex. 710*, where, under an instrument in some of its features similar to this, the issue of fraud was presented by the charge, the court held, in effect, that this issue should have been clearly presented, and not complicated with the issue as to whether there was a conspiracy to defraud. In the present case the charge does not submit the question of fraud in any manner as raised by the pleadings and the proof. The instructions given present issues to the jury about which there was no controversy. The effect of the charge was to direct the jury to find for the

defendant or claimant, because under it the jury could only find for appellants if they believed Levy did not execute the instrument, and that the property was his, and in his possession at the time of the levy. It was impossible for the jury, guided by the facts, to so find, as it was not contended that Levy did not execute the deed, and there was no evidence that he was in possession of the property at the time of the levy. The charge requested should have been given.

There was no error in refusing the special instruction No. 1, asked by plaintiffs below, which was to the effect that the instrument under which defendant claimed the property as trustee, etc., was void in law against plaintiffs in this case. This charge necessarily required the court to determine as a matter of law, without the intervention of the jury, that the conveyance upon its face was fraudulent; that the grantor had executed it with the intention of delaying, etc., his creditors. This conclusion could only have been reached by the court from the language of the mortgage, together with the other facts in evidence disclosing badges of fraud, but which the court could not say were beyond explanation, and which it would have said, if it declared as a matter of law that the mortgage was fraudulent. *Baldwin v. Peet, 22 Tex. 710*. Whether any or all of these badges were sufficient to establish the fact that the conveyance was fraudulent was a question for the jury to decide, guided by instructions from the court, properly presenting that issue. As we have before stated, this, the vital issue involved, was not submitted to the jury; but, instead, they were instructed upon questions about which there was no material controversy, and which were not decisive of the rights of the parties. There are other assignments, but we think what we have said disposes of those involving the controlling questions in the case. We think the judgment should be reversed, and the cause remanded.

STAYTON, C. J. Report of commissioners of appeals examined, their opinion adopted, and the judgment is reversed and cause remanded.

#### SWEETZER *et al.* v. CLAFLIN *et al.*

(Supreme Court of Texas. Nov. 1, 1890.)

#### NEGOTIABLE INSTRUMENTS—ACTIONS ON—EVIDENCE—PLEADING.

1. In an action on a note alleged in the petition to have been executed and delivered to plaintiffs by defendants, a note shown to have been executed and delivered by defendants to a third person, and by him indorsed to plaintiffs, is inadmissible in evidence.

2. An allegation in a supplemental petition that plaintiffs purchased the note is not inconsistent with the former allegation, and does not render the note admissible.

3. Sworn pleas by one of the defendants, denying the execution of the note, and setting up a failure of consideration, which are withdrawn, are not admissible in evidence.

4. Where defendants' goods are sold under attachment in such case, and the proceeds paid into the hands of the clerk, an affidavit and bond for a

writ of garnishment and the writ of garnishment, in a suit by third persons against defendants, are not admissible, as the fund, being in the custody of the law, is not subject to garnishment.

5. It is proper to refuse to permit interrogatories asked by intervenors of one who is not made a party to the suit to be read in evidence, and to take them as confessed on the certificate of the notary that he refused to answer them.

6. It is not error, as against intervenors, to allow defendant to withdraw his pleas and retract a cross-action in reconvention, as intervenors are not thereby precluded from proving the same facts.

Appeal from district court, Marion county:

JOHN L. SHEPPARD, Judge.

Todd & Rowell, for appellants. C. A. Culberson, for appellees.

GAINES, J. This suit was brought by appellees, H. B. Claflin & Co., against Dreeben & Lewis, a mercantile firm composed of Solomon Dreeben and Sam Lewis, to recover an alleged indebtedness of more than \$16,000, evidenced by certain promissory notes, one of which was for the sum of \$8,746.29. A writ of attachment was sued out and levied upon a stock of goods, which was sold by order of the district judge as perishable property, and of which the proceeds, amounting to \$18,750, were paid into the hands of the clerk of the court. Appellants Sweetzer, Pembroke & Co., being creditors of Dreeben & Lewis, also brought suit, and caused a writ of attachment to be levied upon the same goods, subject to the previous levy of Claflin & Co. The Citizens' Bank of Jefferson, also a creditor of the defendants, also brought suit, and sued out a writ of garnishment, and caused it to be served upon the clerk of the court for the purpose of reaching the proceeds of the sale. Sweetzer, Pembroke & Co. and the Citizens' Bank then intervened in this suit, claiming levies upon the fund in the hands of the court, and alleging that the attachment in this case was sued out for the purpose of defrauding the creditors of the defendants, and that the indebtedness evidenced by the note for \$8,746.29 was fictitious and fraudulent. In declaring upon the note the plaintiffs alleged in their petition "that on July 1, 1887, the defendants, under said firm name, for a valuable consideration, made, executed, and delivered to plaintiffs their certain promissory note in writing of that date, whereby, 7 months after date, they promised to pay to the order of themselves \$8,746.29, at 471 Broadway, with current rate of exchange on New York; and thereafter, on the same day, defendants indorsed said note by writing their firm name across the back thereof." The note offered in evidence reads as follows: "\$8,746.29. New York, July 1, 1887. Seven months after date we promise to pay to the order of ourselves eighty-seven hundred forty-six 29-100 dollars, at the 471 Broadway, with current rate of exchange on New York, value received. [Indorsed:] DREEBEN & LEWIS. I. LEWIS." Isaac Lewis, whose name appears upon the note as an indorser, testified on behalf of plaintiffs, in effect, that the note was executed and delivered to him in the city of New York by Sam

Lewis, in settlement of an indebtedness due him from Dreeben & Lewis, which accrued in 1882 by the sale by him to them of a stock of goods, and that after the execution and delivery of the note to him he indorsed and transferred it to H. B. Claflin & Co. for a valuable consideration. The plaintiffs also proved by another witness that the signature of the makers of the note was in the handwriting of Sam Lewis. When the note was offered in evidence, intervenors objected, upon the ground that the execution of the note had not been proved; and upon the further ground that it varied from the note declared on in the petition. The execution of the note was sufficiently proved, *prima facie*, to authorize its admission in evidence; but we are of opinion that there was a variance between the note described in the petition and that offered in evidence, and that for that reason it should have been excluded. The petition declares on a note delivered to the plaintiffs. The instrument with its indorsements indicate, and the evidence showed, that this was not true of the instrument offered. The writing produced was delivered to I. Lewis, and by him indorsed and delivered to plaintiffs. If we had merely the note itself upon which to decide the point, the question would not be free from embarrassment; but the testimony of the witness makes it clear that the note was not executed directly to plaintiffs, and hence is not the note described in the petition. The bill of exceptions shows that the testimony of Lewis was before the court when the note was admitted. The allegation in the supplemental petition of plaintiffs, "that the plaintiffs purchased the same [meaning the note] in good faith, and before maturity," etc., does not alter the averment in the original petition. The purchase of the note is not inconsistent with the allegation that the note was made and delivered by defendants to plaintiffs. They may have purchased it of defendants directly. The admission of the note was error for which the judgment must be reversed.

There was no error in the refusal of the court to admit in evidence the sworn pleas of S. Dreeben, one of defendants, which denied the execution of the note, and set up a failure of consideration. We know of no rule of law which makes them evidence in this case against the plaintiffs. They were formally withdrawn by Dreeben's counsel during the progress of the trial, and could not subsequently be used for any purpose. See *Coats v. Elliott*, 23 Tex. 606.

Neither was it error to exclude the affidavit and bond for a writ of garnishment, and the writ of garnishment in the case of the Citizens' Bank against Dreeben & Lewis. The fund in the hands of the clerk was in the custody of the law, and was not subject to the writ of garnishment. The service of the writ upon the clerk gave no lien upon the fund, and the evidence was therefore irrelevant.

The court did not err in refusing to permit



intervenors to read the interrogatories to one A. Mittenenthal, and to take them as confessed upon the certificate of the notary that he refused to answer them. He was not a party to the suit. Dreeben, in a plea in reconvention, had asked that he be made a party, but so far as the record shows no steps were taken to cite him. He was not made a party to the plea of intervention. He did not appear as a party. The interrogatories were filed to him merely as a witness.

During the progress of the trial S. Dreeben was permitted, over the objections of appellants, who were the intervenors below, to withdraw his pleas, and to retract his cross-action set up in his answer in reconvention; and this action of the court is assigned as error. We think the ruling of the court in this particular was correct. Dreeben had the right to interpose his own defenses, and to withdraw them at will. His action did not preclude the intervenors from alleging and proving the same facts. They acquired no right in his defenses which deprived him of his power to withdraw them.

There is a question raised as to the sufficiency of the verdict, but that question may be obviated upon another trial; therefore we need not decide it. For the error pointed out the judgment is reversed, and the cause remanded.

*BULLIS et al. v. NOYES et al.*

(Supreme Court of Texas. Nov 19, 1889.)

STATUTE OF FRAUDS—LEASES—EXTENSION OF TIME  
—INSTRUCTIONS—ESTOPPEL

1. An alleged extension of a lease of two sections of land did not refer to the former lease, nor depend upon it. New lessees were introduced, and only one of the sections of land was included. The terms were changed, and longer time and new privileges granted. *Held*, in an action by the lessor to recover the land, that it was not an extension, but a new contract, and, being within the statute of frauds, was not binding, unless signed by the lessor.

2. A charge that if the section omitted from the new agreement was found worthless for the purposes for which leased, and was abandoned by the lessees, with plaintiff's knowledge and consent, and he led the lessees to believe that it was eliminated from the contract, it should be considered as so eliminated, is proper.

3. A charge that representations by the lessor that he would extend the time for performance of the conditions of the original lease, made before or after its expiration, on which defendants relied, would estop him to take advantage of their non-performance by defendants, is immaterial error, where all the evidence as to such representations relates to a time before the expiration of the original lease.

4. But a charge that plaintiff would be estopped by such representations to take advantage of non-performance of conditions of the original contract, "by the express terms thereof," is reversible error, where such contract contains no such terms, and the verdict shows that the jury may have considered the alleged extension contract as part of the original, in order to find such terms.

5. Where the pleadings of both parties treat the land sued for as plaintiff's community property, it is not error to charge that it is his community property.

6. It is not error to charge the jury to find in favor of both plaintiff and defendant, against third persons, who are cited and make default.

Appeal from district court, Presidio county; T. A. FALVEY, Judge.

*Wm. Aubrey*, for appellants. *Davis, Beall & Kemp*, *W. S. Wood*, and *A. H. Willie*, for appellees.

HENRY, J. The original petition in this cause was filed in the district court on the 6th day of March, 1885, by Alice Bullis and her husband, John L. Bullis, against the Presidio Mining Company, a corporation organized under the laws of the state of California, and William Noyes, as defendants. The suit was for partition of section 8 in block 8 of surveys made in Presidio county by virtue of certificate issued to the Houston & Texas Central Railroad Company. The plaintiff Alice Bullis claimed to own in her separate right an undivided one-fourth of the survey, and the petition alleged that the mining company owned the other three-fourths interest, by purchase from William R. Shafter, Louis Wilhelmi, and John W. Spencer. A copy of a lease marked "Exhibit B" was made part of plaintiff's pleading, which reads as follows:

"Exhibit B. Agreement made and entered into this 8th day of June, 1882, between Colonel William R. Shafter, Lieutenant Louis Wilhelmi, John W. Spencer, of Presidio county, and Mrs. Alice Bullis, (wife of Lieutenant J. L. Bullis,) of Bexar county, all of the state of Texas, their heirs, administrators, assigns, etc., parties of the first part, and Daniel Cook, of the city of San Francisco, state of California, his heirs, administrators, assigns, etc., party of the second part, witnesseth: That the said parties of the first part do hereby, and by these presents, bond, for the term of one year, unto the said party of the second part, the following described mineral lands, situated in Presidio county, state of Texas: Survey number 6, block number 8, surveyed by the Houston and Texas Central R. R. Co., beginning at the S. E. corner of survey number 1, block number 8, Presidio county, made for the Houston and Texas Central R. R. Co., thence east 1,900 *varas*, thence north 1,900 *varas*, thence west 1,900 *varas*, thence south 1,900 *varas*, to the place of beginning; and survey number 8, block number 8, surveyed for the Houston and Texas Central R. R. Co., beginning at the N. E. corner of survey number 6, made for the Houston and Texas Central R. R. Co., above described, thence east, 1,900 *varas*, thence north 1,900 *varas*, thence west 1,900 *varas*, thence south 1,900 *varas*, to the place of beginning. It is further agreed that the said parties of the first part deliver unto the said party of the second part possession of the above-described property, for the purpose of prospecting and developing the lands for mineral, for the period of one year, as above stated. All work to be done, or necessary machinery, for the purpose above stated to be paid for by the said party of the second part; and in no case shall the parties of the first part be liable for any of the expenditures made by the party of the second part. Should said party of the second part, at the

expiration of one year from this date, or at any time prior, conclude, after having satisfied himself with the development of the property, to demand a deed from the said parties of the first part, then the said parties of the first part agree and bind themselves to execute and deliver to the said party of the second part a good and sufficient deed to the above-described property that is now vested in them, under the following conditions, namely: That the said party of the second part will form, or cause to be formed, two separate mining companies, embracing each of the sections of land above described; the capital stock of each company to contain not less than one hundred thousand shares each. Furthermore, the said party of the second part agrees to pay unto the said parties of the first part the sum of ten (10) dollars for each and every acre of land embraced in the above two surveys; and, further, the party of the second part agrees to give unto the parties of the first part one-fifth of the capital stock of each of the companies mentioned, free of all assessment, until all the necessary machinery is erected and paid for, and the mines placed on a paying basis. It is further agreed by the party of the second part that if, after having thoroughly prospected the property, he concludes not to complete the purchase, he will surrender possession to the parties of the first part, with all work and improvements placed on the same, free of all expenses to the parties of the first part. In witness whereof we hereunto set our hands and seal, the day and year first above written. [Signed] WILLIAM R. SHAFTER. [L. s.] LOUIS WILHELMI. [L. s.] JOHN W. SPENCER. [L. s.] JOHN L. BULLIS. [L. s.] ALICE BULLIS. [L. s.]

The petition charged that defendants entered into possession of the land under said lease, but had failed to comply with its terms. A writ of injunction was issued against defendants upon the original petition, which still remains in force. The cause came before this court on appeal, and is reported in 68 Tex. 581. After the reversal of the cause, the plaintiff John L. Bullis amended his petition in the district court, alleging the death of his wife after the institution of the suit, intestate, and without issue or heirs of her body. The amended petition alleges that the one-fourth undivided interest in the land sued for was acquired, by purchase from the state of Texas, by said John L. Bullis, during the existence of his marriage with said Alice; and that, though the title was taken in the name of said Alice, the purchase money was paid with community funds of the said John L. and Alice Bullis. The pleadings of defendants also treat the interest sued for by plaintiff as the community property of himself and his deceased wife. Plaintiff's amended pleadings charge that defendants failed to comply with the conditions of said lease within one year from the date thereof, and that they continue to hold possession of the whole of said land. Defend-

ants answered, praying that certain persons named, and alleged to be the mother, sisters, and brother of Alice Bullis, deceased, be made parties to the suit; and *scire facias*, making them parties, was accordingly issued and served upon them. Defendants further pleaded: That Daniel Cook, in making with John and Alice Bullis the agreement called "Exhibit B," acted for himself, Seth Cook, William Willis, and John F. Boyd, and that each of them was equally interested in the subject-matter thereof. That, under and in pursuance of said lease, Cook and his associates entered upon the tracts of land therein named, and commenced to work upon and explore the same for minerals. That soon after the entry of said parties it was found that said section 6 was not satisfactory; and the possession of the same was by consent of all parties returned to Bullis and associates, and all the conditions of the lease as to section 6 were by mutual consent waived. That Cook and his associates continued in possession of section 8, and were then in possession of the same. That immediately upon their entry upon section 8 Cook and his associates commenced prospecting and working therein, and so continued at great expense, and at the end of the year mentioned in said agreement had paid out and expended in the work of prospecting and developing the mineral in said land the sum of \$24,000, or thereabout, without return. That at or about the end of said term said Shafter, Wilhelmi, Spencer, and Bullis were anxious that Cook and his associates should not abandon said purchase, but should continue to work on said land for an extended term of six months, in order to find sufficient mineral to induce them to complete their purchase. That all said parties represented that at the expiration of such extended period, they would convey said land; and, induced by such representation, and relying upon same, Cook and his associates continued to work on said land and prospect for minerals, and did in said period of six months succeeding the expiration of the year mentioned in said lease expend \$4,000, without return. That during said period of six months Cook and associates concluded to complete the purchase of said land, and caused to be organized the defendant Presidio Mining Company, with a capital of 100,000 shares, and on December 8, 1883, tendered to said Shafter, Wilhelmi, Spencer, and also to said J. L. Bullis, \$10 for each acre of land in said survey, and one-fifth of the capital stock of said corporation. That Shafter, Wilhelmi, and Spencer accepted the tender, and made a conveyance of their three-fourths interest in said land to defendant company; but Bullis and wife declined said tender. And that the refusal of Bullis and wife to accept said money and stock, and make a transfer of their interest in said land, operated as a fraud upon said defendant corporation. Further, that on or about June 1, 1883, Seth Cook and William Willis, acting for themselves and their associates, being in

possession of said section 8, and engaged in working same, for the purpose of ascertaining its value for minerals, said Bullis made an oral agreement, which was reduced to writing, but not signed by the said Bullis, and which agreement is as follows: "This agreement, made this \_\_\_\_\_ day \_\_\_\_\_, A. D. 1883, between William R. Shafter, Louis Wilhelmi, John W. Spencer, of Presidio county, state of Texas, and J. Bullis and Alicia Bullis, his wife, of Bexar county, said state, of the first part, and Seth Cook and William Willis, of San Francisco, state of California, of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of \$1, to them in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, for themselves, their heirs, executors, administrators, and assigns, do hereby grant, covenant, and agree to and with the parties of the second part, their heirs, executors, administrators and assigns, that they, the parties of the first part, will, by their deed or deeds, good and sufficient in law, grant, bargain, sell, and convey to the parties of the second part, their heirs or assigns, free from incumbrance, all and singular the following described mineral lands, situated in Presidio county, state of Texas, to-wit: Survey No. 8, block No. 8, surveyed for the Houston and Texas Central Railroad Company, beginning at the north-east corner of survey No. 6, made for the Houston and Texas Central Railroad Company, thence east nineteen hundred (1,900) *varas*, thence north nineteen hundred (1,900) *varas*, thence west nineteen hundred (1,900) *varas*, thence south nineteen hundred (1,900) *varas* to the place of beginning, with the hereditaments and appurtenances, upon the payment, by the parties of the second part to the parties of the first part, at the San Antonio National Bank, in the city of San Antonio, state of Texas, at or before the hour of 4 o'clock in the afternoon of the 8th of December, A. D. 1883, of the sum of \$10 per acre for each acre of said lands, and the delivering at the place aforesaid, and at or before the date aforesaid, of certificates, properly issued or indorsed, for one-fifth of the shares of the capital stock of the corporation, to be organized under the laws of the state of California, for the purpose of acquiring and holding said mineral lands, of working in and upon the same, and of reducing the ores therefrom. The capital stock thereof shall not be divided in any number of shares less than one hundred thousand, and which said shares, so delivered to the parties of the first part, shall not be subject to any assessment until all the necessary machinery is erected and paid for, and the mine placed on a paying basis, and a dividend declared from the net earnings. The parties of the second part are vested with the possession and right of possession of said mineral lands for and during the period aforesaid, and the right and privilege of working on, prospecting, and developing the

same, and of extracting and taking away, transporting and causing to be reduced, ore, rock, and earth therefrom, in quantities sufficient for milling and furnace test. The failure of the parties of the second part to make the payment and to deliver the certificates for the shares of stock aforesaid, or either, shall be a forfeiture of any right on their part to the deed aforesaid, and deemed an abandonment by them of this agreement, and election on their part to decline the option herein given them to complete the purchase of said land; and thereupon they will surrender any possession they may have of said premises, and of all their workings thereon, free of any debt incurred by them, and this agreement, and all liability hereunder, shall cease and determine. In witness whereof the said parties hereto have hereunto set their hands and affixed their seal, the day and year first herein written. WM. R. SHAFTER. [Seal.] LOUIS WILHELMI. [Seal.] J. W. SPENCER. [Seal.] SETH COOK. [Seal.] WILLIAM WILLIS. [Seal.]"

The following additional clause appears in the paper following the acknowledgment of Spencer: "It is understood and agreed that the parties of the first part do not warrant the title by them to be granted to the aforesaid premises against any title or claim other than their own, nor will they be responsible to the parties of the second part for any damages arising out of the assertion of any such other title. As witness the hands and seals of the parties hereto, at San Francisco, this 5th day of June, 1883. WILLIAM R. SHAFTER. [Seal.] LOUIS WILHELMI. [Seal.] SETH COOK. [Seal.] WILLIAM WILLIS. [Seal.]" That on or about June 1, 1883, Bullis agreed to execute said agreement, and that he would in all respects comply with the terms and conditions thereof, and that, if Cook and his associates could go on with their work in said section 8, he would act in regard thereto just as if said contract was signed by him. That, induced thereby, Cook and his associates remained in possession of section 8, and expended various sums of money in working upon and developing and ascertaining the mineral value thereof. That afterwards Cook and his associates formed a corporation, to-wit, the defendant, and assigned thereto their said agreement, and did thereafter make said tender of money and stock to said Bullis. That upon the execution of the last agreement by Wilhelmi, Shafter, and Spencer this defendant continued to work in and upon said land, and did erect all the necessary machinery, and placed the mine on a paying basis, at an expense of \$22,000 or thereabout. That Bullis had full knowledge of the possession of said land by Cook and his associates, and defendant corporation, and saw, without objection, the expenditure of \$50,000 by Cook and associates in improving and developing said land. Defendant prayed for a decree ordering the execution of a deed by said Bullis to his one-fourth undivided interest in said section, or, upon his

refusal so to do, that the title to such interests be decreed to be in said corporation.

September 26, 1887, plaintiff Bullis filed his second supplemental petition, averring a general denial of the allegations of the cross-plea of defendants; a special denial that defendants ever performed any one or all the conditions of the lease, Exhibit B, on or before June 8, 1883, or at any other time; that Cook and his associates expended \$24,000, or any other sum, in perfecting and developing the mineral in section 8 before June 8, 1883; that Cook and his associates were induced by plaintiff to continue work on section 8 after June 8, 1883; that plaintiff ever made any representation or request to Cook and his associates, or to defendants; or, further, plaintiff denied any release from the agreement of the obligations of Cook and his associates concerning section 6, or any waiver of such obligations in any manner, or any extension, or promise to extend the time for the fulfillment of the obligations imposed by lease, Exhibit B, or any promise to execute the so-called "Extension Agreement." In this pleading plaintiff further alleged: That he had always refused to waive any of the stipulations of lease, Exhibit B. That he had refused to extend the time for the performance of its conditions, or to make any new agreement in regard thereto. That May 30, 1883, upon plaintiff's declining to extend the time for the execution on the part of defendants of Cook's obligations under Exhibit B, the defendants voluntarily abandoned all their rights, duties, and obligations under lease, Exhibit B, and voluntarily left off all work and labor on said land, and gave notice to plaintiff that they had "ceased work," but intended to hold possession. That about that time, or soon afterwards, the identical parties formed another company called the "Cibolo Creek Mill & Mining Company," and became the sole owners of all the stock thereof. That the organization of the last company was a device to cripple and render valueless stock in the Presidio Mining Company for all time to come. That, with this object, defendants, in the name of said Cibolo Creek Company, purchased a tract of land contiguous to section 8, and thereupon erected a stamp-mill, for the purpose of reducing ore from the mine of the Presidio Mining Company. That defendants made no effort to secure water in section 8, this section being without living surface water, but, on the contrary, bought up the nearest and only accessible surface water to section 8, in the name and as the property of the Cibolo creek corporation, and thus cut off all chances for water to defendant company, and by this action rendered any stock in the Presidio Mining Company wholly valueless. That all these acts of the defendants were in violation of the provisions of Exhibit B, because (1) thereby the shareholders of the Presidio Mining Company were, as such, deprived of all interest in the stamp-mill, and other machinery erected to reduce ore in section 8,

but not on the land embraced in section 8; (2) thereby the Presidio Mining Company was left at the mercy of the Cibolo Company, not only for its productive capacity, but its very existence; (3) thereby the Cibolo Milling Company was enabled to charge such tariff in the reduction of ore from the mine of the Presidio Mining Company as to render its output valueless; (4) thereby the Cibolo Creek Company was enabled at any time to cut off the water supply from the Presidio mine, not only for mining purposes, but to supply the wants of miners and animals at work in the mine. And that the said shares of stock plaintiff was to receive under Exhibit B constituted the chief consideration for the making of said lease, Exhibit B, and that he should not be compelled to receive stock that was valueless.

There was a verdict and decree for the defendants.

The evidence in the record as to what was done in and about the performance of the stipulations of contract styled "Exhibit B," and as to whether plaintiff ever agreed to an extension of time, and about what was done by the other contracting parties, under the influence of his acts and promises, inducing them to believe that he would not insist upon its forfeiture at the expiration of the time named in said contract, is quite voluminous, and somewhat conflicting. It shows beyond controversy that Daniel Cook and his associates, Seth Cook, William Willis, and John F. Boyd, had, before the end of the year named in the contract, done much work in the way of prospecting both sections 6 and 8, with the result of satisfying them to abandon section 6, which they accordingly did, with the knowledge and consent of plaintiff, and of leaving them undecided as to section 8, where the prospect was proving much better. A conflict about the title to section 8 existed. Some negotiations about getting this conflict settled by the withdrawal and cancellation of the adverse title were being conducted by plaintiff, and for a time he was led to believe that it would be done. About the expiration of the year fixed for the performance of the contract, however, plaintiff ascertained that the conflicting claim to the land would not be voluntarily withdrawn; and he shortly afterwards instituted a suit against the parties holding it, which eventually resulted in a judgment sustaining his title. Plaintiff, previous to the expiration of the year's lease, which occurred on the 8th day of June, 1883, expressed to the agents of the lessees, as well as to his own co-tenants, his willingness to extend the time for the development of the mine. Each of his co-tenants did so, one or more of them being particularly urged by him to consent. Plaintiff testified that he made all such representations under the influence of his belief, from statements made to him by the agent of the owner of the adverse claim to the land, that such claim would be surrendered. He is not contradicted in this respect. There is no

controversy as to the fact of his having made known to the agent of the lessees, before the year expired, that unless the controversy about the title was removed he would not agree to an extension, and thereby subject himself to being sued twice,—once by the lessees, and again by the adverse claimants of the land. The record makes it clear that the lessees did not comply with the terms of the contract evidenced by Exhibit B, and that all previous negotiations between plaintiff and the lessees were superseded and merged in what here follows: About the 20th of May, 1883, the defendant William Noyes, acting as agent of the lessees, was furnished by his principals with the paper above set out, and which is referred to in the proceedings as the "Extension Contract," for the purpose of procuring to it the signatures of plaintiff and his co-tenants. What occurred with plaintiff is detailed in the evidence of said Noyes, and is, in substance, that he met plaintiff in the road, and read to him the paper; and he, replying that it was all right, directed the witness to get Spencer's signature to it, and promised to meet witness at Ft. Davis, and sign it himself. This witness next saw plaintiff at Ft. Davis, about the 29th or 30th of May, when he declined signing the paper, because the party claiming the adverse title had refused to surrender it, and he was therefore afraid that he would subject himself to a lawsuit from his inability to make title. Noyes reported the refusal to Willis, one of Daniel Cook's associates in the lease, who was then in California, and about the 3d day of June received a reply from him, by telegraph, to the following effect: "Use every exertion to obtain Bullis' signature to the extension. He agreed with Wilhelmi and Steinberger to sign it, and is honorably bound to do so. Has Spencer signed? Meanwhile, cease work, and hold possession of the premises until arrival of Steinberger, some time in June." Witness showed this telegram to plaintiff, and had another conversation with him about the extension. He said to witness that the company had done well there, and he was anxious to have them continue, and he hoped they would not give up, as it would injure the prospects of other property he had there; that he had other property there that he would like to have the company take, and that he would give them any section they wanted, on the same terms, but that, the title of section 8 being in conflict, he did not want to sign any contract about that until the title was clear, because he was afraid that on the 8th day of December he would not be able to give a title, and then the company would sue him. He then said he would sign an agreement, provided the company would insert in it a clause making him free of all damages if his title should prove imperfect. He said he would sign the extension agreement read to him as above, if a clause to that effect should be inserted in it. Witness then, on June 4th, sent a telegram to Willis, having first

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shown it to plaintiff, who said it contained his proposition. It was in the following words: "Bullis will not sign second contract, but offers to sign one contingent on his success in suit to settle title, which he will bring immediately. In other respects, says contract is satisfactory. If his proposition is accepted, forward papers to him at 423 South Flores street, San Antonio." Willis answered this telegram as follows: "New contract, in accordance with your telegram, will be forwarded to Bullis at San Antonio by June 14th." Witness testified that he said to plaintiff: "Provided we go on with this mine, will you agree to act, as regards Seth Cook and William Willis, just as if that contract had been signed?" to which he answered, "Yes." "Will you promise me that you won't at any future time take advantage of the fact, or raise the question of my not tendering you the money?" He answered, "Yes." The last conversation the witness had with plaintiff prior to his departure from the mine was, witness states, when plaintiff was ready to leave, when he asked him about the contract, and plaintiff replied that he would sign it when he got to San Antonio, if he received it with the exemption clause added; that he then said he hoped the company would continue prospecting, and not give up section 8. The first time witness heard of plaintiff's objecting to the continuation of the company's possession of and working said section was in July, 1884. Plaintiff's own evidence shows that he received the paper styled the "Extension Contract," with the added clause in it, at San Antonio, about the 10th day of June. On the 27th June, 1883, plaintiff returned the agreement to William Willis, unsigned by him, and with a letter assigning the refusal of the parties claiming a conflicting interest in the land to surrender it as a reason for his refusing to sign the proposed contract. Shafter, Wilhelmi, and Spencer signed the paper called the "Extension Agreement," and subsequently conveyed their interest in the land to the Presidio Mining Company. The money and stock stipulated by the said agreement were paid to Shafter, Wilhelmi, and Spencer; and on the 8th day of December, 1883, \$600 in money and 5,000 shares of the stock of the Presidio Mining Company were deposited for plaintiff in the San Antonio National Bank, to be delivered when he should make to the mining company a deed for his interest in the land that should be satisfactory to the attorney of the mining company.

On the first appeal this court virtually decided that section 8 was the community property of Bullis and wife, and not the separate property of Mrs. Bullis, as plaintiffs then contended. It was also then decided that time was of the essence of the contract evidenced by the paper styled "Exhibit B." The court then approved a charge virtually holding that the time for the performance of the original contract could be extended by a

verbal agreement. This view of the law is, we think, sustained by the authorities referred to in the brief of appellees' counsel. *Cummings v. Arnold*, 3 Metc. 486; *Stearns v. Hall*, 9 Cush. 31; *Baker v. Whiteside*, Breese, 174. On this appeal appellants strongly contend that a contract required by the statute of frauds to be in writing can only be extended in writing, and cite authorities to sustain that view. On the other hand, appellees contend for what we consider the better sustained proposition, that the time for the performance of such an undertaking may be extended by a verbal agreement. It seems to us, however, quite clear that, whatever negotiations and representations there may have been between the parties previous to the proposal made by appellees to appellant that he should sign the second contract, they were not considered satisfactory by either party, and were not acted upon by either. It is beyond dispute that after all such representations had been made appellees caused to be prepared, and presented to appellant for his signature, the paper called by them the "Extension Contract," as embodying their proposition and agreement. Appellants, before the expiration of the time limited by the first contract, refused to sign the new one; and then, and because of such refusal, appellees ordered the work to be stopped, and continued to negotiate with appellant, not to get him to extend the time mentioned in the original contract, but to induce him to sign the new one. The pleadings of appellees, we think, clearly show that they base their defense, as well as their right to recover in their cross-action, upon appellants' promise to be bound by the terms of the contract mentioned in the so-called "Extension Paper," and to execute it as it read when the final provision, releasing him from warranting his title, was added. We may add that we think it is clear that the case made by the evidence shows that the reliance of appellees was not based on any promises or representations made by appellant previous to the presentation to him of the second contract for his signature, but upon his oral promise to sign the second contract; and that, instead of appellees proceeding to expend money and develop the property after the expiration of 12 months, on the faith of representations made by appellant previous to the presentation to him of the second contract for his signature, they ceased to prosecute such work, and distinctly announced to him that they would not proceed with it, except upon the terms mentioned in the second contract, nor unless he would bind himself to that. The negotiations of the parties culminated in the offer by appellees to appellant of the paper called by them the "Extension Contract," and the controlling question in the case is, did appellant bind himself to perform the terms of that contract? Whatever negotiations, representations, or promises may have been previously made, they cannot have a controlling, or indeed any, effect upon the decision of the case. The appellant never

signed the second contract; and, if it was of such a nature that he did not become bound by its provisions by promising to sign it, or by promising to perform them without signing it, the jury should have been so instructed. We do not think that the question simply was whether the time for performance of the original contract had been extended for six months. If appellees were satisfied with the terms of the original contract, and only desired further time to determine about their accepting it, it would have been easy for them to so specify, and to confine their proposition for an extension to that purpose. A comparison of the two contracts will show that they did not do that. It is evident to our mind that they not only wanted a longer time, but they wanted a different contract, which they proposed to procure under the guise of an extension. The terms of each contract are distinct and complete within itself. The second contract not only does not depend upon the first for its application or construction, but it no more refers to it than if the first never had existed. The second party in the first contract is Daniel Cook. In the second, the parties of the second part are Seth Cook and William Willis. The first contract has reference to two sections of land; the second, to only one. The first stipulated that the party of the second part should create and convey to the first party stock in two corporations, without specifying under what jurisdiction they should be created, while the second undertakes to create and convey stock in one corporation, to be created under the laws of the state of California. The first gives to the second party possession of the property until the 8th day of June, 1883, "for the purpose of prospecting and developing the lands for mineral;" the second grants the possession to the parties of the second part until 4 o'clock in the afternoon of the 8th day of December, 1883, with the "right and privilege of working on, prospecting, and developing the same, and of extracting and taking away, transporting, and causing to be reduced, ore, rock, and earth therefrom, in quantities sufficient for milling and furnace test." The first contract stipulated that if the second party concluded not to complete the purchase he would "surrender possession to the parties of the first part, with all work and improvement placed on the same, free of all expense to the parties of the first part;" while the second provided that if the second parties declined the option given them to purchase they would "surrender any possession they may have of said premises, and of all their workings thereon, free of any debt incurred by them, and this agreement, and all liability hereunder, shall cease and determine." Appellees claim performance now by reason of a deposit of money and shares for plaintiff in a San Antonio bank,—a privilege given them by the second, but certainly not existing under the first, contract. We feel compelled to treat the second contract as a distinct and independent undertaking, and not a mere agree-

ment for the extension of the time of performance of the first one. So treated, we think it was clearly within the statute of frauds, and appellant, not having signed it, was not bound by it. Appellant requested the court to charge the jury: "That the paper before you in evidence, called variously an extension of Contract B and also a new contract, not being signed by plaintiff, is in law no contract, so far as John L. Bullis is concerned." The court refused to give the charge, and committed, we think, an error, not only in the particular instance, but in every instance when, in different form, the same question was passed upon. Without considering it useful to mention in detail the charges given by the court, and discussed as objectionable in appellant's brief, we think it sufficient to say that the right of defendants to recover under the pleadings and evidence now shown by the record ought not to have been predicated in the instructions to the jury upon any representations or promises made by appellant previous to the negotiations with regard to his signing the paper designated the "Extension agreement."

The court charged the jury: "That if you believe from the evidence that John L. Bullis, before or after the time mentioned in said Exhibit B, represented to the agents [of defendants] that he would extend the time of the performance of the conditions of said instrument for six months, and that defendants, acting upon said statements and promises, and induced thereby, during the said six months did continue to work and develop said mine, and did at the expiration of said six months comply with the terms of said contract, by forming said corporation and issuing 100,000 shares of stock, as required in said instrument, and did at said time tender to said plaintiff, or to said Alice Bullis, (the wife of said plaintiff), the said amount of 5,000 shares, and the sum of \$10 per acre for each acre of plaintiff's fourth interest in said section 8 in block 8, and you further find that section 6, mentioned in Exhibit B, was abandoned, as above explained, then you will find that plaintiff is estopped from taking advantage of defendants' non-performance of the conditions of said Exhibit B in that regard, by the express terms thereof. In which case you will find for the defendants." This charge is objected to because of the direction to consider representations made after the time mentioned in Exhibit B, and because of its reference to the "express terms of Exhibit B," when that paper contains no such terms. In view of the fact that all of the evidence relates to a time before, and none to a time after, June 8, 1888, the first objection may be treated as pointing out an immaterial error. The other objection points out an error that may have exercised a material influence on the verdict. As Exhibit B does not contain any express terms estopping appellant from taking advantage of defendants' non-performance of its conditions, the

jury may have believed that this charge authorized them to look to the paper called the "Extension Contract" to find such terms. In fact, the verdict found by the jury, in the following language: "We, the jury, find for defendants; they to pay plaintiffs \$1,600 purchase money and 5,000 shares of stock in the Presidio Mining Company, according to contract extension, Exhibit B,"—indicates that the jury looked at the second agreement as being part of the first one. We can see no proper application to the real issues in this cause of so much of this part of the charge as in general terms refers to defendants' continuing to work and develop the mine during six months' extended time on account of inducements and promises made by plaintiff. We do not understand defendants' pleadings as setting up a case for the specific performance of a verbal contract to convey land; nor do we find in the evidence a state of facts authorizing such a decree. This charge, if it was upon that issue, would be entirely insufficient; and upon any other aspect of the case, as now presented, it was inapplicable and misleading.

As the pleadings of both parties treated the undivided interest in the land sued for by appellant as his community property, it was not error for the court to charge, as it did, that it was community property. The court ought not to make an issue not made by the pleadings.

It is complained that the court erred in charging the jury to find in favor of both plaintiff and defendants, against the heirs of Mrs. Bullis, who, having been made parties and duly cited, made default. We find no error in this. They do not complain.

The court charged the jury, in substance, that if defendants found section 6 was worthless for mining purposes, and work on it was abandoned by Cook and his associates, with the knowledge and consent of plaintiff, and that he led Cook and his associates to believe that said section 6 was eliminated from the contract, they should consider it as so eliminated. We think this charge was correct. The charges on the subject of section 6 were as favorable to appellant as he had a right to ask.

We fail to comprehend what proper connection the building of a mill by another corporation, organized by defendants upon another section of land than the one in controversy, can have with the issues in this case. The fact that defendants may use their controlling influence in the corporation formed for the purpose of working the mine on the land in controversy, to prevent a mill from being erected on it, so as to enable them to divert the profits of milling the ore found on it to a mill entirely owned by themselves, does not affect the question. The remedy for a wrong of that character must be sought, if at all, when it arises. We do not think that the objections to the form of the verdict are well taken. The judgment is reversed, and the cause is remanded.



## WATSON v. STATE.

(Court of Appeals of Texas. June 12, 1889.)<sup>1</sup>

## MURDER—INSTRUCTIONS—REMARKS OF COUNSEL.

1. The words "acted together," in an indictment charging that defendant and B. acted together in murdering deceased, are surplusage, and not descriptive of the offense; and it is not error to charge that defendant would be guilty if he, "acting by himself or with" B., killed the deceased.

2. A charge that the jury are to judge whether defendant, if present at the killing, acted as principal, "from the surrounding circumstances in proof, such as companionship of the parties and the conduct of defendant at, before, and after the commission of the offense," is not an expression of opinion on the weight of the evidence.

3. Defendant cannot complain of a charge that if the jury did not believe the defendant was present at the time of the killing, they should acquit him, where the defense of *alibi* has not been interposed by him.

4. Objections to remarks used in argument by the state's attorney must be interposed at the time. They cannot be raised for the first time on motion for new trial.

5. Papers, brought up with the record, which constitute no part of the transcript, will not be considered on appeal.

Appeal from district court, Robertson county; HENDERSON, Judge.

John Watson was convicted of murder in the second degree, and appeals.

*Simmons & Crawford*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. It is charged in the indictment that defendant and one Brown "acted together" in murdering the deceased. The court instructed the jury that "if the defendant, acting by himself, or acting together with one W. R. Brown," etc., killed the deceased, etc. Defendant excepted to this instruction, upon the ground that the indictment did not charge him severally with the commission of the murder, but charged that said murder was committed jointly by Brown and himself; and that, therefore, said instruction was inapplicable and unwarranted. We do not regard the exception as well grounded. If the indictment had simply charged that defendant and Brown committed the murder, unquestionably, a conviction under it would be sustained upon proof that he alone committed it, or that he acted together, as a principal, with Brown, or with any one else, in its commission. *Davis v. State*, 3 Tex. App. 91; *Gladden v. State*, 2 Tex. App. 508; *Williams v. State*, 42 Tex. 392. The allegation that defendant and Brown acted together in the commission of the murder we regard as mere surplusage, and not descriptive of the offense, not material in any respect, and as neither enlarging nor restricting the responsibility or rights of the defendant. We are clearly of opinion that under the indictment the defendant might legally be convicted of the murder, not only upon proof showing that he acted together with Brown in its commission, but upon proof showing that he committed it alone, without Brown in any manner being connected with its commission.

<sup>1</sup>Publication delayed by failure to receive copy.

Another portion of the charge was excepted to by the defendant, upon the grounds that it was unwarranted by the evidence, and was upon the weight of evidence. The portion of the charge referred to reads as follows: "The mere presence of a party at the time and place where an offense is committed, does not constitute such party a principal; he must be present at the time and place, with a knowledge of, and participation in, the offense. Of this the jury are to judge from the surrounding circumstances in proof, such as companionship of the parties, and the conduct of defendant at, before, and after the commission of the offense." We think this paragraph of the charge was fully warranted by the evidence; and we are, furthermore, of opinion that it was not on the weight of evidence. To instruct the jury that a certain fact may be inferred upon proof of other facts, without assuming that such other facts have been proved, is not always a charge upon the weight of evidence, within the meaning of the rule. *Sharpe v. State*, 17 Tex. App. 499. Considered with reference to the evidence in this case, we think said paragraph of the charge is correct.

Another paragraph of the charge was excepted to by defendant. It reads as follows: "If you do not believe the defendant was present at the time of the killing, you will acquit him." We see no error in this paragraph, when it is considered in connection with the context, and with other portions of the charge. The defense of *alibi* was not presented by the evidence, any further than that no eye-witness testified that defendant was present at the time and place of the homicide. It was not shown by defendant, or attempted to be shown, that he was at another place at the time of the homicide. There was no evidence demanding a charge as to the defense of *alibi*, and the instruction above quoted was more favorable to the defendant than was absolutely required. Considering the charge of the court as a whole, we regard it as free of error. It is a clear, comprehensive, and correct statement of the principles of law applicable to the facts of the case.

One of the grounds of defendant's motion for a new trial is certain improper remarks made by counsel for the state in the closing address to the jury. There was no exception made to said remarks at the time they were made, and objections thereto are presented for the first time in the motion for a new trial. The objections come too late, and cannot be considered. It is only by proper bill of exception that such objections can be availed of on appeal, unless, perhaps, where it be clearly made to appear that the defendant has suffered injury from such improper remarks; and it is not so made to appear in this instance. *Mason v. State*, 15 Tex. App. 534; *Jackson v. State*, 18 Tex. App. 586.

There are certain papers in the record relating to the trial and acquittal of Brown, subsequent to the conviction of defendant; and defendant claims that Brown's testimo-

ny in his behalf is material, etc. These papers are not properly a part of the record, and we are aware of no rule of practice which would warrant us in giving them consideration.

But one other question is presented, and that is the sufficiency of the evidence to support the conviction. While the evidence is circumstantial, we think it is very cogent, and conclusive of the defendant's guilt. To our minds, it shows, beyond any reasonable doubt, that he participated in the murder of deceased,—a murder which the evidence in this case shows was a cowardly and deliberate assassination. The judgment is affirmed.

### WOOD v. STATE.

(Court of Appeals of Texas. June 20, 1899.)<sup>1</sup>

#### CRIMINAL LAW—DECLARATIONS BY DEFENDANT.

Code Crim. Proc. Tex. art. 751, provides that "when a detailed act, declaration, conversation, or writing is given in evidence, any other act, declaration, or writing which is necessary to make it fully understood may also be given in evidence." In a prosecution for rape, committed in the town of S., the state had proved that defendant told the sheriff, at the time of his arrest, that he had seen one G. in D. on Tuesday night, (the night before the rape.) Defendant offered in evidence a declaration previously made to the sheriff, that he (defendant) was in D. on Wednesday night, (the night of the rape,) and that he was innocent of the crime. Held, that this declaration was properly excluded, as not coming within the purview of said statute.

Appeal from district court, Grayson county; H. O. HEAD, Judge.

William Wood, *alias* William Carson, was convicted on an indictment for rape, and appeals. Several witnesses for the defense testified positively that defendant was in Dallas—60 miles distant from the city of Sherman, the scene of the alleged rape—on the night it occurred. Two witnesses for the state testified as positively that he was in Sherman early on that night, and early on the next morning.

*Woods & Turner*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. But three bills of exception appear in this record. As to the first, the judge explains that after he had overruled the application for continuance, and before the impaneling of the jury was completed, both the absent witnesses named in said application appeared, and that one was excused by defendant, the other remaining to testify. Defendant could not possibly be injured, under the circumstances. The state proved by John Blain that he was marshal of the city of Sherman, and as such officer, went to Dallas, and on Friday, June 8, 1888, at about 11 o'clock, he arrested defendant on Main street, in Dallas. That shortly thereafter, on the same day, he put defendant on the train, and started with him to Sherman. That defendant had been legally warned as to any statements made by him at the time

of the arrest. That shortly after leaving Dallas he (the witness Blain) asked defendant if he (defendant) saw Nat Gunter in Dallas on Wednesday night, (the night of the rape.) Defendant replied that he saw Gunter on Tuesday night, (the night before the rape.) Defendant then proposed to prove by said Blain that when he arrested defendant, about 11 o'clock, he at that time warned him as to his statements, and that defendant then and there told him (said Blain) that he (defendant) was in Dallas on Wednesday night, (the night of the rape at Sherman,) and that he was innocent of the charge. To which the prosecution objected, because the same was a statement in defendant's interest; and the court sustained the objection, and excluded the evidence.

"Declarations made by a defendant in his own favor, unless a part of the *res gesta*, or of a confession offered by the prosecution, are not admissible for the defense." Whart. Crim. Ev. (8th Ed.) § 690. They are considered as self-serving. But our statute provides that "where a detailed act, declaration, conversation, or writing is given in evidence, any other act, declaration, or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence." Code Crim. Proc. art. 751. Such declarations, acts, etc., are admissible whether *res gesta* or not. Willson, Crim. St. § 2481. The criterion for their admissibility is, are they necessary to make any other act or declaration of defendant which has been proved by the prosecution fully understood, or do they explain the same? In this case the state had proved that defendant told Blain that he had seen Gunter in Dallas on Tuesday night. Did the fact that he had previously told Blain that he (defendant) was in Dallas on Wednesday night, and that he was innocent of the rape, tend in any manner to explain his statement that he had seen Gunter in Dallas on Tuesday night, or did it in any manner tend to make this latter statement any more fully understood? We cannot see that it does. As shown by the bill of exceptions, we cannot see that the court erred in excluding the evidence.

Defendant's third bill of exceptions shows that, over his objections, the court permitted the prosecution to prove by the witness Matilda Noel that about a month before the alleged rape she and defendant were "talking about sweethearts," and defendant "said he had a good thing, but it was not black," and that she told him he had better "mind how he talked." This conversation occurred in the alley, close to the place where the rape was alleged to have occurred. Defendant's objection was that the evidence was irrelevant, immaterial, foreign to the issue, and calculated to prejudice the defendant with the jury. Other evidence adduced showed that defendant, prior to the rape, had been living next door, across the alley, from the house in which the prosecutrix lived, and in which she was ravished, "as much as

<sup>1</sup>Publication delayed by failure to receive copy.

a month or two;" that he was several times in the yard where the prosecutrix lived; that some three weeks before the occurrence he had spoken to her from the yard in which he lived, and told her that she "looked pretty;" that on another occasion he asked her to give him a rose; and that one night, about three weeks before the rape, he came to the window of the prosecutrix, and asked her if she had gone to bed, and, when she answered that she had, he asked her if she would not read the "cook receipts" to him, which she had previously promised to do; that she told him "No," and he went away. In the light of this evidence, we are of opinion the court did not err in admitting the testimony of Matilda Noel. It was, it may be, but a slight circumstance; still, it tended to show the bent of defendant's mind, and, when read in the light of these other facts, tended, further, to show who the party was the defendant referred to when he told the witness that "he had a good thing, but it was not black." In Tomlin's Case, 25 Tex. App. 676, 8 S. W. Rep. 931, the evidence which this court held inadmissible could possibly have had no connection, remotely or otherwise, upon the case, or any issue involved in the trial, but was an independent statement, made five years before the rape was committed for which the prisoner was on trial, and before he ever knew the prosecutrix in that case.

The only other question necessary to be noticed is the sufficiency of the evidence. Defendant's identity is positively proved by the prosecutrix. His effort was to establish an *alibi*. That his evidence tended most strongly to sustain this defense cannot be denied; and that there is a decided conflict in the evidence upon this defense is most true. To reconcile and settle this conflict was the province of the jury; and, if they believed the testimony of the prosecution, the evidence is amply sufficient to support the verdict and judgment. The judgment is affirmed.

#### WHITE v. STATE.

(Court of Appeals of Texas. June 22, 1889.)<sup>1</sup>

##### LARCENY—INSTRUCTIONS.

1. On the trial of an indictment for larceny of money defendant requested a special instruction as follows: "If you find that when defendant was called on for an explanation of his possession of the money charged to have been stolen, that he said he had found it, and that he had intended to give it back to the owner, but that he had not seen him since he found it, and that he thought he would bet the money on a horse-race and win some money for himself, and then give it back, and you believe said explanation was reasonable, natural, and probably true, then you cannot convict defendant, unless the state has shown such explanation to be false; and the state must so show beyond a reasonable doubt." *Held*, that the court erred in refusing to give the instruction, where the issue was plainly raised by the evidence.

2. A charge with respect to theft of property of less value than \$20, upon the trial of an indictment for theft of a larger amount, where no issue is raised as to the amount, though it is favorable to the accused if excepted to, is cause for reversal.

Appeal from district court, Milam county; J. N. HENDERSON, Judge.

Had White was convicted on an indictment for the larceny of \$615, and appeals. According to the proof offered by the state the money was taken at night from the clothes of the owner, which hung on a bed-post. Defendant and his brother occupied an adjoining bed. The owner admitted that since he last examined the money, before missing it, he had ridden over his pasture, but declared that in so doing he did not lose it, but that it was stolen. The money was traced to the possession of defendant, who claimed that he found it in the pasture, and that he intended, after using it to win some money for himself, to return it to the owner.

T. S. Henderson, for appellant. W. S. Davidson, Asst. Atty. Gen., for the State.

WILLSON, J. Defendant requested a special instruction as follows: "If you find that when defendant was called on for an explanation of his possession of the money charged to have been stolen, that he said he had found the money in Miller's pasture, and that he had not stolen it, and that he had intended to give it back to Miller, but that he had not seen Miller since he found the money, and that he thought he would bet the money on a horse-race, and win some money for himself on a horse-race, and then give it to Miller, and you believe said explanation was reasonable, natural, and probably true, then you cannot convict defendant, unless the state has shown such explanation to be false; and the state must so show beyond a reasonable doubt." This instruction the court refused to give, and the defendant excepted. In this we think the court erred. We think the evidence demanded such charge, and its substance or equivalent was not embraced in the general charge given to the jury. The issue presented by said special instruction was plainly raised by the evidence, and the jury should have been directly and clearly instructed as to the law upon such issue. *Fernandez v. State*, 25 Tex. App. 588, 8 S. W. Rep. 667; *Guest's Case*, 24 Tex. App. 580, 7 S. W. Rep. 242; *Boyd's Case*, 24 Tex. App. 570, 6 S. W. Rep. 853. It was error, we think, to charge with respect to theft of property of less value than \$20. No such issue was raised by the evidence. While this error in the charge would be regarded as favorable to the defendant, and therefore immaterial, if it had not been excepted to, yet, having been excepted to, and properly presented by bill of exception, we must hold the error to be reversible error. Other errors assigned are not considered tenable. The judgment is reversed, and the cause remanded.

<sup>1</sup> Publication delayed by failure to receive copy.

## MOORE v. STATE.

(Court of Appeals of Texas. June 22, 1889.)<sup>1</sup>

## RECEIVING STOLEN GOODS.

1. An indictment charged that the accused "did then and there fraudulently receive from Had White, \* \* \* and did fraudulently conceal, certain property, to-wit, \$450 in money, \* \* \* the same being the property of Geo. Miller, which said property had been theretofore acquired by another, in such manner as that the acquisition thereof comes within the meaning of the term 'theft;' and the said John Moore then and there received and concealed the said property, well knowing the same to have been so acquired, against the peace and dignity," etc. *Held* sufficient to charge the offense of fraudulently receiving and concealing stolen property.

2. It was error for the court to submit the law with regard to theft of property under the value of \$20; the proof raising no such issue.

Appeal from district court, Milam county; J. N. HENDERSON, Judge.

John Moore was convicted on an indictment for receiving and concealing stolen property, and appeals. The language of the indictment was as follows: That the accused "did then and there fraudulently receive from Had White, \* \* \* and did fraudulently conceal, certain property, to-wit, \$450 in money, the same being current paper money of the United States of America, of the value of \$450, the same being the property of Geo. Miller, and being of the value of \$450, which said property had theretofore been acquired by another in such manner as that the acquisition thereof comes within the meaning of the term 'theft;' and the said John Moore then and there received and concealed the said property, well knowing the same to have been so acquired, against the peace and dignity," etc. In addition to the same proof adduced in *White v. State*, ante, 406, it was proved that a certain \$100 bill was traced to the possession of defendant. When he changed it, he represented the said bill to be the property of his mother. When arrested he said, in the presence of White: "I did not steal this money. Had White gave it to me,"—and asked White: "Didn't you, Had?" White replied, "Yes."

T. S. Henderson, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. We think the indictment is sufficient. *Brothers v. State*, 22 Tex. App. 447, 3 S. W. Rep. 737; *Willson*, Crim. St. § 1256.

It was error to charge the law of theft of property under the value of \$20. There was no evidence to warrant such charge. This error was excepted to, and the exception presented here by proper bill. *White v. State*, ante, 406. We think the evidence demanded instructions as to possession of property recently stolen, and as to White's explanation of his possession of the money. The charge of the court was excepted to because it failed to give such instructions. *White v. State*, ante, 406.

Other assignments presented in the record

we do not think are maintainable. Because of errors above mentioned, the judgment is reversed, and the cause remanded.

## NORTON v. STATE.

(Court of Appeals of Texas. June 22, 1889.)<sup>2</sup>

## LARCENY—EVIDENCE.

On the trial of an indictment for theft of a steer a witness testified that he saw defendant kill the alleged stolen animal; that defendant then said that he had bought the animal of the alleged owner, but a few days afterwards admitted to witness that it belonged to the alleged owner. The witness, who was defendant's brother-in-law, said nothing of the matter for two years, and until after he and defendant had quarreled. *Held*, that the evidence was insufficient to sustain conviction, as the witness was in effect an accomplice, and his testimony was uncorroborated.

Appeal from district court, Stephens county; T. H. CONNER, Judge.

W. M. Norton was convicted on an indictment for larceny, and appeals.

J. R. Fleming, W. Veale, and J. M. Moore, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. There were but two witnesses for the prosecution—Majors, the owner of the alleged stolen animal, and Joe Goodwin, a brother-in-law of defendant. There are some singular features appearing with regard to the testimony of each of these witnesses. Majors had sold defendant a lot of cattle in payment of a tract of land, that were branded in the same brand as the alleged stolen animal, and he at the time executed a bill of sale to the same. Some time afterwards, this bill of sale having been lost, Majors executed another in lieu of it. On the trial, both of these bills of sale were produced by defendant, the first one having been found in the meantime. Majors positively denied writing and signing this purported first one, and, moreover, claimed that it had been altered. He was positively contradicted by some of defendant's witnesses; and five experts, by comparing admitted genuine specimens of his handwriting with said instrument, gave it as their opinion that the instruments were written by the same party. As to the second or substitute bill of sale, Majors admitted he had executed it, but claimed that it had also been changed and altered since its execution. It does not appear what, if anything, were the opinions of the experts as to whether the instruments had been altered or not. Majors did not know who stole his animal, but had never seen it since it left his home on December 13, 1886. Goodwin swore that he was at defendant's house on December 15 or 16, 1886, and saw defendant kill the alleged stolen animal; that at the time of the killing the defendant said that he had bought the animal from Majors, but that a few days afterwards defendant told him that in fact the steer killed was Frank Majors'. How or why defendant

<sup>1</sup> Publication delayed by failure to receive copy.

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came to tell him this he does not inform us. At all events, he tells us that a few days after the theft defendant admitted it to him, and yet he concealed the fact for nearly two years, and then only disclosed it after he and defendant had had a serious difficulty on account of the separation of Goodwin and his wife, for which matter he blamed defendant. The indictment was found and returned against this defendant on December 4, 1888. Moreover, defendant introduced witnesses who proved statements with regard to the animal, made to them by Goodwin, contradictory of his sworn testimony, and statements showing his hostility, and the *animus* with which he was testifying in the case. Taking the testimony as we find it in the statement of facts, we are not satisfied either as to its conclusiveness or reliability. According to his own evidence, Goodwin is an accomplice in the sense in which the statute requires that the testimony of such witnesses should be corroborated. As to the inculpatory portions of this witness' testimony, we have failed to find any corroboration whatever. Defendant and his witnesses do not and never have denied that he killed an animal at the time Goodwin was at his house, but they claim it was the defendant's own animal. No fact or circumstance beyond this corroborates Goodwin in his statement that its mark was different from the marks of the animals purchased by defendant from Majors, and that the animal was a red steer with crumpled horns. Certainly there is no corroboration of the accomplice's statement that a few days after the killing defendant told him that the animal belonged to Majors. We are not willing to sanction a judgment of conviction based upon such unsatisfactory, inconclusive, uncorroborated, and suspicious testimony. The judgment is reversed, and the cause remanded.

#### JACOBS v. STATE.

(Court of Appeals of Texas. June 26, 1889.)<sup>1</sup>

#### ARREST WITHOUT A WARRANT—HOMICIDE—IMPLIED MALICE—BILL OF EXCEPTIONS.

1. Under Pen. Code Tex. art. 322, which provides that a person violating the law by unlawfully carrying arms may be arrested by a peace-officer, without warrant, upon his own knowledge, or upon information of some credible person, a peace-officer may arrest the offender, without warrant, upon information of a credible person, though the offender may be in a distant part of the county at the time of the information, and though the arrest may not be immediately made.

2. On a trial for murder committed by defendant when deceased and others were attempting his arrest on a charge of unlawfully carrying arms, upon the question of motive, and to explain the conduct of the deceased and *posse* in attempting to arrest the defendant, the court properly admitted in evidence the records of the district court of another county, to show that an indictment for murder was pending in said court against the defendant.

3. Upon the same issue, and to show that the attempted arrest was legal, the court properly admitted the sheriff to testify that about a week be-

fore the homicide he received a letter from the sheriff of another county, stating that defendant was in the county, armed with rifles and pistols.

4. A charge, upon the subject of implied malice, that "when a homicide is committed without any, or without considerable, provocation, the law implies malice," is correct; the words "considerable provocation" being equivalent to the words "adequate cause."

5. A bill of exceptions, to be sufficient, must show, not only that the testimony objected to was offered, but that it went to the jury, as evidence.

6. A bill of exceptions to the rejection of testimony, unless definite in the recital of facts, will not be considered on appeal.

Appeal from district court, Milam county; J. N. HENDERSON, Judge.

Will Jacobs was convicted of murder in the second degree, and appeals. The evidence shows that, acting under the orders of the sheriff of Milam county, Deputy-Sheriffs J. H. Bickett and G. L. Pool, with a *posse* of five men, went to the house of one Bounds, to arrest defendant for unlawfully carrying arms. Defendant resisted arrest, and in the encounter shot and killed Pool. Upon the subject of implied malice the court charged the jury as follows: "Implied malice is an inference or conclusion founded upon particular facts and circumstances proved, and from which the malice is inferred. The law implies malice from the commission of an unlawful or cruel act. Hence, when a homicide is committed without any, or without considerable, provocation, the law implies malice. In like manner, if a homicide be committed under the immediate influence of sudden anger, rage, resentment, terror, or excitement, rendering the mind incapable of cool reflection, the law will imply malice, in the absence of any adequate cause to reduce the offense to manslaughter. And when a homicide is shown to have been committed, the killing is not shown to have been done upon express malice, and the evidence fails to show that the act was done upon express malice; and the evidence fails to show that the act was done under circumstances to mitigate or reduce the killing to manslaughter, or to excuse or justify the deed,—the law infers that the killing was done upon malice, and the malice is implied malice."

J. D. Morrison, R. W. Hudson, T. S. Henderson, and C. L. Arlony, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. 1. Bill of exception No. 2 is as follows: "Be it remembered that on the trial of the above-entitled cause the state offered to prove the following facts, viz., (by J. H. Bickett, a witness for the state,) that, at the time the defendant is charged to have killed G. L. Pool, he (Bickett) and said Pool were deputy-sheriffs of Milam county. To which the counsel for defendant objected for the following reasons, viz., because the law directed how deputy-sheriffs could be appointed, and required a record thereof to be kept in the office of the county clerk, and required said appointment to be in writing, and required the appointee to take the constitutional oath; and that said record and said

<sup>1</sup>Publication delayed by failure to receive copy.

original appointment were the best evidence of the official character of deputy-sheriffs. And the court overruled the objections. The defendant excepted to said ruling, and herewith tenders his bill of exceptions," etc.

It will be observed that the bill of exceptions is incomplete, in that it does not state that the testimony objected to was admitted in evidence before the jury. Unless it was admitted in evidence, certainly, no material error was committed in overruling the objections to it. A bill of exceptions must be so full and certain in its statements that in and of itself it will disclose all that is necessary to manifest the supposed error. It must sufficiently set out the proceedings and attendant circumstances below, to enable this court to know certainly that error was committed. Willson, Crim. St. § 2368. When the exception is to the admission of testimony, it must not only show that the testimony was offered, but must, further, show that it went before the jury as evidence. *Burke's Case*, 25 Tex. App. 172, 7 S. W. Rep. 873. In considering a bill of exceptions to the admission of evidence, it must appear from the bill itself that the testimony objected to went before the jury. We cannot look to the statement of facts to determine that fact. We are not called upon, therefore, to decide the question sought to be presented by bill of exception No. 2, but, if we were, we should hold that there was no error in admitting the testimony objected to. The official character of Bickett and Pool was an incidental, collateral issue, —not an issue directly between said officers and the public. Such being the case, parol evidence was competent to prove their official character. *Woodson's Case*, 24 Tex. App. 153, 6 S. W. Rep. 184.

2. Bill of exception No. 3 is incomplete and defective in the same particular as bill No. 2. It recites that the state offered to prove by a record of the district court of Frio county, that defendant, at the time he killed Pool, was charged, by indictment in the district court of Frio county, with murder, and said record, together with defendant's objections thereto, are set forth in the bill. But it is not shown by the bill that said record was read in evidence before the jury. But here, again, were we to consider the bill sufficient, we would hold that said record was competent evidence. It established a circumstance which tended to show defendant's motive in committing the homicide, which tended to show that he was a fugitive from justice, who had resolved to evade and resist arrest for a capital crime at any and all hazards, and regardless of consequences, and regardless of whether his arrest should be attempted legally or illegally. It furthermore tended to explain the conduct and motives of the officers and posse that were seeking to arrest defendant, and to throw light upon the whole transaction. It was, in fact, a part of the *res gestæ* of the homicide.

3. For the reasons above stated, it was not

error to admit the testimony set forth in bill of exception No. 4. Said testimony was also competent for the purpose of showing that in attempting to arrest the defendant the officers and posse were acting by authority of law, and that said attempted arrest was legal.

4. Bill of exception No. 5 does not state that the testimony objected to went before the jury, and is therefore defective. But we think the testimony was competent to show that the attempted arrest of the defendant was a legal one.

5. Bill of exception No. 6 does not show that the testimony objected to went before the jury, and we shall not, therefore, consider it.

6. Bill of exception No. 7 is not maintainable. The testimony objected to was competent to show that in evading arrest, and in violating the law by carrying arms, the defendant was aided and supported by one Johnson, and that the two, acting together, were openly and continuously defying the law, and its officers, to the terror of the citizens of the neighborhood. And, further, it was competent to explain the conduct of the officers and posse in attempting defendant's arrest, and to show that said officers and posse had good reason to believe that defendant's arrest would be resisted by him and said Johnson, and that, therefore, said officers and posse, in attempting said arrest in the manner they did, acted within the limits of prudence and the law.

7. Bills of exception 8, 9, and 10, are to the action of the court in rejecting certain testimony therein set forth, offered by the defendant. Each of these bills are too defective to be considered. They do not recite facts which would enable this court to fully understand and know all the facts on which the correctness or errors of the rulings complained of depend. *Livar's Case*, 26 Tex. App. 115, 9 S. W. Rep. 552.

8. We come now to a consideration of the charge of the court to which the defendant reserved several exceptions, and here insists upon same as cause for reversal. (1) When considered as a whole, we see no error in paragraph 5 of the charge, defining and explaining "implied malice." The words "considerable provocation" in said paragraph, in the connection in which they are used, convey the same meaning as the words "adequate cause;" and, besides, the court in said paragraph was defining implied malice, and not manslaughter, and defined it, we think, correctly. (2) That portion of the charge which explains the law relative to the rights, duties, and responsibilities of parties attempting an arrest, and of the party attempted to be arrested, respectively, is not, we think, obnoxious to the objections urged against it. It is expressly provided by the Code that a person violating the law by unlawfully carrying arms may be arrested, without warrant, by any peace-officer, upon his own knowledge, or upon information of some credible person; and it is made a penal

offense for a peace-officer to fail or refuse in such case to make the arrest. Pen. Code, art. 822. The court gave this law to the jury; and the defendant excepted thereto, contending that said provision of the statute contemplates an arrest *in flagrante delicto*; that to authorize such arrest the officer must be present, with the offender, at the very time of the commission of the offense; that the offender must be escaping; and that there is no time or opportunity to obtain a warrant for his arrest. We do not so understand said provision of the statute. We understand it to authorize an arrest without warrant, not only when the offense is being committed within the presence and within the knowledge of the officer, but also when the officer is informed by a credible person that the offense is being committed, although the offender, at the time of such information may be in a distant portion of the county, and although the arrest may not be immediately attempted. This is a special provision, and is not controlled by other statutes relating to arrests. It does not prescribe the time within which the arrest shall be made or attempted. It does not require that a warrant of arrest shall be obtained, where there is time and opportunity to obtain it. We think it authorizes an arrest without warrant, upon the information of a credible person that a violation of article 318 or 320 of the Penal Code is being committed, although the person committing such violation is not at the time present, or even within reach of the officer, and although there may be time and opportunity to obtain a warrant of arrest. We do not think this provision of the Code, construed as we construe it, is in conflict with section 9 of the Bill of Rights, or of any other provision of the constitution. (3) We have, as far as we are capable of doing, carefully considered every objection made to the charge of the court. We fail to find any error in it of which the defendant can complain. If erroneous in any particular, the error is in the defendant's favor. It is obvious that the learned trial judge prepared his charge with great caution, and with the view of giving defendant the benefit of every phase of the case favorable to him, presented by the evidence. We think, taking the charge as a whole, that it is unobjectionable on the part of defendant, and that none of the exceptions made to it are well grounded.

9. There is no merit in the objection made to the verdict, as appears by an inspection of the original sent up in the transcript. Finding no error in the proceedings and conviction, the judgment is affirmed.

#### BELL v. STATE.

(Court of Appeals of Texas. June 29, 1889.)<sup>1</sup>

INTOXICATING LIQUORS—CONSTITUTIONAL LAW.

1. The Texas act prohibiting the selling of malt liquors without having posted in a conspicu-

ous place in the house wherein the occupation is pursued a license issued by the county clerk, is not in conflict with Const. Tex. art. 16, § 20, conferring upon counties, cities, towns, and justice's precincts the right of prohibiting the sale of intoxicating liquors.

2. Nor does it, by requiring a bond as a condition precedent to license, conditioned that the dealer shall not sell to a husband after he has been notified by the wife, abridge the privileges and immunities guaranteed a citizen by the constitution of the United States.

Appeal from Travis county court; J. M. BRACKENRIDGE, Judge.

F. G. Morris, for appellant. Asst. Atty. Gen. Davidson, for the State.

HURT, J. This is a conviction for pursuing the occupation of selling malt liquors, and failing and refusing to post in a conspicuous place in the house wherein the occupation was carried on any license issued by the county clerk of Travis county, authorizing him (Bell) to pursue the said occupation. Counsel for the appellant excepted to the indictment upon the ground that the act of the legislature upon which this prosecution is based is unconstitutional, in this: (1) Because if the act is enforced, the appellant will be deprived of his liberty without due process of law; (2) he will be denied the equal protection of the laws of the land; (3) his privileges and immunities as a citizen of the United States will be abridged, this defendant being such. Counsel specifies in what particulars the act is in violation of the state constitution, insisting that the act invades the exclusive powers of counties, cities, towns, and justice's precincts, of prohibiting the sale of intoxicating liquors; such power being conferred on them by section 20, art. 16, of the constitution. Evidently, the local option provisions of the constitution do not divest the legislature of the power to prohibit the sale of such liquors, if the legislature has such power, independently of these provisions. It having been held by the supreme court of this state that the legislature could not transfer to the people of the counties, etc., the authority, by election or otherwise, to enact local option laws for their counties, etc., because the people of a county, precinct, town, or city have no legislative capacity,—the power to enact laws being conferred by the constitution on the legislature,—the local option provision of the constitution became necessary in order to confer upon the people of the counties, etc., the law-making power. The object of this provision was not to deprive the legislature of its power over the subject, but to confer upon the counties, and subdivisions thereof, constitutional authority to enact a law prohibiting the sale of such liquors within their respective boundaries. Such counties, or subdivisions thereof, may desire such a law, while others, or the rest of the state, may not. Now, to authorize the counties, etc., to act legally in this matter, the provision was engrafted upon our constitution; the object being to permit the people of the counties, etc., to pro-

<sup>1</sup> Publication delayed by failure to receive copy.



hibit the sale of such liquors within their respective limits. This, and, this alone, was the object of the local option provision.

But let us view this object from another stand-point. Under the local option provision the people of the county cannot, by an election for that purpose, enact a law prohibiting the sale of such liquors in quantities less than a quart, and permit it to be sold in greater quantities; they must prohibit its sale in all quantities,—prohibit its sale absolutely, except for certain named purposes. It follows that, if the local option provision has deprived the legislature of the power to prohibit the retail of such liquors,—prohibit saloons,—then the power to prohibit saloons does not exist in this state. Hence, a very important police power is lost or cannot be exercised without absolute prohibition; and that, too, by the tedious and uncertain process of local option. The people of the state might desire the prohibition of saloons and not absolute prohibition; but we are seriously told that they cannot have this,—that they must take absolute prohibition in order to obtain the suppression of saloons; and this they must receive as doled out to them by the separate action of counties, precincts, cities, and towns. This is absurd. We will follow this subject but one step further. Local option prohibits absolutely in the counties of its adoption. Say that this divests the legislature of the power to prohibit absolutely all over the state, (a proposition too preposterous for discussion.) May not the legislature still retain the power to prohibit saloons? Concede that the legislature, because of the local option provision of the constitution, cannot prohibit the sale of such liquors absolutely. May it not still retain the power to prohibit the saloon? Now, it is well settled by all the authorities that the legislature, no constitutional provision forbidding, has the right to absolutely prohibit the saloon business,—the retail of intoxicating liquors. If, therefore, the legislature can prohibit this business absolutely, it follows inevitably that the legislature can annex to the pursuit of such business just such conditions precedent as it may deem just, unless the citizen has granted to him affirmatively, by the constitution of the United States, the right to sell such liquors by retail,—to keep a saloon. If such right is given, the legislature might regulate the business; but regulation could not extend to prohibition. No such right is conferred; and hence another position of counsel for appellant is 'unsound, to-wit, that, conceding the right to require a bond with sureties, yet, if conditions are annexed,—embraced in the bond,—and these conditions are illegal,—unconstitutional,—the right to require bond and license is lost. In support of this proposition we are cited to *Barron v. Burnside*, 30 N. W. Rep. 872. In this case the legislature had no authority to require an agreement that the insurance company should not remove suits brought in the state courts to the

federal courts; the company having a constitutional right to so remove them. There is not the slightest analogy in the two cases, because the legislature has the power to prohibit saloons. Hence the power to require a bond with sureties, and a license, unless the condition of the bond demands of the person desiring to engage in such pursuit the surrender of a constitutional right, or right acquired from a higher source than the legislature. When we speak of constitutional right to retail spirituous liquors, we mean an affirmative grant of such, not that the constitution does not forbid the pursuing of the business.

It is contended that the conditions in this bond, requiring the person engaging in the business not to sell to the husband, etc., after having been properly notified not to do so by the wife, etc., is unconstitutional, because it is a transfer of the legislative power to the wife. This is not the case. The wife does not legislate. We will follow this no further.

It is also urged that under this condition the appellant would surrender his liberty by submitting his conduct to the arbitrary and capricious government of these women. This is so; and, if he does not desire to do this, he must not engage in the business. This, however, is no novel method of regulating this business. *Goldsticker v. Ford*, 62 Tex. 385; *Ex Parte Bell*, 24 Tex. App. 428, 6 S. W. Rep. 197. We find no error in the judgment, and it is affirmed.

#### JENKINS v. STATE.

(Court of Appeals of Texas. June 26, 1899.)<sup>1</sup>

##### CRIMINAL LAW—STATUTES—INSTRUCTIONS.

1. Pen. Code Tex. art. 15, providing that, when the punishment for an offense is ameliorated by statute subsequent to its commission, the defendant, upon conviction, must be punished according to the latter enactment, unless he elect to receive the penalty affixed by the former law, does not apply to cases tried before the ameliorating act becomes operative.

2. Act Tex. Jan. 30, 1899, ameliorating the penalty provided by Pen. Code, art. 318, for carrying a pistol, was not passed under an "emergency clause;" and therefore, under Const. art. 3, § 39, does not take effect until 90 days after the adjournment of the session of the legislature.

3. An instruction, objected to by defendant, making it discretionary with the jury whether or not defendant shall be imprisoned, when the law requires such imprisonment, is reversible error.

Appeal from county court, Llano county; W. S. MAXWELL, Judge.  
Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. This appeal is from a conviction for unlawfully carrying a pistol, the offense having been committed on the 22d day of September, 1888, and the trial and judgment being had on May 6, 1889. The verdict and judgment simply impose a fine of \$25. Under article 318 of the Penal Code, the punishment assessed for this offense is

<sup>1</sup> Publication delayed by failure to receive copy.

"by fine of not less than \$25, and not more than \$200; and the accused shall be confined in the county jail not less than twenty, nor more than sixty days." Imprisonment under this statute is a necessary part of the punishment; but the learned trial judge instructed the jury that "the imprisonment of the defendant in the county jail is discretionary with the jury, and you may or may not imprison, as you think proper." This instruction was evidently based upon a change in the law made by the act amending article 818, approved January 30, 1889, (Gen. Laws 21st Leg. p. 33,) by which the punishment for unlawfully carrying arms may be by fine or imprisonment, or both. But this act did not take effect from and after its passage, under an emergency clause, and therefore would only go into effect and become operative "ninety days after the adjournment of the session of the legislature at which it was enacted." Const. art. 3, § 39. The twenty-first legislature adjourned on the 6th day of April, 1889, and the act would and will not go into operation for some time yet to come. It is not at this time in force. The rule with regard to ameliorated punishments—that is, that when the punishment for an offense is ameliorated by statute subsequent to its commission the defendant upon conviction, must be punished according to the latter enactment, unless he elect to receive the penalty affixed by the former law (Pen. Code, art. 15; Willson, Crim. St. § 41)—does not, and cannot, apply where the ameliorating act has not yet become an effective law at the time of the trial. The accused had no right to claim such amelioration, because it was not the law, and, not being the law, the court had no authority to charge it as part of the law of the case. The instruction was specially excepted to by the defendant, though in his interest. A charge must set forth distinctly the law applicable to the case. "If the charge incorrectly instructs as to the penalty of the offense, it is fundamental error, for which the conviction will be set aside, although the error be not excepted to, and although it may be an error inuring to the benefit of the defendant." Willson, Crim. St. § 2348. For error in the charge as to the penalty of the offense the judgment is reversed, and the cause remanded.

#### DOXEY v. STATE.

(Court of Appeals of Texas. Oct. 16, 1889.)

##### THEFT—INFORMATION.

An information charging theft must allege that the property was fraudulently taken.

Appeal from county court, Wood county; C. W. RAINES, Judge.

M. D. Carlock, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. This conviction is upon an information charging theft of property under the value of \$20. The complaint upon which the information is founded is fatally

defective, because it does not allege that the property was fraudulently taken, which allegation is essential in all cases of theft. The judgment is reversed, and the prosecution is dismissed.

#### SMITH et al. v. STATE.

(Court of Appeals of Texas. Oct. 16, 1889.)

##### EXHIBITING GAMING TABLE.

1. The evidence showed that defendants had paid the tax and secured license to keep pool and billiard tables, and had posted notices forbidding betting; that a game of pool was played by several persons, with the understanding among themselves, to which defendants were not parties, that the loser should pay to the proprietors the sum of five cents for each cue used in the game. Defendants did not in any way participate in the game. Held insufficient to support a conviction for exhibiting a gaming table.

2. Defendants were entitled to an instruction that if they owned a pool table on which games were sometimes played for the table fees, but did not keep or exhibit the table for gaming purposes, and did not know, and could not by reasonable diligence have known, that the table was used for gaming purposes, they should be acquitted.

Appeal from county court, Tarrant county; W. D. HARRIS, Judge.

Jas. S. Davis, for appellants. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. Appellants were tried and convicted under an indictment for unlawfully keeping and exhibiting, for the purpose of gaming, a gaming table and bank. Defendants had paid the state and county tax, and taken out license on their pool and billiard tables; and the games played, and for the playing of which they have been convicted, were games of pool, played by parties with the understanding that whoever of the players lost the game would pay to the proprietors five cents for each cue that had been used in the game. The proprietors did not play in the game; there was no dealer or exhibitor in the game, and it was played solely among those participating in the game, without the intervention of any third person. Further than that there was an understanding among the players that the loser should pay five cents for the cues used, there was no betting upon the table or games. Defendants expressly, and by written notices posted in the house, forbade betting of any kind in their house.

In all essential particulars, this case is in no way different from the case of Wells v. State, 22 Tex. App. 18, 2 S. W. Rep. 609, in which the judgment was reversed because the evidence was wholly insufficient to support the conviction. The facts of this case are essentially different from those in Reeves' Case, 12 Tex. App. 199, when the defendant (the keeper) furnished checks or tickets to the winner of the game, which were good at his bar for drinks or cigars. Defendants' first special requested instruction, which the court refused to give, was as follows: "The jury are charged that if you find from the evidence that the defendants owned a pool table upon which games of pool were played sometimes

for the table fees, but that defendants did not keep or exhibit the table for gaming purposes, or [nor] had any knowledge, or might, by the use of reasonable diligence, have known, that the table was used by the players for gaming purposes, then it will be your duty to acquit defendants." This charge was in conformity with the rules announced in Wells' Case, supra; was directly opposite to the facts of the case; and it was error to refuse to give it. For this error, and because the evidence is insufficient to prove a violation of law, the judgment is reversed, and the cause remanded.

#### BOWEN v. STATE.

(Court of Appeals of Texas. Oct. 19, 1899.)

##### BAIL-BOND—SUFFICIENCY.

Under Code Crim. Proc. Tex. art. 288, requiring the offense to be distinctly named in a bail-bond, a recital that he was charged with "unlawfully selling liquor on Sunday" is insufficient, but the indictment having charged that he was a merchant, grocer, or dealer in wares, and merchandise, or trader in business, and that as such he did unlawfully sell liquor on Sunday, the bond must allege the same facts.

Appeal from county court, Tarrant county; SAM. FURMAN, Judge.

B. G. Johnson, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. It is recited in the bail-bond that Bowen, the principal, stands lawfully charged in the county court of Tarrant county with "unlawfully selling liquor on Sunday," and the obligation in the bond is for him to appear before said court and answer said charge. We think the bail-bond is void, because it does not appear therefrom that the principal, Bowen, was charged with an offense against the laws of this state. "Unlawfully selling liquor on Sunday" is not an offense *eo nomine*, as is murder, theft, robbery, rape, and the like. It was essential, therefore, to the validity of the bail-bond that the specific offense with which Bowen was charged should be set forth, to-wit, that he was charged with being a merchant, grocer, or dealer in wares and merchandise, or a trader in business, and that as such he did unlawfully sell liquor on Sunday, following and conforming to the charge contained in the indictment or information. Code Crim. Proc. art. 288; 8 Tex. App. 671; Day v. State, 21 Tex. App. 213; Cravey's Case, 26 Tex. App. 84, 9 S. W. Rep. 62. Because of the invalidity of the bail-bond, the judgment is reversed, and the prosecution dismissed.

#### PONCIO v. STATE.

(Court of Appeals of Texas. Oct. 19, 1899.)

##### RESOUR—EVIDENCE.

There was evidence that defendant went to the jail, was asked by a prisoner for his knife, and

<sup>1</sup>This article requires "that the offense of which the defendant is accused be distinctly named in the bond."

threw it into the jail to him; that the prisoner did not state what he wanted with the knife, and that defendant went away without saying anything. There was no evidence that the knife could be useful in effecting an escape, or that the prisoner ever attempted to use it for such purpose. Held, that the evidence was insufficient to convict, under Pen. Code Tex. art. 210, of conveying into the jail an instrument "with intent to facilitate the escape of a prisoner."

Appeal from district court, Live Oak county; D. P. MARR, Judge.

Pen. Code Tex. art. 210, prescribes a penalty for conveying into any jail "any disguise, instrument, arms, or any other thing useful to aid any prisoner in escaping, with intent to facilitate the escape of a prisoner."

J. C. Cade and F. H. Church, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. Appellant has been convicted upon an indictment which charged him with conveying into the county jail "an instrument, that is, one certain knife, the same being useful to aid T. Venturo, a prisoner then and there lawfully detained in said jail on an accusation of felony, in escaping from said jail, and with the intent then and there to facilitate the escape of the said T. Venturo, so lawfully detained in said jail." This indictment was based upon article 210 of the Penal Code. The evidence showed that the knife thrown into jail by the defendant was "a common pocket-knife, large, but old, with two blades,—a large and small one." There is no evidence going to show how such a knife was useful, or could be used by the prisoner in effecting his escape from said jail. There is no evidence that the prisoner ever attempted to use it for such purpose. The knife was simply found by the jailer in the possession of the prisoner, Venturo. Venturo, who testified as a witness for the state, says that defendant came to the jail one evening; that he asked him for his knife; that defendant threw it into the jail, to him; that he did not tell defendant what he wanted with the knife; and that defendant, after throwing him the knife, went away, without saying anything. Defendant, who testified in the case, denied that the knife was his, and denied having given it to Venturo. If we accept Venturo's statement as true, then, in our opinion, the evidence is wholly insufficient to support the conviction, both as to the criminal intent of defendant, and the fact that the knife was useful to aid the prisoner to escape. Judgment reversed, and cause remanded.

#### READ v. STATE.

(Court of Appeals of Texas. Oct. 23, 1899.)

##### NEW TRIAL—JURY—NEWLY-DISCOVERED EVIDENCE.

1. A new trial should be granted where a juror was incompetent, as being neither a freeholder in the state nor a householder in the county, and he had answered on his *voter dire* affirmatively, thinking that he was a householder in the county;

and neither defendant nor his counsel knew till after verdict that the juror was incompetent.

2. After a trial for incest, the prosecutrix having testified that defendant was the father of the child, and that she never had sexual intercourse with any other man before the birth of the child, newly-discovered evidence that sexual relations had existed between prosecutrix and a certain other man before the birth of the child is sufficient to require a new trial, as it not only tends to impeach prosecutrix's testimony, but tends to show that another than defendant might be the father of the child.

Appeal from district court, Tyler county; J. F. LANIER, Special Judge.

James Read, convicted of incest, was refused a new trial and appeals.

*Nicks & Kirby*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. On a motion for new trial it was made to appear that one Campbell, who served on the jury, was incompetent to serve in that capacity, because he was neither a freeholder in the state nor a householder in the county of the trial; that said juror, before being impaneled, answered on his *voir dire* that he was a freeholder in the state, or a householder in the county, he believing at the time that he was a householder in the county, when in fact and in law he was not such householder; that neither defendant nor his counsel knew the fact of said juror's incompetency until after the return of the verdict. The facts above recited, and which are uncontradicted, entitled defendant to a new trial, and the court erred in refusing to grant his motion therefor. *Armendaris v. State*, 10 Tex. App. 44; *Boren's Case*, 23 Tex. App. 28, 4 S. W. Rep. 463; *Brackenridge's Case*, 27 Tex. App. 513, 11 S. W. Rep. 630. We believe, further, that defendant should have been granted a new trial upon the ground of newly-discovered evidence. In view of the peculiar character of the evidence adduced on the trial, the newly-discovered testimony of the witness Ada Read, to the fact of sexual intercourse between one Phillips and Angeline Read, was competent and material. This testimony was not desired merely for the purpose of impeaching the testimony of Angeline Read, the prosecuting witness. It was desired, and might be potent, for another purpose; that is, to show that defendant was not the only person who might have caused the pregnancy of the prosecuting witness, Angeline Read. We find no material error in the charge of the court, and the record contains no bill of exception to any portion of the charge, nor does it appear that the defendant requested any additional instructions. Because, in our opinion, the defendant should have been granted a new trial, the judgment is reversed, and the cause remanded.

#### TOMLINSON v. BOARD OF EQUALIZATION.

(Supreme Court of Tennessee. Oct. 12, 1889.)

#### APPEAL—CERTIORARI—TAXATION—EQUALIZATION.

1. Act Tenn. March 25, 1887, provides that the board of equalization shall examine and compare

and equalize the assessments, etc., and hear and adjust complaints, when in their judgment justice demands, and their action as to valuation shall be final. It provides that all complaints shall be heard from the first to the third Monday in June. It also provides that if the complaint is based on excessive values the board shall have the right to summon before them witnesses, and the testimony of three will be sufficient evidence on which the board may act. *Held*, that no appeal would lie from the decision of the board in such case.

2. Const. Tenn. art. 6, § 10, providing that the judges of inferior courts may issue writs of *certiorari* on sufficient cause, does not give a right to the writ as a substitute for an appeal from the decision of the board, but only as substitute for appeals of which the petitioner is wrongfully deprived.

3. The summoning of witnesses is not a matter of right to a complainant; and the board in refusing to summon witnesses, is not "acting illegally," or "exceeding its jurisdiction," within Code Tenn. § 3128, granting *certiorari* when an inferior tribunal or board thus abuses its power.

4. Nor is petitioner entitled to the writ to have the decision reviewed on the merits, as such right exists only where the writ lies as a substitute for appeal or writ of error, or, possibly, instead of *audita querela*.

TURNER, C. J., dissenting.

Appeal from circuit court, Grainger county; W. R. HICKS, Judge.

*Shields & Shields*, for plaintiff. *Tate & Pickle*, for defendant.

LURTON, J. The petitioner applied for and obtained writs of *certiorari* and *superseas*. Upon motion, at the following term of the circuit court, the petition was dismissed. His complaint is that the tax assessor of Grainger county has placed an excessive tax upon three parcels of land owned by him. He alleges that he made complaint before the board of equalization that his assessment was excessive, and produced and sought for permission to examine witnesses to support his complaint; that the board refused to allow him to examine these witnesses, or to grant him a subpoena for others that he proposed to bring before them; and that they adopted and approved the valuation fixed by the assessor. The petition shows the ground upon which the board refused to hear his witnesses, in that it states that they ruled that "a complaining tax-payer had no right, under the law, in such cases to introduce evidence as to the value of his property claimed to be excessively assessed, or the board any authority to hear and consider any evidence upon the subject, unless, in the judgment of the board, justice demands that it should have evidence, and then only such as the board might see fit to call itself, in its discretion." Petitioner then alleges that he preferred a bill of exceptions, which the board refused to sign, and prayed an appeal to the circuit court, which was refused.

What relief can petitioner obtain under a writ of *certiorari*, upon these facts? The duties and powers of the board of equalization are defined in section 42 of the Assessment Act, passed March 25, 1887. It is as follows: "That said board of equalization shall carefully examine and compare and equalize said assessments, and shall eliminate

from the lists thereof all property exempt under this act, and they are hereby empowered to hear and adjust complaints from any party feeling aggrieved on account of excessive assessments, when, in their judgment, justice demands it, and to correct any and all errors arising from clerical mistakes, or otherwise; and the corrections made, if any, shall be entered upon the assessment book without in any way altering the assessment lists; and the action of this board as to valuation shall be final; and all complaints in this regard are hereby required to be made and acted upon by this board, during its session, which shall be from the first Monday to the third Monday in June. If complaint made is based on excessive values, said board shall have the right to summon before them witnesses, who shall be disinterested freeholders, and the sworn testimony of three such witnesses concerning same will be sufficient evidence upon which such board may act." The italics are ours. It may be directly seen from the plain words of the act that the legislative intention was that there should be no appeal or review of the action of this board upon the subject of valuations, where it has acted upon a complaint. The law-maker has in so many words declared that its action in this regard "shall be final." When no right of appeal is given by the statute in express words, or by necessary implication, an appeal will not lie; and it was, therefore, not error in the board to refuse the appeal prayed for. *Wade v. Murry*, 2 Sneed, 50; *Ex parte Knight*, 3 Lea, 401. But it is insisted that when no appeal lies the writ of *certiorari* may be used in lieu of, or as a substitute for, an appeal. Article 6, § 10, of the state constitution provides that "the judges or justices of inferior courts of law and equity shall have power in civil cases to issue writs of *certiorari* to remove any cause, or the transcript of the record thereof, from any inferior jurisdiction into such court of law, on sufficient cause, supported by oath or affirmation." What is "sufficient cause" must be defined by either statute or judicial decision. Judicial decision has established that where the law gives an appeal, and the party is deprived of it without any fault or negligence on his part, that is "sufficient cause," if he shows, in addition to it, a meritorious case. *History of a Lawsuit*, § 655, (Old Ed.) But in the case before us the law gave no appeal; hence, the writ will not lie in lieu of or as a substitute for an appeal. But will it lie under any of the statutory definitions of "sufficient cause?" Code, § 3123, is as follows: "The writ of *certiorari* may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions, has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy." By the succeeding section it is declared that the writ of *certiorari* lies in the following cases: "On suggestion of diminution; where no appeal is

given; as a substitute for appeal; instead of *audita querela*; instead of writ of error." This is a case which learned counsel contend comes under the provision for the writ in the section last quoted, "where no appeal is given." It is too plain for argument that if the writ cannot lie under this provision it will not under any of the other cases named in the statute. These two sections must be construed together. The statutory ground is that the writ of *certiorari* will lie, upon sufficient cause shown, where no appeal is given; where an inferior tribunal, board, or officer exercising judicial functions, has exceeded the jurisdiction conferred, or is acting illegally; where, in the judgment of the court, there is no other plain, speedy, or adequate remedy. Does petitioner present such a case? Waiving for the present any consideration of the question as to whether a board of equalization, under our act of 1887, is a judicial tribunal, or whether, in regard to its action upon a complaint of an excessive assessment, it is a board "exercising judicial functions," we will first undertake to ascertain whether, if we assume it to have been in the exercise of judicial functions in the matter complained of, it has in any way exceeded its jurisdiction, or, in the language of the statute, was acting illegally.

The complaint made in the petition is that it refused to hear witnesses offered by complainant in support of his complaint as to an excessive assessment as to valuation. In this, did they "exceed their jurisdiction," or "act illegally?" To determine this, we must not only consider the language of the act defining their duties, but consider the general nature and scope of the powers conferred upon them. They are styled a "board of equalization." They are charged, primarily, with the duty of "examining" and "equalizing" assessments. This duty they are expected, most manifestly, to perform, not upon testimony, but upon a "comparing" the assessments in one district or neighborhood with another,—one piece of property with the assessment upon another of equal value. Clearly, this is to be done upon their own knowledge of the comparative valuations, and the end to be reached is an equalization whereby discriminations in favor of one, or against another, are to be corrected. In addition to this, they are to correct mistakes made by the assessor, and eliminate from the list property exempt under the law from assessment. Finally, they are empowered to hear and adjust complaints from any party feeling aggrieved on account of excessive taxation, where in their judgment justice demands it. How are they to "hear and adjust" such complaints? Petitioner's contention is that they must hear witnesses produced by him; that he has a right to examine such witnesses, and cross-examine such as are produced against him. In other words, that act contemplates a regular trial, according to the ordinary course of law, and the decision according to the weight of the proof. We

have seen that, with reference to the primary duty of the board—that of equalizing assessments—the act contemplates no issue of fact or hearing of evidence, but that the equalization is to be brought about by a comparison of assessments and the knowledge they have of the relative values of different pieces of property. Can the law contemplate any very different method of correcting an excessive assessment? The knowledge of relative values—of comparative values—which they have as citizens and freeholders, and which they obtain from an examination and comparison of the assessment lists, will, in the vast majority of cases, enable them to act justly upon the complaint. But cases may occur where these means are, in their judgment, unsatisfactory. In such case, the act declares that the “board shall have the right to summon before them witnesses, who shall be disinterested freeholders; and the sworn testimony of three such witnesses concerning same will be sufficient evidence upon which such board may act.” The “board shall have the right” to summon before them disinterested freeholders, in the language of the act. Does this power conferred make it their duty to either have witnesses brought by the party making complaint, or require them in all cases to summon witnesses upon such complaint being made; or is the hearing of witnesses a matter wholly in their discretion? We think the statute means no more than it plainly discloses. To hold that it was the duty to permit the examination of witnesses offered by a complainant would imply a duty to the state and county to hear and examine witnesses to sustain the assessment. All this would imply a trial, and a judgment upon weight of proof. The question of valuation is altogether a matter of opinion. Before questions of opinion the greatest diversity may be expected. The sessions of this board terminate in two weeks; and at the end of that time they are required to return the assessment lists, and their corrections, to the clerk of the county court. In populous counties the assessments reach into the thousands. That each tax-payer should have the right to come with his witnesses, and have them heard, and be heard by counsel, would result in such delay and embarrassment as to amount to a great public peril with regard to the assessment of the public revenues. No legislative body could have seriously contemplated such a tribunal to determine a mere question of an excessive valuation for purpose of assessment. Occasional instances of excessive assessments may occur; but they had better be borne than that such a court should be created to settle them. The taxpayer in the first instance may make his representations to the assessor. If he overassess him, he may carry the matter to a board of disinterested freeholders, acting under oath. If they upon their own knowledge, agree with the assessor, and, upon a “comparison,” find no case for a reduction of or purpose of equalization, the chances are that the assess-

ment is not far wrong. If he cannot induce the board to think that it is a case where they ought, for their own enlightenment, exercise the power they have to summon witnesses of their own selection, he must submit. The board was not “exceeding its jurisdiction,” or “acting illegally,” in refusing to have the witnesses offered by petitioner; and it had a right to refuse to summon witnesses of its own selection, if it deemed that justice did not demand evidence from witnesses.

The next contention is that petitioner has the right to have the writ of *certiorari* to the end that he may have the matter heard or retried upon the merits. This is based upon the proposition that if the board had heard witnesses, or had decided the matter without witnesses, and upon their own knowledge, or upon a comparison of the assessment complained of with other assessments, in any event their action in adopting and approving the assessment is a judgment which they are entitled to have reviewed upon the merits; and that, inasmuch as it is a case where no appeal lies, for this reason the writ of *certiorari* lies to review and retry the matter upon its merits. The answer to this is that it is only where the writ of *certiorari* lies as a substitute for an appeal or a writ of error, or, possibly, instead of *audita querela*, that the writ will operate to give to the petitioner a new trial upon the merits. On the first plan the act, as we have before seen, expressly declares that the action of the board shall be final. The law-maker did not intend that its judgment on the merits should be subject to review. In all such cases the writ will not lie to review the matter upon the merits. Such controversies must be finally settled by some means. The judgment of a disinterested board of freeholders upon a mere matter of opinion as to the valuations for taxation is as likely to be right as that of any court. Says Judge COOLEY upon this question: “As a general rule, a tax cannot depend for its validity upon the ability to justify it to the satisfaction of a court or jury. Value is matter of opinion; and, when the law has provided officers upon whom the duty is imposed to make it, it is the opinion of these officers to which the interests of the parties are referred. The court cannot sit in judgment upon their errors, nor substitute their own opinions for the conclusions the officers of the law have reached.” Cooley, Tax'n, (1st Ed.) 157. Every interest of the state alike demands that such questions shall be settled cheaply and speedily. Where an act creating a special tribunal, even exercising judicial functions, gives it power and authority to settle particular grievances, such as this, and either expressly or by plain implication declares that the judgment of such special tribunal shall be final, and it confines itself within its jurisdiction, and does not “act illegally,” the writ of *certiorari* will not lie to review its action upon the merits. This question has been settled in this state since the case of *Wade v. Murry*, 2 Sneed, 50.

That case was this: Under Act 1854, c. 32, contested elections of judges and attorney generals were to be heard and determined by a special tribunal, consisting of the chancellor of the division within which the contest arose. The jurisdiction was conferred upon the chancellor, and not upon the chancery court. The act prescribed how, when, and where he should have the contest. No provision was made for an appeal or writ of error. Judge McKINNEY delivered the opinion of the court, and held—*First*, that no appeal or writ of error would lie from the judgment of the chancellor determining such a contest; *second*, that no writ of *certiorari* would lie as a substitute for a writ of error, and that when the law intended the decision to be final and conclusive there could be no review of the judgment in any way whatever. The learned judge, however, qualifies his decision,—as we think, properly,—when he says that “we do not mean to say, however, that the *certiorari* might not be resorted to for some purposes in a case like the present. We think it might. In a case involving a question as to the legal competency of the judge, or showing such a substantial departure from the course of proceeding prescribed in the statute as would render the proceedings void, the *certiorari* would be the proper remedy.” *Id.* 57. The learned author of *A History of a Law-Suit*, in commenting on the doctrine now under discussion, says that “the law as stated in *Wade v. Murry*, precluding all inquiry into the correctness of the judgment upon the merits of the case, may be considered settled.” This has been thought of by some to operate as an abridgment of the right to a *certiorari* which is secured by the constitution. But the language of the constitution secures the benefit of the writ “on sufficient cause;” and what is sufficient cause, is not defined by the constitution. It must be therefore by the legislature or the courts. When the legislature has created an inferior jurisdiction, and has given no appeal from its decisions, it must be evident that it did not intend them to be reversed upon the merits of the case. It is equally evident that it intended the jurisdiction to keep itself within the prescribed limits, and to proceed in a legal manner; and it is only when it transgresses in these respects that “sufficient cause” exists for a *certiorari*. Caruthers, *History of a Law-Suit*, (Old Ed.) §§ 750, 751. *Wade v. Murry* has been followed in the case of *Ex parte Knight*, 8 Lea, 401. Opinion by Judge MOFARLAND; Judges TURNER and FREEMAN, dissenting. That this writ will not lie to review the judgment of a board of assessors or a board of equalization upon the merits, where the controversy is as to the valuation, has been repeatedly settled in other states. Judge Cooley, in his elaborate work on Taxation, in speaking of the office of this writ, says: “It will not lie to review any merely discretionary action of any tribunal, nor is it within the proper scope of the writ to review the decisions of inferior

tribunals upon the merits. The court awarding it, therefore, will not look into the evidence on which the inferior tribunal may have acted, except so far as may be necessary to the determination of any jurisdictional question that may depend upon it.” Again, he says: “The writ does not lie to the collector of taxes, or any other mere ministerial officer, to review either his action or any of the prior action on which his own was based,” and “that assessments cannot be revised, and set aside on this writ, on the ground, merely, that they are excessive or unequal.” *Cooley, Tax'n*, (1st Ed.) 531–533. See, also, *Shelby Co. v. Railroad Co.*, 16 Lea, 412, 1 S. W. Rep. 32. We have been referred to Mr. Burroughs on Taxation, who seems to entertain the opinion that a writ of *certiorari* will lie to correct an excessive assessment, although the assessor or board of equalization have not acted illegally, or exceeded their jurisdiction. This is a total misconception of the “sufficient cause” upon which such writ is authorized, either at common law or under our constitution. It is certainly not in accord with our cases, and is in direct conflict with the views of Judge Cooley, as quoted above. The judgment of the circuit court dismissing the petition is affirmed, with costs.

TURNER, C. J., (*dissenting*.) By an act passed 25th March, 1887, creating a board of equalization in the assessments of taxes, it is provided, in section 42, “that said board of equalization shall carefully examine and compare and equalize said assessments, and shall eliminate from the lists thereof all property exempt under this act; and they are hereby empowered to hear and adjust complaints from any party feeling aggrieved on account of excessive assessments, when, in their judgment, justice demands it, and to correct any and all errors arising from clerical mistakes or otherwise, and the corrections made, if any, shall be entered upon the assessment book, without in any way altering the assessment lists; and the action of this board as to valuation shall be final, and all complaints in this regard are hereby required to be made and acted upon by this board during its session, which shall be from the first Monday to the third Monday in June. If complaint made is based on excessive values, said board shall have the right to summon before them witnesses, who shall be disinterested freeholders; and the sworn testimony of three such witnesses concerning same will be sufficient evidence upon which such board may act.” The tax assessor of Grainger county assessed three separate tracts of land of petitioner at \$70,000. On a day fixed for hearing his complaint, petitioner appeared before the board, and filed a sworn exception to the assessment, alleging that it was \$30,000 in excess of the value of the property. He offered to sustain his complaint by three competent witnesses. The board refused to hear his proof, holding that petitioner had no right to introduce proof, or be heard upon the sub-



ject of his complaint. Petitioner prepared and extended a bill of exceptions, which the board refused to sign. He then prayed an appeal to the circuit court, which was refused. The prayer of the petitioner is that said board be restrained from returning said excessive assessment; that the matter be brought into the circuit court; that the property be lawfully and justly assessed; that said erroneous and unjust assessment be reviewed and canceled. The board moved the court to dismiss the petition, because the statute provided the action of the board should be final, and that petitioner's remedy was to compel the examination of witnesses,—was by *mandamus*. Upon the final ground, if the act intended to prohibit and cut off appeal to the courts for relief, it would be void,—a violation of article 1, § 17, of the constitution, ordaining “that all courts shall be open; and every man, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered, without sale, denial, or delay;” and of section 8, same act, that no man shall be deprived of his property but by the judgment of his peers, or the law of the land. Every man has a right to be heard before he can be lawfully condemned, in person or property. Is the writ of *certiorari* a proper remedy under this petition? By section 3838, Code M. & V., it is provided: “The writ of *certiorari* may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions, has exceeded the jurisdiction conferred, or is acting illegally; when, in the judgment of the court, there is no other plain, speedy, or adequate remedy.” By section 3839, “*certiorari* lies \* \* \* where no appeal is given.”

For the purposes of the question, we treat the petition as true. We have a board exercising judicial functions, exceeding the jurisdiction conferred, in its refusal to hear proof as directed by the act, and therefore acting illegally. No appeal is given by the act, and for that reason an appeal was refused. There is no other plain, speedy, or adequate remedy. The action of the board was on the 11th day of June, and its existence expired, by direction of law, on Saturday before the third Monday in June. It was a tribunal of only two weeks' duration. The first term of court after its action was on the fourth Monday in August, when there would have been no tribunal, board, or office, upon whom a peremptory *mandamus* could have operated; and the petitioner would have been without remedy, either plain, speedy, or adequate.

§. In *Dodd v. Weaver*, 2 Sneed, 672, it is said: “If there be no appeal, then the *certiorari*, which is a constitutional writ, is a proper remedy, by which any injurious irregularity in the proceeding may be corrected, or a trial *de novo* had. ‘The maxim of the law is that there is no wrong without a remedy, and it is a particular rule that a *certiorari* will lie to all inferior jurisdictions, the proceedings of

which cannot be corrected by writ of error, to remove their proceedings into the superior court, to be there affirmed or quashed, or otherwise corrected, as law and justice shall require.’” In *Saunders v. Russell*, 10 Lea, 295, this court holds: “The writ of *certiorari* is in this state a constitutional writ, and has always had a more extended application than in England, and been used for purposes unknown to the common law. It is the universal method by which the circuit courts exercise control over all inferior jurisdictions, however constituted, and whatever may be their course of proceeding.” In *Burroughs, Tax'n*, 242, 243, it is said: “In *Swift v. Poughkeepsie*, [37 N. Y. 511,] to determine the validity of a tax on bank shares, where the bank claimed an exemption to the extent of its capital invested in the United States bonds, and finally to examine into the action of assessors, so as to look into the evidence before the assessors, and correct mere questions of valuation, the court says: ‘It has been finally settled that a common-law *certiorari* to review the proceedings of assessors brings up the merits, as well as questions of jurisdiction and regularity, and that, where assessors have neither exceeded their powers nor been irregular in exercising them, the court will still, upon the facts appearing in the return, examine and correct their decisions, if erroneous.’ The cases in other states sustain those in New York as to the functions of the *certiorari*.”

In the argument that if this petition be allowed to prevail it will multiply suits, and thereby cripple the state in the collection of taxes, it is sufficient to say that the state is ordinarily as much bound by the constitution and laws thereunder as the citizens; and it is its duty to protect, and not oppress, the citizens. While every legitimate aid will be given to the state in collecting its revenue, the courts must see that their aid is authorized, remembering that the state is the creature, and not the creator, of the constitution. This argument of inconvenience to the state is, to my mind, a begging of the question. The state has set in motion machinery shown by the petition in this case to be apprehensive, and requires it to complete its work, and cease to exist in the space of two weeks, and now asks to say that “the shortness of the life of an institution of my own creation will, if its acts be allowed to be renewed, imperil my revenues. I must, therefore, be permitted to take advantage of my own wrong.” Recurring to the act, I do not see that it requires such interpretation. It requires the board to hear and adjust complaints from any party feeling aggrieved. How heard? How adjusted? Why, by summoning “before it witnesses, who shall be disinterested freeholders, and the testimony of three such witnesses will be sufficient evidence upon which said board may act.” The language that “it shall have the right to summon such witnesses means that it shall be its duty to do so on the complaint made. This is the only

way in which the complaint could be made and adjusted. The argument that it may exercise the right,—and that it is merely a right, unembarrassed by a duty,—and determine the question of excessiveness, presumes that the board is acquainted with all lands in their county,—a presumption that cannot hold good in any one county in the state. The objection that a trial will result if witnesses are introduced is answered by the statute providing for this introduction and examination. The trial naturally comes of the power conferred and the duty imposed upon the board by the words of the act. The petition only seeks to have the duties defined by the act enforced. It sets out the grounds, and suggests the names of witnesses of the character specified by the law. This was refused. If the action of the board is to be final, it can only be so after the law has been obeyed, which cannot be done under a rule that the board may, in its arbitrary discretion, as was done here, reject a main provision. The board is a judicial tribunal, to try questions of fact and law. In this case it passed alone upon that of law,—the construction of the statute,—holding that petitioner had no right to introduce proof, or be heard upon the subject of his complaint. It construed the law for itself, and by itself. It said to petitioner: "The law does not mean what you claim it to mean. We are the sole and exclusive judges of the meaning of the words of the act, and of the intention of the legislature in the employment of these words." Now, if the legislature may confer such judicial functions on this board, I can see no reason why it may not say that magistrates, county, circuit, and chancery, and such other inferior courts as may be established, shall have exclusive jurisdiction in such matters as the legislature may name, and their respective actions, judgments, and decrees "shall be final." The board of equalization is a court, and authorized by article 6, § 1, of the constitution, and upon which the legislature had no power to confer a jurisdiction to make its action final. Such legislation contravenes the spirit and theory of a state government.

EAST TENNESSEE, V. & G. RY. CO. v. HULL.  
(*Supreme Court of Tennessee. Oct. 13, 1899.*)

#### COMPARATIVE NEGLIGENCE.

In an action for damages for injuries suffered on defendant's railway, a charge drawing the attention of the jury to the comparative negligence of plaintiff and defendant, and directing them to find for plaintiff if they found the injury was caused by the greater negligence of defendant, is error.

Error to circuit court, Sullivan county; A. J. BROWN, Judge.

*Thomas Curtain and Taylor & St. John*, for plaintiff in error. *Haynes & Haynes*, for defendant in error.

FOLKES, J. The railroad company has appealed in error from the verdict and judg-

ment against it for damages for personal injury occasioned by a train of cars belonging to and operated by it. The facts of the case need not be stated, in the view we have taken of the case. For the plaintiff in error, it is insisted that the judgment should be reversed for error in the charges of the court upon the law of negligence. The portion of the charge objected to is as follows: "If the proof should show that it was the greater or grosser negligence of the defendant, through its agents or employees who were the superior of this plaintiff, or by using defective, imperfect, and unsafe machinery, that he was injured, he could recover; but if, at the same time, the evidence shows you that the negligence, or want of care or caution, upon the part of the plaintiff himself contributed to that injury, then that would be contributory negligence, and would be looked to and considered in mitigation of damages; that is, you could not give as much damages for the injury he sustained where his own want of care or negligence contributed as you could when he had been entirely blameless. The greater the contributory negligence upon his part, the less damages, if he should be entitled to any." This is manifestly erroneous. It invited the jury to a comparison of the negligence between plaintiff and defendant, and directed them to render verdict for the plaintiff if they should be of opinion that the injury was caused by the greater or grosser negligence of the defendant. This charge presents the doctrine of "comparative negligence," which this court has more than once said has never prevailed in this state. The error of the charge, in this regard, is emphasized by the statement, in that connection, concerning the doctrine of contributory negligence. The jury were nowhere told that the negligence of the plaintiff which might and ought to be considered in mitigation of damages should be such as contributed remotely, and not directly, to the injury; and that, if the negligence of plaintiff contributed directly to the injury, as the proximate cause thereof, instead of remotely, such negligence would be a complete bar to any recovery. Contributory negligence on the part of the plaintiff is, when it proximately contributes to the infliction of the injury, a bar to an action, because a person cannot be permitted to rush upon an apparent danger, and then, because an injury ensues to him, to be allowed to saddle the other party with the pecuniary consequences of an injury which his own want of care has brought upon him. But if the damage is not the necessary or ordinary or likely result of such contributory negligence, but is due to some wholly unlooked-for and unexpected event, which could not reasonably have been anticipated or regarded as likely to occur, such contributory negligence is too remote to be set up as a bar to the action. "In all cases where negligence on the part of the plaintiff is remotely connected with the cause of injury, the question to be determined is whether the defendant,

by the exercise of ordinary care and skill, might have avoided the injury. If he could have done so, the remote and indirect negligence of the plaintiff cannot be set up as an answer to the action." 2 Wood, Ry. Law, 1254, 1255.

It is unnecessary here to discuss the doctrine of "comparative negligence" as it exists in the states of Illinois and Kansas, and to some extent in Georgia. The subject will be found fully treated in 2 Thomp. Neg. 1164 et seq. It is sufficient to say that it has been expressly repudiated in this state. In the case of Railroad Co. v. Fain, 12 Lea, 35, the court permitted the term "more gross" negligence, and other language, in a charge which might ordinarily imply comparison, to pass without violating the verdict, when it was manifest from the context that the terms were limited so as to signify the prime, principal, and proximate cause of the injury, as contradistinguished from the remote cause, and when the charge was elsewhere so explicit as not to permit of the jury being misled by such terms. Now, while it is true that in the case at bar the jury had been told, in general terms, that if, by the exercise of ordinary care, plaintiff could have avoided the injury, he could not recover; and that, if injured by his own negligence, he could not recover; and that, if he were equally blamable with the defendant, he could not recover,—yet when the language used is considered in connection with so much of the charge as we have quoted, it is manifest that the objectionable terms were not qualified so as to save the charge, as was held in the case of Fain, supra, and of Railroad Co. v. Gurley, 12 Lea, 46. Instead of leaving it to be studied out whether or no the objectionable language has been saved or cured, it would be much better to omit from the charge all language implying a comparison of the negligence between plaintiff and defendant. A correct exposition of the law governing such actions does not require the use of any language of doubtful import. Inasmuch as the case will be tried again in the court below, we express no opinion on the facts of the case as presented in another assignment of error. For the error in the charge as herein shown the judgment must be reversed, and cause remanded.

#### MCDONALD v. UNAKA TIMBER CO.

(Supreme Court of Tennessee. Oct. 15, 1889.)

##### BREACH OF CONTRACT—DAMAGES—COSTS.

1. Complainant contracted to cut timber, and place it in a river, in a good, workman-like manner, knowing it was to be floated to the owner's mill. Held, that in an action on the contract, where defendant was allowed to recoup for a portion of the timber destroyed by the negligence and unskillful work of complainant, evidence of the market value of the timber at the mill was admissible to show the measure of damages, it not appearing that there was a market value for it at the time and place it was put in the river, and the mill being the point nearest thereto at which such timber had a market value. TURNER, C. J., dissenting.

2. In the chancery court the taxation of costs

is so largely within the discretion of the chancellor that his action will not be disturbed, on that account, unless the alleged error is very manifest.

Appeal from chancery court, Knox county; HENRY R. GIBSON, Chancellor.

Luckey & Yoe, for complainants. Webb & McClung, for defendant.

FOLKES, J. This is a bill by complainant to recover judgment upon a note for \$2,000, executed by the defendant company. The defendant, by answer and cross-bill, alleges that the note sued on was the last installment upon the sum of \$6,500, which had been agreed to be paid to complainant by defendant in consideration of complainant's undertaking to cut timber belonging to defendant in Yancy county, N. C., and deliver same in Cane river, in said county, "in a good, workman-like manner." This contract was reduced to writing on the 20th of March, 1888, and thereupon complainant entered upon the performance of his part of the contract. For the timber company, it was claimed that McDonald had breached his contract, among other things, in this: That he had, instead of putting the timber in the river in a good, workman-like manner, handled the timber in such a reckless and unskilled way as to totally destroy a great quantity thereof. The company sought to set off against complainant's demands the damages resulting from the destruction of the timber in the manner above stated. Much proof was taken in the matter at issue, and upon final decree the chancellor found in favor of the company, fixing the number of feet of timber destroyed by complainant, and ascertained its value to be \$1,393.75, which was deducted from the note for \$2,000, with interest; leaving a balance in favor of complainant of \$606.25, for which judgment was given; and defendant was taxed with three-fourths of the costs, the balance being charged to complainant. Both parties appealed, and have assigned errors. Many matters that were seriously litigated in the court below have been eliminated by an agreement of counsel; and the case is before us now only on two propositions,—one on behalf of defendant, concerning the taxation of three-fourths of the costs against it, and one on behalf of the complainant, in regard to the measure of damages adopted by the chancellor. It is agreed that the number of feet of timber destroyed by complainant's negligence has been correctly fixed by the decree below.

The contention on behalf of complainant is that the chancellor erred in adopting, as the measure of damages, the value of the timber at Knoxville, and that he should have taken the market value at Cane river, in Yancy county, in North Carolina; the place where, by the terms of the contract, the timber was to have been delivered. The decree upon this point is as follows: The court is of opinion that the Unaka Timber Company bought for the Knoxville market the logs which McDonald agreed to put into Cane

river; that said McDonald knew this fact on March 20, 1888, and that both said parties knew the said market price. The court is therefore of opinion that the amount of this damage should be fixed and controlled by the market price of the lumber in the log at Knoxville, less the cost of the rafting from Cane river to Knoxville; and the court finds the market value at Knoxville to be \$10 per thousand, and the cost of rafting thither \$2.50 per thousand, thus making the damage caused by breach of contract \$7.50 per thousand; and the amount of the decree was arrived at upon this basis. In his assignment of errors complainant does not challenge the fact alleged in the pleadings, and sustained by the proof, that he knew before and at the time the contract was entered into that the defendants had purchased the timber, and had made the contract with the complainant with reference to its value and use at the Knoxville market, where the defendant's saw-mill was situated, and where it dealt in logs and timber, and for no other purpose. The objection, as stated in the assignment of error, is that "the conversation and knowledge and information were all had and known before contract was signed; and, the contract being in writing, the presumption is conclusive that the writing contained entire terms; and, no mistake or fraud being averred, such parol proof was incompetent." It is unnecessary to say in this connection whether the action of the chancellor in overruling the objections as made was correct or not. The rule of evidence invoked had no application to the case made in the proof. The parol proof objected to does not enlarge, restrict, or vary the terms of the written contract in any respect, but merely shows the situation and knowledge of the parties at the time the contract was entered into. It is to be observed that the implication from the knowledge by the contracting parties of the special circumstances, and the objects contemplated by the contract, required the performance of no additional or different act on the part of the complainant to fulfill the contract. The measure of his duty remained as fixed in the contract. The knowledge brought home to him in the proof of the special and particular use to which the timber was to be put only served to admonish him that upon the breach of his contract he might be called upon to make good the loss that might result to the other party, to the extent that compensation for the injury might be found to depend upon the value in the Knoxville market. The principle upon which such testimony, when sufficient for that purpose, is admissible, and the office it is to perform, when admitted, is well stated in the much-quoted English case of *Hadley v. Baxendale*, 9 Exch. 353, which has been very generally adopted in America: "Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be consid-

ered either arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances, so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and, in the great multitude of cases, not affected by any special circumstances, from such a breach of contract." *Messmore v. Lead Co.*, 40 N. Y. 422. While the rule as above stated has been generally accepted as correct, yet, in the practical application of it in extending the liability so as to embrace damages brought within the contemplation of the parties by the communication of special circumstances, there has been some conflict of opinion. But the view we have taken of the case at bar renders it unnecessary for us to pursue the subject further.

Whether the facts within the knowledge of the complainant, to which the proof objected to was directed, to-wit, that the timber was bought and the contract made for the purpose of being sold or sawed by defendant at its mill in Knoxville, would be sufficient to authorize the chancellor to fix, as a matter of law, the measure of damages at the market value in Knoxville, it is not necessary for us to decide. If the testimony had been admissible for the purpose, and under the rule, as already stated, its sufficiency would be quite another question, and one which need not be determined, inasmuch as the result reached by the chancellor is unquestionably correct from another point of view. The elementary rule for the measure of damages rests upon the principle of compensation to the party injured for the loss sustained, with the least burden to the party guilty of the breach consistent with the idea of fair compensation, and with the duty upon the party injured to exercise reasonable care to mitigate the injuries, according to the opportunities that may fairly be, or appear to be, within his reach. The application of this rule, in the majority of cases where there is a breach of contract to deliver certain goods or property at a particular time and place, leads to the adoption by the courts of the market value of the property at such times and place. This is predicated upon the fact that ordinarily the party injured can make himself whole, or save further loss, by pur-

chasing or selling, as the case may be, at such market price, and then recover of the party guilty of the breach the difference between the contract price or value and the market price. If, however, there be no market price at such place, by reason of the want of dealers, or the want of the commodity, then the actual value at such place can be ascertained by proof of market value in other markets, with the cost of transportation added or deducted, as the case may be; such other markets to be at the nearest points where goods of the quality and quantity can be bought or sold. Under such circumstances, and perhaps others that might be named, the market price or value at the place of delivery may be shown by proof of value at the market where such commodities are usually sent for sale, and the cost of transportation to or from the place of delivery. 2 *Suth. Dam.* 373, and cases cited in notes 2 and 3. *Wood's Mayne, Dam.* 241, 242. See, also, *Henegar v. Copper Co.*, 1 *Cold.* 241; *Fort v. Saunders*, 5 *Heisk.* 487; *Railroad Co. v. Mason*, 11 *Lea*, 116; and *Railroad Co. v. Hale*, 1 *Pickle*, 69, 1 *S. W. Rep.* 620,—where these rules have been applied. Under the rules as above laid down, the chancellor was right in considering the proof of value at the Knoxville market, which is shown to have been the nearest point at which timber of the quality and quantity could have been purchased or sold, and that it was the market to which such timber, from the place of delivery mentioned in the contract, was generally shipped, as showing market value at place of delivery. It is, however, insisted in argument of counsel for complainant that there is proof of market value at Cane river for such timber, which prevents consideration of market value elsewhere; and the testimony of the witnesses Peek, Lewis, Hunnicut, Belton, Losey, and McDonald is cited to sustain this contention. It is true that the first three, and the last witness named, do say that there was a market value there, and fix it at \$4 per 1,000 feet for No. 1, and \$3 for No. 2; but only two transactions are given,—one by Lewis, of 18,508 feet; and another by Losey, of 11,000. Belton proved, and it is by no one contradicted, that at the time of complainant's default there was no such timber to be had in the neighborhood; certainly, not in any quantity. It is shown that all such timber anywhere in reach of the river had been cut and marketed; and those engaged in the business of cutting and putting such timber in the river had withdrawn their men and teams, because the timber accessible had been exhausted. It is granted that, while there was timber to be had at Cane river, it had a market value there of from \$3 to \$4; but, when the proof as above summarized is taken in connection with the proof of the very large quantity involved in the contract under consideration, (between six and seven hundred thousand feet, of which over one hundred and fifty thousand feet had been destroyed by complainant,) and the utter impossibility

of the defendant being able to repurchase at that place any appreciable quantity of such timber, the rule of compensation cannot be satisfied by merely awarding damages at what had theretofore been the market value there, nor at what then may have still been the theoretic value. In the absence of an actual market for quantity and quality, the true value there may be ascertained by proof of the value in Knoxville,—the nearest point where such quantity and quality could be bought and sold, and the point to which timber, from the place of delivery named in the contract, was usually sent for a market,—with a deduction for cost of transportation. The measure of damages, therefore, fixed by the chancellor is correct, notwithstanding we reach the same result by a different route.

We do not feel warranted in disturbing the decree on the taxation of costs. While we may not see clearly what led to the judgment in this regard, the matter of costs is so largely within the discretion of the chancellor that his action will not be vacated, unless error be very manifest. The decree will therefore be in all things affirmed; and as both parties have appealed without obtaining relief here, the costs of this court will be divided equally between complainant and defendant.

**TURNER, C. J., (dissenting.)** I am of opinion that the quantity and quality of timber, and its market value, as shown by the proof as recited by the majority opinion, is sufficient to make such a market price at Cane river as to render incompetent any proof of value in Knoxville as a means of ascertaining the value at place of delivery.

#### LAWRENCE v. INGERSOLL *et al.*

(*Supreme Court of Tennessee.* Oct. 19, 1899.)

##### INJUNCTION—ELECTION OF MUNICIPAL BOARDS.

1. An injunction is not mandatory which prohibits the meeting of a municipal board unless it gives complainant notice, and permits him to meet with it, but does not command his admission.

2. The charter of a city provided for the election of a member of the board of education by the mayor and aldermen by ballot; but no other official was directed to declare or certify it, and no provision was made for a contest. *Held*, that the validity of such an election could be inquired into and determined by *mandamus*.

3. Under the charter of the city of Knoxville, § 3, the board of mayor and aldermen is composed of nine aldermen. By section 4 the mayor cannot vote, except in case of a tie. Section 5 provides that a majority of the board shall form a quorum. An ordinance provides that any vacancy on the board of education shall be filled by an election by the mayor and aldermen. At such an election eight of the aldermen and the mayor were present. Complainant received 4 votes, there were 3 scattering votes, and 1 blank. The mayor did not vote, but declared complainant elected. *Held*, that a majority of the eight aldermen present was necessary to elect complainant, and the blank vote must be counted to show that he did not receive such majority. **TURNER, C. J., dissenting.**

4. The action of the mayor, declaring complainant elected, was not equivalent to a vote for him.

5. The board of aldermen having no power to elect except by ballot no action by them ratifying their previous action could make such election valid.

6. A certificate issued by the recorder of the board of aldermen, which is not authorized by law, notifying complainant of his election, and signed "by order of the board" is no evidence of ratification.

Appeal from chancery court of Knoxville; H. R. GIBSON, Chancellor.

*Taylor & Hood*, for complainant. *J. W. Caldwell* and *Ingersoll & Peyton*, for defendants.

SNODGRASS, J. The bill in this cause was filed by J. C. Lawrence, claiming to be a duly-elected and qualified member of the board of education of the city of Knoxville, for an injunction against defendants and the other four members of said board, to prohibit the meeting and action of said board without him, and to compel defendants, by *mandamus*, to recognize him as a member of the board, and permit him to take part in its proceedings, upon allegations of refusal of defendants so to do. The injunction issued, and, on final hearing, *mandamus* was awarded as prayed for. Respondents appealed, and assigned errors. Two preliminary questions are made, which need to be briefly noticed before disposition of the real merits of the controversy. One of these is made by respondents, and is an objection to the power of the court to issue a mandatory injunction, upon the assumption that the one issued in this case is such. The other question is made by complainant, and goes to the right of the court to inquire into the legality and validity of his election in this proceeding. Respecting the first question, it is sufficient to say that the injunction is not mandatory. The injunction prohibited the meeting and action of defendants without giving complainant notice, and permitting him to act with them. It did not command his admission, except that if respondents proceeded to act, it prohibited their acting, but authorized them to avoid this prohibition on compliance with conditions which they could or could not accept, as they saw proper, and was clearly not mandatory. It therefore becomes irrelevant and unimportant to discuss the question of the right, to issue mandatory injunctions, and the extent to which they may go.

As to the second question stated, it is equally clear that the chancellor had the right to determine the legality and validity of the election under which complainant claimed title to the office, for the exercise of the powers of which he sought the aid of the court. His election depended alone upon the action of the board of mayor and aldermen as embodied in the record made of it by them. The notification, called a "certificate," issued to him by the recorder, is of no force or validity, because not required by law. But, if it were, it could only embody the result of the record of the election, and could not add to its efficacy in the least, or change its effect. All the provisions made in the charter of Knox-

ville representing this election, pertinent to the point now being considered, are that it shall be made by the mayor and aldermen, by ballot. No other official is in terms directed to declare it, or to certify it, nor is any provision made for a contest. In such case it is well settled that the legality and validity of such election may be inquired into, in any proceeding, by *mandamus*, to compel other persons to recognize the claimant's title to the office, or when he seeks to enter into it, or otherwise assert his right to act as duly elected. 6 Amer. & Eng. Cyclop. Law, 384, 385, and cases cited; *Marshall v. Kerns*, 2 Swan, 67, 68; *Pucket v. Bean*, 11 Heisk. 600; *Lewis v. Watkins*, 3 Lea, 181, 182.

These questions out of the way, we come to the real question in the case: Was the complainant elected, and is he therefore entitled to compel the defendants to admit and recognize him as a member of the board? To determine this it is necessary to examine his claim to election, and then ascertain if, under the law, it is well founded. To support the first, he shows the following record of the minutes of the proceedings of the board of mayor and aldermen, in addition to the notification or certificate of the recorder, before referred to,—an indorsement, thereon of the recorder that complainant had taken the oath required by law:

"At a call meeting of the board of mayor and aldermen of the city of Knoxville, held Friday, Jan. 27, A. D. 1888, there were present, and answering roll-call, Aldermen Selby, Barry, Hockenjos, Jones, Albers, House, Perry, and McDaniel. Mayor Luttrell called Mayor-Elect Condon and Ex-Mayor Fulcher and Alderman S. B. Boyd to take seats on mayor's stand. (The following proceedings were had, to-wit:) The minutes of the meeting of the board of January 6, Jan. 25 and Jan. 26 were read and approved. On motion of Alderman Albers the board took a recess of five minutes. Mayor Luttrell resumed the chair, and called the board to order. Alderman Perry moved to go into an election of the city school board, to fill out the unexpired term of Hon. M. J. Condon resigned. Motion carried. Mayor Luttrell appointed Aldermen McDaniel and Barry as tellers, and Alderman Perry to take up the votes. Alderman Perry nominated F. L. Fisher. Alderman Jones nominated Rev. J. C. Lawrence. The ballot was taken, and it was found that J. C. Lawrence had received four votes, and F. L. Fisher three votes, and a blank without any name was also found, and thrown out. Mayor Luttrell declared J. C. Lawrence legally elected as a member of the city school board of education, to fill out the unexpired term of Hon. M. J. Condon, resigned. Some discussion was had, after which Alderman Perry moved to reconsider said vote and election. Seconded by Alderman Albers. The ayes and noes were taken on roll-call, Aldermen Selby, Hockenjos, Albers and Perry voting aye, and Aldermen Barry, Jones, House, and McDaniel voting

no.—4. Mayor Luttrell decided the motion lost. On motion of Alderman Barry, the board adjourned until nine o'clock to-morrow morning. [Signed] Approved: JAS. C. LUTTRELL, Mayor."

"City of Knoxville, Tenn., Jan. 31, A. D. 1888. Mr. J. C. Lawrence: At the regular meeting of the board of mayor and aldermen of the city of Knoxville, held Jan. 27, A. D. 1888, you were chosen and elected as a member of the board of education, to fill out the unexpired term of said office of Martin J. Condon, resigned. By order of the board. C. C. NELSON, Recorder. Enrolled, 1-12-89, Bk. 2, p. 45."

"J. C. Lawrence came before me and took oath of office as required by the new charter, Jan. 31, 1888. C. C. NELSON, Recorder."

Upon this record and these statements of the recorder he bases his claim to the office, and right to a peremptory *mandamus*. No question is made that the oath said to have been taken is not shown to have been done by this indorsement, nor upon the notification or certificate as such. The question is only made, as to the latter, that the recorder had nothing to do with the election, or certifying it, and that the certificate does not affect the question; and this is true. This brings us to the second subdivision of the real question, that is, to determine whether, under the law he was in fact elected. The provisions of the charter in relation to the election are found in several sections of the act of June 10, 1885, entitled "An act to reduce the incorporating the city of Knoxville, and the various amendments thereto, to one act, and to amend the same." Section 68 of this act provides that there shall be a board of education for the city, to consist of five members,—citizens of the town, and not members of the board of mayor and aldermen. "Sec. 64: The board of education shall be elected by the board of mayor and aldermen, from the citizens and qualified voters of the town by ballot; and the term of office of each member shall be five years." "Sec. 8. \* \* \* The board of mayor and aldermen shall be composed of nine aldermen." "Sec. 4. \* \* \* The mayor shall not vote, except in case there shall be a tie vote, on any question, and then he shall by his vote decide the question. Sec. 5. \* \* \* It shall require a majority of the members of the board to form a quorum for the transaction of business." No provision being made for the filling of vacancies in the board of education, this defect was remedied by an ordinance as follows: "In case any vacancy shall occur in the board of education, the unexpired term of such member vacating shall be filled by an election by the board of mayor and aldermen, as soon as practicable after such vacancy occurs."

These are all the provisions of the charter or ordinances of the city necessary to be noticed. They are those under which the election was held, and the provisions of which must determine its validity; no other law existing in our statute which affects the ques-

tion. It is observed that there are nine aldermen, who, with the mayor, are to make the election, if all are present,—the mayor having no vote,—as no tie could result; that if less than nine are present, but a majority of that number, then those present may elect; but, if equally divided in an election, the mayor may cast the deciding vote,—the only contingency in which his act can affect the question. In the election now being considered a majority (eight) were present, and participating in the election. This appears both in the recitals of the records herein before shown and in the fact that seven ballots were cast for the candidates, and one blank ballot. It remains now to inquire, what is the effect of this action on the part of this board, acting through its eight members and authorized quorum? In determining this question, it must be borne in mind that we are not examining the effect of an election of an indefinite number of electors, as the vote of the body of the people of the city, or the vote of any indefinite number of people, in a popular election; for the rule governing the one is entirely different from that governing the other. In the case of general or special elections by the vote of the people,—by the vote of an indefinite number,—the common-law rule is that a plurality of votes elects. That is, the candidate getting more votes than any other is elected, although he does not get a majority of the votes cast, and hence it makes no difference that there are absent voters, or blank votes cast. They do not change the fact that one candidate receives a plurality; and cannot do so, in the very nature of things. Cooley, Const. Lim. (5th Ed.) 779. See, also, 770 and 771. Mr. Cooley treats alone the subject of popular elections, the scope of his work not including elections by governing bodies of corporations. This is not only the rule at common law, but it is so by statute in this state; and hence, in our elections by the people, the candidate who gets the highest number of votes is elected. And this rule is applied to corporate action, where the corporate power resides in the inhabitants or citizens at large, and where they meet and act in their primary capacity,—and, hence, indefinite numbers. 1 Dill. Mun. Corp. §§ 208-215.

It is equally well settled, and, indeed is not open to controversy, that when an election is to be made by a definite body of electors, as members of a board of aldermen, that, "in the absence of special provision, the major part of those present at a meeting of a select body must concur, in order to do any valid act." 1 Dill. Mun. Corp. § 220. "When, therefore," adds the author, "it appeared that thirteen ballots were cast, when the members present were only entitled to give twelve votes, of which seven were for one person and six for another, there is no election; and the council, though it has declared that the person receiving seven votes was duly elected, may rescind its action, and proceed to a new election. \* \* \*" Id. And this



common-law rule as to majorities, he declares, is applied to governing bodies of municipal corporations, where not specially regulated by charter or statute. Sections 216, 217. We have seen that it is not only not differently regulated by the charter of Knoxville, or other statute of Tennessee, but that the charter provides for the transaction of business only by a majority of a quorum, and gives the mayor a right to vote when the majority thereof cannot decide; thereby conclusively showing that a majority must concur, or there is no result.

A different rule, as we have seen, and we repeat, prevails at common law where the election is by an indefinite number of electors, in which a plurality of votes is sufficient for an election. These rules, and their distinctions, are very forcibly and clearly stated in the able treatise on elections in the sixth volume of American & English Encyclopædia of Law, as follows: "The only way to defeat the election of a candidate at an election where the number of electors is indefinite, or where the law does not require a majority of all the members of a body having a definite number, as opposed to a majority of those voting, is by voting for another candidate; and the fact that a majority enters a protest against the minority candidate voted for at a regularly called election will not defeat the election, if no other candidate is voted for. This rule does not apply to cases where the elective body consists of a definite number, and a majority of the members is required for an election. In such cases a refusal to vote, or a blank vote by a majority, will defeat an election." Page 381.

We have heretofore seen that under this charter a majority of the quorum is required. This author shows, further, that the rule respecting the election by a definite number in a municipal body extends also to other bodies of definite numbers, as legislative, etc., and shows that in such case a majority must concur, and vote for the candidate, in order to elect him. Quoting several cases and instances of high authority, he says, illustrating: "By section 15 of the Revised Statutes of the United States it is provided that all votes for senators shall be by *visa voce* vote of members of the legislature, and, by section 27, that all votes of representatives in congress must be written or printed ballots; and that all votes received or rendered contrary to such action shall be of no effect. It has been held that when there is no provision of law making a plurality sufficient for an election a majority of the votes cast must be for a candidate, in order to elect him." Id. 332, citing *State v. Fagan*, 42 Cong. 35. He cites several cases sustaining the text, the notes being as follows: "In the absence of any act of congress on the subject, a state may pass a law, or a joint or concurrent resolution of the legislature, requiring a majority of all the members elected to both branches of the legislature to elect a senator of the United States; and in such a case, where twenty-

nine votes are given for one candidate, and twenty-nine blank votes were given, it was held that this did not constitute an election. *Yulee v. Mallory*, 2 Cong. El. Cas. 608; Senate El. Cas. 146." And again: "In 1866, in the Stockton Case, in New Jersey, (Senate El. Cas. 264,) it appeared that there was no law in the state regulating the election of senators, and there had been a practice of regulating the election of all officers by resolution of the convention; and at the convention for the election of senators in 1865 a resolution was adopted that a plurality of the members present might elect. The judiciary committee, reporting through Senator Trumbull, decided in favor of the validity of the election; but the resolution was amended by the close vote of 22 to 21, and the candidate was declared not elected. It was claimed by some of the senators that "the parliamentary law required a majority to elect, and this could only be changed by a law or resolution of the house, acting in the legislative capacity." Id. 332.

Thus it appears by concurrence of textbook, judicial, senatorial, congressional, and legislative authority, that the rule is settled that a majority of a definite body present and acting must vote for a candidate, in order to elect him, and that it is not sufficient that he receive a plurality of votes cast, or a majority, if blank ballots are excluded. His claim must not depend upon the negative character of the opposition, but upon the affirmative strength of his own vote; that it is not sufficient that a majority were not cast against him, to be elected. The majority must be cast for him. "So, if a board of village trustees consists of five members, and all, or four, are present, two can do no valid act, even though the others are disqualified by interest from voting, and therefore omit or decline to vote. Their assenting to the measure voted for by the two, will not make it valid. If three only were present, they would constitute a quorum. Then, the votes of two, being a majority of the quorum, would be valid. Certainly so, where the three are all competent to act." 1 Dill. Mun. Corp. § 217. These authorities answer the proposition, urged by complainant, that the blank vote must not be considered, and it must be treated as though only 7 votes were cast, and he got 4. It is true that the blank vote cannot be, in the technical sense, a ballot, but it is, nevertheless, an act of negation,—affirmative in showing that another voter acted negative in determining the majority. It was one of eight, attempted to be cast with the purpose of not supporting complainant, and is only to be counted in showing that he did not get a majority, just as would have resulted had it been an illegal vote,—as being for two candidates, or otherwise.

But complainant's case would be no better if that vote was entirely disregarded, because the record otherwise shows that eight aldermen were present; and, without reference to

their vote, he must have received five votes in order to be elected. The roll-call shows eight present. On the vote to reconsider, eight voted. Indeed, it is not anywhere pretended by complainant that they were not all present and participating; and, nowhere the contrary affirmatively appears. But it is said that the mayor declared the election carried, and that this is equivalent to a vote for him; and, with four votes for him and four not for him, the mayor's vote or action makes the election. There are several answers to this, all conclusive. *First*, the mayor had no right to vote, as there was no tie; and, *second*, he did not vote; *third*, his action, declaring the result, without voting, would not make an election, because the law does not allow him to declare a candidate, even on a tie, elected, without voting at all. He could only, in such cases, vote, and make an election; and, when he does this, it makes it, even though he should then declare the candidate not elected.

A still further argument is made, however, that the board appears to have ratified it, and this should be treated as giving validity. The answers to this are, if possible, even more conclusive. They are—*First*. That the board has not power to elect, except by ballot. There was never but one ballot cast, and, if that did not make it, no election could otherwise be made. *Second*. The board did not ratify it. On the contrary, four members voted to reconsider, and therefore against ratification, and four for it. This, at least, while unimportant, was not an affirmation. It was, at most, but a tie, which the mayor might by his vote have decided. He did not chose to vote, but, instead, declared the matter lost. In both instances the mayor refused or failed to vote, and contented himself with declaring that the results stood accomplished without his vote. We are not presenting the parliamentary question, or attempting to show that four against four would rescind any legal action. We are only showing that no majority ever in any way voted to ratify an election. The argument need not be repeated here that this meant nothing, and accomplished nothing. The law is that they could not make an election by ratification, and the fact is they did not. In addition to the effort to reconsider, it is said, as evidence of ratification that on the notification, called a "certificate," of the recorder, in which he advises complainant of his election, he appends to that statement the words, "by order of the board," and that this is evidence of ratification. Having shown that ratification could not make, or make valid, an election, it is perhaps superfluous to deal with the evidence of it; but, having denied the fact, it is proper not to overlook this point, as bearing on the question of fact as to whether or not any act of the board was an attempted ratification. We have seen that the recorder has nothing to do with the election, either to make or declare or certify it, under the charter. This whole

paper, including indorsement, therefore, goes for nothing. His statement, in a paper that he was not required to make, that it was done by order of the board, would not prove that fact, of course; and no other evidence of it is offered. He may, and doubtless did, think himself authorized to make it, and may have been ordered to do so; but no such order is produced, and nothing else proves it.

The construction herein given to the charter regulating municipal elections and the action of municipal boards is not only sound in law, but in policy. It would be of the most injurious consequence to hold that municipal bodies could make elections or appropriate money, legislate rights away or pass measures affecting vast property interests, by less than an affirmative vote of an acting majority. It is going sufficiently far to allow them to vote by majority of a quorum present; but if, by legislative act or judicial construction, they should be authorized to act by a majority of a quorum, there would be no safeguards effectual to protect the public, within the scope of their authority. It is equally salutary to provide, by following well-founded principles and precedents, that what they will not or do not in fact do by vote they shall not accomplish by declaring it done without vote. Reverse the decree, and dismiss the bill, with costs.

**TURNER, C. J., (dissenting.)** The charter of Knoxville provides: "The board of education shall be elected by the board of mayor and aldermen, from the citizens and qualified voters of the town, by ballot, and the term of office of each member shall be five years." On the 27th of January, 1888, the board of mayor and aldermen met. A motion "to go into an election for a member of the city school board, to fill out the unexpired term of Hon. M. J. Congdon, resigned, was carried. There were present the mayor and eight aldermen, who constituted at that time the entire board. The ballot was taken, when it was found that J. C. Lawrence had received four votes, F. L. Fisher three votes; and a blank was found, without any name on it, which was thrown out. The mayor declared Lawrence elected. Motion to reconsider was lost. Lawrence was notified of his election, and on January 31st took the oath of office before the recorder, having received from the board a certificate of election. The members of the board of education refused to permit Lawrence to sit and serve with them. Whereupon he filed his bill, alleging his title to the office; asking that it be declared by decree; praying that defendants be required to give him notice of the meetings, and permit him to be present; that they be enjoined from meeting, or transacting any business of the board of education, without giving him notice, and permitting him to be present and participate. There was demurrer, which fully presents every question of jurisdiction in the chancery court, which was overruled,—properly, as we hold.

There can be, in our opinion, no valid reason why a chancery court may not exercise its injunctive powers to restrain an unlawful act, or, as here, what seemed to be a lawful act performed in an unlawful manner. The bill did not seek, nor the fiat restrain the meetings of the board, and the transaction of its business. The restraint went only to the extent of inhibiting such action by four members of the board without notice and permission to complainant to be present and take part; his bill making a *prima facie* case of a right and duty on his part to do so. It is difficult to see why a court having the power to prohibit action may and does not have the power, derived in the same way, to command action. The reason for the one applies with like force to the other. If the court may restrain a wrong, it may command a right. Then, if complainant was a duly-elected member of the board, he was entitled to his voice therein; and the chancery court had the jurisdiction to enforce his claim.

So far, the court is a unit. The question of his election arises. Under the facts stated, a majority is of opinion there was no such election as the charter contemplates, and in support relies in part on 1 Dill. Mun. Corp. § 220, which is: "In the absence of special provision, the major part of those present at a meeting of a select body must concur, in order to do any valid act." This is construed to mean that the candidate must have a majority of the votes of all present, entitled to vote; and that, while the seven voting constituted a quorum for the transaction of any business of the board, there was not the majority of all present, and, therefore, no election, and complainant is entitled to no relief under his bill. I do not assent to this conclusion, and am of opinion that, even under the rule laid down by Mr. Dillon, there is an election. There was no dissent to the motion for an election; therefore, to hold it as was done was "a valid act," to which there was a concurrence, not only of the "major part," but of all present. If it was necessary that all the aldermen present should vote, then I am of the opinion such necessity was conformed to,—that eight votes were cast, although one of the ballots was a blank. If the blank can be regarded at all, it must be as an expression of indifference by the alderman who cast it as between the two nominated candidates, and, therefore, as an expression of consent that he who shall receive a majority of those actually voting should be the elected member of the board of education; and, if the blank was considered at all, such was the interpretation of the mayor, when he declared Lawrence elected. Such was the interpretation of the board, refusing to reconsider, and also in the unchallenged certificate of election furnished by the recorder, "by order of the board," with objections from no one. To my mind, it is clear that no account should be taken of the blank ballot, nor of the nominal presence of the alderman who cast it. He

might have retired from the room, in which event, I understand, it is to be agreed that a majority of the seven voting would have made an election. His absence would, of itself, make the "action" of the "major part present" "valid." The question, then, is, was it necessary that his absence should have carried him out of sight or hearing? I think not. When he determined, after voting that an election be held, that he would take no part in the election, he, in legal contemplation, absented himself from the board, and did not change that contemplation by dropping a blank in the ballot-box, any more than would the failure of a qualified voter, present at the polls of a town or city election, to cast a vote, nor any more than the casting a blank by such voter would change the result. Both would be failure to vote. Both would be absence from the election as a voter. No weight should be attached to the fact that he voted for an election to be held at that meeting. That would not make him present for the election any more strongly than it would make him present for an election on the next or any subsequent day. Nothing can constitute a presence but participation. It was by acts signifying a full acquiescence in the action of the majority voting.

Judge Cooley, in his work on Constitutional Limitations, (3d Ed.) § 14, states the rule more strongly against the defendant than I have done. He says: "In most of the states a plurality of the votes cast determines the election. In other words, as to some elections, a majority. But, in determining upon a majority or plurality, the blank votes, if any, are not to be counted; and a candidate may, therefore, be chosen without receiving a plurality or majority of voices of those *who actually participate in the election*." (Italics mine.) Under this rule, the blank is not to be counted. The presence of him who cast it was not necessary to a quorum, to make an election. If he had been in fact absent, it is admitted, the election would have been lawful and free from objection. If Judge Cooley is right, it follows, although we may hold that the casting a blank ballot was a participation in the election, still complainant, having a majority of such number as was authorized to elect, was elected, notwithstanding the presence and participation of him who cast the blank which is not to be counted. If there had been 5 present at the election, with 3 voting for one man and 2 for another, or 2 voting blank or not voting at all, the election would never have been complete. Here were 7 actually voting, and 1 not; and we are asked to count the blank against the complainant. We may as well, by the same process of reasoning, count it for him. The juster rule is not to count it at all. It seems to me the rule cited from Judge Cooley is the one this state should adopt, in the first case of the kind arising in our courts. The blank was nothing,—should be counted for nothing. Without it, or its author, there was a complete quorum; and their action should be affirmed.

If a quorum may hold an election, a majority of that quorum may make an election. Under rule laid down by the majority, is it not in the power of one man to defeat an election? When he sees that his vote for his favorite will make a tie, as the mayor cannot cast his vote, so if he—the voter—desires a defeat, he can accomplish it by a blank.

**WEBB v. EAST TENNESSEE, V. & G. R. CO.**

(*Supreme Court of Tennessee. Oct. 19, 1889.*)

**DEATH BY WRONGFUL ACT—RIGHT TO SUE—RAILROAD SIGNALS.**

1. Mill. & V. Code Tenn. § 1298, subsec. 3, regulating railroad signals, provides that "on approaching a city or town the bell or whistle shall be sounded when the train is at the distance of one mile, and, at short intervals, until it reaches the depot or station; and on leaving a town or city the bell or whistle shall be sounded when the train starts, and, at intervals, until it has left the corporate limits." *Held*, that the word "town" in the first part of the section includes only incorporated towns.

2. Act Tenn. 1851, (Thomp. & S. Code, §§ 2291, 2292,) provided that the right of action which a person who dies from injuries received from another, etc., would have had in case death had not ensued shall pass to his personal representative, for the benefit of his widow and next of kin; and that, if the personal representative decline to sue, the widow and children may, without his consent, use his name. Section 2293 provided that if deceased had commenced an action it shall proceed without revivor, and the damages shall go to the widow and next of kin, free from the claims of creditors. Act 1871, c. 73, § 1, provides that section 2291 be so amended as to provide that the right of action shall pass to the widow, and, in case there is no widow, to the children or the personal representative for the benefit of the widow or next of kin. Section 2 provides that section 2292 be so amended as to allow the widow, or, if there be no widow, the children, to prosecute suit; and that this remedy is provided in addition to that now allowed by said section and section 2291. *Held*, that the amendment did not take away the right of the personal representative to sue, when deceased left a widow; but, if the widow waives her right to sue, the right remains to the personal representative.

Appeal from circuit court, Bradley county; D. C. TRUEHITT, Judge.

*P. B. Mayfield and J. E. Mayfield*, for plaintiff in error. *S. P. Gant and J. N. Aiken*, for defendant in error.

FOLKES, J. This was an action by an administrator to recover damages for the killing of plaintiff's intestate by the negligence of the employees of defendant company in the running of a train of cars. There was a verdict and judgment for plaintiff, in the sum of \$5,500, to recover which, after the refusal of the circuit judge to grant a new trial, the defendant has brought the case here on writ of error. The declaration contained two counts, in the first of which the plaintiff declared on the facts in an action on the case at common law; in the second, the right of recovery is placed upon the alleged failure of the defendant to comply with the statutory requirements set forth in section 1298, Mill. & V. Code. The court instructed the jury with reference to the law governing the case as made in each count, and directed them to

say in their verdict upon which count they found, if at all, for the plaintiff. In response to such instruction, the jury, as shown upon the face of the verdict, predicated the defendant's liability upon the second count; that is, upon the failure of the company to comply with the statutory requirements. Concerning the facts, it is sufficient to say that plaintiff's intestate was killed, while on the track, by being run over by a regular train of defendant, which was approaching the depot in the town of Charleston; the accident occurring near the depot. There was a conflict in the proof as to whether the various provisions of the statute were complied with or not. Under these circumstances, the court charged the jury in the exact language of section 1298, reading from the statute each subsection thereof,—none of which need be noticed here, except subsection 3, which is as follows: "On approaching a city or town, the bell or whistle shall be sounded when the train is at the distance of one mile, and, at short intervals, until it reaches the depot or station; and on leaving a town or city the bell or whistle shall be sounded when the train starts, and, at intervals, until it has left the corporate limits." In this connection the judge said to the jury: "As appropriate to the consideration of the matter in the second count,—as to whether the injury complained of was in a town, and whether or not the defendant blew its whistle or rung its bell as required by the statute,—it is proper, perhaps, for me to define what is meant by the word 'town' in the statute, or what could constitute or make a town. Upon this point, I instruct you that a town may consist in the building in close proximity or connection a collection of, or many, houses, in which people live and do business, and have a market and stores of supplies; and in which such people live and do business, not as yeomen in the country, but as people living in a town or city. Or it may consist in the laying off a piece of land or ground into town lots and streets, and people building thereon, and buying and selling and living in such boundary as in a town, and recognized and treated as a town by people of the country, and otherwise. There are various definitions for the word 'town,' but I think the one I have given you sufficient in this case; and, be the meaning of the statute (section 1298, subsec. 3) what it may as to trains on leaving the depot or station until they pass the corporate limits, I instruct you that as to trains approaching the town, and the requirement of the company to blow the whistle and ring the bell, the town need not necessarily be an incorporated one, for the statute to apply. The duty of the company, under this part of the section, applies alike to cities incorporated, and to unincorporated towns." It is unnecessary to say anything concerning the definition above given of a town, inasmuch as the assignment of error is only predicated upon such part of the charge quoted as we have italicized. The result of

the charge, or its substance, is an instruction to the jury that the specific precautions pointed out in subsection 3 of section 1298 must be shown to have been complied with, or the verdict must be for the plaintiff, under section 1299, which enacts, as we know, that "every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants, shall be responsible for all damages to persons or property occasioned by, or resulting from, any accident or collision that may occur." So that if this jury had concluded from the proof that all of the precautions pointed out in the other subsections of section 1298 had been complied with, and that the defendant had exercised all the prudence that devolved upon it under the rules of the common law, yet, if they should find from the proof that the place of the accident was a town, within the definition given by the trial judge, although not an incorporated town, and if they should further find that the train inflicting the injury was approaching such town, and the company had failed to prove that the bell or whistle had been sounded when the train was at the distance of one mile, and, at short intervals, till it reached the depot or station, the verdict must be for the plaintiff. This was manifestly erroneous. The words of the statute must have a fair construction. There is no authority nor necessity for enlarging or extending or qualifying the meaning of the terms used in the statute, and every word must be given effect, if it can be done without doing violence to the manifest intention. If an incorporated town or city were not meant, why say in the last clause of the section under consideration that the bell or whistle should be sounded at intervals till the train "has left the corporate limits?" Where and how are the corporate limits of an unincorporated town to be located by the railroad company, within this statute? But it is urged at the bar that, if this be so as to trains leaving a town or city, the first clause of the subsection, which relates to trains approaching a city or town, does not mention "corporate limits," and that, as the accident here was occasioned by an approaching train, the limitation implied in the clause relating to departing trains should not control. It is sufficient to say that the use of the term at the end of the section may reasonably, if not necessarily, refer and apply to the entire section. If it were not so intended and used, to what are we to apply the language of the first clause, requiring the bell or whistle on an approaching train to be sounded "at the distance of one mile?" One mile from where, if not from the corporate limits? As we have already said, there is no necessity for giving any strained construction to this act, for the reason that in unincorporated towns, as in all places along its road, the common law and the provisions of our other statutes—which are, in the main, but an embodiment of common-law rules—are in all respects ample for the protection of life and

property from the negligence and wrong of the agents and operatives of the railroads of the country. A like construction was placed upon the statute in an unreported case, (*Bright v. East Tennessee, V. & G. R. Co.*), at this place. See Opinion Book, 1874, p. 349. For this error in the charge, the judgment must be reversed, and cause remanded.

There is another assignment of error which must be disposed of, inasmuch as the case goes back for a new trial. It is this: Has the plaintiff, who sues as administrator, the right to maintain the action, when the declaration alleges, and the proof shows, that the intestate, whose death was occasioned by the alleged negligence of the defendant, left a widow still living? It is contended that since the act of 1871, c. 78, amendatory of section 2292, *Thomp. & S. Code*, (carried into the *Mill. & V. Code* at sections 3130, 3131, and 3132,) the right of action passes to the widow, and that the administrator cannot maintain an action for injuries resulting in death of his intestate, except where there be "no widow." If this contention be sound, it is fatal to the present action, and is not cured by verdict and judgment, as the question goes to the plaintiff's title. This question has never been passed upon directly by this court, so far as we are apprised. To determine the force of this assignment of errors, we must examine the statutes in question. The act of 1851 (carried into *Code, Thomp. & S.*, §§ 2291, 2292,) is as follows: "Sec. 2291. The right of action which a person who dies from injuries received from another, or whose death is caused by the wrongful act or omission of another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his personal representative, for the benefit of his widow and next of kin, free from the claims of his creditors. Sec. 2292. The action may be instituted by the personal representative of the deceased; but, if he decline it, the widow and children of the deceased may, without the consent of the representative, use his name in bringing and prosecuting the suit, or giving bond and security for costs, or in the form prescribed for paupers. The personal representative shall not, in such case, be responsible for costs, unless he sign his name to the prosecution bond." Section 2293, which originated with the *Code* of 1858 and is not referred to in the act of 1871, is very important, as it helps us to get at the meaning by showing the state of the law on the entire subject at the time of the amendment under consideration. It is as follows: "If the deceased had commenced an action before his death, it shall proceed without a revivor. The damages shall go to the widow and next of kin, free from the claims of the creditors of the deceased, to be distributed as personal property." In this state of the law, the act of 1871, c. 78, is passed. It is in two sections. The first section is as follows: "Be it enacted," etc., "that section 2291 of the *Code of Tennessee* be so amended

as to provide that the right of action which a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrong-doer, in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and, in case there is no widow, to his children, or to his personal representative for the benefit of his widow or next of kin, free from the claims of his creditors. "Sec. 2. That section 2292 be so amended as to allow the widow, or, if there be no widow, the children, to prosecute suit; and that this remedy is provided in addition to that now allowed by law in the class of cases provided for by said section and section 2291 of the Code, which this act is intended to amend." Does this act restrict the right of action theretofore existing in the administrator, and deprive him of the right to maintain a suit when there is a widow, or does it merely add to and enlarge the rights of the widow and children, without diminishing the powers of the administrator, when the widow or children do not see proper to exercise the privilege? The intention of the legislature must be arrived at, and this can generally be aided by a knowledge of the state of the law at the time of the passage of the amendatory act.

Now, as we have seen, prior to this act of 1871 the legislature had enacted that such actions should not abate by the death of the injured party, but that when death had ensued before action brought the action must be by the administrator, for the benefit of the widow and next of kin. And, to guard against a failure of the administrator to sue, the widow and children were allowed to use his name, without his consent, and bring such action, provided a bond for costs were given, etc. And if suit had already been begun in the life-time of the deceased, it might proceed without review, for the benefit of the widow and children; so that, while the widow and children were beneficiaries of the recovery in either event, they were not allowed to bring the action in their own name. Both before and since the amendment the administrator is in fact a nominal plaintiff, the recovery being for the widow and children; but, while this was so, neither the widow nor children were allowed to bring such action, unless they could make out a case of declination on the part of the administrator. When we consider the object in view, and when we take the language of the amendatory act itself, we are led to the conclusion that the legislature intended merely to give the cause of action to the widow, in her own name, in preference to any administrator, but not to the exclusion of an administrator, where the widow elected not to sue; and her election or waiver will be presumed when the suit is prosecuted by the administrator, without objection by her, signified by bringing the suit in her own name, or otherwise. To so hold is to give effect to every word of the statute, and to carry out the declared purpose of the legis-

lature as shown in the second section, where it is in terms that "this remedy is provided in addition to that now allowed by law, in the class of cases provided for," etc., and is also to give effect to the language "for the benefit of his widow," found in the next to the last line of section 1 of the amendatory act, where the personal representative is authorized to prosecute the suit for the benefit of the widow and next of kin. If it had been contemplated that the administrator was to have no right to sue where there was a widow, it would have been folly to have provided that his recovery should be for the benefit of the widow. It is true that to make this conclusion we encounter some difficulty in the use of the language "in case there is no widow;" but, this language being in apparent conflict with the language which in that event allows administrator to sue for "her benefit," we must reconcile such conflict, if possible. We believe that it is reconciled, and the intention of the legislature fully sustained, when we hold, as we do, that the administrator is not debarred from suing simply because there is a widow who does not sue. She has the preference, undoubtedly, but may waive it, as it is manifestly for her benefit. We are the more content with this conclusion when we reflect that this is the construction that has in practice been placed upon this act by the legal profession ever since its passage. For us, at this late day, to hold otherwise, on any overwise or strict construction, would be to defeat many actions, pending in the various courts of the country, where the one-year statute of limitations has barred a new action. While such considerations would not lead us to a construction not otherwise sound, it strengthens and confirms a conviction otherwise reached under well-settled principles of law. The case of *Flatley v. Railroad Co.*, 9 Heisk. 230, is not, as counsel seem to insist, in the way of the conclusion reached. It only announces in this connection that prior to the act of 1871 the widow could not maintain such an action; and, in answer to the suggestion that, inasmuch as the statute gives the action for her benefit, she should be treated as a person entitled to sue, the court says: "It is a general principle that where a right is given by statute, and a remedy provided in the same act, the right can be pursued in no other mode." We do no violence to this rule, but recognize it fully, in construing the act of 1871. Nor is there anything decided in *Greenlee v. Railroad Co.*, 5 Lea, 418, that is hostile to our construction of the act in question. It merely holds that the widow, who, under the act of 1871, has the right to sue in the first instance, has an incident to that right,—the power to dismiss or compromise such suit. But there is nothing in that case that negatives her power to waive the right which is hers "in the first instance;" and the same may be said of *Traf-ford v. Express Co.*, 8 Lea, 99, 100, cited by counsel for the railroad. The last assignment of error is, therefore, not well taken;

but, as already stated, the judgment must be reversed, and cause remanded for a new trial, because of error in the charge.

**BARNARD et al. v. STATE.**

(Supreme Court of Tennessee. Oct. 26, 1889.)

**MURDER—EVIDENCE—LYING IN WAIT—INSTRUCTIONS—NEW TRIAL.**

1. On a trial for murder, it appeared that deceased and some of the five defendants, three of whom were brothers, and cousins of the other two, who were also brothers, had been for weeks on unfriendly terms. Deceased had made accusations and threats against two of the defendants, which had mostly been communicated to them; but he never went out of his way to meet them. One of the defendants, J., became very angry at the accusations, and two witnesses testified that they saw all of the defendants in the neighborhood of deceased's home several weeks before the killing; that four of them were armed, and J. seemed mad about the report, and wanted to get it settled; that they were on the road on which it was deceased's habit to pass at that time in the week. They did not then meet him. Deceased was shot from his horse as he was passing along a road, along which it was his known habit to pass at that time in the week. Defendants knew of this custom, and one defendant inquired about it a few days before, and was informed that such was the fact. Defendants had passed the day on hills from which parts of this road were in easy view, without dinner, and in winter, within a half mile of their uncle's house, where they testified they were going. The killing occurred near a place where a large log lay, on the left of, and at right angles with, the road. A witness, who was riding with deceased, testified that he heard a gunshot, saw deceased falling from his horse, and then looked ahead, and saw smoke by the log, and defendant J. emerging from behind the log, and crossing the road to a bank on the right. Another witness, who had passed the log shortly before, and was 200 to 300 yards away, testified to substantially the same, except that, on looking back, he saw three men between him and the log. Both witnesses testified that the firing was renewed from the bank. Neither was impeached, and one was related to, and on friendly terms with, defendants. Two other witnesses testified that considerable time elapsed between the first and second shots, after which the shots followed in quick succession. It appeared that there were four fresh signs of men having been behind the log, and what seemed to be a "rest" was found under it. A cartridge shell corresponding with the ball cut from deceased's body, and of the same kind used in defendant J.'s rifle, which he admitted that he fired at deceased, was found behind the log. Defendants admitted their presence at the killing, and that J. shot deceased, but testified that they did not go to the place to meet deceased, and that on reaching the road one of the defendants saw deceased coming, raising his gun towards J., when such defendant cried out, and J. turned and shot deceased before the latter could fire. J. fired six or seven shots, though his co-defendants and other witnesses testified that deceased fell at the first shot. The testimony of defendants that the firing began only when they reached the road, and after deceased presented his gun, was corroborated by one witness only, and he was their kinsman, and had been arrested for complicity in the murder, and the evidence showed that it was improbable that he could have seen what he testified to. Four of the defendants were armed, and they testified that they were all in sight of deceased when the firing began. *Held*, that the evidence showed that defendants were lying in wait for the purpose of killing deceased, and warranted a conviction, regardless of the condition or position of deceased's gun when he was shot. **TURNER, C. J.**, dissenting.

2. The court charged: "Self-defense \* \* \* rests upon necessity, actual or apparent. A com-

mon assault, not actually or apparently endangering life or great bodily harm, will not excuse a homicide. \* \* \* But \* \* \* the danger \* \* \* must be real, or honestly believed to be so, and on reasonable grounds. The danger must be apparent and imminent and existing, \* \* \* or honestly believed to be so, and on reasonable grounds. The belief or apprehension of danger must be founded on sufficient circumstances to authorize the opinion that the purpose to kill or do great bodily harm then exists." *Held*, that the jury could not have been led to believe that self-defense could be established only by showing the actual existence of real danger of death or great bodily harm, though they were also charged that defendants were not guilty if the killing was done "under a well-founded belief and apprehension" of death or great bodily harm, but were guilty if the killing was done "from any other feeling than a well-grounded fear or apprehension" of such danger, especially where it is manifest that, if defendants had any such apprehension at all, it was "well founded."

3. An instruction that "previous threats made by the deceased against defendant will not of themselves excuse the defendant in killing the deceased, but there must be some overt act or words, at the time, clearly indicative of a present purpose to do the threatened injury," was proper, especially as the defense was self-defense, and the theory of the prosecution was that defendants were lying in wait.

4. One of the defendants admitted that he fired six or seven shots at deceased. A witness testified that he saw another of the defendants fire once. Two other defendants admitted that they were at the place of the killing at the time, armed with rifles, and the remaining defendant was very near by. It appeared that they had been together all day, within easy reach of the place of killing; that they came there together; and that after the killing they met near the body, and, after consulting, departed together. The defendant not actually present at the killing had, several days before, inquired if it was not deceased's habit to pass the place at the time in the week when the killing occurred; he voluntarily joined the other defendants the night before; suggested that they go out on the hills overlooking the place of the killing, on the morning of the day thereof; and stopped on a side of the hill commanding a view of the road on which deceased was traveling when killed, from whence he could signal the other defendants, who, there was evidence to show, had been watching various parts of the road all day, and were lying in wait behind a log. The court properly instructed the jury on the question of conspiracy and reasonable doubt in relation thereto. *Held*, that an instruction on the question of reasonable doubt, as applicable to a case of purely circumstantial evidence, was not required.

5. After verdict of conviction, a motion for new trial was made, and continued until the next morning, when it was moved to continue it again, which was refused, unless for cause shown on affidavit. Thereupon an hour's time was asked to prepare such affidavit, but no fact was stated which was to be placed therein, and no reason shown for delay. *Held*, that the motion for new trial was properly overruled.

Error to circuit court, Hancock county; **A. J. BROWN, Judge.**

Indictment of John Barnard, Clint Barnard, Elisha Barnard, John Barnard, and Anderson Barnard for murder. Defendants were convicted, and bring error.

*Gillemwaters & Fulkerson, Coleman Jarvis, McH. Ross, and Shields & Shields*, for plaintiffs in error. *G. W. Pickle, Kyle, Davis & Drinon, Grant & Jarvis, and Williams & Syler*, for the State.

**CALDWELL, J.** There is very much of human life involved in this case. The plaintiffs



in error are under sentence of death for the murder of Henly Sutton, having been convicted in the circuit court of Hancock county. There are five of them,—John, (known as "Big John,") Anderson, and Elisha Barnard, who are brothers; and their cousins, John (called "Little John") and Clint, who are also brothers. They have appealed in error to this court, and, through eminent counsel, seek a reversal and new trial.

Of the many reasons urged for a new trial, we consider, first, the contention that the verdict is not sustained by the evidence. That the prisoners—or one of them, rather—took the life of Sutton is not by them disputed; but it is boldly asserted by them in their evidence, and strongly urged by their counsel in argument, that it was done in self-defense. The state's theory of the homicide is that it was deliberately planned, and perpetrated while lying in wait. The deceased is shown to have been a violent and dangerous man when his passions were aroused, though he was not a quarrelsome or "fussy" man, as some of the witnesses say. It was his habit to go armed, and when killed he had both a gun and a pistol,—the former in his hand, and the latter upon his person. The character of the prisoners for peace and quietude is not shown, further than it appears from their conduct in this case, and from their own testimony that they had serious difficulties with "the Fergusons" twelve months, and with "the Wincklers" six months, before the death of Sutton; in which two difficulties, they say, "shooting was on both sides," and since the latter of which they have habitually carried repeating Winchester rifles, as they themselves testify.

The first fact or circumstance presented in this record as an indication of unfriendliness between Sutton and any of the prisoners is detailed by Big John himself, as follows: "I was out hunting one night. Had a light, and somebody shot at me. I did not know then who it was, but have since learned that it was Sutton. I heard the balls strike, and threw down my light. \* \* \* It was five or six years ago that we were shot at while hunting." Noah Sutton, who was with Big John on the occasion just mentioned, says that they were out hunting; "and while in the woods near Henly Sutton's some one fired three shots, I supposed at us. \* \* \* We went back next morning, and examined, but could find no sign of bullets." Tillman Sutton, who, as well as the last witness, was introduced by the prisoners, gives this account of the matter, namely: "I am a son of Henly Sutton, deceased. Some six years ago we heard some one hallooing and cutting up, and father and I went out to where we could see something, near one-fourth of a mile from the house, and saw two boys with a light. \* \* \* Father shot twice, but not in the direction of John Barnard and Noah Sutton. He fired the shots down the bottom." For the purpose of showing subsequently existing and continuing ill will on the part of Sutton,

the defense introduced Noah Mills, a kinsman of all parties, who testified that while at Sutton's still-house, about three years before the trial, Sutton picked up a big pistol, and said, if Big John Barnard did not "quit fooling around there, he would empty it into him." The witness makes no explanation of this threat, and gives no reason for it. None is shown in any part of the record, nor does it appear that the threat was ever communicated. The firing of the shots in the nighttime is sufficiently explained by the quotations given, which make it apparent that the deceased intended only to frighten the hunters away, and not to harm them. At any rate, it is evident that neither of the scenes thus far mentioned played any part in the tragedy ending in the death of Sutton, years thereafter.

The facts leading up to and causing the homicide were of more recent origin. It is a well-established, and indeed a conceded, fact, known to many of their friends and neighbors, that Henly Sutton and some of the defendants were on unfriendly terms for weeks, and perhaps months, before he was killed. Some time before his death,—exactly how long is not disclosed,—Sutton became greatly enraged on account of cruel injuries secretly done to his hogs. At different times, and to different persons, he charged Big John and Little John Barnard with the offense, and expressed a firm purpose to hold them to a personal account. To show their exact character, we give his accusations and threats somewhat in detail, and substantially in the language of the witnesses. George Barnard, an uncle of the defendants, says: "I had a talk with Sutton about the hog matter. He accused Big John and Vina's John [Little John] of cutting his hogs. They denied it. I talked to Sutton to try to get the matter settled. Sutton said he did not fear living man, and, if they got at it, the river would not be between them." Anderson Barnard, a son of George Barnard, says: "Sutton told me that Big John and Vina's John had cut his hogs, and that a man could not do him that way and live." Jesse Jordan states: "\* \* \* A few days before the 4th of July," Sutton told him, "it would not do for him and Big John to meet." William Cook testified that Sutton told him Big John Barnard cut his hogs, "and he would kill him for it." These threats, or most of them, are shown to have been communicated. Little John and Elisha say that, a short time before the death of Sutton, they were passing his house with a loaded wagon; that he saw them, and, taking Elisha to be Big John, came out to the road "with gun and pistol, and said: 'Hold on there, Big John Barnard. I have a settlement to make with you;'" that, on discovering his mistake, he cursed Little John and Big John, saying that they cut his hogs, and that "all he wanted was to see Big John, the black-hearted rascal; that he would settle with him." All this was reported to Big John soon after it occurred.

Wiley Cozart claims to have heard Sutton say that Big John Barnard had cut his hogs, and that he would kill him for it "at all hazards, and would give any man \$50 that would get him on the road between the still-house and George Barnard's; that he had the tools to do it with,"—at the time exhibiting a Winchester rifle. Speaking of a different time, Zora Horney says: "\* \* \* He [Sutton] told me, if I would bring Big John Barnard between the still-house and George Barnard's, where he could kill him, he would give me twenty-five dollars." The two last alleged statements are not shown to have reached the ears of the defendants before the trial in the court below. The witnesses making them were impeached upon their general character by one witness each, and sustained by none. On cross-examination the witness impeaching Horney shows that he does so on insufficient grounds. Notwithstanding these threats, some of them very violent in their nature, it is not in fact shown, or attempted to be shown, that Sutton ever left his business, or went out of his way, at any time, to seek a meeting with the defendants, or any one of them; and it is at least probable that he had changed his mind as to the identity of the perpetrators of the offense complained of, as will appear from facts now to be narrated. The state's witness John F. Mills, who was a friend to Sutton and a cousin of the prisoners, makes the following statement: "A few weeks before the killing, I was talking with Sutton about the hog-cutting, and told him I didn't believe Big John had cut his hogs. He said he had about come to believe that too, and that, if Big John would make affidavit that he didn't do it, he would have nothing against him. I told him I would go and see him [Big John] about it. The next day I went to see Big John Barnard to get the difficulty fixed up. Barnard offered to go and make the affidavit that he did not cut the hogs, and fixed the Saturday following to do so." In his testimony, Big John says: "Sutton accused me of cutting his hogs. I did not do it, and offered to go before a magistrate and file an affidavit that I did not do it." Touching the same subject, Prior Barnard, Big John's father, says: "I knew of John Mills' coming to have John go and make the affidavit about not cutting the hogs. I told John not to go to make the affidavit; that it was a plan to get him killed." The affidavit was not made.

In stating the facts and circumstances leading up to the homicide, and as indicative of his state of mind, it is proper to note that Big John Barnard, particularly, became very angry at the charge made against him, and at one time went into Sutton's neighborhood to investigate the report, and perhaps to do more than that. The state's witness Clinton Leyer says that he met the prisoners at his mother's house, one mile from the home of Sutton, in the forenoon of the last Monday before Christmas, 1888; that four of them were then armed with Winchester rifles; that

Big John called him to the fence, inquired and complained about the report,—seemed to be very "mad," and wanted "to get the matter straightened out." Thomas Sutton, another witness for the state, says that he saw four of the defendants, about 10 o'clock in the morning of the same day, some two miles from Sutton's still-house, and on his nearest road from his residence to his still-house; it being the same road on which Sutton did, in fact, pass Mrs. Leyer's house, going in the direction of his still-house, soon after the defendants left her house, and it being known to the defendants that it was the habit of Sutton to go by this road from his residence to his still-house every Monday morning. The same witness further says: "As I came up to them, I saw Big John Barnard going along the fence, apparently about half bent. He raised up as I came up. They had guns. \* \* \* Some people say that I resemble Henly Sutton. He was my cousin." Big John admits that he saw the last two witnesses at the times and places mentioned by them, but disclaims any purpose then to do violence to Sutton; saying, rather, that it was his desire to talk with other persons. The fact was that he and his companions returned to their homes that time without meeting Sutton, or having an adjustment of the matter they had so much at heart, and which had brought them into Sutton's neighborhood, and upon this particular road, in the forenoon of this particular day. Defendant Clint Barnard seemed to understand the situation, and to know the state of Big John's mind, when he said to Clinton Leyer, at one time, that "he believed, if Sutton and Big John ever met, one of them would be killed." Such seems also to have been the apprehension of others who knew both men; some fearing they would meet, as they in fact came near doing, on the very Monday morning just mentioned.

Sutton owned and operated a licensed distillery on the north side of Clinch river, in Hancock county, and resided three and one-half miles away, on the same side of the river. It was his known custom to spend Sunday at home with his family, going to his distillery Monday morning, and returning to his home Saturday evening. Late in the afternoon of Saturday, January 12, 1889, while on his way home by his usual route, and when one and one-half miles from his distillery, near a small ravine, and in a narrow valley between two hills, he was shot from his horse, and instantly killed. All of the prisoners except Clint lived on the south side of Clinch river, some five or six miles from the place of the killing; and Clint lived with his mother, Vina Barnard, on the north side of the river, about four miles from the fatal spot.

Nearly three weeks after their fruitless visit into the neighborhood of Sutton's home, on the last Monday before Christmas, they went again into the same neighborhood, and upon the same road, with very different re-

sults. Early in the afternoon of Friday, the day before Sutton met his death, Big John, Anderson, Elisha, and Little John, each armed with a repeating Winchester rifle, and by previous agreement, left their homes for a purpose to be learned from what afterwards transpired, in connection with facts and circumstances heretofore and hereafter given in this opinion. Reaching the river, which was about three miles from their homes, at dark, these four armed men stealthily took possession of a canoe, belonging to a man with whom they had unfriendly relations, and in it crossed over to the other side, quietly, and without being seen. They then met and took supper at Vina Barnard's, and, when the meal was over, Clint proposed to join them, as he did, and the five went together that night, on foot, four miles further, to the house of their cousin Anderson Barnard, where they spent the remainder of the night. This cousin resided about one-half mile from the place of the homicide, between it and the distillery, and 100 yards from, in sight and hearing of, the road along which it was Sutton's known habit to pass, on Saturday, when going from his still-house to his home. Between daylight and sunup next morning, they left their cousin's home, and went out a short distance into "Troublesome Ridges," a range of hills or ridges which were situated along and within the curve of the road between Sutton's still-house and the point at which he was killed. On these ridges, from which parts of the road mentioned are in easy view, the prisoners quietly spent the day, without dinner, and, as they say, without seeing any one, save their said cousin, Anderson, and his brother John, whom they met on the hill not far from the place, and not long before the time, of the homicide. When Sutton reached the narrow valley already mentioned, shortly after 4 o'clock in the afternoon of that day, going along the road in the direction of his home, the defendants were there, and in the shortest time the fatal work was done by one or more of them. This narration of what they did, and where they went, from the time of leaving their homes until Sutton's death, is taken from statements made by the defendants themselves while on the witness stand.

Their explanation of their wanderings is that their uncle George Barnard was sick, and had sent word to his brother, Prior Barnard, on Tuesday or Wednesday, and again on Friday, claiming a visit from him; that, because he was not right well himself, Prior asked his son Big John to make the visit for him, which the latter agreed to do, and for that purpose set out with his two brothers and cousin (Little John) in the afternoon of the latter day, as before stated. They further say that when they reached the home of their cousin Anderson, that night, he informed them "that his father [their sick uncle] was better, and that they were crowded, had plenty of company, and that we could stay with him," which they did; that Clint

told them, (the other defendants,) that night, that he had heard that May Lawson, a woman of bad character, was over in Troublesome ridges, and suggested that they should go the next day and "run her off," because his brother William had been neglecting his family on her account; that they went into the ridges, accordingly, the next morning, intending to go to their Uncle George's that night; that they failed to find May Lawson, and were returning that evening when they met their cousin John (George's son) "hunting a squirrel" for his sick father; that John told him his brother Anderson, with whom they spent the night before, "was over the hill fixing a fence," whereupon they went to Anderson, who was on the hill-side, about 100 yards from the point at which Sutton was killed shortly thereafter. Their uncle George, whom the defendants claim to have started out to visit in the first instance, lived on the road so often mentioned hereinbefore, about one-half mile from the scene of the homicide, back in the direction of Sutton's still-house, in sight of, and about 100 yards from, the house of his son Anderson. George Barnard and others show that he was in fact sick at this time; and Samuel Davis says he communicated the fact to Prior Barnard on Friday before the homicide. Prior Barnard states that he received the information from Davis, and thereafter requested his son Big John to go to see his sick brother for him; and Anderson, a son of George, says that he intended the defendants to spend Friday night at his house, by the statement that his father was better, and had plenty of company for the night.

To this extent the explanation of the defendants is corroborated. But why so many of them should have gone on this friendly mission at the same time, four of them heavily armed, is not satisfactorily explained by the defendants themselves, nor any one else. Nor is it natural that they should have gone away from their cousin's house the next morning, and wandered in the hills all day, without calling to see their sick uncle, who lived only 100 yards from the place where they spent the night, if a visit to him was the prime object of their coming into the neighborhood. The mission was so pressing that they must travel several miles in the night-time and on foot; yet, when a new day dawned upon them, in sight and hearing of their sick kinsman's house, without calling, even a moment, to assure him of their own interest in him, or to deliver a message of sympathy from an affectionate brother who had sent them, they go out upon the hills, whose tops command successive views of the road upon which their victim was soon to travel. Would it not have been more natural, if their contention is the correct one, for the defendants to have visited their uncle at the first opportunity on Saturday morning, and then, with all reasonable expedition, have carried the good tidings of his improved condition to his brother Prior, who had inspired

the brief journey, and who was miles away, in the midst of concern and anxiety?

There is much conflict in the testimony with respect to the immediate facts of Sutton's death. The first and leading witness for the state was John F. Mills, who, as has already been seen, was a cousin of the defendants, and a personal friend of the deceased. He was "store-keeper and guager" at Sutton's distillery. He says Sutton's "custom was to leave his distillery for home Saturday evening, and return Monday morning, and I usually went to and fro with him. On Saturday, January 12, about four o'clock P. M., we left. I left the still-house with Sutton, on horseback, \* \* \* going in the direction of Sutton's house, and he said he had started home. We had got one and one-half miles, and were riding along, side by side, some four or five feet apart, he on my left side, when I heard a gun fire. My horse jumped, and I looked back, supposing Sutton's gun had fired, and saw Sutton falling to the ground from his horse. He was just about straight on the ground. I then looked down the road in the direction we were going, and saw smoke rising about four feet above and over a log that lay at right angles to the road, on the left, and between two beech trees, that stood on the side of the log next to me; and then I saw Big John Barnard, one of the defendants, coming from the end of the log next to the road, and crossing the road to the right side from me; and saw Anderson Barnard, one of the defendants, coming towards us from the direction of the log and bushes on the left of the road; and saw a boy named Elbert Leedy, who was just ahead of us, some 250 or 300 yards beyond the log in the road, and looked like he had stopped his horse, standing angling across the road; and then saw Little John Barnard and Anderson [Elisha?] Barnard, defendants, coming around the side of the hill to my left from the direction of the root of the log. When Big John was at a mossy bank on right of road, and about 30 feet from where I saw the smoke, he shot the second time, and then advanced in the direction of Sutton, and kept shooting, and I think shot in all four or five times; the last shot being fired when within about 30 steps of Sutton, who was lying on the ground. I saw Anderson Barnard shoot one shot. He was in front of log about 15 feet. I did not know any of the defendants were there, nor saw none of them, until the first shot was fired. From where Sutton was when first shot was fired to where I saw the smoke the distance is about 70 yards, I should guess. I did not see Sutton make any pass to shoot. I saw only four of the defendants, —John Barnard, Anderson Barnard, and Elisha Barnard, sons of Prior Barnard; and John Barnard, son of Vina Barnard,—and all four had guns I thought to be Winchester rifles. When the shooting was over, Big John and Anderson came up to where I was; and I said to them, looking at Sutton, 'What a pity!' and John said, yes it was a pity, but his

life was as sweet to him as Sutton's, and said he had to do what he had done in self-defense. And Anderson then asked me if I did not see Sutton bring his gun up. I told him I did not; was not looking at him at the time. Big John seemed to be crying, as I saw him take out his handkerchief, and wipe his eyes with it. While standing there, Elisha and Little John came down off the left-hand hill to where we were. I told them there would have to be something done with Sutton, and I would go and get some one to come and see to him, but was afraid the hogs would get to him; and they agreed to stay; and I got on Sutton's horse, led mine, and started, leaving them there. \* \* \* I afterwards examined the log, and am of opinion the log is 30 feet or more long, probably 30 inches in diameter at small end; had fell across the road, and had been cut out for wagons to pass, and, in falling, turned up by the roots at the foot of the hill. The log bows up, and is off of the ground. I saw some limbs which looked like they had been fixed for a rest; one limb lying at right angles with log, and the other with one end on that limb, and parallel with the log. \* \* \* I saw Big John and the smoke about the same time. He was coming from the end of the log, and crossing the branch and road to my right. When I first saw him he was about 15 or 20 feet from the smoke. He was holding his gun in a shooting position when he crossed the road to the right, angling towards us. As he crossed the road with his gun in shooting position, I thought he had his gun pointed towards me, and I told him not to shoot me, and he said, 'Get out of the way,' and I did so; and when he reached a mossy bank on the right side of the road he fired at Sutton, lying on the ground, which was the first shot I saw fired. \* \* \* After Big John fired the shot at the mossy bank, I saw defendant Anderson Barnard fire a shot at Sutton, as he lay on the ground. \* \* \* The rest under the log was near the first beech. I afterwards lay down at the rest, and could plainly see the body of a man on horseback who was placed in the position where Sutton was when he was shot. I could see from the breast up." Mills further says that Sutton was armed with a Winchester rifle and a 44-caliber Smith & Wesson pistol at the time he was killed, and that he was accustomed to go armed in this way; that, when he "last noticed Sutton before the shooting, he was carrying his gun in his right hand, and across his right thigh."

The next witness called by the state was Elbert Leedy, the same person seen by Mills on horseback beyond the log, and the same seen and mentioned by all the defendants. He says: "I had been to Sutton's still-house on the day of the killing, and left there about 4 o'clock, and started home on the road the killing was done on. I was riding fast, to get home to go to meeting that night. When I passed the log some 200 or 300 yards, I heard a shot fired behind me, and immediately turned my horse across the road to the

left, and looked back, and saw four men, John Mills and three others. When I first saw them, one was near the end of the log on the right-hand side of the road as I looked back,—that is, my right hand,—and crossed the road, and went in the direction from me, and shot several times. I saw him shoot after he got across the road. I could see him hold out his gun and see the smoke. He was shooting up the hollow. I could see the end of the log at the road on my right, and could not see the roots of it. I then went on home. The hollow from foot of one hill to the other is about 50 yards wide. I was riding in a fast trot when I passed the log. The men I saw were near the beech trees. \* \* \* When I first turned around after hearing the shot, the three men were between me and the log. \* \* \* The road I was traveling entered the woods just about where the log lay, and run through a wooded hollow for several hundred yards. \* \* \* I was riding a gray horse six years old, and had good eyes. I saw no one at the log as I went down. I think I would have seen them if they had been there, and especially if standing up, and I had been looking that way. There was no obstruction to hinder me from seeing them if they had been there, and I had looked that way. I was looking down the road. \* \* \* I saw one of the men on a mossy bank on the left of the road from me, and heard and saw him shoot. He walked from the end of the log."

Marion Lewis, who was attracted to the scene of the report of the firing, and who noticed the defendants going away as he approached the dead body of Sutton, testifies: "Four of us made an examination of the log. A foot-path crosses over the log near the roots. Saw a limb lying upon another limb. Looked like it had been fixed for a rest at a place where it lay off the ground about 18 inches, and near the middle of the log. One large limb lay on the ground at right angles to the log. Another smaller one, about the size of my leg, lay under and parallel to the log, with one end lying on the large limb, and the other on the ground. I saw fresh dirt on the under side of it, as if it had recently [been] picked up off of the ground and laid there. I saw, in four different places by the log, signs which looked like signs of men,—looked like men had tramped around,—but saw no whole tracks. It looked as though the leaves and dirt were moved and tramped down. \* \* \* The first sign was near the root of the log, and looked like where a person had stood, and tramped and patted the ground down with his feet. The next was at the rest I have described, some 10 or 12 feet further down the log, near its center. I saw here signs of where it looked [like] a person had lain down. The earth and leaves were pressed down at the smaller limb under the log, and further back were the fresh prints; looked like of a man's boots or shoes. The third sign was between the rest and the first beech tree, and near tree,

and near the first beech. The ground was tramped, and looked like it had been patted down with feet. I saw the half prints of boots or shoes, but the ground was patted down so that I couldn't distinguish whole tracks. The fourth sign was at the beeches, or at the log near the beech next to the road, and was like the last I have described. There was a large hole in the ground where the roots of tree had been torn up, and the roots were wide spreading. Men could have been there, and not have been seen from road. \* \* \* A man could not be seen from supposed rest on a horse at Sutton's feet, but don't know how it would be at hips. This was all the experiments I made. I looked from limb under log." Sutton fell and lay on his back at right angles to the road, with his head near the edge of the road, and his feet his full length from the road. This statement is made here in explanation of the last three sentences quoted, and to show that a man on horseback at Sutton's feet might not be seen from "the rest," when one so mounted at his hips or head might be in full view from that place.

John Winkler was one of the first persons to examine Sutton's dead body, and to note its position and the surroundings. He says: "I saw what looked like the sign of men at four places at the log;" and after giving substantially the same description of "the signs," in detail, as that just quoted from Lewis, he continues: "I could stand on the ground where Sutton lay, and see the rest under the log. All the signs looked like fresh signs. \* \* \* I went and looked at the place particular. \* \* \* I am brother-in-law of Sutton, and distant relative of defendants." At the time Sutton was shot he was returning into the road, having just ridden slightly to the left, "around a mud-hole."

William B. Davis, a practical land surveyor, who went upon the ground and made a map of the road, states: "I saw a man on a horse, and he rode around the mud-hole, and turned into the road; and from supposed rest, about middle of log, he was in plain view."

William Standeford says: "I found a cartridge shell behind and near the beeches, and on the opposite side of the log from where Sutton was killed, some days after the killing. I found it not more than three feet from the log, and nearly straight behind the beech nearest the road. \* \* \* It was somewhat covered up in dirt and leaves." The witness produced the shell in court. Upon examination of it, the fact appears that it was a 38-caliber Winchester rifle cartridge shell, corresponding precisely with the ball cut from Sutton's back, and being the same kind used in the Winchester rifle which Big John says he fired at Sutton.

Dr. Stane, who examined Sutton's body at the time of the coroner's inquest, thus describes the wounds: "One shot had entered the body a little to the right of the left nipple, and was cut out about two inches to the right of the back bone. I saw a wound on

his right shoulder, and three wounds on his right arm, and one that had entered his right temple, and come out near and behind the left ear." The character and direction of these wounds, together with the position of the body after it fell from the horse, demonstrate the fact that the first one mentioned was fatal, and that the others were inflicted while the body lay upon the ground.

To bring knowledge of Sutton's movements home to the defendants, the state introduced Clinton Leyer, who said: "I was rafting on Wednesday or Thursday before the killing on Saturday, and defendant Clinton Barnard was there, and in a conversation about the logs between us he asked me if Sutton didn't come home on Saturday evening, and go back on Monday morning, and I replied he did. I do not remember who commenced the conversation between us. My brother, Marion Leyer, was there. We were talking about the difficulty most every time we met. I was expecting a difficulty between Sutton and Big John." Marion Leyer says: "I heard defendant Clint ask my brother, at the raft, if Sutton did not come home every Saturday evening, and go back to the still-house every Monday morning, and he told him he did. I also heard him say then that Big John wouldn't make affidavit." The defendant Clint says, in effect, that he does not remember making the inquiry of Clinton Leyer; but it is nowhere controverted that the defendants knew the truth of the matter inquired about.

The first testimony offered by the defense was given by the defendants themselves. Already we have stated what they say up to the time they reached their cousin Anderson at the fence, about 100 yards from the fatal spot. Their testimony with respect to what occurred thereafter can best be presented in their own language. Little John says: "We came over where Anderson was, and while we were standing there Elbert Leedy passed down the road. We then started over to the road. Anderson said for us to go on,—he would come; and as we went down the hill Clint stopped on the hill,—said he had to step aside. Myself, Prior's Anse, [Anderson] Elisha, and Big John went on down towards the road. John got to the road first. He asked me who that was going down the road. I replied Elbert Leedy. I thought I heard horses' feet, and looked up the road, and saw Henly Sutton, with gun presented towards Big John. I said, 'Lord have mercy!' and ran across the road. Elisha followed me. After the shooting stopped, me and Elisha came back to the other boys. I did not hear Sutton's name mentioned. We had not been in the road a minute when I saw Sutton. We never went there to meet Sutton. There was no such understanding or agreement. Not a man shot but Big John. We never went to Sutton after he was shot. We never went any nearer than when we met and talked with John Mills. None of the defendants touched his gun. John Mills was with Sut-

ton. \* \* \* John fired six or seven shots. I saw Sutton after shooting was over. Did not go to him. John did not go to him. \* \* \* We all left together, and just after Mills left. Anderson did not fire; only John."

Taking up narrative at same point, Big John says: "I saw a man passing the road. It was Elbert Leedy. We went to the road, down along the fence. I crossed the marsh at the foot of the hill on an old log. Stopped upon a mossy bank. Heard John say, 'Lord have mercy!' I looked. Saw Sutton raising his gun. I shot. I had not seen Sutton before, that day. I shot six or seven shots. Mills was with Sutton. I shot two or three shots before Sutton fell from his horse. \* \* \* We had not been at the road until after Leedy passed. Clint had stopped on the hill. \* \* \* I went home from there, and went early next morning, and surrendered to deputy-sheriff. I did not go there to meet Sutton. We had no such agreement or understanding among ourselves. I shot as fast as I could. \* \* \* I shot to keep Sutton from killing me. I was not at the log, and did not shoot from behind it. I shot from side of road,—right side coming down. \* \* \* I done all the shooting. \* \* \* I had a 38-caliber Winchester rifle, and did not go closer than 20 or 25 steps of Sutton's body. It was about this distance from his body when I had the talk with Mills. I did not agree to stay and watch the body of Sutton. \* \* \* I had a Winchester rifle. Would shoot 15 or 16 times. Sometimes carried it half cocked. After first shot, could not see very well; smoke was in my way. I don't know how far I advanced. Did not know he was dead while I was shooting. \* \* \* When I heard horses' feet, and John said, 'Lord have mercy!' I was looking down the road at Leedy. Had my gun in hand, holding it down, when I looked around. Saw Sutton raising his gun. I immediately raised my gun and fired. Fired two or three shots before Sutton fell from his horse. Fired in rapid succession. \* \* \* When I first saw Sutton he was some 40 or 50 yards from me."

Clint says: "I stopped to step aside, and the other boys went on down to the road. I saw a man pass down the road in a trot, riding a gray horse. I heard a gun fire, and looked, and saw Brother John and Elisha running across the bottom. I saw Big John and his brother Anse, [Anderson.] John [Big John] had his gun to his shoulder. I raised up and then saw John Mills in the road, about 75 yards above where Big John was standing. Mills was on his horse. I saw another horse standing there. I could not see Sutton from where I was. We did not go there to meet Sutton. \* \* \* I had no gun. I had a gun at home, but did not take it with me. The boys had no more than time to get to the road before I heard the shot. \* \* \* The boys did not get behind any log, and there was no shooting done from across the road."

Elisha next states: "As we came down to

the road, I saw Elbert Leedy pass down the road on a gray horse. Big John got to the road first. I heard horses' feet. Looked up the road, and saw Mills and Sutton. Sutton was raising his gun towards Big John. I heard Vina's John [Little John] say, 'Lord have mercy!' and we ran across the road, and Big John fired at Sutton. No one shot except Big John. It was all done quick. We did not go there to meet Sutton. Did not expect to meet him. \* \* \* We did not get behind the log, and there was no shooting done from about the log. \* \* \* Big John can shoot as quick as any one I ever saw. I have seen him turn on his heel, and shoot at a tree, 4 or 5 inches across, 30 or 40 yards, and he would hit it every time. \* \* \* Neither one of the defendants went up to where Sutton's lay. John Mills come on down towards where we were. We all met, talked, and started off down the road away from Sutton, and went on home. Next morning Big John went and surrendered himself to the deputy-sheriff. I did not surrender, for I had done nothing. \* \* \* Don't know that I heard Sutton's name mentioned that day."

Anderson, the other defendant, testified as follows: "We went on down the hill. Big John got to the road first. I was looking down the road at some one that had passed. I heard Vina's John say, 'Lord have mercy!' I looked up the road. Saw John Mills and Henly Sutton coming in the road. Sutton was raising his gun to shoot, as I thought. He was raising it towards Big John, and John fired. We did not go there to meet Sutton. \* \* \* No one shot but Big John. \* \* \* He moved, as he fired, sorter in the direction of Sutton. \* \* \* We did not go to Sutton after he was killed. \* \* \* The reason we come down to the road to go to Anse's [Anderson's] and Uncle George's was there were briars and bushes the other way, and it was steep. Big John is the quickest shot I ever saw. He could turn on his heel and hit a tree, not more than a foot thick, 40 or 50 yards. I have seen him do it with his Winchester. Clint had no gun; did not bring his gun. We did not get behind anything. \* \* \* Me and John [Big John] went closer to Sutton than any of the other boys. We went, perhaps, in 15 or 20 steps of his body."

As corroborative of the statements made by the defendants on the main point, we give the language of their cousin Anderson, namely: "I was not quite done my fence, straightening it up, and putting the brush on, \* \* \* when the boys come to me in the evening. Leedy passed before defendants went to the road. I told them to go on to the house and get some dinner; that I would come. \* \* \* From the place where I was I could see all along the road from the log to above where Sutton fell. I saw Sutton and Mills just as they come to where the branch crosses the road. Sutton turned on his horse to the left around a mud-hole. He was in the path. The boys were just getting

to the road. I saw Sutton raise his gun. Then John [Big John] shot. From where I was I could see both parties. Nothing to obstruct my view. I saw Sutton raise his gun. He had it in his right hand. Was bringing it to his shoulder. \* \* \* I saw his horse throw his head up, as if jerked, just as Sutton raised his gun. I saw no one shoot but Big John. He shot six or seven times very rapidly. \* \* \* I was also arrested on a charge of the murder of Sutton, but was discharged by the magistrate."

The defense introduced several witnesses to show that a man could not be seen on a horse, where Sutton was killed, from the rest under the log. On this point George Barnard testifies: "I was down where the killing was done. Could not see a man on a horse, from limb under log, where they said Sutton's body lay. A steep bank cut off the view. I was there the day C. H. Coleman and others were there. Marion Lewis and others showed me the place." Marshal Mans says: "Could not see place where body lay from the rest for the bank that was near the beech." Isham Sutton states: "A man could not be seen on a horse at the place pointed out to me where Sutton lay, from the supposed rest. I could not see a man on a horse from the rest, nor could I see him when I stood on my feet. The view was cut off by a bank on the right side looking from the log." Mc. H. Ross says: "As shown, a man on a horse where he was shown to have lain could not be seen from the limb under the log." And, finally, C. H. Coleman, one of the counsel for the defendants, who examined the locality with the four preceding witnesses, and made a map, some two or three weeks before the trial in the court below, testifies: "A man was placed upon a horse where the middle of Sutton's body was said to have been, and I looked from the supposed rest at the log, and could not see him. I then stood up, and could not see him."

Such, in the main, is the case on both sides as made by the testimony.

Without an elaborate discussion, some further comment will be indulged, before we give expression to our conclusions from the whole body of the proof. In doing this we begin with the question last mentioned, which seems to have been a matter of unnecessary solicitude in the court below. The conflict in the evidence with respect thereto may be reconciled, and yet give every witness credit for speaking the truth, by the natural and reasonable assumption that the observations whose results are detailed were made with the horse and rider at one time in a slightly different place from that occupied by them at another; the hill being so near the road as to entirely obstruct the view in one place, and not at all interfere with it at another, only a few feet away. No doubt this mode of reconciliation was adopted by the jury; for none of these witnesses were impeached, and there is no positive proof that the position of "the person on horseback" was precisely the same when some say



he could not be seen, as when others say he could be seen. Of all the witnesses speaking to this point, Mills confessedly knew best where Sutton was at the time of first shot, and he says a man could there be seen from the rest. But, be this as it may, the question is an unimportant one. Whether Sutton could or could not be seen from the rest at the fatal moment can neither strengthen nor weaken the theory of lying in wait. Whether the fact be one way or the other is altogether immaterial, for the very evident reason that neither the state nor any of her witnesses claim that the first or any other shot was fired from the rest. Mills says that after the first shot, and when he looked in the direction of the log, he saw the smoke of the gun rising above and over the log between the two beech trees. These, it is shown, stand in front of the log between the rest and the road. Behind the log, near these, and between the rest and the road, were two "signs of men," from either of which it is not denied that Sutton could have been seen at the time he was shot, and for some distance further up the road. In fact it is entirely clear from the whole proof that Sutton might well have been seen from either of the two "signs" nearest the road. There was nothing to obstruct the view at any point, from either of them, for from 150 to 200 yards up the road in the direction from which he came. The witness Ross, while stating that a man on horseback where Sutton is supposed to have lain could not be seen from the rest, says "he could be seen from the beech," and that "the road could be seen 150 yards, looking up the road from the beech." Standeford says he found the cartridge shell "not more than four feet from the log, and nearly straight behind the beech nearest the road." So that both the smoke and the place of the shell, so far as significant at all, indicate that the shot was fired from near the beech trees, from which all admit Sutton could have been seen, and not from the rest, where the view might or might not have been obstructed, according to the precise position of the object. Therefore we repeat that it is altogether immaterial and unimportant to determine whether Sutton could, at the particular time, have been seen from the rest.

Were the defendants lying in wait? Was the first shot fired from behind the log, as contended for the state, or from the mossy bank across the road, 30 to 40 feet from end of log, as contended by the defendants? This is a vital question, and about it there is much dispute. All witnesses agree, substantially, as to the position of the log and the mossy bank with respect to each other, and with respect to the place at which Sutton was killed. So all agree that one shot was fired from the mossy bank. Mills and Leedy say that was the second shot, and not the first; while the defendants say it was the first. Mills and Leedy give a detail of facts about which they could not be honestly mistaken. Hearing the report of a gun, Mills says he first looked at Sutton, and saw him falling from his horse,

and then looked ahead to learn the cause, and saw the smoke by the log, and Big John emerging from behind its end, and crossing the road to the mossy bank. Leedy, who was 200 to 300 yards below the log, hearing the first shot, turned immediately, and, looking back, saw three men between him and the log; one of them soon crossing the road to the mossy bank, from which he and Mills say the firing was renewed. They could not have been deceived about what they swear they saw and heard. They are neither interested nor impeached. Their testimony is freely and frankly given; nothing being withheld, so far as we can see, that might benefit the defendants, to whom Mills is related, and with whom he is on friendly terms. Their statements are reasonable in themselves, consistent with each other, in accord with undisputed physical facts, and strongly corroborated in many important particulars. That there were four fresh signs of men behind the log, and what seemed to be a rest under it, is positively and circumstantially sworn to by several reputable witnesses, and disputed by none. These signs and this supposed rest are accounted for, in this record, solely and alone upon the theory that four of the defendants were behind the log, and made them. Neither is the finding of the cartridge shell behind and near the log accounted for, unless it be true that it was there dropped from the gun after the first shot, and when preparation was being made for a second one; the expulsion of the empty shell, and the substitution of a loaded one, being accomplished at one and the same time by the easy movement of a lever on the gun for that purpose. (That an empty shell was previously found on the mossy bank, and tossed upon the hill several feet in front of the log, does not explain the presence of one on the opposite side and behind the log.) Furthermore, it is stated by Mills and Leedy, and by all the defendants as well, that from the first shot on the mossy bank all the others followed "in rapid succession." Concerning this there is no disagreement at all. The conflict is as to what preceded the first shot from that place. Mills and Leedy say there was one report, and that after a while, when a man (Big John) had passed across the road to the mossy bank, the firing began again, and continued at very brief intervals until the end; while the defendants say that, when the firing once began, it was kept up without interruption until the work was done; Big John's language being: "I shot as fast as I could." Now, that there was some considerable time elapsing between the first and second shots—enough for a man to walk from the end of log across the road to the mossy bank, as Mills and Leedy say the fact was—is manifest from what two other witnesses testify. Marion Lewis says he and his wife heard the first shot; that he said to her, "That was a rouser;" after which they "talked a little about it, and then heard several shots fired in succession." William Trent, who was

traveling on the same road behind, but not in sight of, Sutton and Mills, says: "I heard a shot fired on before me, and then, after a while, some 7 or 8 more." The testimony of these witnesses corroborates Mills and Leedy directly as to the interval between the first and second shots, and circumstantially as to their claim that they were fired from different places,—one behind the log, and the other from the mossy bank. That Leedy did not see the defendants, and his horse did not shy at them, when he went by the log down the road, by no means proves that they were not behind the log, and that he did not in fact see three of them there, immediately after the first shot was fired, as he says he did. They may have been by the log in a stooping posture, as they naturally would have been, if there at all, and thus escaped his observation; especially as he was riding fast, and looking ahead, and not to the side, as he expressly swears was the fact, and as the defendants admit, so far as the riding fast is concerned. Or the defendants, seeing him for 150 to 200 yards before he reached the log, as they could and certainly would have done, if there, could easily have concealed themselves behind the uplifted and spreading roots of the log itself, which are shown to have been amply sufficient for that purpose.

Besides its direct antagonism to well-established facts, the testimony of the defendants is inconsistent in itself. Of the manner in which the defendants account for being at this particular place at this very opportune and auspicious moment, of their quiet journey the night before, and their silent sojourn upon the peaks of the well-named "Troublesome Ridges" during the day, and up to the time of the frightful homicide, we now make only the general observation that the stay is extremely suspicious on its face, and may well have been too much for the credulity of an intelligent jury. To their subsequent statements we give more extended notice at this point. Is it not strange that, with innocent purpose, and without any sign or motion attending Little John's exclamation, Big John, who says he was looking down the road, should have turned immediately at the word, and shot Sutton from his horse? Is it not stranger still that he should have been able to do so, raising his gun from his side, and putting the ball with unerring aim so near the heart, before Sutton, whose presented or rising gun had caused the exclamation, could fire at all? There was no inquiry or explanation as to what Little John felt or saw. The exclamation was its own interpreter; and Big John wheeled, and fired without delay. There was no reason why Sutton should not have fired first, if he had his gun presented, as Little John says, or was presenting it, as other defendants say, when Little John cried, "Lord have mercy!" that exclamation being the first thing to attract Big John's attention, as he himself says. Is it not also unreasonable that a man shooting alone in self-defense, at long range, and sur-

rounded by armed friends, should advance upon his victim, firing five or six times after he had fallen from his horse, and while he lay motionless and dead upon the ground? Big John attempts to palliate this feature of the case by saying he fired two or three shots before Sutton fell from his horse. In this he arrays himself against the manifest truth of the matter. His co-defendants, even, do not pretend to sustain him on this point. Clint says he looked, immediately after the first report, and saw Sutton's riderless horse standing in the road. Mills says Sutton fell at the first shot, and all the proof shows such to have been the fact. No one but Big John states or intimates the contrary. The claim of defendants that the firing commenced about the time they reached the road, and that Sutton had his gun presented when Big John fired the first time, is in accord with the testimony of their cousin Anderson, who alone corroborates their statement. He says: "I saw Sutton raise his gun. Then John fired." When it is remembered that this witness was at one angle of an almost equilateral triangle, with Sutton and Big John, respectively, at the other angles, and the sides being from 75 to 97 yards in length, it must seem to have been something of a stretch of vision for him to see the movements of both at the same moment; especially is this so when it is further remembered that he was supposed to be intent on his work, that he might complete it, and soon follow his kinsman, as he and they say he had promised to do. The probability of such a sweep with the eye, at this very instant of time, would seem much greater if, for any reason, the witness had previously made up his mind to make the observation, and was actually on the lookout to see what would occur, or to give a signal for any purpose. Though not directly impeached, this witness is a kinsman and friend of the defendants. Finding them in great need of corroboration at this point in their case, knowing their theory, and naturally smarting under the imputation cast upon him by his own arrest before the magistrate on a charge of complicity with the defendants in the commission of this very homicide, it is not unlikely that he gave some play to his imagination while upon the witness stand, or, at least, that the jury so thought.

That Big John voluntarily surrendered himself to an officer of the law, and boldly confessed the homicide, is not a fact of much importance as affecting his guilt or innocence. He knew that the act was witnessed by Mills, and may have chosen the alternative of surrendering, rather than to flee the country. He confessed nothing that was not already known. Of course, no one can go into his thoughts, and with certainty determine the motives which prompted this action; but we think it can be reasonably explained upon either of two grounds, both entirely at war with innocence before the law: *First*, he may then have supposed that

be had the right to hunt Sutton down and slay him because Sutton had threatened his life; or, *secondly*, he may have believed that he and the other defendants, five in all, could establish a case of self-defense by their oaths, true or untrue.

It is said that the theory of the defense may be aided by the position of Sutton's body and gun as they lay upon the ground, and the condition of the gun when found. Marion Lewis, one of the first persons to reach the place after the defendants had gone away, says: "Sutton was lying on his back, with his head at edge of road, and body at about a right angle to the road; his right arm extending out from his body, and left arm drawn up and bent at elbow, the hand lying towards the head. His gun was lying near his left shoulder, the muzzle passing the head, and the breech near his left arm, obliquely to the road. \* \* \* I think Sutton's gun was cocked, and I saw Sampson Williams let the hammer down." John Winkler says: "The hammer of Sutton's gun was pulled back. The gun was on the left side of Sutton, with the muzzle towards the road." We see but little, if any, importance in the position of the body and the gun, since we know no rule, and have no expert testimony, by which it can be determined on which side of the body the gun would have fallen, or in what condition the body itself and the arms would have been left, if the gun had been presented, or had not been presented, when the enemy's fire was received. Suppositions or conjectures about such a question cannot be indulged with profit or satisfaction. If the gun was in fact cocked, so as to be ready for shooting, that would be a circumstance of some significance; but, if only half cocked, that would not be so. The witnesses just mentioned seem not to have had their attention called to the difference between cocked and half cocked, and in their language they make no distinction between the two. One of them says he thinks the gun was cocked, and that he saw the hammer let down. The other says the hammer was pulled back. How far it was pulled back neither of them says. Yet, whether the gun was cocked or half cocked, in either case the hammer would be pulled back to some extent, and could be let down. Big John says he "sometimes carried" his Winchester "half cocked;" and Grant Jarvis, speaking of such rifle, says: "The gun is usually carried at half cock, the hammer being pulled back to safety-notch." It will be remembered that Mills left the defendants near the body of Sutton. He says they agreed to stay a while. They say they made no such agreement, but admit that they did in fact remain a short while after he left. Giving his own language, Mills further says: "When I left the defendants and the body of Sutton, his Winchester rifle lay by his right side, nearly parallel with his body, with muzzle pointing to his feet, and the breech lying on or under that part of arm between shoulder and elbow." If this

be true, the defendants must have changed the position of the gun, if nothing more, for it is shown that no one else could have done so before Marion Lewis got there, and found the gun on left side of body. The defendants deny most positively that they went any nearer the body after Mills left, or that they touched the gun. What the truth of the matter is we cannot know; yet it is easy to see how the defendants could have seized and improved this favorable opportunity to make evidence for themselves. Undenially, their present defense had occurred to them before Mills went away, for he says Big John had said he was compelled to shoot in self-defense, and Anderson inquired if he (Mills) did not see Sutton present his gun. Certainly, it would have been neither unnatural nor a bad stroke of policy, from their stand-point, for them, with the thought of self-defense uppermost in their minds, and the opportunity before them, to cock the gun, and give it and the left arm any position they deemed most significant, there being no eye to see, and no witness to report, the act.

A fundamental inconsistency in the claim of innocence on the part of the defendants is found in the fact that they were on this road at all when Sutton came along. Confessedly, they knew that Sutton was accustomed to travel upon this road on Saturday evening. They had been reassured of this fact through Clint's Inquiry of Leyer only a few days before. They do not claim to have supposed he had already passed, though the day was almost gone. The time for meeting him was ripe, as they must have known. It cannot be believed that they entered this road, at this time and place, without thought of Sutton, and with innocent purpose, intending, as they swear, to walk upon it half a mile in the direction of Sutton's still-house, and to the home of their uncle George. More than four hours before, they were as near their uncle's house, on the almost opposite side, and about one mile from the place of the homicide. John Ratliff, who is in no way impeached, says he saw four or five armed men, between 10 and 12 o'clock that day, "coming up towards top of ridge, about half way from still-house to George Barnard's;" that he heard one of them say, "We will go over to Uncle George Barnard's, or on the ridge opposite Uncle George Barnard's;" and the same witness further says that "at different points along top of ridge you could see parts of the road all the way from still-house to place of killing." Why should these defendants spend even these four hours, (conceding that they had previously been further away hunting May Lawson, as they claim,) in the dead of winter, within half a mile of their uncle's house, and without their dinner? Why should they approach his house, (for Ratliff says they were going in that direction when he last saw them,) pass near by, and go beyond, only to enter the road at or near a large log by the road-side, in the edge of a narrow, "wooded hollow," and travel

thence back for half a mile, and this without any thought of Sutton, or mention of his name? We believe they were watching for Sutton's approach, besetting his pathway, for the purpose of taking his life. Their own testimony, though denying, goes far to confirm this conviction in our minds. That Sutton, on horseback, should have first presented his gun, and attempted to open fire on four well-armed footmen, all in sight, as they say they were, involves the highest degree of improbability. To have done so would have been to invite certain death. But if they were lying in wait for the purpose of taking his life, as we believe the proof clearly shows to have been the real situation, and he, discovering them, attempted to fire, that would in no sense mitigate their crime in killing him in pursuance of their original design. In this view, it matters not in what position or condition his gun was found after his death, or in what position he held it when shot. Regretful as we may be, and as we are, that it is so, the verdict of the jury is sustained to our entire satisfaction.

Next we pass to the consideration of errors of law assigned in behalf of defendants.

1. After verdict, and on same day, motion for new trial was entered, and continued until next morning. When next morning came, counsel for defendants made successive motions to continue the motion for a new trial until the day after, or until the afternoon of the same day, both of which the court refused, "unless good ground was shown on affidavit;" whereupon one hour's time was asked for the preparation of such affidavit, and this was refused, "unless some ground for delay to write affidavit" should be shown or stated. Because "no grounds or reasons were mentioned or offered by said counsel, and nothing being stated in reference to any ground or reason for delay, or stated as to what was to be stated in said affidavit, the court stated that ample time had been given already, so far as he could see," and, after argument, overruled the motion for a new trial. This action of the court is now assigned as error. We think it is not error, but most manifestly right. No affidavit was produced, and no fact was stated that was desired to be placed in an affidavit, nor was anything stated "in reference to any ground or reason for delay." Further indulgence was not required by any rule of law or practice, in the absence of any statements or intimation of any known or suspected fact to the advantage of defendants, or that any investigation was being made or contemplated.

2. We cannot agree to the suggestion that the jury were misled or erroneously charged on the subject of apprehension that they could, fairly and legitimately, have concluded from the instruction given that the defendants could establish self-defense only by showing that they, or one of them, was in fact in danger of death or great bodily harm when the fatal shot was fired, and that it would not be

sufficient to show that an apprehension of such danger was entertained, and upon reasonable grounds. On this point the court said to the jury: "Self-defense, therefore, rests upon necessity, actual or *apparent*. A common assault, not actually or *apparently* endangering life or great bodily harm, will not excuse a homicide in repelling it. But, to excuse a homicide, the danger of life or great bodily harm must be real, or *honestly believed* to be so, and *on reasonable grounds*. The danger must be *apparent* and imminent and existing at the time of the fatal injury, or *honestly believed* to be so, and *on reasonable grounds*. The belief or apprehension of danger must be founded on *sufficient circumstances to authorize the opinion* that the purpose to kill or do great bodily harm then exists, and the fear that it will at that time be executed." This extract correctly states the law; and in every sentence, as is readily seen from the italics, which are ours, the court distinctly repudiates the idea that a homicide can be justified, or self-defense established, only by showing the existence of real danger. The language is almost precisely the same as that used by this court in *Rippy v. State*, 2 Head, 218, and approved in other cases. *Williams v. State*, 3 Helsk. 394; *Draper v. State*, 4 Baxt. 252; *Jackson v. State*, 6 Baxt. 457; *Allsup v. State*, 5 Lea, 369; *Hull v. State*, 6 Lea, 257. No particular complaint is made of what we have quoted, standing by itself, but the main criticism is of what followed. In a subsequent part of the charge, when the court came to apply the law more directly to the facts of the case, the jury was told, in substance, that the defendants would be guilty of no crime if the fatal shot was fired "under a well-founded belief and apprehension" of death or great bodily harm, but that they would be guilty of some offense if the shot was fired "from any other feeling than a well-grounded fear or apprehension" of such danger. The objection is made to the words, "well-founded" and "well-grounded." It is urged that their use was improper, erroneous, and well calculated to mislead the jury, and make the impression on their minds that they must find that there was in fact danger of death or great bodily harm, before the defendants could be acquitted. How such an impression could have been made (and we have no evidence or reason to believe that it was made) by the language used it is difficult to understand. Certainly, it has no such meaning to us, and we think it could not naturally or reasonably have such a meaning to the jury. "Well-founded" and "well-grounded" signify the same thing, confessedly; and full warrant for the use of the former by the trial judge is found in the opinion of this court in the *Rippy Case*. There, Judge CARTHERS, speaking for the court, said: "So a case must not only be made out to authorize the fear of death or great harm, but such fear must be really entertained, and the act done under an honest and well-founded belief that it is absolutely necessary to kill at that mo-

ment to save himself from a like injury." 2 Head, 221. Moreover, it is incredible that the jury could have received such an impression from these terms, when considered in the light of, and in connection with, what had previously been told them on the subject of apprehension. It was their duty to consider the whole charge,—each and every part; and this record raises no doubt in our minds that they did so, and that they fully understood it. Besides, upon their own theory of the case, if the defendants had any apprehension at all, it is manifest that it was well founded, and that they could in no event have been injured by the charge on this point.

3. In the next place, objection is made to what the court said to the jury about the necessity of an overt act. The charge on that subject is as follows: "Previous threats made by the deceased against defendant will not of themselves excuse the defendant in killing the deceased; *but there must be some overt act or words, at the time, clearly indicative of a present purpose to do the threatened injury.*" So much of this instruction as requires an overt act at all, to justify the homicide in this case, is assailed as unsound; the position being that, whatever may have been the law in former times, an overt act should not be required in this day of the revolver and repeating rifle, especially with such a man as the deceased is shown to have been. We are aware of no change, or reason for a change, of the law on this subject since the decision by this court of the Rippy Case, already referred to, in which the language of the opinion is: "Previous threats, or even acts of hostility, how violent soever, will not of themselves excuse the slayer; *but there must be some words or overt acts, at the time, clearly indicative of a present purpose to do the injury.*" 2 Head, 219. This language is precisely the same in meaning, and almost the same, word for word, as that used by the trial judge, and quoted above. This is especially so as to the portion of each relating to the overt act, which we have italicized for the purpose of emphasis. The language of the Rippy Case is quoted in some, and approved in all, of the following cases, since decided by this court: Williams v. State, 3 Heisk. 394; Draper v. State, 4 Baxt. 251; Hull v. State, 6 Lea, 256; Allsup v. State, 5 Lea, 369; Jackson v. State, 6 Baxt. 457, 458. The opinion in the case last cited (Jackson's Case) may by some be supposed to have changed the rule laid down in the Rippy Case; but it does not do so in fact, and was not so intended, as is readily seen from the very clear and vigorous language of the writer, the lamented Judge McFARLAND. He expressly recognizes the doctrine of the Rippy Case as sound, and undertakes to show, and does show to a demonstration, that different facts will constitute the ever-necessary overt act in different cases; that greater demonstration of a deadly purpose is required where the slayer and slain have previously been friends than where they have been ene-

mies, and the deceased has made threats against the life of the defendant. To use his own words, he says: "The necessary overt act in the one case might be different from the other. It is difficult to lay down a rule exactly governing all cases, the circumstances of the cases differ so widely. The overt act that will justify a defendant in assuming that his own life is then in danger must depend upon the circumstances of each particular case." 6 Baxt. 458, 459. This quotation from the opinion itself is sufficient to refute all claim that the learned judge delivering it could have intended to say that the overt act, therefore, required by all the authorities, except the Kentucky cases, could or should be dispensed with in the administration of the criminal law in this state. The Allsup Case is no more a modification of the Rippy Case on this point. The learned judge who delivered the opinion in the Allsup Case, in extracting the true rule from the Williams Case, (3 Heisk. 394,) quotes therefrom, with approval, as follows: "There must be words or overt acts, at the time, clearly indicative of a present purpose to do the injury;" thus using with approbation the very words of the Rippy Case. 5 Lea, 370. It is true the Williams Case is criticised in the Allsup Case for confining the overt act to the "moment" of the homicide; but that there should always be an overt act to constitute self-defense is neither denied nor questioned in the slightest degree. Id. It is further said in the Allsup Case, on the same page, that the justification "must appear from all the facts and circumstances of the entire transaction, taken as a series of events." So the trial judge in this case instructed the jury: "No exact rule of law can be laid down which will govern in all cases of self-defense. Each case must stand upon its own facts and circumstances, taken together as a series of events." Thus we have seen that the charge with respect to overt act is strictly within the decisions of this court, which we think entirely sound, and worthy to be followed. But, in reality, the taking of nice distinctions on this subject could have been of no possible moment to the defendants in this case; for, if their theory of the fatal meeting was to be credited by the jury, there was unquestionably an overt act on the part of Sutton of the most marked and unmistakable character; and on the other hand, if the theory of the state was to be accepted, the defendants were lying in wait, and no overt act by Sutton, however violent, would, under such circumstances, have justified them in taking his life.

4. And, finally, it is insisted that the charge is fatally defective in that it omits the usual instruction in a case of purely circumstantial evidence, which it is contended this is, as to all the defendants except Big John. The instruction on the law of conspiracy and reasonable doubt, or so much of it, rather, as need be here noticed, is in these words: "In this case, if the evidence should satisfy your minds, to the exclusion of all reasonable

doubt, that the defendants entered into a conspiracy to go and hunt up, or waylay, Henly Sutton, the deceased, and to kill him, then the act of any one of them, done in furtherance of the common design, would be the act of all, and all would be equally guilty of the act, and liable to the same punishment therefor." This charge is not assailed as unsound or inaccurate, so far as it goes; but the earnest contention is that the court should have gone further, and told the jury, in substance, that, to convict the defendants in this case, the proof must be so clear and convincing as to exclude every other reasonable hypothesis than that of their guilt, and that this must be true as to each and every one of them. It is well settled now that such additional instruction must be given where the guilt of the accused is sought to be established upon circumstantial evidence only; and that, too, notwithstanding the doctrine of reasonable doubt be already embraced in the charge. *Smith v. State*, 2 Leg. Rep. 56; *Turner v. State*, 4 Lea, 207. Though it is a well-established and just practice, we do not think the rule applicable to the case before us, because the guilt of the defendants does not depend alone on circumstantial evidence. Such is not the dependence of the state as to any one of them. That such is the case as to Big John is, of course, not insisted, for he confesses that he fired six or seven shots. That it is not such a case as to Anderson is equally clear. Mills says that he saw Anderson fire one time. To say that this statement of Mills is denied, and shown to be untrue, does not make it any the less direct testimony of the fact. The statement is not a mere circumstance tending to show the fact, but it is direct testimony of the fact itself. Whether it was true or not is quite another question, and that was for the jury to determine, under the rules with respect to conflicting evidence and the doctrine of reasonable doubt. The case against the other three defendants, though partly circumstantial, is likewise not dependent entirely on circumstantial, as contradistinguished from direct, testimony. They were, in fact, upon the very scene of action, as they themselves admit; two of them armed with Winchester rifles, and the other one only temporarily absent, and then very near by. Not only were they, to all intents and purposes, present, at the time, so that they might have rendered assistance, if necessary, but the positive facts of the record are that the whole five of the defendants were in fairly easy reach of this road all day, that they came to this place together, and that, after the act, they met near the body, consulted, and departed all together. Elisha says: "We all met, talked, and started off down the road away from Sutton, and went on home." True, there are many circumstances connected with these facts, and throwing light upon them, which were material and important to be considered in arriving at a just conclusion in the case; yet that does not make it a case of circumstantial evidence.

In one sense, of course, the facts we have just mentioned are only circumstances indicating the main fact,—a purpose and readiness to encourage, or render needed assistance in the taking of Sutton's life; still, they are not merely circumstantial evidence, in the contemplation of the cases cited. Otherwise, it might be said that the fact that Big John discharged his gun in the direction of Sutton was but a circumstance indicating his purpose to kill. That would be unreasonable in the extreme. Actual and close association with the principal actor near the scene, and for hours before the time; actual presence with him when the act is done, with means of rendering assistance; rallying promptly around or near the dead body after the deed is accomplished,—thus sustaining and supporting the principal actor, and thereby concurring in the act itself,—are all facts, and not mere circumstances, in the legal sense; and evidence of them is direct, and not circumstantial, evidence.

In behalf of the defendant Clint, it is well said that the fact that he had no gun, and was not at the road, when Sutton was killed, should weigh something in his favor. Nevertheless, we think that fact becomes unimportant, in view of the other facts that he, a few days before, inquired of Clinton Leyer if it was not the habit of Sutton to go home Saturday evening; that he voluntarily joined the other defendants at his mother's house the night before; that he made the suggestion that they should go out upon Troublesome ridges Saturday morning; and that he stopped on the side of the hill, from which he could command a view of the road on which Sutton was expected to travel, and from which he could give all necessary and desired signals to the other defendants at or behind the log. Whether the line of signals extended further up the hill to the place where their cousin Anderson stood, it is not necessary for us to surmise. If it be true, as we believe it is, that the other defendants had been watching different parts of this road during the day; if it be true that the other defendants made the undisputed signs and preparations, and were lying in wait at this particular place, and behind the log, as we believe it is,—then it cannot be true that defendant Clint was ignorant of their purpose, or innocent of their crime.

We have given this case, in all of its aspects, a most solicitous and painstaking consideration; and, in doing so, we hesitate not to say we would have been glad to find these young men innocent of the charge laid at their door. The deceased made unjust and violent threats against two of them, but that can afford neither moral nor legal justification for taking his life. Let the judgment be affirmed.

LURTON, FOLKES, and SNODGRASS, JJ., concurring. TURNER, C. J., dissenting, because he does not believe the verdict sustained by the evidence.

DIXON *et al.* v. COOPER.

(Supreme Court of Tennessee. Oct. 26, 1889.)

## DEATH OF DEVISEES—LAPSED LEGACIES.

1. Where a devisee dies before his testator, leaving a will by which he bequeaths to his wife all that is coming to him from the first testator, the wife has no interest in the estate devised to her husband, although it appear from the circumstances that the first testator intended the wife to stand in her husband's shoes, as such intention found no expression in the will; and such devise is deemed to have lapsed.

2. Mill. & V. Code Tenn. § 8036, provides that "whenever a devisee or legatee dies before the testator, or is dead at the making of the will, leaving issue who survives the testator, said issue shall take the estate devised or bequeathed as the devisee or legatee would have done, had he survived the testator," etc. *Held*, that the statute applied only to cases where a devisee or legatee died leaving issue, and not to every case where such person dies before testator.

Appeal from chancery court, Bradley county; W. H. DE WITT, Special Chancellor.

*P. B. Mayfield and J. N. Aiken*, for complainants. *S. P. Gant and D. A. Gant*, for respondent.

CALDWELL, J. Bennet Cooper made and published his last will and testament on the 5th day of February, 1873. The third clause of that will is as follows: "I will and bequeath to my four grandchildren born of the body of Martha Batt, former wife of James Batt, one whole distributive share, to be equally divided among said four grandchildren born of the body of said Martha Batt; said Martha Batt being a legal heir." This testator lived some 13 years after the execution of this will; and the legatees and devisees thereunder became well acquainted with its terms and provisions, as we infer. Thomas Batt, one of the four children of Martha Batt and grandchildren of the testator, knew of the provision made for him in that clause of his grandfather's will just quoted above; and on the 27th of January, 1882, he made his will, the second clause of which is in these words: "I give and bequeath to my wife, Roxey Batt, all my estate that is coming to me from my grandfather, Bennet Cooper." On the next day Thomas Batt died without issue, leaving his wife, Roxey, surviving. Thereafter, in due time, the will of Thomas Batt was admitted to probate, James L. Kirby being qualified as executor thereof. Bennet Cooper, the original testator, and grandfather of Thomas Batt, lived until the ——— day of ———, 1886, and then died. His said will, made in 1873, was then probated, and Dempsy Cooper became his executor. Roxey Batt, widow of Thomas Batt, intermarried with William Dixon; and, on the 15th of January, 1889, she and her husband, and the executor of Thomas Batt, filed this bill, to recover from Dempsy Cooper, executor of Bennet Cooper, that part of the latter's estate given to Thomas Batt by the third clause of his (Bennet Cooper's) will. The chancellor dismissed the bill on demurrer, and complainants have appealed to this court. It is alleged in the bill that Bennet Cooper knew

of the death of Thomas Batt, and that, notwithstanding this knowledge, he (Bennet Cooper) permitted the provision in his own will for the benefit of Thomas Batt to stand unchanged. And from the facts thus alleged it is urged, in argument at the bar, that it was the clear intention of Bennet Cooper that complainant Roxey, the widow of Thomas Batt, should take the share of her husband under his (Bennet Cooper's) will; and that, such being his intention, it should prevail, and she should have the relief sought in her bill.

The object of all construction is to arrive at the intention of the testator, and, when ascertained, that intention will be enforced, unless contrary to law or public policy. But that intention must be learned from the language used in the will, aided, when necessary, by the peculiar facts and circumstances surrounding the testator at the time of its execution. Looking to the language of Bennet Cooper's will, and applying this primary rule of interpretation, no provision whatever is found for the contingency which happened. Hence, the course of the property given to Thomas Batt must be determined alone by rules of law applicable to such a case. The testator neither declared for himself what course it should take in case he should survive his grandson, for whom the provision was made, nor did he undertake to authorize the latter, in such event, to dispose of it by his own will. If the facts alleged were admitted to be sufficient to show that Bennet Cooper, after the death of Thomas Batt, desired and intended that the widow of Thomas Batt should stand in his shoes, and enjoy the provision made for him, that would manifestly give her no interest or benefit under the will of Bennet Cooper, previously executed, for the very evident and all-sufficient reason that no such desire and intention were incorporated in the will. A mere desire and intention on the part of A. that B. shall have a share of A.'s estate, or that B. shall take place of C., who is in fact provided for, if C. die before A., will confer no rights upon B., unless such desire and intention find expression in the will.

The next position taken in behalf of complainants is that the will of Bennet Cooper vested an inchoate right in Thomas Batt, which he could and did effectually dispose of by his will. This proposition is predicated on the assumption that our statute was taken from the English statute, and that the latter has been construed by the English courts to vest the right and confer the power here contended for. Our statute is in these words: "Whenever a devisee or legatee dies before the testator, or is dead at the making of the will, leaving issue who survives the testator, said issue shall take the estate devised or bequeathed as the devisee or legatee would have done, had he survived the testator, unless a different disposition thereof is made or required by the will." Mill. & V. Code, § 8036; Thomp. & S. Code, § 2196. The English



statute is as follows: "That where any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed, for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will." 1 Vict. c. 26, § 38; 1 Jarm. Wills, (Rand. & T. Ed.) 638. It is first to be observed, with respect to these statutes, that they are intended alone to meet the case where a devisee or legatee dies "leaving issue," and not every case where such person dies before the testator. Therefore, the statutes have no application to the case before us, and afford no foundation for the proposition insisted upon, inasmuch as Thomas Batt, the devisee or legatee, did not die "leaving issue," but died "without issue." If authority were necessary for this construction, we have it in *Strong v. Ready*, 9 Humph. 170, where this court held that the statute in question had no application, because the devisee died without issue. It results that the present case must be determined upon the law as it existed before the enactment of those statutes, and as it has since been administered in cases to which they are not applicable. The general and well-settled rule in all cases not within the scope of those statutes is that all devises and legacies shall be deemed lapsed if the devisee or legatee dies in the lifetime of the testator. 4 Kent, Comm. 541; 1 Jarm. Wills, 617; *Morton v. Morton*, 2 Swan, 319; 3 Meigs, Dig. § 2750; 2 Redf. Wills, p. 484, § 50. That rule governs this case.

### HESTER v. HESTER.

(Supreme Court of Tennessee. Dec. 5, 1889.)

#### HUSBAND AND WIFE—ACTIONS.

1. Mill. & V. Code Tenn. § 3505, provides that, "where a husband has deserted his family, the wife may prosecute or defend in his name any action which he might have prosecuted or defended. She may also sue and be sued in her own name for any cause of action accruing subsequently to such desertion." A declaration alleged that defendant agreed, if plaintiff would dismiss a suit for breach of promise and seduction against his son, and marry the latter, that he (defendant) would support them; that plaintiff did this, when defendant, by slandering her, persuaded her husband to sue her for divorce, and abandon her; that defendant then induced her husband to have her arrested, and prosecute her for murder, and assisted in the prosecution; but that plaintiff was acquitted. *Held*, that a demurrer to the whole declaration, on the ground that plaintiff should have joined her husband in the action, was too broad, as the declaration showed desertion, and that some of the causes of action accrued thereafter, for which plaintiff could sue alone.

2. The alleged acts of defendant prior to the husband's desertion may be considered on the question of damages, though plaintiff could not sue independently for such acts.

Appeal from circuit court, Sumner county; JO W. STARK, Judge.

Action by Rhoda E. Hester against Samuel T. Hester. A demurrer to the declaration was sustained, and plaintiff appeals.

*S. F. Wilson, J. M. Head, and C. R. Head*, for appellant. *Munday & Elkin and J. M. Anderson*, for appellee.

TURNER, C. J. The summons requires the defendant "to answer for falsely and maliciously attempting to ruin her character, and for separating her and her husband." The declaration avers that Taylor Hester, a son of defendant, seduced plaintiff under a promise of marriage, begot her with child, and then refused to marry her. That she commenced suit for breach of promise and seduction, attaching property. That he thereafter assured her of his love, and willingness to marry her. That the defendant, Samuel T. Hester, urged her to marry his son Taylor, and dismiss her suit; that, if she would do so, he would take them to his house, and see that they always had a good home and support. That, being thus urged and persuaded, she did dismiss her suit, marry the said Taylor, and go to the house of her father-in-law to live. That the action taken by her husband's father was for the purpose of getting rid of her suit through the marriage, and then of breaking up the marriage by alienating her husband's love for her through falsehood and slander against her reputation, desiring to enable her husband, under the form of law, to be rid of her, and his obligation to support her. That by these means, and in accordance with his scheme, the defendant did induce his son to abandon her, and file a bill for divorce on the charge of adultery with George Martin. That on the following day she was driven from home by her husband, through the influence of his father, the defendant. That, on the same day, George Martin was killed, and the defendant induced her husband to charge her with the murder, and to have her arrested and prosecuted on that charge before a magistrate, and in the circuit court. That defendant assisted in the prosecution, and furnished money for that purpose, and she was acquitted. That by slander, falsehood, insinuation, and subornation of perjury he did separate her and her husband, and deprived her of his love, affection, and support. To the declaration, several grounds of demurrer are assigned, raising the question of the right of the plaintiff to sue without joining her husband as plaintiff.

Our statute, (Mill. & V. Code, § 3505) provides that, "where a husband has deserted his family, the wife may prosecute or defend in his name any action which he might have prosecuted or defended. She may also sue and be sued in her own name for any cause of action accruing subsequently to such desertion." Taylor Hester could have maintained no action for the alleged fraudulent conduct of the defendant in procuring the

dismissal of the suit for breach of promise and seduction. This is a sufficient reason for holding the wife cannot. He and the wife could, however, have maintained an action for breach of the promise, made in consideration of the dismissal of that suit and their marriage, to furnish a home and support. The husband could have maintained an action against the father for slandering and traducing the wife, thereby causing the husband to lose his confidence in her, and to separate from her, and to file his bill for divorce. If the husband was, by slander and falsehood of the father against the reputation of the wife, induced to withdraw his affection and support from her, he could have maintained an action therefor. He could have maintained an action for a false charge of adultery, murder, etc., or for malicious prosecution of the wife set on foot by the father, and so for false imprisonment. The fact that for such causes the suit would ordinarily be in the name of husband and wife makes no difference, as the prosecution is for the benefit of the husband. The declaration makes a case of desertion, with a certainty that some of the causes of action accrued subsequent thereto, and for these she may sue. The fact of desertion is not confined to the time of the actual separation of the parties, or the driving away by the husband of the wife, but may have existed from a period anterior, as the conduct and treatment of the husband to the wife may show. While no independent action by the wife will lie for the acts of the defendant in bringing about a dismissal of her suit for seduction and breach of promise, nor for the other alleged acts prior to the husband's desertion, the facts may be looked to on the question of damages in the present suit, if shown to have been a part of the plan alleged in the declaration. The statute is clearly susceptible of the construction here given to it. Courts will not look through a magnifying glass for purely technical defenses to such actions. The demurrer goes to the whole declaration, and is therefore too broad. The judgment sustaining the demurrer is reversed, the exceptions to the report of the commission of referees allowed, and the cause remanded.

#### O'CONNER v. O'CONNER et al.

(Supreme Court of Tennessee. Oct. 19, 1896.)

#### VENDOR'S LIEN—ASSUMPTION BY GRANTEE — EXCUTORS—MARSHALLING ASSETS.

1. Where the grantee of land subject to a vendor's lien covenants in the deed to assume and pay the purchase money due from his grantor, and secured by such lien, such covenant being a part of the consideration for the land, he becomes personally liable to the original vendor for the amount of his incumbrance upon the land.

2. The personal estate of an intestate is primarily liable for the discharge of incumbrances upon his land for the purchase money thereof, whether such incumbrance was created by the intestate himself, or by his grantor, when, in the latter case, he assumes its discharge as part of the consideration of the grant to him.

TULNER, Sp. J., dissenting.

Appeal from chancery court, Knox county; HENRY R. GIBSON, Chancellor.

*Webb & McClung*, for appellant. *Colyar, Marks & Childress* and *Taylor & Hood*, for respondents.

LURTON, J. Thomas O'Conner died in 1882, intestate, and without issue, leaving a large real and personal estate. Under the statute of descents and distribution, his widow, who is likewise his administratrix, is his sole distributee, and entitled, after payment of his debts, to his entire personal estate. The heirs at law, to whom the real estate descends, are the brothers and sisters of the intestate, and the representatives of such as are dead. Thus the heirs and distributees are not the same persons, and the fact has given rise to a controversy as to whether the personal estate is, in equity, the primary fund for the discharge of certain incumbrances upon lands of the intestate. The parties in interest have submitted to the chancery court an agreed case, as provided by the statute, and from the decree of the chancellor the administratrix has appealed.

The agreed case shows, first, that at the time intestate acquired one of the tracts of land which he owned at his death it was subject to a vendor's lien to secure certain purchase-money notes made by the immediate vendor of Mr. O'Conner; that Mr. O'Conner, as a part of the consideration for the purchase, expressly assumed and agreed to pay off the incumbrance, and to pay to his immediate vendor an additional sum of \$3,000. This agreement was contained in the deed to O'Conner; and, to secure the payment of both sums, a lien was retained on the face thereof. Notes were executed and delivered for the sum to be paid his immediate vendor; but there was no substitution of intestate's notes for those of the seller, and no communication whatever between Mr. O'Conner and the creditor. At Mr. O'Conner's death no part of the purchase money due on this tract of land had been paid,—neither that which was due directly to his immediate vendor, nor that which he had assumed and engaged to pay for his vendor. The lien of the original purchase money, as well as that due immediately from intestate to his vendor, was subsequently enforced in a suit against the heirs to whom the incumbered land had descended, to which the administratrix of O'Conner was not a party, and these incumbrances have been paid by a sale of the land. The heirs now ask to have the sums thus enforced against the lands reimbursed out of the personal estate of the intestate, which, it is admitted, is sufficient for this purpose. A second tract which descended to the heirs was incumbered with a lien to secure purchase-money notes made by the intestate. This lien has been likewise enforced under a bill against the heirs, and the land sold for its satisfaction; and for this sum they likewise seek reimbursement out of the personalty. Two questions arise from these facts: *First*. Is the personal estate the pri-

mary fund, as between the distributees and the heirs, for the satisfaction of a lien, or charges upon the lands, at the time they were acquired by the intestate; the lien not being to secure a debt originally created by the intestate, but one assumed by him as a part of the consideration to be paid for the land, when there has been no communication between the intestate and original vendor, to whom the debt thus assumed was due? The second question is whether a debt created by the intestate for the purchase of land is, as between the distributee and heirs, a primary charge on the personal estate, or does the heir take the land *cum onere*?

It may be, at the outset, admitted that where lands descend subject to a charge, or mortgage, or lien, not created by the intestate, which was never his personal debt, or one for which he could have been held personally liable by the creator, the heir, in such case, would take the land subject to the incumbrance, and could not call upon the personal estate to have his lands exonerated from the burden. This would follow for the obvious reason that the incumbrance was never the debt of the intestate, and his administrator could not therefore be called upon to discharge it.

The first matter to be determined, before we can reach a solution of the first question, is to decide whether the intestate had made himself personally responsible for the incumbrance. The agreed case states that in the deed accepted by the intestate there was a clause whereby the vendee assumed the unpaid purchase money, and agreed to pay the same. It is true, this promise or assumption is not made directly to the creditor, but only to the vendor, who was the debtor. The payment of this incumbrance was, however, a part of the consideration for the land. The undertaking, in effect, was that the vendee should pay the vendor the sum of \$3,000, and, in addition, should assume and pay off his lien upon the land. The price the vendee was to pay for the land was the sum of \$3,000, plus the lien debt. That this was the plain intent and meaning is most manifest from the fact that the covenant in the deed is not merely that he took the land subject to the incumbrance, or that the vendor was to be indemnified against personal liability on account thereof; but that he expressly agrees to assume and pay off the outstanding notes for purchase money due from his grantor to the vendor of the latter; and these notes, and their dates, and amounts, and payer, are precisely described. To secure the grantor against default either in the payment of the lien debt thus assumed, or in the payments directly made to him, an express lien is retained on the face of the deed accepted by the purchaser. This was, therefore, not a promise to pay the debt of another, or to be answerable for the debt, default, or miscarriage of another; but was a promise, rather, to pay his own debt to a third person, designated by his creditor.

That the intestate, by the acceptance of the deed containing this assumption of the lien debt, made himself personally responsible to the creditor holding the lien, will not at this day admit of doubt. Upon this subject, Mr. Pomeroy says: "The mortgagor may not only convey the premises 'subject to' the mortgage. He may also convey them in such a manner that the grantee assumes the payment of the mortgage debt, and thus renders himself personally liable therefor. The element which lies at the bottom of such assumption, and which alone gives it efficacy, according to the theory held by some courts, is the fact that the mortgage debt is included in the purchase price, as a constituent part thereof, and the grantee actually pays or secures to his grantor only the balance of the gross price, after deducting such debt. No particular form of words is necessary to create a binding assumption. It is sufficient that the language shows unequivocally an intent on the part of the grantee to assume the liability of paying the mortgage debt; but this intent must clearly appear. When the deed executed by the grantor contains a clause sufficiently showing such an intent, the acceptance thereof by the grantee consummates the assumption, and creates a personal liability on his part which inures to the benefit of the mortgagee, as though he had himself executed the deed." 3 Pom. Eq. Jur. § 1206. The person who thus assumes a mortgage on his debt becomes, as to the mortgagor or lienor, the principal debtor, and the mortgagor a surety. Upon such a promise, the original vendor could have maintained an action at law. *Moore v. Stovall*, 2 Lea, 543. This is upon the ground that the original vendor, in adopting the act of the vendee for his benefit, is brought into privity with the promisor, and may enforce the promise as if it were made directly to him. *Lawrence v. Fox*, 20 N. Y. 263; *Burr v. Beers*, 24 N. Y. 178; *Thompson v. Bertram*, 14 Iowa, 476; *Thompson v. Thompson*, 4 Ohio St. 333.

But it is insisted that if it be admitted that the intestate had made himself personally liable to the owner of the incumbrance for the assumption of the debt, in the manner heretofore shown, this promise and liability is only collateral. That, the debt being one not originally contracted by him, his liability, growing out of the promise to pay it, only makes it his debt with respect to the land, which continued to be charged with the lien, and which was therefore the primary fund for its payment; and that the rule in equity in respect to incumbrances upon lands described is that, if the incumbrance was not created by the ancestor, the heir takes the land *cum onere*, and cannot call upon the personal estate to exonerate it; and that the rule is not affected by the fact that the ancestor has made himself personally liable, unless there be something, in addition, indicating a clear intention that the personal estate shall be the primary fund for the payment of the debt.

This presents a question concerning the marshaling of assets, which is altogether *res integra* in this state. It is a general rule at common law, and in equity, that debts shall be primarily payable out of the personal estate, and that the land shall only be subjected as auxiliary to the personalty. In this state, by statute, both the personalty and the lands of an intestate are assets for payment of debts; but the latter cannot be subjected until the former is exhausted. These principles are fundamental, and need no elaboration. When, therefore, a creditor, whose debt is secured upon the land, elects to go upon the latter, as he may, the heir will be reimbursed out of the personalty. This is the undisputed rule where the debt was the personal debt of the intestate, and one originally created by him. In every such case the election of the creditor to enforce his mortgage is not suffered to disappoint the heir; for, the personalty being the primary fund for payment of such debts, it must reimburse the heir for the loss of the land, the latter being entitled to exoneration. Therefore there is no room for controversy. Neither can it be seriously denied that in the case under consideration the creditor could, at his election, have recovered the debt secured by him from the personal representative. But it is insisted that, if such a creditor should, at his election, rely upon his right to satisfaction out of the personalty, rather than pursue his remedy by enforcement of his lien, in that event the personal representative could call upon the heir for reimbursement, upon the ground that, as to the debt thus paid, the land, as between the personal representative and the heir, was the primary fund, and the personalty the auxiliary; in other words, that the land must ease the personalty, in case of debts of this character. The rule heretofore stated as to the primary liability of the personalty to the payment of the debts of an intestate is likewise the general rule as to the payment of legacies and of the debts of a testator. But this is a mere rule for the determination as between those to whom the land may be devised and those to whom the personalty may be bequeathed, when the testator has made no other direction as to which shall be the fund primarily liable. The testator may, undoubtedly, entirely or partially change the natural order of liability, either by express words or by a plain indication of such intention. It has been lamented by a long line of judges that the rule governing the construction of wills had not been that nothing but "express words" would be held sufficient to alter the course and order of the law concerning the primary liability of the personalty to pay both debts and legacies. *Duke of Ancaster v. Mayer*, 1 Lead. Cas. Eq. (4th Ed.) pt. 2, p. 892. The question here presented is not arising under a will claimed to alter the natural order of liability, for there is no will. But it is, nevertheless, an analogous question; the alteration of the usual

order of liability arising, it is claimed, from acts *in pais* of the testator, whereby the land, and not the personalty, is the primary fund for the payment of this debt. It may be here premised that the doctrine here invoked arises only where the testator or intestate has acquired, by purchase or otherwise, lands which at the time were subject to mortgage or other incumbrance. The incumbrance being for a debt not originally created by the purchaser, he is generally presumed not to intend to subject his personal estate as the primary fund for its payment, but, rather, to intend that the land shall discharge the burden.

This doctrine, as stated by Chancellor KENT, is this: "When a man," says he, "gives a bond and mortgage for a debt of his own contracting, the mortgage is understood to be merely a collateral security for the personal obligation. But when a man purchases, or has devised to him, land with an incumbrance on it, he becomes a debtor only in respect to the land; but, if he promises to pay it, it is a promise, rather, on account of the land, which continues, notwithstanding, in many cases, to be the primary fund. The same equity which in other cases makes the personal estate contribute to ease the land, as between the real and personal representatives, will here make the land relieve the personal estates. There is," says he, "good sense and justice in the principle; and I feel the force of the doctrine that it requires very strong and decided proof of intention before the court can undertake to shift the natural course and order of obligation between the two estates." *Cumberland v. Codrington*, 3 Johns. Ch. 257. The doctrine just quoted is the deduction of the learned chancellor after reviewing the English equity cases, though in other points of his opinion he recognizes certain important distinctions and qualifications, which will hereafter be noticed. See, also, Story, Eq. Jur. 571-577, 1248 et seq. The American editors of White & Tudor's *Leading Cases in Equity* thus sum up the doctrine: "The weight of authority would therefore seem to be that the personal estate is not primarily liable, unless the testator has not merely made himself answerable for the payment of the mortgage, but has made the debt directly and absolutely his own; or has in some other way manifested an intention to throw the burden on the personalty in case of the land." Volume 1, pt. 2, p. 926, (4th Ed.) The question in all the cases has been whether or not the facts and circumstances showed such an adoption of the debt as to make the personalty the primary fund for its payment. A careful examination of the reported English decisions makes it exceedingly difficult to extract any distinct rule by which it may be determined when a purchaser has so manifested his intention to adopt the debt as to take a particular case out of the general rule, which makes the realty the primary fund for the payment of an incumbrance existing upon lands purchased by a decedent.

By all the cases it is held that a mere dry covenant, by which the purchaser agrees to indemnify his vendor against an incumbrance, is insufficient. *Cumberland v. Codrington*, 3 Johns. Ch. 229. This case presented no other question, the learned judge distinctly stating that in the deed conveying the incumbered estate there was only a naked and dry covenant of indemnity." *Id.* 254. All that is said in the case as to the rule under any other circumstances is nothing but *dicta*. So there are cases holding that when lands are purchased subject to a mortgage, and the vendor enters into bond at the time, or subsequently, to pay off the incumbrance, this alone, without other circumstances, will not be regarded as a sufficient demonstration of his intention to make it his personal debt, with respect to the fund primarily liable for its payment. *Billinghurst v. Walker*, 2 Brown, Ch. 604; *Evelyn v. Evelyn*, 2 P. Wms. 664; and a number of other cases cited in the very full note of Mr. Cox to the case last cited. These cases proceed upon the notion that the assumption of the incumbrance was only by way of collateral security, the land remaining the principal debtor, and primary fund for its payment. Very slight circumstances, however, will, it seems, suffice to take a case of the latter class out of the rule; as, for instance, in the case of *Earl of Oxford v. Lady Rodney*, 14 Ves. 418, where the purchaser of the equity of redemption at the same time covenanted with the mortgagor to pay his debt, and agreed upon new terms and conditions of payment. This was held to distinguish the case from *Tweddell v. Tweddell*, 2 Brown, Ch. 101, and to make the personal estate primarily liable. *Waring v. Ward*, opinion by Lord ELDON, presents another case where slight circumstances, in addition to a covenant to pay, were held enough to make the debt the personal debt of the vendee. 7 Ves. 336. See, also, *Woods v. Huntingford*, 3 Ves. 128.

Another rule may be deduced from the decided cases with a good deal of certainty, which is this: That when the incumbrance is assumed as a part of the purchase price, and the vendee makes himself, in any way, directly liable to the creditor for the amount of the incumbrance, in such case the personal estate is the primary fund for the payment of the incumbrance. To satisfactorily show the ground upon which this conclusion is reached, it becomes necessary to briefly consider some of the adjudged cases. *Tweddell v. Tweddell* is termed a leading case, and is certainly the most extreme of the many cases touching upon the doctrine. That case was this: An estate was purchased subject to a mortgage. The purchaser covenanted to discharge the mortgage debt, and to indemnify the vendor, and to pay the agreed purchase price, less amount of the mortgage, to the vendor. Lord THURLOW held the land the primary fund, and refused to exonerate it, on bill of the heir, out of the personal

lars, is like the one under consideration, and it might be well assumed to be a very commanding authority. But the reasoning of the learned judge, when examined, shows most conclusively it is not, in view of our own decisions as to the effect of a covenant to pay the incumbrance as a part of the purchase price, of any weight whatever. He put his decision distinctly upon the grounds that the personal estate is not chargeable in equity when it is not at law, saying: "The land was the original debtor, and the mortgagee could not bring his action against the executor of any other party, but merely against the original debtor." He proceeds: "Where it is a debt payable by executors at law, this court will relieve the heir by turning the charge upon the executors, provided it does not interfere with other debts and legacies, or any more substantial claims." 2 Brown, Ch. 101. Upon the reasons of the chancellor, the decree should have been the other way, for the creditor clearly could have maintained a direct action at law against the vendee. Chancellor Kent himself questioned this case, suggesting that the rule was not applicable in that case, saying: "When the indentures between the mortgagor and purchaser recited an agreement by which A. had agreed to pay out of the purchase money, to the son and heir of the mortgagee, the principal and interest due on the mortgage, being 2,155 pounds, and the residue of the purchase money, being 1,945 pounds, to the mortgagor, it might be a question whether the son and heir could not have sued at law for that money, as so much received for his use. It has been held that if one person makes a promise to another, for the benefit of a third person, that third person may maintain an action at law on that promise." 3 Johns. Ch. 254. That an action at law would lie on such a promise has been expressly decided in this state. *Moore v. Stovall*, 2 Lea, 545. This case, in the subsequent case of *Woods v. Huntingford*, 3 Ves. 128, was commented on by Lord ALVANLEY as follows: "*Tweddell v. Tweddell* amounts only to this: That where a man buys subject to a mortgage, and has no connection, or contract, or communication with the mortgagee, and does no other act to show an intention to transfer that debt from the estate to himself, as between his heir and executor, but merely that which he must do if he pays a less price in consequence of that mortgage,—that is, indemnifies the vendor against it,—he does not by that act take the debt upon himself personally." Again, he says: "There was no communication with the mortgagee, but upon the sale there was a mere covenant of indemnity against the mortgage by the vendee." This case, thus limited, and the facts changed from those stated in the report of the case, becomes a sound opinion, but is no authority for the contention of the administratrix; and its reasoning is altogether against the rule involved.

The case of *Butler v. Butler* was decided

in 1800. It was a case of a purchase of a mortgaged estate, the vendee merely covenanting with his vendor that he would indemnify him against the mortgage. The briefs of counsel admit that the vendee had not made himself personally liable to the mortgagee by a mere covenant of indemnity, and the decision was put upon the ground that he had not made himself personally liable. 5 Ves. 534. The case of *Billinghurst v. Walker*, 2 Brown, Ch. 604, was this: A rectory, subject to a charge, was devised. The devisee subsequently assigned the devised estate, and executed his bond to the person in whose favor the charge was, to pay interest during his life, and that his executor and heirs should pay off the principal within three months after his death. The bearing this case has upon the one at bar is not on account of its facts, or of the decision, but for the reasoning of Lord THURLOW as to what facts and circumstances would show such an adoption of an assumed debt as to make the personality the primary fund for its discharge. Lord THURLOW said: "I agree that, if the testator has shown an intent to take the debt upon himself, it will become his debt; but here the old security remained, and he merely gave a collateral security. If there was anything in the marriage contract which bound him to exonerate this estate from the debt, it would become his personal debt; but there is nothing in the contract like that. Where a man transfers a mortgage, which is not his own debt, his executing a bond as a collateral security does not vary the nature of the charge. It is only a necessary act in the transfer. I do not mean that it does not make him liable personally to the creditor, but it does not throw the charge on his personal estate. Nothing passed here to vary the charge. All the cases of sale have turned upon this,—whether the charge was considered as part of the price. The mere purchase of an estate, subject to charges, as an equity of redemption, does not make the personal estate of the purchaser liable to the charge; but, if the charge is part of the price, then the personal estate is liable." This clear announcement, that "if the charge is part of the price" the personal estate is liable, is but an announcement of the rule as stated by the English editors of *Leading Cases in Equity*, vol. 1, pt. 2, p. 904, citing *Cope v. Cope*, 2 Salk. 449, and *Rochfort v. Belvidere*, decided by house of lords, Wallis, 45-52. The case of *Cope v. Cope* is not accessible. But the case of *Rochfort v. Belvidere*, having been decided by the highest English court, and before the independence of these United States, is one of very high authority. The case is one of a sale of premises subject to a mortgage, the deed stating that the mortgage debt and interest were to be paid and discharged by the purchaser out of the consideration agreed to be paid. On the back of the deed was indorsed a receipt for the £900 paid as a consideration, in this manner, viz.: "450 pounds on the perfection

of the deed, and 450 pounds allowed on account of the mortgage." The purchaser, Lord Rochfort, died, never having paid the mortgage debt. By his will, he devised the mortgaged estate. The devisee, upon bill filed, obtained a decree that the mortgage should be paid by the personal representative. This decree was affirmed by the house of lords. Another case directly in point, and of the same high authority, because decided long before our independence, is that of *Parsons v. Freeman*, decided in 1751 by Lord HARDWICKE. As the case is reported by Cox in his note to *Evelyn v. Evelyn*, 2 P. Wms. 664, it was this: A. purchased an estate for £90 which was at that time mortgaged for £86, and he covenanted to pay £86 to the mortgagee and £4 to the vendor. The lord chancellor held that, although the covenant was with the vendor only, and the vendee's personal estate was not therefore liable in that respect to the mortgagee, (which would not be the law in this state,) yet the words were sufficiently strong to show an intention in the vendee to make it his personal debt. It was accordingly held that the personal estate must exonerate the heir. These three earlier cases are not by any subsequent cases overruled. When we analyze the reasons upon which they rest, it will be seen that the subsequent cases are not even in conflict. The ground upon which the land, in any case, is held to be the primary fund is not that the contract is a contract concerning realty, or even for the benefit of realty. In some of the cases the courts, in endeavoring to get at the intention of the purchaser, in order to determine whether the one fund or the other should be the primary fund, have, as a circumstance, referred to the fact that the engagement which had been entered into was for the benefit of the incumbered land. The suggestion in argument that the intent is to be determined by an inquiry as to whether the debt assumed, or the promise to pay, or the covenant to discharge was for the benefit of the vendee's personality or realty, is not supported by the cases. If it were so, then money borrowed to buy land, and secured by a mortgage on land, would be primarily a charge on the land. So the notes of the vendee, executed to his immediate vendor for the purchase price, would be a debt incurred for benefit of the land, and hence primarily a charge on the land. This extreme has never, it is believed, been held by any court. On the contrary, the English notes to *Leading Cases in Equity* say: "Again, if a person bought an estate, and thereby contracted a debt with the vendor, and for the purpose of securing it gave a charge on the estate, and entered into a covenant to pay it, it would be the personal debt of the purchaser, and his personal estate would be primarily liable to pay it; and it will make no difference whether the purchase money was to be paid in a gross sum, or from time to time, by way of annuity for life. It is equally a debt and charge upon the personal estate, and in either case

the personal estate is the primary fund to pay it." Volume 1, pt. 2, p. 904, (4th Ed.) Yonge v. Furse, 20 Beav. 380, 383. So, under the English act of 1854, declaring mortgaged land in all cases the primary fund for the discharge of such mortgages, unless the decedent, by will, expressly declared otherwise, it was held not to make a vendor's lien a primary charge upon the land. Hood v. Hood, 26 Law J. Ch. 616; Barnwell v. Iremonger, 1 Drew. & S. 255. The act was subsequently amended so as to include such liens.

A debt created for purchase money of land not therefore being within the rule contended for, it would seem to follow, without discussion, that a debt assumed as a part of the purchase price would be just as decidedly the personal debt of the vendee as that part of the purchase money covenanted to be paid directly to his immediate vendor. There is no distinction between the two engagements; and the early English cases, cited heretofore, holding that, where the incumbrance is to be paid off as a part of the purchase price, the incumbrance becomes a charge primarily upon the personal estate, are unquestionably to be regarded as sound upon principle, and commanding as authorities upon this court.

We have not deemed it necessary in this opinion to consider how far we would be willing to be governed by the highly artificial rules by which an incumbrance is held to be primarily dischargeable out of one fund or the other. It would seem then, when the vendee has assumed the debt in such a way as to give to the creditor a right of action against him or his representatives, that this, of itself, would be a sufficient adoption, and sufficient demonstration of his intention to put such a debt on the footing of a personal liability. But this is not now decided, under the well-settled principles of equity, as administered in courts of equity. When all these artificial distinctions as to the origin of the debt have been adopted, the debts which have been paid by a resort to a lien on the land of the heir were the personal debts of Mr. O'Conner, and the personal estate was the primary fund for their payment. The costs taxed to the heir in the foreclosure suit are properly payable by the administratrix. It was the duty of the administratrix to have exonerated the heirs' land. These costs have been thrown upon the heirs by reason of the failure of the administratrix to relieve the heirs before suit. The costs of this cause will be paid by the administratrix, and the decree of the chancellor in all respects affirmed.

Hon. B. J. TURNER sat, upon the hearing of this case, in the room and stead of the chief justice, who was absent; and he, taking part in the decision of this cause, did not agree with the conclusions here reached, and has filed a dissenting opinion:

TURNER, Sp. J., (*dissenting*.) The complainant's assignment of errors correctly states the material facts involved in this controversy, and the same is here copied, viz.:

Thomas O'Conner died intestate, in Knoxville, October 19, 1882, without issue, leaving a widow, (the complainant,) his sole distributee, and his brothers and sisters, (the defendants,) his heirs at law. He left a valuable real and personal estate, and was in debt about \$500,000. His widow administered on his estate, and has paid all the debts, except about \$10,000 and some interest; and the balance of the personal estate is merely nominal, having no market value. The defendants have realized over \$200,000 in cash from the real estate, and will realize \$50,000 more. At the time of said O'Conner's death three parcels of his real estate were incumbered with purchase money liens, as follows: *First*, Sanborn lot, about \$1,100; *second*, the Moffatt farm, about \$5,000; *third*, the one-half interest in the Williams McKinney plan, about \$13,000. About \$10,000 of the lien upon the third purchase was resting upon it at the time O'Conner purchased it, and was for purchase money due from O'Conner's vendors to Samuel McKinney, from whom said vendors had purchased it. The \$3,000 was the amount which said O'Conner owed his vendors upon this purchase, who conveyed the interest held to O'Conner, retaining in the deed a lien for the payment of the \$3,000, also a recitation that said O'Conner assumed and agreed to pay the \$10,000 incumbered on the land to McKinney. O'Conner accepted the deed, and went into possession. The other liens were for purchase money due direct by said O'Conner to his vendors, and said liens were retained in the deeds conveying him said real estate. The administratrix did not pay off said liens out of the personal estate, but the lienholders foreclosed them by sale of the property, and the proceeds of the sales were applied in discharge of said liens. The heirs demand that the administratrix shall reimburse them to the extent that proceeds of said lands were applied to the discharge of said liens, etc. The chancellor decreed that the administratrix was bound to reimburse said heirs this money out of the personal estate, and rendered judgment against her for about \$24,000, and all the costs of the several causes in which said liens were enforced. The complainant has brought the case here, and has assigned three errors to the action of the court below. Complainant's second assignment of error is: "The \$10,000 purchase money due from O'Conner's vendors to McKinney was a primary liability resting upon the land; and that O'Conner's understanding as to said incumbrance was merely secondary; and, as between the heirs and personal representatives, his personal estate is not liable."

This precise question has not heretofore been before this court, and is particularly an open one in Tennessee. Our Code system for administering estates of decedents does not provide for the state of facts presented by this assigned error. We have the opportunity of determining this question under the light of adjudged cases in courts of last resort, and



gaining from them whatever of wisdom they may afford. The chancery court of England, more than two centuries ago, held, where one acquired real estate already incumbered, if he did no more than assume or undertake to discharge it, as between himself and his vendor, that the real estate so acquired contained the primary fund for its payment, and the personal liability of the purchaser was auxiliary, merely. This proposition received the approval of its finest judicial minds, and was never questioned by them. Some uncertainty and collision in the adjudication of the English high court of chancery came in when it was attempted to determine what amount of contracting with the owner of incumbrance by the purchaser would make his (purchaser's) personal liability primary, and not secondary. Some of the judges held that the last purchaser or taker entered into a contract with the prior incumbrancer, and bound himself to discharge it; or, if the incumbrance was deducted from the gross price,—at which price he purchased,—then his liability was primary. But, though the last proposition was supported by many fine lawyers, the weight of the adjudged cases in England was against it. The better opinion held the purchaser's liability merely secondary, and the real estate—the burden bearer—primarily liable for the discharge of the incumbrance. We refer to the able and exhaustive opinion of Chancellor KENT in *Cumberland v. Codrington*, 3 Johns. Ch. 252 et seq., in which he collects and reviews the English adjudged cases bearing on this question during a period of more than a century. The most distinguished law-writers in England concur with Chancellor KENT in the result reached by him in his review of the cases. Mr. Spence says: "The rule" (the one making personality the primary fund) "only applies to those debts which were properly the debts of the testator. In all other cases, where the real estate was the original debtor, and came to the possessor as such, it must continue to bear the burthen. Even though testator, when he purchased the estate, entered into a collateral contract or covenant, or gave a security for payment of the debt, the estate burthened must first be resorted to." 2 Spence, Eq. Jur. 335. Mr. Powell on Mortgages says: "A. purchases an estate subject to a mortgage, and covenants with the mortgagee to discharge the same. A.'s personal estate is not liable to exonerate the land purchased," (this author, continuing, in the same connection adds,) "the personal estate not having received any addition to its funds by reason of the mortgage." These citations from Powell and Gratio are approved by Sir WILLIAM GRANT in *Hancox v. Abbey*, 11 Ves. 179.

It will be noted these two eminent masters of the law go further than the case in hand. It does not appear from the record that the intestate gave any bond, covenant, or other obligation to the incumbrancer, McKinney, to discharge his debt. Williams on Executors says: "Again, if a man buys an estate

subject to an existing mortgage, the lands remain the proper fund for its discharge, and the heir or devisee cannot throw the debt upon the personality, as the primary fund for its payment." 2 Williams, Ex'rs, 1535, 1536; 2 Rop. Leg. 957, 958; 3 Jarm. Wills, 477; Adams, Eq. 529. 2 Redfield on Wills, (page 878,) after stating the rule making the realty, incumbered when acquired, the primary fund for its payment, says: In order to make the purchaser's personality primarily liable, the purchaser must by contract make himself personally liable, and directly liable, to the owner of the incumbrance; and even a covenant or bond for the purpose will not be sufficient, unless accompanied with circumstances showing a decided intention to make it thereby personally his own. This rule prevails in most of the states of this Union. Only three have attempted to vindicate a different rule, and in those three states there is no separate chancery court. *Coudert v. Coudert*, decided in 1887, and reported in 43 N. J. Eq. 407, 5 Atl. Rep. 722, is to the same effect. See, also, *Mount v. Van Ness*, 33 N. J. Eq. 264; *Sutherland v. Harrison*, 86 Ill. 366; *Hirst's Appeal*, 92 Pa. St. 494; *Bisp. Eq. § 348*; 3 Pom. Eq. Jur. 1206; *Story, Eq. Jur. §§ 574-576, 1248, 1248e*; 2 Lomax, Ex'rs, 413; 1 Lead. Cas. Eq. pt. 2, p. 922. In the case in hand, the intestate had no negotiations with the owner of the incumbrance touching it in any particular. He gave no note or other obligation to his vendors for the payment of the debt upon the land, or its purchase. The deed conveying him the land contains a recital of the existence of the incumbrance, and intestate's assumption and promise to pay it; and the intestate accepted the deed, and went into possession of the land under it. "This is the head and front of his offending" in this direction. It will be noticed that the principle applicable to these facts has not been questioned in England or the states of this Union, excepting this, during a period of 200 years, and that there has been no conflict upon it, but only upon the question what acts of the purchaser will make the incumbrance his debt, and his personal estate primarily liable for its payment; and that the weight of authority upon this phase of the question was adverse to the primary liability of the purchaser. Sir WILLIAM GRANT, in *Lechmere v. Charlton*, 15 Ves. 198, says: "Where a person becomes entitled to an estate subject to a charge, and then covenants to pay it, the charge still remains primarily on the real estate, and the covenant is only a collateral security, because the debt is not the original debt of the covenantor." It is well settled by the ablest courts and law-writers in this and the mother country that the personal estate will not be primarily liable unless the testator has not merely made himself answerable for the payment of the mortgage, but has made the debt directly and absolutely his own, and has in some other way manifested an intention to throw the burden on the personality, in ease of the land.

We are aware that it has been objected that the high authorities cited to sustain the principle laid down above are not Tennessee authorities, and therefore are not binding on this court; that we have a system of statutes of our own regulating the administration of decedents' estates, and the system, as explained by our adjudged cases, should determine and settle the question raised by the second error of complainant's assignment. Is this objection well taken? There is no provision of our Code touching the administration of estates that provides for a case circumstanced as is the one in hand. It is not a creditor seeking, under these laws, to subject realty to sale, in order to pay his debts, nor an administrator or executor, for the creditor, seeking to reach realty as a means of paying a debt of a decedent. The creditor enforced his lien for purchase money in the courts, and had sale and payment of his debts from the proceeds of the realty. The heir at law now asks to be reimbursed the sum paid from the proceeds of this land. The question of his prayer depends upon the equity of his case, and whether his land was the primary fund for the payment of the debt paid by his inheritance. Our Code makes both real and personal property assets for the payment of debts,—the latter the primary, and the first the auxiliary, fund for payment,—unless this order has been changed by the decedent in his life, as between legatee and or distributee, on the one hand, and the devisee or heir at law, on the other. Our Code and the adjudged cases of this court permit the decedent to determine which shall be the primary and which the auxiliary fund for paying debts and legacies. His intention or purpose thereupon, either express or by necessary implication, is sufficient to control the question, provided its latitude is reasonably apparent. We are not shut up to a will alone for this intent. We may get it from the *res gesta*. The facts of the transaction connecting the decedent with the incumbrance, it may be express or by necessary implication. Bisp. Eq. §§ 347, 348. It is to be noted that the judges in the cases cited, considered and interpreted the facts as transactions, to find proper evidence of the decedent's intentions to charge his personalty in ease of the burdened realty. Lord COWPER, in *Bagot v. Oughton*, 1 P. Wms. 347, after detailing the facts of the transaction, said: "The covenant \* \* \* was an additional security, for the satisfaction only of the lender, and not intended to alter the nature of the debt." Chancellor KENT, (3 Johns. Ch. 262,) after saying there must be a direct dealing with the owner of the lien debt, adds: "And even that is not enough, unless the dealing with the mortgagee be of such a nature as to afford decided evidence of an intention to shift the primary obligation from the real and personal fund." 2 Story, Eq. Jur. § 1248b, on the same point, has this language: "And even a covenant or bond for the purpose will not be sufficient, unless accompanied with cir-

cumstances showing a decided intention to make thereby the debt personally his own." Redfield on Wills, in nearly identical language, lays down the same rule.

The inquiry is not, did the decedent charge the McKinney land primarily with the \$10,000 incumbrance? This debt had been fastened upon it before intestate's purchase, but it is said that O'Conner intended to relieve the land by throwing upon his personalty the primary liability of its payment. If we are precluded from considering and interpreting the facts of the purchase for the answer to the question, (he dying intestate,) we have no evidence of an intention to exonerate the land with his personalty; and, however, clearly, the heir cannot call on the distributee to reimburse him for the discharge of the McKinney debt. But, considering the facts of the purchase of the McKinney land by the intestate, is there proper evidence of interest to exonerate? The vendor's lien in favor of McKinney was fastened on the land, being retained on the face of the deed to intestate's vendors. O'Conner made no contract with the lienholder; gave no note or other obligation to him for it. He merely accepted a deed from his vendors, which recited the existence of the incumbrance, and that intestate assumed and agreed to discharge it; but nothing was said or done by him in the direction of its discharge. This fixed lien was left by the parties undisturbed,—a primary charge upon the land.

It is clear this purchase was made for the benefit or increase of the real estate. This fact, under the old rule, which will be discussed below, was evidence of an intention and purpose on the part of the purchaser that the land purchased should be the primary source of its payment. Evidently, the intestate intended his personalty to be in aid of the realty merely, for the reasons stated under the high authorities cited. I hold that the McKinney land was first liable for the payment of the McKinney \$10,000, and interest, and cost, and that the heir is not entitled to a recovery against the administratrix for reimbursement therefor.

We feel less certain in disposing of the three 1,000-dollar notes given by the intestate to his vendors on the purchase of the McKinney land. These notes are for an additional sum, needed to acquire the half of the McKinney land; were in aid of the purchase; and come under the rule laid down by Mr. Lomax, as follows: "So, in cases where the land comes to the deceased by descent or devise, [will perchance vary the rule,] his concurrence in the mortgage deed, and his personal covenant for the payment of the money, on the assignment or transfer of the mortgage, will not alter the burden, as between his real and personal representatives. And the same principle applies if other estates are added to the security, on a further sum lent, or if there be a covenant on his part increasing the rate of interest. And it seems that, if the sum borrowed by him and

added to the original mortgage be comparatively small, equity will not consider that he had different intentions as to these different terms, but will charge the real estate with the whole." See 2 Lomax, Ex'rs, marg. n. 227, 228. The sum covered by the three notes is small, compared with the incumbrance debt; being a little less than one-third its size. Alluding to the rule above given, equity will not consider he had a different intention as to these terms, and, therefore, the real estate should be charged with both sums, as the primary source of payment. Complainant's first error assigned, denies the right of the defendant to reimbursement on these facts: The intestate bought of Sanford real estate at the price of \$1,650; paid \$550 cash, and gave notes for balance. He purchased of Moffatt real estate at \$4,500, and gave his notes therefor. Each vendor made a deed of the real estate sold by him to intestate, retaining lien for purchase money upon the land conveyed. Each enforced his lien upon the real estate against the heir at law, and had his debt paid from the proceeds thereof. These proceedings were after death of intestate, and the realty so sold was situated in or near the city of Knoxville. The presumption is that this realty was bought by the intestate on speculation, and he intended and proposed to pay the sums due thereon from the proceeds thereof when sold. Complainant insists that no case has been passed upon by this court identical in its facts and defenses with the one in hand. We have found none determined by courts of last resort in the United States, except one or more adjudged by the supreme court of Massachusetts, wherein the court briefly held that, the contract of purchase was a personal one, upon which the purchaser might have been sued, judgment had, and the debt collected from his personal estate; and for that reason held the personalty the primary fund for payment, and the realty in aid of it, merely.

Complainant admits that the non-lien creditor cannot subject the land to sale for the payment of his debt until he shows complete exoneration of the personalty, or its insufficiency to pay debts. She insists the lien creditor can proceed to enforce his lien upon the realty in the first instance, without reference to the personalty; that there is neither statute nor decision of this court settling the identical question presented here; that the question is equitable, to be settled by deciding where the superior equity is; that complainant's contention is supported by the superior equity, the controversy being between the heirs at law and distributees, creditors and legatees having no interest therein. On the last analysis, lying back of the fact of a "personal contract," on which the Massachusetts cases put the primary liability on the personalty, is this inquiry: Was the contract for the increase and benefit of the realty, or of the personalty? Its answer determines which estate is first liable. If the realty is first in liability, the contract made

for the purchase money, though capable of being turned into a personal judgment against the purchaser, is secondary in its character, and in aid of the realty. This rule was formulated and used by the courts of England more than 200 years ago, in settling questions identical with those now before this court, and since its introduction into the judicial history of the mother country we remember no decision of her courts questioning its soundness. It should be stated that at the date of its first use personalty constituted the only fund for the payment of debts in England. A favoritism, the outgrowth of the old feudal system, so completely hedged the realty about that it was rarely made to pay debts of decedents. In the United States, property of a decedent, of all kinds, is and has been applicable to the payment of his debts. It has been made so now in England. Our constitutions and laws constitute a soil more favorable to the growth and vigor to this old rule than that of its origin, and in this country we would expect to see it oftener applied, and its authority less questioned, than in the land of its nativity. This old rule has been cited and approved by the supreme court of the United States in *McLearn v. Wallace*, 10 Pet. 644. Judge McLEAN, delivering the opinion of the court, quotes Lord ELDON as saying, in 7 Ves. 334, that "the principle upon which the personal estate is first liable in general cases is that the contract, primarily, is a personal contract; the personal estate receiving the benefit." Judge McLEAN, continuing, says: "And so, if the contract was in regard to the realty, the debt is a charge on the land. It is in this way that a court of chancery, by looking at the origin of the debt, is enabled to fix the rule between distributees." We state generally that many of the state courts and law-writers in the United States cite and approve this "rule;" but they need not be referred to here with more particularity. When the rule was adopted in England, personal property did not have its present volume or importance. The mortgages upon real estate were nearly without exception for borrowed money. Vendors' liens were very rare, and cut no figure in the current litigation of that day. The courts, in that formative period, explained the parts of the transaction from which grew the debt, to ascertain the interest of the debtor to charge his real or personal estate with its payment. Those able judges had little of precedent to guide them, but had good common sense, and large acquaintance with and understanding of the motives and purposes moving to action in the affairs of every-day life. To this circumstance is largely due the excellency of those early decisions. These fathers of our inherited jurisprudence, guided by their practical good sense and level-headed wisdom, interpreted the making of the debt for the increase of and benefit to the personalty to mean that the debtor intended that estate should be bur-

dened primarily with the payment. Hence all debts for personal property, services, loaned money, and mortgage debts, which made up the consideration supporting the great bulk of the indebtedness of that period, were held to be for the benefit of the personality; and consequently it was first chargeable with their payment. These judges were too clear-headed not to know that the converse of this rule, when applied to real estate, was axiomatically true, also; but, as the occasion of its application was rare, there being few land transactions, there are few rulings of the courts upon it to be found in the early reported cases. If the personality receiving the benefit coming from the creation of a debt means that the debtor intended that it should first be chargeable, why does not the result follow to the realty? When it gets the benefit, why should it be true as to personality and untrue as to realty? The courts proceeded in principle and reason upon the same line when they left the facts to determine the relative liability into parties of two or more persons jointly and severally bound upon the same instrument. If it is reasonably certain, upon weighing the facts, that one signed with the intention to be bound as principal, and the others as sureties, the courts do not hesitate to so define their rights, and to enforce them accordingly. Likewise, the determination of the many questions arising in the settlement of partnerships, involving the conflicting rights of firm and individual creditors as to their priorities of payment from firm and individual means, is largely controlled by the intention and purpose of the parties, impressed upon the particular transaction. In fact, the rule giving several priorities is the outgrowth and fruitage of the expressed or presumed intent of the parties to the transaction, or in relation thereto. Death and intestacy do not affect the question; and the personal contract idea, though a prominent fact, is silent while the courts give expression to the intent of the parties, in settling and fixing the relative liability of persons and funds in the two classes of cases hereinbefore referred to. Also, if a tract of land subject to a lien is sold by the lien debtor surreptitiously, in separate parcels, at different times, and conveyed by deeds registered when made, the lien, if enforced by rule of the land, must be in the inverse order of alienation. The first subpurchaser may force this order in the sale of the parcels. This equity grows out of the presumed intention of the several subpurchasers, and may be enforced, notwithstanding death and intestacy have intervened. Other contentions might be cited wherein the expressed or presumed intention of the parties, impressed upon the transaction, is the controlling fact with the courts in fixing the liability of persons or funds, but those named are deemed sufficient for this purpose, to show the constant practice of the courts in giving a controlling influence to the intent of parties in settling the large part of the covenant lit-

igation of the day. Where the claims of creditors have been paid, with no opposing statute nor adjudication of this court, and when the title to both realty and personality flows from the same source,—the intestate,—why should not his intent, impressed upon his property, control the question which shall enrich his heir or his distributee? What good reason is there for making this an anomaly,—an exception to a rule of such general application?

This court, in *Masson v. Swan*, 6 Heisk. 451, 457, goes far to sustain this rule. Swan sold a lot to Masson, by parol, who put valuable improvements on it, but did not pay purchase money. Swan died, and Masson disaffirmed the contract, and sued for the value of the improvements. This court held the lot the primary fund for the payment. Judge NICHOLSON, speaking for the court, said: "The real estate, and not the personal, is benefited by the improvement; and equity necessarily fixes the liability for the benefit on the real estate. The principle of *Masson v. Swan* has been applied to similar facts by nearly all the courts of this Union; and the reason of the rule, whenever applied, is the same, viz.: The realty, having received the benefit, must be held first liable for the payment thereof. The personal contract on the part of Swan had no bearing in the decision. JOHN MARSHALL, of Franklin, Tenn.,—a great name in the law,—sat as a special judge in *Franklin v. Armfield*, 2 Sneed, 356, 357. This great lawyer held the executor, who had paid off an incumbrance upon a parcel of land, partly with his own means, and partly with the assets in his own hands, was entitled to be reimbursed therefor; and that the land, relieved from the burden resting on it when it came to the devise, was chargeable therewith, as the primary fund. The "personal contract" theory, as a test to determine which estate is to be first chargeable with a debt, has been shifting and unfixed in its nature, as may be seen in the overruling of *Campbell v. Findley*, 3 Humph. 330, after an interval of half a century, by *Stovall's Case*, in 2 Lea, 543, by a divided court, and a century of discordant opinions in England, and to some extent in New York, as to what makes a binding personal contract, in the sense of the rule. It should be observed that these two prominent states in intelligence, wealth, and culture have cleared up the question by clear-cut legislative enactment, providing that the descended realty of decedents shall in all cases be the primary fund for payment of any debt fastened upon it by mortgage, etc., when it came to the heir, unless there is a clearly expressed intention to the contrary in the will of decedent. The better rule, we think, is to let the answer to the inquiry, which estate got the benefit? fix the primary liability, if the debt is for borrowed money, and is secured by a mortgage on real estate, and the personality has been benefited thereby; and the courts, for more than a century, held these facts, by necessary implication, evidence

of the decedent's intention to charge his personality with the burden of discharging the mortgage debt, in exoneration of the realty, —not an intention shown in a will, but impressed upon and inhering in the very fiber of the transaction from which came the debt. When the debt is the price of land bought, why will not these facts, under the same rule, evidence an intent to charge the incumbered land primarily, as the debt was made for the increase of the land?

Why shift the rule, and say the personality is the primary fund to pay, because it is the "personal debt of the decedent?" In strictness, the canons of descent devolved upon the heirs only the excess of the market value of the realty over the incumbering, unpaid purchase money, with the privilege to them, upon discharging that debt, to be invested with the fee-simple. The intestate took just this interest in the realty purchased, and no more was transmitted to his heirs. He consented to the retention by his vendors of so much of the realty purchased as would be sufficient to pay its price, and thereby appropriated and set apart that interest as a means charged with the payment of the price of the realty. Presumably, the purchases from Moffatt and Sanford were on speculation, and intestate intended to pay the debts credited in the purchase from the proceeds, when sold. As between the heir and the distributee, should not that intent of intestate to make the realty first liable to pay off the burden be effective, not as an intent evidenced by a will, but one impressed upon and woven into the very texture of the transaction by the intestate himself? Does public policy, or public good, or the uniformity of the rules for administering the estates of decedents favor or oppose the settlements of these open questions, as already indicated? It can only be a practical question when the distributee and heir are not the same person, which is really the case. Under our laws of distribution and descent, the heir and distributee are never different persons, except when one dies circumstanced as was Thomas O'Conner, or without wife, or husband, or children, when the distributee is a parent, old, and perhaps needy.

The intestate was largely in real-estate speculation in a growing city, where real estate was rapidly enhancing in value. The purchases were made with the expectation of early sales, at fine profits. He meets a sudden death. No testament is made, providing for his childless widow. If the personality is to relieve the realty of the incumbrance for its purchase money, the heir will be enriched, and the widow and distributee impoverished. The superior equity is certainly in her favor. The heir is in a court of equity, asking that equity be done. Will equity reimburse the heirs at the expense of the distributee?

The reasoning upon the first error assigned by complainant is equally applicable to the third 1,000-dollar note given to intestate's vendors in the purchase of the McKinney land. We reach a conclusion as to this error

with less certainty than we had as to the McKinney incumbrance; but still we feel justified in holding that the heirs are not entitled, in equity, to be reimbursed for sums paid upon the Moffatt and Sanford parcels of land from the proceeds of said lands. This disposes of the third assigned error of complainant adversely to the claim of the heirs at law, and upon the whole case, the chancellor is in error, and should be reversed, and the heirs at law pay the cost of this cause in this and the court below. Entertaining these views, I am compelled to dissent from the opinion of the majority of the court in this case.

#### JACOBS *et al.* v. JACOBS.

(*Supreme Court of Missouri.* Dec. 2, 1889.)

#### EXECUTORS AND ADMINISTRATORS—SETTLEMENTS—ALLOWANCES.

1. An executrix who has accounted for the full amount received by the compromise of a note belonging to the estate, for less than its inventoried value is not liable for more than is thus accounted for, where it is shown that the compromise was made in good faith, and that more money was realized thereby than would have been by an attempt to enforce the payment of the note.

2. Rev. St. Mo. § 280, provides that upon every settlement the executor shall show that every claim for which disbursements have been made has been allowed by the court according to law, or shall produce such proof of the demand as would enable the claimant to recover in a suit at law. *Held* that, upon the production of the latter proof, credit will be allowed for the disbursement, though the voucher for such credit was not allowed as a demand against the estate.

3. Under Rev. St. Mo. § 229, providing that executors and administrators shall be allowed "all reasonable charges for legal advice and service, an executrix is entitled to attorney's fees for defending her final settlement in the probate and circuit courts."

4. An executrix is not entitled to an allowance for commissions paid her agents for effecting the sale of real estate of her testator, beyond the "commission of 5 per cent. \* \* \* on money arising from the sale of real estate," allowed to executors and administrators by Rev. St. Mo. § 229.

Appeal from circuit court, Boone county; G. H. BUCKHARTT, Judge.

Rev. St. Mo. § 280, provides that upon every settlement the executor or administrator shall show that every claim for which disbursements have been made has been allowed by the court according to law, or shall produce such proof of the demand as would enable the claimant to recover in a suit at law.

*A. M. Hough and H. Clay Ewing*, for appellants. *Thos. Thoroughman and J. K. Hansbrough*, for respondent.

BRACE, J. At the November term, 1883, of the probate court of Boone county, the respondent, executrix of George R. Jacobs, deceased, filed in said court her account for final settlement; to which the appellants took exceptions, and thereafter filed 19 objections to the approval of such final settlement, all of which were either abandoned on the trial or overruled by the court, except 18 and 19, which were partially sustained; and both parties appealed to the circuit court. The case coming on for trial in the circuit court,

the plaintiffs stated "that they abandoned all their exceptions, except those numbered 2; the item of \$1,302.86, mentioned in exception 17; and the items in exceptions 18 and 19, relating to commissions for the sale of real estate, and taxes paid by defendant on the John F. Jacobs real estate, and penalties on delinquent taxes; and all attorney's fees in final settlement, and the Caulfield note, mentioned in exception 2,"—and, in connection with this statement, read exceptions 2, 17, 18, and 19, theretofore filed in the probate court. The circuit court overruled plaintiff's exception No. 2; their objections to the credit item of \$1,302.86 in the executrix's first annual settlement, objected to in exception 17; sustained exceptions 18 and 19, as to the items of credit for taxes paid by the executrix on the John F. Jacobs land, and for penalties on delinquent taxes; overruled them as to items of credit for commissions paid agents for the sale of real estate, and for attorneys' fees on final settlement, and in the matter of the Caulfield note; stated an account between the executrix and the estate upon the basis of the balance of \$168.33 due the estate, as shown by her settlement filed in the probate court, by adding to such balance the amount of the credits taken for penalties on tax-bills, and interest, amounting to the sum of \$30.93, the credits taken for taxes paid on the John F. Jacobs land, and interest, amounting to \$463.10, making the aggregate debits \$662.36; allowed the executrix a credit of \$25 for attorney's fee in defending the settlement in the probate court, and \$300 in the circuit court,—showing a balance due the estate of \$337.36 at the date of the judgment in the circuit court; rendered judgment therefor, and ordered same certified to probate court for distribution under the will, and that the costs of the appeal from the probate court, and all other costs under objections not sustained, be paid by the objectors, who now appeal from that judgment.

1. Plaintiff's exception No. 2, to the executrix's account for final settlement, is as follows: "(2) Defendant has failed to account for a balance of the inventoried note of B. G. Caulfield and Fanny Deaver, with interest thereon; the said balance being, as shown by inventory and the collection reported on said note in defendant's first settlement, \$12.457; which sum should be charged to defendant, with interest thereon, at 10 per cent. compound, from April 16, 1878." The note of B. G. Caulfield and Fanny Deaver, referred to in this exception, was dated August 1, 1867, for \$20,000, payable to the testator, George R. Jacobs, three years after date, with interest from maturity, at the rate of 8 per cent. per annum. To secure this note, and six interest notes for \$800 each, payable in 6, 12, 18, 24, 30, and 36 months, of same date, a deed of trust of the same date was executed by B. G. Caulfield, his wife, Laura Caulfield, and Fanny Deaver upon certain real estate in the city of St. Louis belonging to Mrs. Deaver and Mrs. Caulfield. The interest notes were

paid as they became due, and shortly after the principal note became due the time of its payment was extended by an agreement indorsed on the note, signed by Mrs. Deaver, B. G. Caulfield, and the testator, Dr. Jacobs, in consideration of the payment of 10 instead of 8 per cent., as specified in the note. Interest at 10 per cent. was thereafter paid on the note to August 1, 1876, and on the 5th of April, 1877, it was inventoried, and came into the hands of the executors, at \$21,361.10,—the amount of the principal and interest at 10 per cent. from August 1, 1876, to April 5, 1877, the date of the inventory. The plaintiff introduced evidence tending to show that the real estate owned by Mrs. Deaver in the years 1877 and 1878 was worth an amount largely in excess of the amount of said note. The executrix introduced evidence tending to show that Mrs. Deaver, during those years, although the owner of valuable real estate, was in embarrassed circumstances; that she was largely in debt; and that her real estate was heavily incumbered,—to use her own language, that in 1878 "her financial condition was very bad. \* \* \* If the Jacobs debt had been forced upon me, it could not possibly have been made." The action of the executrix in regard to this note, as well as the considerations which induced such action, will appear from the following extracts from the evidence of R. B. Price, who, at the inception of the administration, was her co-executor; of Gen. Guitar, who was the attorney for the estate; and of Francis F. Haydel, of the firm of John Byrne, Jr., & Co., real-estate agents, who negotiated this loan, and who for many years had been the agents of Dr. Jacobs, the testator, in the management of his interests in St. Louis, and who continued in the same relation to his executors. Mr. Price testified: "We employed Gen. Odin G. Guitar to act as counsel for us in the administration of the estate; and he and I both made a careful examination as to the nature, character, and value of the real estate included in the deed of trust, and the solvency of the makers of this note. I thought it best, and Gen. Guitar, as our attorney, advised us, to compromise and settle this debt by releasing Mrs. Fanny Deaver, and her property, from all liability on the note, upon her paying to us \$11,000, being the one-half then due on the note, and taking a new note, executed by Mrs. Laura Caulfield and B. G. Caulfield, for the balance, with a new deed of trust on the same property, belonging to Mrs. Caulfield, embraced in the first deed of trust. This we did; and the property was afterwards sold under the new deed of trust, and the proceeds accounted for. We had John Byrne, Jr., & Co., one of the best real-estate firms in St. Louis, to assist us in making the compromise and settlement with Mrs. Deaver. I was in St. Louis three or four days, looking into this matter. *Cross-Examination.* I did not make any personal examination of this matter myself, but had confidence in John Byrne, Jr., & Co., and the man they employed to examine

the title and condition of Mrs. Deaver's real estate. I consulted with and acted under the advice of John Byrne, Jr., & Co. and Gen. Guitar." Mr. Haydel testified: "At the time the compromise was effected by which Mrs. Deaver was released from her indebtedness to Dr. Jacobs, I was acquainted with her financial condition, having examined into her affairs with a view to this settlement, and from this examination I know the settlement was the best that could have been made, and considered it advantageous to the estate. Our firm was at that time, and now is, engaged in the real-estate and loan business. If a sale of the property mortgaged had been had at that time, less money would have been realized than was realized by the settlement. I did not think as much money could in any other way be made out of Mrs. Deaver as by this settlement." Gen. Guitar testified: "I was employed in 1877 by Mr. Price and Mrs. Jacobs as their counsel and attorney in winding up and administering the Jacobs estate. I have been acting as their counsel ever since. I was requested by them to investigate the solvency of the parties, and the nature and character of the real estate covered by the deed of trust given by Fanny Deaver and Laura Caulfield to secure the note in controversy; and, after making a full investigation of all the facts, and after fully informing myself as to the solvency of the parties, and the kind and value of the real estate embraced in the deed of trust, I advised my clients, Mr. Price and Mrs. Jacobs, to compromise with Mrs. Deaver by her paying one-half of the note, and their releasing her from all further liability on the note, and by the other half due on the note being secured by a new note, executed by Mrs. Laura Caulfield and her husband, B. G. Caulfield, secured by a deed of trust on the same real estate, belonging to Mrs. Caulfield, embraced in the first deed of trust. They, acting under my advice, settled the note in full on this basis; and the Caulfield property was afterwards sold under the deed of trust, and the proceeds accounted for. \* \* \* By reason of the indorsement on the note, made after it became due, extending the time of payment, I advised my clients that Mrs. Caulfield's property in the deed of trust was released; and that was one of the reasons for my advising, and my clients accepting, the compromise settlement. The indorsement on the note was signed by Mrs. Fanny Deaver, B. G. Caulfield, and Dr. Jacobs after the note became due; and, in consideration of a definite extension of time being given by Dr. Jacobs, Mrs. Deaver and B. G. Caulfield agreed to pay 10 per cent. interest instead of 8 per cent., which the note originally bore."

It is not pretended that the executrix has not accounted for every dollar that has been realized upon this asset; but it is urged that she could and ought to have realized the whole amount of the principal and interest of said note, which, confessedly, she did not. There is some contention as to the amount

which she fell short; but, in the view we take of the evidence, it is not necessary to determine definitely that amount. At the time the compromise of this debt was made, there was no statutory enactment, as now, authorizing an executor or administrator, with the approbation of the judge of probate, to compound with a debtor to the estate, who was unable to pay all his debts, and give him a discharge, on receiving a fair proportion of the same. Section 242, Rev. St. 1879. "At common law, the arbitration, compromise, or release of a debt or claim due the estate was regarded as a waste on the part of the personal representative, if it resulted in loss to the estate. \* \* \* As to compromise, however, later qualifications were admitted, which \* \* \* the court of chancery saw fit to insist upon, and which, as to either compromise or arbitration, are now usually insisted upon. The executor or administrator who compromised a debt, so as to receive less than the full amount, was still held answerable for the whole; and yet, if he could show, in exculpation, that he acted therein for the benefit of the estate, he stood excused. The universal test for modern times should be whether, in compromising or submitting to arbitration, the representative acted with fidelity and due prudence." Schouler, Ex'rs, § 386. In *Merritt v. Merritt*, 62 Mo. 150, it was said: "The prevailing rule now established in this court is that executors and administrators stand in the position of trustees to those interested in the estates upon which they administer, and are liable only for want of due care and skill; and that the measure of care and skill required of them is that which prudent men exercise in the direction and management of their own affairs." Applying this rule to the compromise made by the executors in this case,—and on principle, it cannot be seen why it should not be applied,—it abundantly appears from the evidence that the executors, in making this compromise, acted diligently, in good faith, with all the prudence, care, and skill that a prudent man, with the light then obtainable in regard to the value of the security, the situation of the debtors' affairs, and the relation they sustained to the obligation which the estate held against them, could have exercised, in a manner which then seemed to be for the best interest of the estate. And, even if it could have been shown—which, however, was not done—that the executors were mistaken, and that they might have made the whole of the debt compromised, yet, under such circumstances, they ought not to be held liable for more than the amount which they actually realized. The probate and circuit courts both held that the executrix was not liable on account of this asset for more than she had accounted for in her settlements, which was the full amount secured by the compromise, and in doing so, we think, committed no error.

2. The objection to the item of \$1,302.06,



in exception 17, was properly overruled, as it appears from the record that, although the voucher for that credit was not allowed as a demand against the estate, yet, at the time credit therefor was taken by the executrix in her settlement, such proof thereof was produced to the probate court as would have enabled the claimant to recover in a suit at law; thus bringing this credit within the terms of section 230, Rev. St. 1879. Besides, the evidence on the trial in the circuit court showed that it was a legal demand against the estate, and the executors had paid it.

3. The attorney's fees paid by the executrix, and allowed by the probate court, for legal services rendered in the settlement of the Caulfield note, are not unreasonable, and were a proper charge against the estate. Nor do we find any error in the allowance made by the circuit court to the executrix for attorney's fees in defending her final settlement in the probate and circuit courts. Such allowance is for legal advice and service such as is contemplated in the statute. Section 229, Rev. St. 1879. If executors and administrators of estates who have faithfully discharged their duties, and in the main rendered a true account of their trust, are to be required, at their own individual cost, to defend their settlements, in protracted and expensive litigation, from every attack that may be made upon them, few responsible and competent persons will be found to take charge of estates for the modest compensation the law allows for the service. 2 Woerner, Adm'n, § 515; Pinckard v. Pinckard, 24 Ala. 250; Smyley v. Reese, 53 Ala. 100; Sterrett's Appeal, 2 Pen. & W. 419; Schouler, Ex'rs, § 544.

4. The items in exceptions 18 and 19, relating to commissions for the sale of real estate, are as follows: In second settlement, O. Guitar, commission on sales of real estate, \$349.20; in final settlement, amount paid J. M. Carpenter, commission on sales of real estate, \$350; and for amount paid Ed. Jacobs, commission on sales of real estate, \$100. The probate court disallowed these credits; but they were allowed by the circuit court, and plaintiffs' objections thereto overruled. Section 229, Rev. St. 1879, provides that executors and administrators shall be allowed "all reasonable charges for funeral expenses, leasing real estate, legal advice and service, and collecting and preserving the estate, and, as full compensation for their services and trouble, a commission of five per cent. on personal property, and on money arising from the sale of real estate." The testator, in his will, directed that all his real estate not specially devised be sold by his executors. The executrix, in her settlements, took credit for 5 per cent. commissions on all the money arising from sales of real estate, and, in addition, took credit for these commissions paid her agents for effecting such sales. The statute is the measure of the executrix's compensation for the discharge of her duties; and, whether the duty

be discharged by her or her agents, there can be but one compensation allowed for its performance, and that at the rate fixed by the statute. These credits ought to have been disallowed by the circuit court, and for its error in not doing so the judgment will be reversed, and the cause remanded to the circuit court, where judgment will be entered, charging the executrix, in addition to the balance found to be due the estate by said court, with these items, and interest thereon from the date when credit for them was taken. All concur, except RAY, C. J., and BAROLAY, J., absent.

#### HOLLOWAY v. HOLLOWAY.

(*Supreme Court of Missouri*. Dec. 2, 1889.)

ACTIONS — TENANCY IN COMMON — PARTNERSHIP.

The right of plaintiff to have set aside a deed procured from him by his co-tenant by fraud, and his right to demand an accounting for personality, the assets of a former partnership between them, of which the latter is in possession, are separate causes of action, and are not made one by the fact that defendant, by the same fraud by which he deprived plaintiff of his real estate, attempted to deprive him of his interest in the partnership assets.

Appeal from circuit court, Buchanan county; JOSEPH P. GRUBB, Judge.

*J. D. Campbell and Houston & Parrish*, for appellant. *Ramey & Brown*, for respondent.

BRACE, J. The amended petition in this case was in three counts. The first, which was for partition, and for an account of rents and profits, was dismissed. The second count charged that plaintiff and defendant were tenants in common of a tract of land in Atchison county; that they entered into an agreement to, and did, farm said land, buy, sell, and raise products and stock, in copartnership, and on their joint account; that the partnership affairs were carried on from 1864 to October, 1875, by the defendant as the active partner, having full control and management of the same, plaintiff being a cripple, weak in body and mind; that a large amount of personal property, notes, and other evidences of debt was acquired on their joint account; that the defendant invested large sums of money belonging to the partnership concern on his own individual account, in other business, and in land, from which he derived profits; that he has failed to render plaintiff any account of the same; that the partnership accounts have never been settled; and prays that an account may be taken between them, and for judgment for such balance as may be found to be due him. The third count charged, in substance, that in October, 1872, plaintiff was induced by the fraudulent representations of his brother, the defendant, to make a pretended sale and transfer of all his interest in the partnership property then on the place to the defendant for the pretended consideration of a promissory note for \$500, executed and delivered by him to the plaintiff; that he after-

wards, in the year 1877, discovered said fraud, offered to deliver said note to defendant, and demanded a retransfer of said property; and prays that such pretended sale and transfer may be set aside and held for naught. The answer of the defendant was a general denial, and plea of the statute of limitations. The case coming on for trial, the plaintiff introduced the following decree of the Buchanan circuit court, theretofore rendered: "Henry A. Holloway against John P. Holloway. Now, at this time, this cause coming on for hearing by the court, \* \* \* and the plaintiff having dismissed as to the second cause of action stated in his amended petition, in reference to the partnership in and to the personal property, the court, being sufficiently advised in the premises, doth order and adjudge and decree that the deed of conveyance mentioned in the first count of plaintiff's amended petition, dated October 18, 1872, from the plaintiff to the defendant, purporting to convey plaintiff's undivided interest in and to the following lands, [here follows description of same farm described in present suit,] be, and the same is hereby, for the causes alleged in said petition, annulled, set aside, canceled, and for naught held." The decree further vested plaintiff with same interest he had before deed was made, and divested same from defendant.

The plaintiff was called as a witness upon his own behalf; and after being duly sworn, and when on the stand, was handed the following note for identification: "\$500.00. This October 18th, 1872, twelve months after date I promise to pay to the order of Henry A. Holloway, five hundred dollars, for value received, with interest from maturity at the rate of ten per cent. per annum; the interest, if not paid annually, to be added to the principal, and bear the same rate of interest. [Signed] J. P. HOLLOWAY." Said witness testified that in 1872 the defendant procured from him, without any consideration therefor, certain real estate, being same described in the decree read in evidence, and also his interest in certain personal property owned by plaintiff and defendant on the farm, being the property here in controversy, and that the note read in evidence, and herein copied, was given to cover up the transaction, and was never paid. This note was surrendered to the court upon the suit between the parties in this case in which the above decree was rendered. The court, of its own motion, here asked the plaintiff whether the above copied note (shown witness) was given to cover the personal property, or both the personal and said real property. The witness answered that it was given to cover both. The transfer and sale of the real and personal property were had and done at the same time. Whereupon the court answered that according to, and in consequence of, the testimony of plaintiff, he could not recover; that the conveyance of the personal property and the real estate from the plaintiff to defendant was one transaction; and that, as the plain-

tiff had brought his suit and obtained a decree to set aside the deed, (which is the same, and for the same lands, mentioned in the decree,) he could not divide his cause of action, and could not therefore recover in this suit; and refused to allow plaintiff to introduce any further testimony,—to which ruling the plaintiff excepted, took nonsuit with leave, and, failing to get the same set aside, brings his case here by appeal.

The plaintiff and defendant occupied a dual relation to each other. They were tenants in common as to the real estate described in the petition in this case, and in the decree in the former case, and partners in the personal property and assets acquired by them in the farming and trading business carried on in connection with said real estate. As an owner in fee in the real estate, the plaintiff had a right to go into a court of equity, and have set aside a deed procured from him by his co-tenant by fraud, and which was a cloud upon his title, and which stood in the way of his assertion of that title in an action at law; and, as a copartner, he had a right to go into a court of equity, the partnership business having ceased, his copartner being in possession of all the assets of the concern, and its debts paid, as is here alleged, and call his copartner to account for such assets, and that he render him his share thereof, as he here does, substantially, in the second count of his petition. These are separate and independent causes of action. The fact that the defendant, by the same fraud by which he clouded the plaintiff's title to his real estate, also attempted to deprive him of all interest in the partnership assets, could not render them one; nor could a recovery against such a fraud as to the real estate bar the plaintiff from calling on the defendant to account to him for his interest in the partnership assets. The judgment is reversed, and the cause remanded for trial.

All concur, except RAY C. J., and BABCOCK, J., absent.

#### KRIDER v. MILNER.

(Supreme Court of Missouri. Dec. 2, 1889.)

##### ADVERSE POSSESSION—INSTRUCTIONS.

1. Where the line between adjoining owners is in doubt, but they only claim ownership to the true line, wherever that may be, no title by adverse possession can arise in either, as against the other.

2. An instruction that, "on the evidence in this case, the statute of limitations is a bar to the suit," is properly refused, as an instruction should state hypothetically the facts of the case, so that it may be determined upon appeal whether the court applied correct principles of law.

Appeal from circuit court, Greene county; JAMES R. VAUGHN, Judge.

Thrasher, White & McCammon, for appellant. T. W. Kersey and Goode & Cravens, for respondent.

BLACK, J. This is an action of ejectment to recover a strip of land eight rods

wide off of the south side of the east half of lot 2 of the north-west fractional quarter of section 4, etc. Plaintiff owns the east half of lot 2 which contains, according to government survey, 43.06 acres. Defendant owns the east half of lot 1, which contains 40.04 acres. The contest is over the proper location of the boundary line. The plaintiff's land is on the north, and the defendant's on the south, of this disputed line. For convenience each tract will be designated as a 40-acre tract. It appears a fence had been erected between the two 40-acre tracts, as far back as 1868 or 1869, by one Autery, who owned the south 40. Mr. Moore, who then owned the north 40, says he supposed the fence was on the line. Mr. Franklin owned the north 40 from 1874 to 1879, and during that time, and on to December, 1883, Mr. Hale owned the south 40. Mr. Franklin says he and Hale talked about the line, and Mr. Hale said he thought the true line was in his (Hale's) field; that Hale agreed with him that the line was in his (Hale's) field, and that some time they would have the land surveyed, and place the fence on the true line. Plaintiff purchased and took possession of the north 40 in 1879, and it appears he made a new fence, placing it still further in on his own land, and Hale took the old fence away. The county surveyor says he established the line between plaintiff and Hale, at their request, in 1883, that both parties were present, and that he found the line to be eight rods south of the fence. Subsequently, and in 1885, the defendant, Milner, became the owner of the south 40. This suit was commenced in 1885. The case was tried by the court, without a jury. No instructions were asked by the plaintiff. Mr. Youngblood, the county surveyor who made the survey in 1883, attempted to make a record of his survey under the provisions of chapter 158, Rev. St. 1879; and he produced in court a copy of this record, which copy was made and certified by himself. On the objection of defendant, the court, by an instruction, excluded this copy because it failed to show that the survey was made in accordance with the requirements of the statute; but the copy was evidently used by the surveyor as a memorandum, to refresh his memory in giving his evidence as to how he made the survey, and where he found the line. The record could have been used for such a purpose; and since there was no objection to the copy because it was a copy, and not the original, there was no error in allowing it to remain in evidence for that purpose. That this survey disclosed the true line does not seem to be questioned; and the real contention is whether, for other reasons, the defendant can hold a part of the land belonging to the plaintiff's 40-acre tract.

The principles of law which dispose of this and like cases are not difficult or doubtful. When adjacent proprietors hold possession up to a dividing fence, built for convenience, and without claiming, or intending to claim, beyond the true line, the possession of the

one is not adverse to the other. *Kincaid v. Dormey*, 47 Mo. 337; *Walbrunn v. Ballen*, 68 Mo. 165. But where there is a dispute as to the true division line between them, or the line is uncertain, and they are ignorant of its true location, and they fix and agree upon a permanent boundary line, and take possession accordingly, the agreement is binding on them, and those claiming under them. Such an agreement is not within the statute of frauds. *Jacobs v. Moseley*, 91 Mo. 457, 4 S. W. Rep. 135; *Schad v. Sharp*, 95 Mo. 573, 8 S. W. Rep. 549; *Atchison v. Pease*, 96 Mo. 566, 10 S. W. Rep. 159. Now, in this case the evidence is all to the effect that the owners of these two parcels of land, down to the purchase of the south 40 by defendant, in December, 1883, claimed, and claimed only, to own to the true line, wherever that might be. There was therefore no adverse possession on the part of those through whom the defendant derives title; and the court did not err in refusing to give the instruction asked by the defendant on the statute of limitations. There was no evidence upon which to base it. It was properly refused for another reason. It simply says "that, on the evidence in this case, the statute of limitations is a bar to this suit." While this court may determine whether there is any evidence to support a given theory, still, where there is such evidence, it has no more power to review the finding of facts made by the court in actions at law than it has to review the finding of facts made by a jury in like cases. Whether a case at law is tried by the court alone, or before a jury, the instructions should state hypothetically the facts, so that we can determine whether the court applied correct principles of law.

There is no evidence in the case showing, or tending to show, that prior to the survey made in 1883 there was ever any agreement between the adjacent owners as to what should be deemed and taken as the true line. Those prior owners were in doubt as to where the true line was; and they left its location to be fixed by a subsequent survey. The matter stood in this way when defendant purchased. The plaintiff is manifestly the owner of the land for which he sued and recovered a judgment, and that judgment is now affirmed.

RAY, C. J., and BARCLAY, J., absent. The other judges concur.

#### BAKER v. VANDERBURG et al.

(Supreme Court of Missouri. Dec. 2, 1890.)

##### DEDICATION—EVIDENCE—DECLARATIONS.

1. Within the boundary lines of a square on a plat was written: "This park is reserved from public use, and title kept in proprietors." A clause in the certificate of acknowledgment thereof stated that the proprietors adhered to the reservations made in the specifications therein as to parks. Held, that there was no dedication to the public, within 2 Rev. St. Mo. 1855, p. 1586, § 8, providing that such plat "shall be a sufficient conveyance to vest the fee of such parcels of land as are

thereon expressed, named, or intended for public use in the county in which such town \* \* \* is situate, in trust and for the uses therein named, expressed, or intended, and for no other use or purpose."

2. The approval of an ordinance by one of the proprietors of the land, as mayor of the city in which it was situate, appropriating money to pay for maps of the city on which said block was marked "Park," was not an assertion by the proprietor that the block was in fact a park.

3. The declarations of the proprietors that they intended to turn the square over to the city for a park when the city was ready to accept and improve it, and the selling of lots fronting on the block at a higher price than those not facing on it, did not show a dedication to the public use, where the offer was never accepted by the city, and the land was not used as a park.<sup>1</sup>

Error to circuit court, Jackson county; J. H. SLOVER, Judge.

Injunction by Smith Baker against Otto P. Vanderburg and others. Judgment was for defendants, and plaintiff brings error.

*Stephen P. Twiss and Botsford & Williams*, for plaintiff in error. *C. O. Tichenor, D. S. Twitchell, and T. A. Frank Jones*, for defendants in error.

**BLACK, J.** The plaintiff and appellant is the owner of lots fronting on a block of ground in McGee's addition to the city of Kansas. He brought this suit for himself, and all other persons similarly situated, to have the block declared a public park, and to restrain defendants from erecting buildings thereon. Mrs. Eleanor R. Campbell owned the 40 acres of which the block in question is a part; and in 1850 she and her husband, John Campbell, conveyed it to Pollard, who conveyed it to Riddlebarger in 1857, and he conveyed it to N. Holmes and E. M. McGee in February of the same year. The property was then within the corporate limits of the city of Kansas; and on the 3d of June, 1857, Holmes and McGee made a plat of this and other land, and laid the same off into lots, blocks, streets, and alleys, and designated the same "McGee's Addition to the City of Kansas." The plat was executed and recorded according to the statute law of this state. There is shown upon this plat a block of ground, 247 by 274 feet, inside of the streets by which it is surrounded. Within the lines bounding the block, and on the face of the plat, are written these words: "This park is reserved from public use, and title kept in proprietors. E. M. MCGEE. N. HOLMES." The plat was acknowledged before the clerk of the circuit court; and the certificate states, among other things, that Elijah M. McGee and Nehemiah Holmes acknowledged the same to be their act and deed, "adhering, however, to the reservations made in the specifications made therein as to parks." In

general, the lots have a width of 49½ feet, and front on the north and south streets, and are numbered. The square in question is not numbered or laid off into lots, and the lots around it have a front of only 25 feet, and they face towards the square. There is one other block on a different part of the plat laid off in like manner, and having written on the face of it the same words; which block has never been claimed to have been dedicated to public use. In 1865, Holmes and McGee quitclaimed, each to the other, a large number of the lots; and in October of that year McGee conveyed to plaintiff some thirteen lots, three of which front on the square in question. Plaintiff's evidence is that he paid a higher price for these three lots because they fronted on the square; that in his negotiations for them with Vincent, who was McGee's agent, the block was said to be a public square. He speaks of a subsequent conversation with Holmes, in which the latter said they were ready to turn it over as soon as the city was ready to improve it. The evidence shows that other persons purchased lots fronting on this square, and that the property there was sold at higher prices than at a short distance away from it. Many witnesses testified as to what McGee said about this block when endeavoring to sell property. This evidence is very indefinite, and amounts to about this: that he and Holmes were holding it for a park when the city saw fit to improve it. On one occasion, Holmes offered to defray his share of the expenses in improving it. The plaintiff's evidence shows that prior to 1869 or 1870 the block had not been taxed, and a committee of the common council called upon McGee, and he told them he intended to make a park out of it, but he would not dedicate it to public use. Thereafter the property was assessed by the city. The then assessor says he assessed it back for several years, but cannot say for how many. The agent of McGee says it was assessed back to the time the land was platted, the taxes amounting to \$800, and that Holmes and McGee paid these taxes. As before stated, the proprietors of the addition acquired title through Mrs. Campbell. Her deed to Pollard was acknowledged in 1850 before a justice of the peace, and was therefore defective. After the death of her husband, and in 1869, she gave notice that she would release to purchasers of lots in the 40 acres, and, pursuant thereto, did execute deeds of release to the then claimants of lots, but at that time made no deed to any one for the block in question. In 1871 she caused the block to be inclosed by a fence. Thereupon, McGee, who was her brother, gathered together a number of persons, and, under the inspiring influence of a barrel of beer, made a bonfire out of the fence. His declarations made on this occasion, to the effect that the square "shall be a park," and "must be a park," were put in evidence. At this time some buildings had been erected on a few of the lots surrounding the square. In 1880, and after the death

<sup>1</sup>On the general subject of what constitutes a dedication of land to public use, see *Pierce v. Roberts*, (Conn.) 17 Atl. Rep. 275, and note; *People v. Davidson*, (Cal.) 21 Pac. Rep. 533, and note; *City of Eureka v. Croghan*, (Cal.) 19 Pac. Rep. 435, and note; *In re Hand St.*, 5 N. Y. Supp. 153; *People v. Reed*, (Cal.) 22 Pac. Rep. 474; *City of Shreveport v. Dronin*, (La.) 6 South. Rep. 656.

of Holmes and McGee, the city of Kansas commenced proceedings to condemn the land for a park, but they were dismissed; and, in 1882, Mrs. Campbell conveyed an undivided third to George I. Seeney, who claimed an undivided half through the heirs of McGee. She also conveyed a one-third to the widow and heirs of Holmes. Suit for partition was then instituted between Mrs. Campbell and these persons to whom she conveyed; and, pursuant thereto, the commissioners divided the square into lots, and assigned part of them to Mrs. Campbell, part to Seeney, and the residue to the heirs and widow of Holmes. The defendants in this suit acquired the lots claimed by them from the persons to whom they were assigned by the partition decree.

The evidence shows that from the time the plat was filed, down to 1871, the block was unfenced, open, and not different from many other open and unimproved parcels of land in the same locality. It was never at any time improved or used as a park, but was simply an open piece of ground, devoted to no particular use whatever. This suit was commenced in August, 1885; a notice of an intention to bring it having been served on the principal defendants in July, 1885. At and prior to the date of that notice, the defendant Vanderburg had erected upon his three lots two brick buildings, and had completed the foundation for a third one. The defendant Young acquired her lots from Mrs. Campbell, and erected two substantial brick houses there in 1884. Mrs. Boult, another defendant, had completed one brick house, and had excavated for the foundation for another. The defendants all paid full value for the property purchased by them.

1. Counsel for the appellant present a great many propositions of law based upon the assumption that Holmes and McGee, by the plat, dedicated the square to public use as a park. It becomes necessary, at the outset, to determine whether this assumption is well founded. The plat, as we have said, was executed, acknowledged, and recorded in conformity with the statute. Section 8, 2 Rev. St. 1855, p. 1536, provides that such plat "shall be a sufficient conveyance to vest the fee of such parcels of land as are therein expressed, named, or intended for public uses in the county in which such town \* \* \* is situate, in trust for the uses therein named, expressed, or intended, and for no other use or purpose." To what public use did the proprietors devote this parcel of land? They say on the face of the plat: "This park is reserved from public use, and title kept in the proprietors." This statement is, in effect, repeated in the acknowledgment. They not only say the title is kept in themselves, which would have passed to the county had the square been devoted to public use, but they say the property is reserved from public use. Stronger language could not have been used to show that they did not, and did not intend to, devote the parcel of land to public use. This statement completely overcomes any in-

ference that might have been drawn had no statement been made, or had the word "park," only, appeared upon the face of the plat. But the contention seems to be in effect, if not in terms, that we should strike out and disregard all this statement after the word "park." We know of no rule of law, ancient or modern, which gives to the courts power to deal with contracts in any such a way. We must take the statement as a whole; and when that is done it is shown beyond all doubt that the square was not, by the plat, devoted to public use. Where there is a map or plan, though not executed and recorded in conformity with the statute, and on which plat land is laid off with streets and alleys and other public grounds, and the owner sells lots with reference to the plat, his acts in making such sales amount to a dedication of such parcels as appear to be designed for streets and other public purposes. 2 Herm. Estop. § 1147. In view of this uncontroverted principle of law, the plaintiff put in evidence a vast number of deeds executed by Holmes and McGee to various persons, including the plaintiff. These deeds convey the lots by their numbers, and by the number of the blocks. The streets and alleys had before been irrevocably devoted to public use, and the deeds could do no more. They cannot, of themselves, make a public park out of this square, for the very plat to which they refer shows that it was reserved from public use. So, too, in respect of the various deeds made by Mrs. Campbell to the many lot-owners. By these deeds she ratified the plat for all that it purported to say or do; but, as we have seen, the plat did not profess to devote the square to public use, but, on the contrary, reserved it from such use.

2. The plat and the deeds made by Holmes and McGee, combined, did not work a dedication of the square; and the question arises whether the acts and declarations of these persons show a common-law dedication. For the purposes of this question, we shall treat Holmes and McGee as the owners of the land, when the addition was laid out; laying out of view the claim of Mrs. Campbell, asserted by reason of her former defective deed. A dedication of land to public use need not be evidenced by writing. It may be manifested by acts and declarations. Dedications, it has been said, have been established in every conceivable way by which the intention of the party could be manifested. Washb. Easem. (3d Ed.) 186. But the acts and declarations of the land-owner, indicating the intent to dedicate his land to public use, must be unmistakable in their purpose, and decisive of their character. Id. 188. There must be a clear intention on the part of the owner to devote it to public use. Brinck v. Collier, 56 Mo. 160; Landis v. Hamilton, 77 Mo. 560. An intent on the part of the owner to dedicate is absolutely essential; and, unless such intention can be found in the facts and circumstances of the particular case, no dedication exists. 2 Dill. Mun. Corp. (3d Ed.) §

636. The principal circumstances to show a dedication here are—*First*, the fact that these lots around the square were sold for a higher price than those not facing in upon it; *second*, the reported declarations of Holmes and McGee. A *third* circumstance is the fact that McGee, in 1870, while mayor of the city, and in his official capacity, approved an ordinance appropriating \$1,000 to O'Flaherty and Koehler for 100 maps of the city of Kansas, and on which it is said this block is marked "Park." This map is not in the record, and we do not know what it shows. Sufficient appears, however, to show that its preparation and sale was a private enterprise on the part of these civil engineers. The approval of the ordinance did not make McGee assert, as true, the statements made upon the map. The declarations of Holmes and McGee occurred many years ago, and they died some 10 or 12 years before the institution of this suit. These statements, as reported, are loose and uncertain; and the most to be made out of them is that they, especially McGee, intended to turn the square over to the city for a park or market place when the city was ready to accept and improve it. This, at most, was but a conditional offer, and was never accepted during the life-time of these proprietors, or at any other time. On the other hand, the persons who purchased these lots knew, from the public records, that this square had not been devoted to public use. Under this state of the case, we should expect to see the deeds to them make some statement to the effect that this square was a park; but nothing of this kind is said in them. McGee declined to convey the square to the city, when called upon by a committee of the common council, and would not donate it for a public park; and thereafter the property was taxed as other private property. These substantial acts are far more valuable, as evidence, than the loose reported declarations, and are strong evidence to the effect that the proprietors had not at that time devoted the property to public use. To constitute a common-law dedication, there must be an acceptance by the public. 2 Herm. Estop. § 1142. We have held, where there is an unconditional attempt or offer to dedicate a parcel of land for a public square, and such offer is followed by adverse use by the public, that such use is a sufficient acceptance. No formal acceptance by the corporate officials is necessary in such cases. *Price v. Town of Breckenridge*, 92 Mo. 382, 5 S. W. Rep. 20. The acceptance is sufficiently indicated by common use; certainly so in the case of a square or park. *Abbott v. Inhabitants of Cottage City*, 143 Mass. 521, 10 N. E. Rep. 325. Such use is often a sufficient acceptance of a street. *Rose v. City of St. Charles*, 49 Mo. 510. Had these declarations of McGee and Holmes been followed by adverse use by the public, then we would find no difficulty in making them harmonize with that use. But there is no evidence whatever that the public ever used this square as a park.

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The contrary is affirmatively shown. Besides all this, the plaintiff stood by, and saw these defendants expend their money in building up this property, and now comes forward and asks the court to declare the block a public park on the uncertain evidence produced. This cannot be done, and the judgment dismissing the petition ought not to be disturbed.

We have not made mention of some of the evidence, because it is of no value on the question of dedication. The respondents insist that they hold under Mrs. Campbell, and are not affected by any dedication, by plat or otherwise, made by Holmes and McGee; but with the result reached, that no dedication is shown, even as against those claiming under Holmes and McGee, it is unnecessary to consider the question thus raised. Some other questions are discussed in the briefs, but they are subordinate to those before ruled. The judgment is affirmed.

RAY, C. J., and BARCLAY, J., absent.  
The other judges concur.

SHERRELL v. CHESAPEAKE, O. & S. W. R. CO.  
(Court of Appeals of Kentucky. Nov. 14, 1889.)  
DEATH BY WRONGFUL ACT—COURTS—JURISDICTION.

Under Civil Code Ky. § 73, providing that an action against a common carrier for an injury to a passenger or other person, or his property, "must be brought in the county in which the defendant, or either of several defendants, resides, or in which the plaintiff or his property is injured, or in which he resides," the circuit court of a county in which neither plaintiff nor defendant or its chief officer, resides, and in which the killing did not occur has no jurisdiction of an action against a railroad company for the alleged negligent killing of plaintiff's son.

Appeal from circuit court, Hardin county.  
"To be officially reported."

*Hargis & Eastin* and *Jas. Montgomery*,  
for appellant. *J. P. Hobson*, for appellee.

LEWIS, C. J. Appellant brought this action in the Hardin circuit court, to recover damages for destruction of life of his son John T. Sherrell, by alleged willful neglect of appellee's servants and agents; and the only inquiry we deem it necessary to make on this appeal is whether the lower court erred in overruling demurrer to second paragraph of the answer, in which it is stated that neither the plaintiff, his intestate, the defendant, nor its chief officer, ever resided in Hardin county, and that the plaintiff's intestate did not receive the injury therein. Section 73, Civil Code, is as follows: "Excepting the actions mentioned in section 75, an action against a common carrier, whether a corporation or not, upon a contract to carry property, must be brought in the county in which the defendant, or either of several defendants, reside, or in which the contract is made, or in which the carrier agrees to deliver the property. An action against such carrier for an injury to a passenger or to

other person, or his property, must be brought in the county in which the defendant, or either of several defendants, resides; or in which the plaintiff or his property is injured, or in which he resides, if he reside in a county into which the carrier passes." It will be seen that section required this action, which is against a common carrier for personal injury, to be brought in the county where the defendant resided when it was commenced, or, by fair construction, where its chief officer resided, if in the state, or in the county in which the plaintiff, or, by construction, his intestate was injured, or in which the plaintiff resided when the action was commenced. But, taking the statements of the second paragraph of the answer to be true, for purpose of trying the demurrer, as they must likewise be regarded in the absence of a reply, it seems to us the Hardin circuit court has no jurisdiction, and consequently the demurrer was properly overruled, and a dismissal of the action followed inevitably, for that county is not either the residence of any of the parties nor the county where the injury was done. Subsection 4, § 51, relates altogether to the county in which a summons in an action brought pursuant to section 73 may be served, but does not prescribe the county in which such action must be brought, nor determine the jurisdiction of the court in respect to the county. The judgment is affirmed.

#### HERD v. CIST et al.

(Court of Appeals of Kentucky. Nov. 23, 1889.)

NON-RESIDENT PARTIES—WARNING—ESTOPPEL—DEED—SURETY.

1. The appellate court will presume that such a state of facts was presented as authorized the entry of an order of warning against defendants, where it is conceded that they were non-residents, though no affidavit to that effect appears in the record.

2. Where a defendant in an action to sell land under a deed of trust claims only a portion of the land, and she is invested with title to that portion as against her co-defendants, she cannot question the trustee's title to the balance of the lands.

3. A recorded deed, executed out of the state, the acknowledgment of which before a notary public is certified under his official seal, takes priority over a deed executed out of the state, which was recorded before the former deed, but the acknowledgment of which before a notary public is not certified under his seal, as required by Gen. St. Ky. c. 24, § 16, which provides that "deeds executed out of the state \* \* \* may be admitted to record, when the same shall be certified under his seal of office \* \* \* by a notary public," etc.

4. The non-residence of a surety on the bond of a commissioner appointed to sell land under decree of the court is no ground of objection, where it is shown that the surety has sufficient property within the state.

Appeal from circuit court, Lee county.

"Not to be officially reported."

John L. Scott and J. M. Beatty, for appellant. D. W. Lindsey, for appellees.

PRYOR, J. In August, 1878, L. W. Waldron owned 5,000 acres of land in the county of Lee, in this state; and for the purpose of

indemnifying and securing to one William C. Huntington, in various liabilities, and in the performance of certain agreements entered into between the two, conveyed to Huntington, in trust, this land; the deed having been executed on the 1st of August, 1878, and recorded in the Lee county clerk's office, or lodged for record, on the 11th of February, 1879. These parties were then residents of the state of Ohio, and the deed was acknowledged before a notary public, and properly certified under his seal of office. On the 6th of January, 1879, Waldron and wife, then of Cincinnati, executed to Nye & Thompson a deed conveying 1,500 acres of this same 5,000-acre tract, and this deed was lodged for record on the 14th of January, 1879. In February, 1879, Nye & Thompson executed a conveyance to one French for 600 acres of the 1,500-acre tract, that was recorded on the 1st of May, 1879. In July, 1879, a deed was lodged for record in the Lee county clerk's office from French to one Severn, and Severn executed a mortgage to French on this land, (600 acres,) that was assigned to Brown, and by Brown to Herd. Herd foreclosed the mortgage, and became the purchaser of the 600-acre tract, obtaining a commissioner's deed for the land. Huntington was not a party to the foreclosure suit. In August, 1882, Huntington brought his action to enforce the stipulations of his trust-deed, alleging a non-performance on the part of Waldron, and showing a liability on his part to Huntington of about \$8,000. He sought to sell the entire 5,000-acre tract of land, making all the parties in interest defendants, all of whom were non-residents except the appellant, Herd. An order of warning was entered as to the non-residents, and an attorney appointed to correspond. The claim of Huntington was not resisted, or, if so, there was no reason to reject it, and a judgment was rendered subjecting the entire tract to the payment of his debt. The commissioner was directed to sell, first, all the 5,000 acres outside of the 1,500 acres; and, if that failed to pay Huntington's debt, then the 1,500 acres sold Nye & Thompson, less the 600 acres sold by them to French, and finally purchased by the appellant; and, if this failed to satisfy the debt, then so much of the 600 acres as might be necessary for that purpose. The commissioner, following the directions of the judgment, that were just and equitable, sold all the land; and the appellant, Herd, now complains, and insists that as there was no affidavit to the petition in which it is alleged that her co-defendants were non-residents, and no affidavit appearing to that effect in the record, the order of warning was void, and the judgment should be reversed for that reason.

The fact that her co-defendants were non-residents is conceded,—a fact doubtless known to the parties engaged in the litigation, and the officer making the warning order; and the court, in such a case, will presume that a state of fact was presented authorizing the



order of warning to be entered. Besides this, defendants are not here complaining; and the appellant, Herd, who had purchased and obtained a conveyance of this land at the sale by the commissioner, has made the defense; and being invested with the title to this 600-acre tract, in so far as her co-defendants are concerned, and that being severed by the conveyance to her from the 5,000-acre tract, we perceive no reason for permitting her to question the title to Huntington or his assignee to the balance of the tract.

That the conveyance was made to Huntington to secure him in the indebtedness of Waldron to him is established; and the whole question, it seems to us, turns upon the priority of legal right, and this arises from the date the several deeds were recorded. The fraud of Waldron and Nye & Thompson cannot affect the rights of their vendees, who are innocent of the fraud; and therefore the depositions taken in the state of Ohio cannot affect the appellant. There is no proof that her vendor had notice of the fraud between Waldron and Nye & Thompson; and, if the deed to the latter was without consideration, still their deed to French would pass the title, he being an innocent purchaser. So the case will be treated as if the depositions as to the fraud of Waldron were out of the case; and, if the judgment was proper, it ought not to be reversed. The conveyance from Waldron to Nye & Thompson was left for record on the 14th of January, 1879, and the conveyance made to Huntington was not left for record until the 11th of February, 1879. If, therefore, the deed to Nye & Thompson was a recordable instrument, the appellee Huntington had constructive notice, under the law, of its existence, and his deed must yield to the one first recorded. The conveyance to Huntington is acknowledged before a notary, and is so certified under the notary's seal of office. The conveyance to Nye & Thompson purports to have been acknowledged before a notary, but there is no seal of office annexed to his certificate. The statute of this state provides the manner in which deeds acknowledged out of the state may be admitted to record. Section 16, c. 24, Gen. St.: "A deed may be admitted to record when the same shall be certified under his seal of office by the clerk of a court or his deputy, or by a notary public, mayor of a city, or secretary of state, or by a commissioner to take the acknowledgment of deeds, or by a judge, under the seal of his court, to have been acknowledged or approved before him in the manner hereby required." There being no seal of office annexed to the notarial certificate, the conveyance to Nye & Thompson must be treated as a bond for title; and, if the prior equity is to prevail, it then appears that the conveyance to Huntington was executed in August, 1879, and, being recorded, invested him with title. *Miller v. Henshaw*, 4 Dana, 330.

The testimony shows that the bond executed by the sureties for the sale of the prop-

erty of the non-resident was ample. An affidavit was filed showing that the surety had property in the state of the value of \$30,000, and hence the objection that he lived out of the state will not avail. In this case the appellant and the appellee claimed under the same title. The appellant claimed a distinct and separate parcel of the land that had been carved out of the larger survey, and made her defense; and as said in *Johnson v. Rankin*, 3 Bibb, 86: "A party not affected by an order of publication, proof of its advertisement, or the manner of taking the bill for confessed, cannot object to those proceedings as irregular." The assignment to Cist does not affect the merits of this controversy; and the objection raised, that the defendants should have in some way been parties to, or had notice of, the transfer, cannot be considered. The assignment was not made until October, 1885, when the principal judgment was rendered, or when the case was ready for submission. The presumption must be in favor of the regularity of the proceeding as to the warning order in the court below; and the presence of the affidavit as to non-residency, as part of the record, not being essential to the jurisdiction, the judgment below must be affirmed.

#### MATTINGLY v. STONE.

(Court of Appeals of Kentucky. Nov. 23, 1889.)

CONTRACTS—RESCISSION—CONSTRUCTION—TRADE-MARK.

1. Defendant sold the O. D. Co. the exclusive right to use his name as a brand on its whisky until December 1, 1888, and afterwards made a contract with plaintiff, giving him, for an interest in his business, the exclusive use of the same brand from September, 1888; the latter contract reciting, by mistake, that the contract with the O. D. Co. would expire on the — day of September, 1888. The O. D. Co. did not make any whisky after September, 1888, and plaintiff used the brand from that time. *Held*, that the conflict between the contract of plaintiff and that of the O. D. Co. did not prejudice plaintiff, and is no ground for the rescission of his contract with defendant.

2. A contract giving a person for a certain time the right to use a brand on the whisky manufactured by him gives him the right to use the brand, at any time after the expiration of the period, on whisky which was manufactured within the period specified in the contract.

3. The right of a person to use his name as a brand on manufactures, the words used in connection with his name being words of common use, is a personal right, and does not pass to his assignee in bankruptcy.

Appeal from circuit court, Daviess county.  
"Not to be officially reported."

*Weir, Weir & Walker*, for appellant.  
*Geo. W. Jolly, Geo. W. Williams & Son, W. T. Ellits*, and *Wm. Lindsay*, for appellee.

HOLT, J. In 1871 the appellee, W. S. Stone, became the sole owner of a distillery, which he operated until 1876, branding the product, "W. S. Stone, Old-Fashioned, Hand-Made, Fire Copper Sour Mash Whiskey." He then, together with one Perkins, who had acquired a joint interest in the distillery, sold it to the appellant, Mattingly, and one Lan-

caster. Perkins did not unite in the deed, as the title to the property was in the appellee, Stone. Mattingly & Lancaster operated it until 1880, when the latter sold his interest to the appellant. They used the Stone brand, with the addition of their names as the makers. After he became the sole owner, Mattingly used this brand: "Old W. S. Stone Distillery; M. P. M., Distiller. Hand-Made, Sour Mash Whiskey." The brand became valuable; and on November 8, 1880, Stone, in consideration of a certain quantity of stock in the Owensboro Distilling Company, and a certain royalty to be paid to him upon each barrel of whisky, entered into a written contract with the company, by which he gave to it "the sole and exclusive right to use my name as a brand on all or any whisky hereafter manufactured by said company, for a period of three years from the 1st day of December, 1880." March 10, 1882, the appellant, Mattingly, and Stone entered into a written contract, which recites that "W. S. Stone has heretofore sold the use of his whisky brand to the Owensboro Distilling Company, for a term which will expire on the ——— day of September, 1883;" and by which Stone became the owner of a one-eighth interest in the "Old W. S. Stone Distillery," and also in another distillery, owned by Mattingly, known as the "Davies County Club Distillery," and in the profits of both, from the ——— day of September, 1883, in proportion to his interest,—Mattingly to have the remainder. The recited consideration for this transfer was "the use in the said two distilleries of the exclusive right to use the whisky brand of said W. S. Stone from and after the ——— day of September, 1883;" and the contract further provides that "the said William S. Stone hereby sells and conveys to said Miles P. Mattingly, for the exclusive use of himself and his successors in said Davies County Club Distillery, and said Old W. S. Stone Distillery, his whisky brand, and agrees that the same shall not, after said date of September, 1883, be used by any other person or corporation, if within his power to prevent it." By their agreement the appellant, Mattingly, was to have the general control, financially and in all other respects, of the business, so long as he remained the principal owner of the property; and it was further provided that "from and after the first day of September, 1883, W. S. Stone is to take charge of one of said distilleries, as its manager, and that Miles P. Mattingly shall from said date have charge of the other distillery, as its manager, and that out of the proceeds of said business each party shall be entitled to one hundred dollars per month for his services in said business." This action was brought in ordinary by the appellee, Stone, claiming a balance as due him for services under the clause of the contract last cited. The petition sought this relief only. An amended petition was tendered during the progress of the case, asking a settlement of the entire business; but the court refused to

permit it to be filed. The appellant, Mattingly, by proper pleading, sought a rescission of the contract of March 10, 1882, and a recovery of the amount he claimed to have paid the appellee as profits of the venture. Upon the coming in of the answer the action was transferred to equity, and upon final hearing the relief sought was refused to both parties.

The rescission of the contract was asked by the appellant, first, upon the ground that he had entered into it under a mistake of his legal rights; that the right to use the name of the appellee as a brand upon the whisky that might be made, passed to Mattingly & Lancaster by the purchase from him in 1876; that he therefore did not have it to sell on March 10, 1882, and there was no consideration for the contract then made. The deed to the property made in 1876 makes no mention of the whisky brand. The appellant and Lancaster state, substantially, that it was a part of the contract of sale that they thereby became the owners of the right to use it. This is substantially contradicted by the appellee and Perkins. They are strongly fortified in their statement by the fact that, subsequent to the sale, Lancaster tried to buy the right to use Stone's name as a brand upon their whisky, and that subsequently Mattingly did purchase it, by the contract of March 10, 1882. Moreover, it had acquired a considerable value, and the appellee appears to have been offered for it more than the entire price paid by Mattingly & Lancaster for the distillery. In any event, the testimony as to whether it was included in their purchase is conflicting, and the chancellor, upon this question of fact, found in favor of the appellee, Stone; and his conclusion will not, in view of the state of the testimony, be disturbed.

It is next contended that by the contract of March 10, 1882, Mattingly was to have the right to the exclusive use of Stone's name, as a part of the whisky brand, from and after the ——— day of September, 1883, when, in point of fact, Stone had already parted with it to the Owensboro Distilling Company until December 1, 1883. It is shown that when the contract of March 10, 1882, was prepared the one with the Owensboro Distilling Company was not at hand to inform the draughtsman of its terms, or to refresh the recollection of the appellee. It is quite evident that it was not then known to any of the parties then present when it did expire, save that it was at some time during 1883. The contract between the appellant and appellee shows that the day of the month when the expiration would occur was not deemed material, as it was omitted. It is evident, from the entire evidence, that, while the contract fixed the time as being in September, yet this was done through an honest mistake, without any fraudulent intention upon Stone's part, and that the parties to the contract had in view the understanding that it ended in the year 1883. Moreover, it is shown, be-

yond question, that the Owensboro Distilling Company made no whisky in 1883; and the appellant says that he used the Stone brand all the time. The mistaken recitation in the contract between the appellant and the appellee, as to when the right of the Owensboro Distilling Company to use Stone's name expired, is not, for the reasons recited, ground for its rescission. In our opinion, the contract with the Owensboro Distilling Company gave to it the right to use Stone's name as a brand upon its whisky even after the expiration of the three years named in its contract, provided it was made during that period; and a fair and reasonable interpretation of the contract of March 10, 1882, between the appellant and appellee, recognizes such right; and there is, in our opinion, no conflict between the two contracts in this respect.

Between the time of the sale of the distillery by Stone to Mattingly & Lancaster and the making of the contract of March 10, 1882, Stone became a bankrupt. It is therefore urged that, if the right to use his name as a part of the whisky brand did not pass with the sale of the distillery, then it passed to his assignee in bankruptcy; and there was, therefore, no consideration for the contract of March 10, 1882. It will be noticed that the words composing the brand, save the name of the appellee, are those of common use; and the right of using his name merely was a personal one to the appellee, and did not, therefore, pass to his assignee, any more than would the skill acquired by a merchant from experience in his business. *Helmbold v. Manufacturing Co.*, 17 Amer. Law Reg. (N. S.) 169.

Nearly three years elapsed before the appellant sought a rescission of the contract; and the grounds upon which he now does so are insufficient to authorize such relief. Whether the appellee was entitled to any relief, or whether the court below erred in passing upon any question looking to it, cannot be considered by us, as there is no cross-appeal. The opinion of the lower court, in discussing the case, takes a wide range. We must not be understood by this decision as affirming or disaffirming what is said by the lower court as to what would be proper in another suit. The only question presented by this appeal is the right of the appellant to a rescission of the contract, and it alone is therefore determined. The judgment upon his appeal is affirmed.

#### McCONNELL v. WILCOX et al.

(Court of Appeals of Kentucky. Dec. 3, 1889.)

##### WILLS—CONSTRUCTION—LIFE-ESTATE.

Testator, after devising all his estate to his wife, provided that "at her death, if the land I now live on should not be sold, it is to be sold on one and two years' credit, and one-half the proceeds to go to" M. and J. "In case both or either of them should depart this life before my wife, then that portion, as the case may be, on account of death, to descend to the living heirs of" K. and W.; "but, in case she should sell the above-mentioned tract of

land in her life-time, she is to have the use of all the money during her life, without interest, and, with that exception, she has the power to dispose of all the balance she may think best." Held, that the widow was only entitled to a life estate in the homestead, or, if sold during her life, to the use of the proceeds, without interest.

Appeal from circuit court, Fulton county.  
"Not to be officially reported."

*Tyler & Tyler*, for appellant. *J. C. Gilbert*, for appellees.

HOLT, J. Alney Kuykendall died, testate, in 1856. His wife, Pernecy Kuykendall, survived him. She died in 1886. His will provides: "I give and bequeath to my beloved wife, Pernecy, all my estate, both real and personal, after my just debts are paid, with full power to sell and convey the same, or any part thereof that she may think best; but at her death, if the land that I now live on should not be sold, it is to be sold on one and two years' credit, and one-half of the proceeds to go to Howard Mullins and Joseph Kuykendall, son of Howard Kuykendall. Now, in case that both or either of them should depart this life before my wife, then that portion, as the case may be, on account of death, to descend to the living heirs of Howard Kuykendall and Martha Jane Wilcox; but, in case she should sell the above-mentioned tract of land in her life-time, she is to have the use of all the money during her life, without interest, and, with that exception, she has the power to dispose of all the balance she may think best." Howard Mullins and Joseph Kuykendall were nephews of the testator. The last named died prior to the widow of the testator, and the petition avers that the first named had left the country many years before, had not been heard of for over 15 years, and was supposed to be dead. His only child, Charles Mullins, was made a defendant. He filed an answer confirming the averments of the petition. The answer of some of the other defendants averred the death of Howard Mullins in positive terms. Howard Kuykendall was a brother of the testator. He is dead. Martha Jane Wilcox is a sister of the testator, and is yet alive. Howard Kuykendall had three children, to-wit: Catharine Freeman; Elizabeth Freeman, who is dead, leaving children; and Joseph Kuykendall, who is also dead, leaving children. The lower court decided that the widow of the testator had but a life-estate in the home place or its proceeds, and adjudged the same, the one-fourth to Catharine Freeman, the one-fourth to the children of Elizabeth Freeman, the one-fourth to the children of Joseph Kuykendall, and the remaining fourth to the children of the deceased daughter of Martha Jane Wilcox. The pleadings do not expressly aver whether the home place was sold during the life-time of the testator's widow or not; but the judgment recites that it was, and we shall so presume. The question is, did she have but a life-estate in the entire home place or its proceeds, or did one-half of the same belong absolutely to her?

No one is appealing but the executor. He insists that only a half interest was bequeathed to Howard Mullins and Joseph Kuykendall together; that, in the event of the death of both of them, but this half interest was to pass to the living heirs of Howard Kuykendall and Martha Jane Wilcox; and that, with this exception, the testator devised all his estate to his wife.

It is true, the will, at the outset, gives all the estate absolutely to the wife, but then follows an exception. Did this exception embrace all the home place or its proceeds, or only half thereof? This question is to be answered by arriving at the testator's intention, and it must be gathered from the entire will. To properly construe it is to ascertain the maker's intention, either from its express words, or the natural inference resulting from their use. It is manifest the testator intended to dispose of his entire estate; and it is hardly supposable he intended, in case his wife did not sell the land, that the one-half of it should vest absolutely in her, whereas, if sold during her life-time, she was to have no interest in it save a life-estate. We can conceive no reason for such a distinction. The paramount idea in the mind of the testator evidently was to provide for the support of his wife. With this view, he distinctly declares, "but, in case she should sell the above-mentioned tract of land in her life-time, she is to have the use of all the money during her life, without interest." Undoubtedly, the testator intended that she should have the use of the home or its proceeds, if she chose to sell it, during her life, as a support for her declining years; and, to harmonize the provisions of his will, the clause relating to Howard Mullins and Joseph Kuykendall should be read as if it contained the word "each," thus: "And one-half of the proceeds to go to Howard Mullins and Joseph Kuykendall, son of Howard Kuykendall, each." This, we think, was the manifest intention of the testator, in view of the fact that the will gives her the use only of the proceeds of the lands, if sold during her life-time. If so sold, the proceeds were to stand in lieu of the land. The widow was given the right, if she chose to exercise it, of substituting the use of the proceeds in place of the use of the lands during her life; and then the testator intended his nephews, Howard Mullins and Joseph Kuykendall, to each have one-half of the proceeds, whether arising from a sale made during the life-time, or after the death, of the widow. Since this appeal was taken, affidavits have been attached to the appellant's brief showing that Howard Mullins is alive. This court cannot, however, consider them. Judgment affirmed.

**SAWYER et al. v. GOODPASTER'S ASSIGNEE.**  
(Court of Appeals of Kentucky.. Dec. 3, 1889.)  
INSOLVENCY—VENDOR'S LIEN—HUSBAND AND WIFE.

Land was purchased jointly by the husband and wife, and the deed provided that when a stat-

ed sum should be paid the wife should be entitled to half the land, and, if it should be sold at any time, she should, "at her option, be entitled to the aforesaid sum of money, or one-half of the proceeds of such sale." Held, that the creditors of the husband, whose debts were contracted after the specified sum had been paid, were not entitled to have the wife's interest subjected to the payment of a vendor's lien.

Appeal from court of common pleas, Bath county.

"Not to be officially reported."

H. L. Stone, R. Gudgeon, and Dodd & Grubbs, for appellants. J. J. Nesbitt, for appellee.

PRYOR, J. Frank A. Goodpaster, an insolvent debtor, made an assignment to L. A. Goodpaster, which included a tract of land that had been conveyed to the debtor and his wife, jointly. The extent of the interest of the wife in this land is the subject-matter of the present controversy, and the legal question arises from the action of the court below in sustaining a demurrer filed by the wife (now a widow) to the answer and cross-petition of the appellants. The appellants, Sawyer, Wallace & Co., during the year 1886, loaned or advanced to the husband of Mrs. Goodpaster a large sum of money, leaving a balance due them, after deducting all credits, in a sum exceeding \$11,000. At the date of the assignment there was a lien upon the land that had been conveyed by the joint deed to the husband and wife, and the ground of contention by Sawyer, Wallace & Co. is that the one-half of the tract of land conveyed by the joint deed to the wife should contribute to the discharge of the lien note. If this is done, it increases the assets of the estate of the husband, who is now dead, and lessens the interest of the wife.

The determination of the question depends upon the construction given the conveyance. That instrument, written in the usual form, contains this clause: "It is understood that when seven thousand one hundred and twenty-five and 75-100 dollars shall have been paid on the foregoing tract of land, then Nannie L. Goodpaster is entitled to the one-half of said tract or tracts of land. Should the land be sold at any time, the said Nannie L. Goodpaster will, at her option, be entitled to the aforesaid sum of money, or the one-half of the proceeds of such sale of the land." This conveyance was executed on the 1st of April, 1880,—some six years before the debt to the appellants was created, and at a time, so far as appears from this record, when no creditor intervened who could complain of this settlement on the wife, even if the consideration was only that of love and affection. There is no fraud alleged, and no one complaining of the judgment below, except the appellants, who became creditors long after the right of the wife had been perfected by the payment of the sum upon which depended the extent of the wife's interest. It is argued that the husband had received, or was to receive, the patrimony of the wife.

amounting to the sum mentioned, and for that reason the husband, to secure the wife, had the deed executed, vesting her with an interest when her money found its way into this land. This argument cannot be considered, because the question arises on the demurrer; and, if the wife's interest is subject to the lien at the instance of this creditor, it must be made to contribute. We think it manifest that neither the husband nor the husband's creditors, whose debts were created after the conveyance, could disturb the right of the wife, in the absence of fraud on the part of the husband; and, if the wife's estate had contributed to pay for this land, under an agreement that it should be conveyed to the wife, no fraud would be presumed in favor of existing creditors. Some \$10,000 of the purchase money on the land had been paid by the husband, and, by the express terms of the conveyance, when \$7,125 was paid, the wife then became the owner of the one-half of the land, that being one-half of the purchase-money notes. What right, then, has a creditor, whose debt originated six years after the conveyance was made and recorded, to complain? The recital in the deed was not only to evidence the extent of the wife's interest, but to vest her with the title, so far as the husband was concerned, free of any incumbrance or lien; and, if the holder of the purchase-money note is entitled to enforce his lien on the wife's interest, (a question not before us,) then the chancellor would require him to subject first the interest of the husband; for it is plain, upon a reasonable construction of this conveyance for the benefit of the wife, that the husband intended she should hold the one-half of the land free of any incumbrance. Nor do we hold or decide that the vendor has or not a lien, as the parties representing that branch of the case are not before the court. The judgment denying the right of the creditor to subject this interest of the wife, or to require the vendor of the land, or his representatives, to do so, must be affirmed.

#### O'BRIEN v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 5, 1889.)

MURDER—EVIDENCE—INSTRUCTIONS—ARGUMENTS OF COUNSEL.

1. On a trial for murder, where it appears that deceased was defendant's wife, but that their marriage had not been made public, and that deceased was *enclinte* by defendant, letters from defendant to deceased are admissible in evidence to show the relations between them.

2. Letters from defendant to two other women, showing his relations to them, he being engaged to be married to one, and intimate with the other, who was a prostitute, are admissible to show motive for desiring to be rid of his wife.

3. Where the entire evidence shows a previously formed purpose to kill deceased, and there is no evidence that it was the result of a sudden passion, no instruction as to manslaughter is necessary.

4. It is not improper to show defendant's business at the time of the killing.

5. Under Crim. Code Ky. § 288, providing that, on verdicts of conviction in felony cases, "the

court shall not pronounce judgment until two days after the verdict is rendered," it is error to pronounce judgment on Monday on a verdict rendered on Saturday, as Sunday, not being a judicial day, should not be counted.

6. But such error is not prejudicial, where defendant's motions in arrest of judgment and for new trial have been made and overruled before judgment is pronounced.

7. Crim. Code Ky. § 220, providing that the prosecuting attorney may "state to the jury the nature of the charge against the defendant, and the law and the evidence upon which he relies in support of it," does not authorize him to read to the jury, in his opening statement, writings which he intends to offer as evidence.

8. But such action is not reversible error, where the writings are afterwards offered in evidence and found competent.

9. Objections to statements of an attorney in argument to the jury cannot be raised for the first time on appeal.

Appeal from circuit court, Fayette county.  
"To be officially reported."

Thomas O'Brien, Jr., appeals from a conviction of murder.

Watts Parker, Jas. H. Mulligan, and B. P. Farrell, for appellant. P. W. Hardin and C. S. Brouston, for the Commonwealth.

HOLT, J. Bettie Shea was a servant girl of good character. She occupied a room over the kitchen, while the family of her employer slept in a remote part of the house. She was last seen alive by them upon the afternoon of Sunday, March 31, 1889. Early the next morning, they found her dead body lying upon the floor of her room, partially disrobed, as if she were about retiring, when cruel and murderous blows, one upon the other, and, from appearances, from six to fifteen in number made with some blunt instrument, crushed in her skull, and made some one the murderer of a helpless woman. We may presume, at the outset, that the killing was not for gain, as nothing of value was taken. She, doubtless, had little to tempt in this direction. It was done between 8 o'clock at night and 4 o'clock of the next morning. The mantle of darkness hid the doer. Under its cover a deed of blood was done, so horrifying in character as to be almost nameless, —as the witches said to Macbeth of King Duncan's murder, "a deed without a name." The family heard no noise, and knew nothing of it until morning. This is accounted for by the fact that the room of the victim was isolated; the entrance to it being by a side door. Moreover, the wind and storm prevailing made it a fit night for such a deed. The appellant, Thomas O'Brien, Jr., has been found guilty of it, and his punishment fixed at death. The evidence is altogether circumstantial; but a jury of his vicinage have passed upon it, and found he did it beyond a reasonable doubt. In our opinion, it points unmistakably to him, and fully sustains the verdict. Moreover, his motive is clearly shown; and a careful reading of the record is not only convincing of his guilt, but points in no degree, even to the extent of suspicion, to any other person as the guilty party. The deceased was not only his third

cousin, but his wife. They had been secretly married, under assumed names, in October, 1888, and at the time of her death she was *enroute* by him. He had been in the habit of privately visiting her as her husband from the time of their marriage, but it had been kept a secret. In the mean time he had not only become intimate with a prostitute, but had engaged himself to marry an Indiana girl in May, 1889. When the deceased was killed, the appellant knew, from her condition, that their marriage could not be much longer concealed. He also knew that the time when he had promised to marry the Indiana girl was fast approaching. He may also have thought that publicity of his marriage, and which he testifies he believed to be valid, might interfere with his relations with the prostitute. Reason existed, therefore, why he should desire to rid himself of the deceased. Motive was not wanting.

Before his marriage, and in June, 1888, he told one party that he was courting a girl, and she would not submit to his desires. In January following, he told the same person that the girl was with child by him, and asked how to get rid of it, saying he had to do so or marry the girl, and he did not intend to do the latter, if he had to get rid of both. He also told another party of the girl's condition, and that he wished to get rid of the child. In February, he applied to a physician for this purpose, telling him that the girl was the deceased; but, a few days afterwards, told him that she did not claim he was the father, and he was going to let it rest. In the pocket of the dress which the deceased had evidently worn the day preceding her death was found an undated note from the appellant, saying: "Will be up to-night as soon as possible." He was arrested the day succeeding the killing; and upon the next day there was found in a bureau drawer in the room where he had been arrested a metallic knuck, calculated to make such wounds as were found upon the head of the deceased, if one could be found cruel enough to do so. There was a red shade upon it, but no microscopical examination was had to determine certainly whether it was blood or other substance. A witness says she saw the appellant talking with a woman at the gate of the house where the deceased lived at about 8 o'clock upon the night of the killing. She did not know the woman, but from her description of her dress it was the deceased. Two witnesses testify that the appellant said, when told upon the day of his arrest that it was for killing Bettie Shea: "I was with the girl last night, but I did not do it." These and other circumstances to which we might allude, banish all doubt of the appellant's guilt. His evidence as to an *alibi* is faulty. He fails to account by any witness whatever where he was for at least an hour upon the night of the killing. This would have afforded him ample opportunity to have done it. Moreover, allowing that all of his witnesses are credible, yet they can very readily

be mistaken as to the time when, and for how long, they saw him upon the fatal night. It matters not, however, how guilty the appellant may be, nor how great the crime, he is still entitled to a trial according to law. His life cannot be otherwise taken. It is one of the highest and most sacred duties of this court to see that every person charged with crime, however heinous, is thus tried, although, by so doing, it may subject itself, for the time being, at least, to public censure and popular disapproval. Any other course would endanger the life and liberty of every one, bring discord and anarchy, and destroy that confidence with which the citizen appeals to the judiciary, even in times of popular excitement and violence, for the protection of his rights.

We deem it unnecessary to notice all the grounds relied upon for a reversal. Upon the hearing of the motion for a continuance, the state consented that the statement contained in the affidavit of what the absent witness, if present, would prove, might be taken as true, and so read to the jury. It was decided by this court in *Pace v. Com.*, ante, 271, (October 17, 1889,) that this was all a defendant could demand. The appellant cannot rely in this court upon any error of the lower court in acting upon a challenge to a juror for cause. Section 281 of the Criminal Code forbids it.

Complaint is made that the attorney for the commonwealth, in his opening statement to the jury, said, in substance, that neither the accused nor his counsel opened their mouths at the examining trial to tell who did kill Bettie Shea, if the accused did not; meaning, as is claimed, that the appellant did not then testify. We hardly think the statement admits of this construction, but in any event the court expressly excluded its consideration in this light by the jury. The attorney, in his opening statement, also read to the jury some notes written by the appellant to the deceased, and also the correspondence between the accused and the Indiana girl whom he had promised to marry, and the prostitute already named. This was improper. Section 220 of the Criminal Code provides: "The attorney for the commonwealth may then state to the jury the nature of the charge against the defendant, and the law and evidence upon which he relies in support of it." This should not be construed to authorize him to read to the jury writings which he subsequently intends to offer as evidence. It would give the state an undue advantage. When offered, the court might rule them incompetent as testimony, or the state's attorney might finally conclude not to offer them, and yet it would be difficult to efface the probable impression from the minds of the jurymen. They should not be read to the jury until regularly offered, and shown to be competent as evidence. The statement to be made to the jury is that of the attorney, based only upon his word as to the law and evidence of the case. Where, however, the

writings are subsequently offered in evidence, this action of the attorney for the state would not be ground for reversal, provided they were competent as evidence; and this brings us to the consideration of the two principal questions involved in this appeal: *First*. Were the letters competent? *Second*. Should an instruction as to manslaughter have been given to the jury?

Necessarily, where the commission of crime can be shown only by proof of circumstances, the evidence should be allowed to take a wide range; otherwise the guilty person would often go unpunished. It is true there must be some connection between the fact to be proven and the circumstances offered in support of it; yet any fact which is necessary to introduce or explain another, or which offered an opportunity for any transaction which is in issue, or shows facilities or motives for the commission of the crime, may be proven. Even evidence tending to prove a distinct offense is therefore admissible, if it shows facilities or motives for the commission of the one in question. The purpose is to weave a net about the guilty; and often this can no more be done by proof of a single circumstance than the building of a house with a single brick. The notes written by the accused to the deceased were certainly competent evidence, if for no other reason than that they showed the relations existing between them. The correspondence between the accused and the other two women was, we think, equally admissible. Some of the letters of the accused to the prostitute contained statements which might fairly be considered by the jury as referring to the killing of the deceased, and facts connected therewith. But all of them, including the correspondence with the Indiana girl, showed the existence of a relation between the accused and these two women which might be broken off or interfered with by his inmarriage to the deceased becoming public. They exhibited a motive why he should desire to rid himself of his wife and their unborn offspring. The correspondence with the Indiana girl shows that he had engaged to marry her in May, 1889; and this he knew he could not do safely with a living wife.

The jury were properly instructed as to murder. The court refused to give any instruction as to manslaughter. It is not the duty of the court in every case of homicide, to instruct as to both murder and manslaughter. Instructions must be based upon the evidence, and given to suit the case in hand. In this instance the accused was denying the killing altogether. He testifies that he did not do it. Waiving this fact however, and conceding that the plea of "not guilty" authorized him to rely upon every ground of defense, and to be entitled to an instruction based upon the idea that, if he did kill the deceased, yet, if it was done in sudden passion, he was only guilty of manslaughter, yet he is a man, and she was a weak, defenseless woman. Motives are shown upon his part for killing her. Preparation with an adequate

weapon was made. The killing was secret in character, and neither the clothing nor person of the accused showed the least mark of any struggle. It is evident her death resulted from a previously formed purpose to kill her. There is not only no evidence tending to show that it was the result of passion or sudden quarrel, but the entire testimony is utterly in conflict with such a supposition. It cannot reasonably be so supposed. No instruction as to manslaughter should therefore have been given; and it was proper for the court, in its instruction as to murder, to define that crime. Under the instructions, if the jury did not find the accused guilty beyond a reasonable doubt of murder, they were bound to acquit him altogether.

We cannot consider the point, now for the first time made, that the attorney for the state referred, in his argument to the jury, to certain matters which were not in evidence. No objection was then taken to it, and this was necessary to our consideration of the question.

It was not improper to prove what business the accused was following at the time of the murder; and the fact that he had once killed a man was brought out by the commonwealth asking, upon cross-examination, for the remainder of a statement by a party, a portion of which the defense had already put in evidence by the main examination.

The appellant was convicted on Saturday, and sentenced on the following Monday. The Criminal Code (section 283) provides: "Upon verdicts of conviction in cases of felony, the court shall not pronounce judgment until two days after the verdict is rendered, unless the court be about to adjourn for the term." This means judicial days, and Sunday should not be counted. The day of the rendition of the verdict is to be counted as one of the two days, because the time is to be counted from the performance of that act; but, as it says the judgment shall not be pronounced until two days thereafter, the appellant should not have been sentenced before Tuesday, unless the court was about to adjourn for the term. The appellant's motions in arrest of judgment and for a new trial had, however, been made and overruled before judgment was pronounced, and further delay could in no way have been beneficial to him. It was not, therefore, a prejudicial error.

Complaint is made that the appellant did not have a fair trial; that throughout it he was dealt with unfairly, and that the verdict is the result of prejudice and the indignation of the community. Undoubtedly, the public were aroused by the horror of the crime. It would have been strange had this not been so; for, dismal as was the night when the deed was done, it made the night darker. No change of venue was asked, however. A jury was obtained without the accused exhausting all of his peremptory challenges, and he has been defended by able counsel, who as this record shows, have done all within their power which was honorable to save the life of a doomed man. The record fails to dis-



close that a fair trial was not afforded him. He has been found guilty of a crime, committed for reasons which seldom prompt to murder in our state. Unfortunately, lives are taken within our border through sudden passion, or from a false notion of what true honor and courage demand; but it can be said to our credit that it is done but seldom from motives of gain, or such as actuated the accused, when, instead of being a protector, as he had promised, he, with the night winds mocking her cries, cruelly and brutally took the life of Bettie Shea and her unborn child. Judgment affirmed.

**ST. LOUIS, I. M. & S. RY. CO. v. PUREFOY.**

(*Supreme Court of Arkansas.* Nov. 9, 1889.)

Appeal from circuit court, Nevada county; C. E. MITCHELL, Judge.

*Dodge & Johnson*, for appellant. *C. C. Hamby*, for appellee.

**PER CURIAM.** There is testimony to sustain the verdict. The charge of the court was favorable to the company. There is no reversible error, and the judgment is affirmed.

**LEVY v. SALE et al.**

(*Supreme Court of Arkansas.* Nov. 16, 1889.)

**RECOUNPMENT—PLEADING.**

In an action by a mortgagee in a mortgage for future advances, in pursuance of a contract, for advances made by virtue of the same, an answer which sets up a breach of the contract by way of recoupment, but which alleges no facts upon which a recovery for more than nominal damages could be sustained, and which shows a probable excuse for the breach, is demurrable.

Appeal from circuit court, Jefferson county; JOHN A. WILLIAMS, Judge.

Action by W. B. Sale & Co. against W. J. Levy on his note and on an open account. The court sustained a demurrer to the answer, and from the judgment thereon defendant appeals.

*N. T. White*, for appellant. *J. W. Crawford*, for appellees.

**COCKRILL, C. J.** Where a mortgage is executed to secure to the mortgagee the price of goods thereafter to be furnished, upon the demand of the mortgagor, and the mortgagee violates his contract after it is partially performed, the rule governing the rights of the parties under the contract is fully and concisely stated by Judge CAMPBELL, of Mississippi, in the following language: "We hold the contract evidenced by the deed of trust not to be an entire contract, but separable, and hence apportionable; so that the parties who furnished supplies under it are entitled to enforce their security *pro tanto*, subject to the right of the grantors in the deed of trust to have a reduction of the demand of the creditors, to the extent of any loss directly traceable to the breach of contract by the other party, and fairly within

the contemplation of the contracting parties, as a natural result from such breach of contract, and which could not, by reasonable effort, have been avoided by the parties disappointed." *Coleman v. Galbreath*, 53 Miss. 303. See *Petty v. Grisard*, 45 Ark. 117. The question here is, do the allegations of the defendant's answer bring him within the rule? The contract itself furnishes no guide for the measure of damages, and the recoupment by the defendant could be only nominal and inappreciable, unless the answer alleges an actual, substantial loss, arising from the violation of the contract. *Railway Co. v. Mudford*, 44 Ark. 439. It is not alleged that the same class of goods which the plaintiff had agreed to furnish could not have been purchased in the market; or that the mortgage which the defendant had executed to the plaintiff had hindered or impeded him in getting credit from others for such goods; or that he was without means, or other property to furnish a basis of credit, to purchase them, nor is any other fact alleged upon which a recovery of more than nominal damages could be sustained. Moreover, the answer alleges what was probably a sufficient excuse on the part of the plaintiff for refusing to furnish additional goods. The demurrer ought to have been sustained. Affirmed.

**BAZEMORE et al. v. MULLINS.**

(*Supreme Court of Arkansas.* Nov. 9, 1889.)

**MORTGAGES—EQUITY OF REDEMPTION—PURCHASE BY MORTGAGEE.**

Where conveyances, absolute on their face, are only intended as security for a debt which is also secured by chattel mortgages, but the latter are released on the parol agreement of the debtor to release his interest in the land, and it appears that the consideration for the promise is an adequate one, that the price of the land was fixed by arbitration, and that the transaction is in all respects fair, the debtor will not be allowed to invoke the statute of frauds in an action to cancel the deeds, but they will be left to carry the estate in fee as they purport to do.

Appeal from circuit court, Columbia county; C. W. SMITH, Judge.

*Marshal & Coffman*, for appellants. *J. M. Kelso and Smoots, McRae & Arnold*, for appellees.

**COCKRILL, C. J.** The conveyances which Mullins caused to be made to the appellants by way of security for his indebtedness were absolute in form. There is a conflict in the testimony as to what indebtedness they were intended to secure. Mullins' statement that they were intended to secure only the sum of \$250 which the appellants lent him in January, 1883, is not very probable, because the deed to the Baker tract was not executed until long after that indebtedness had been paid, according to his theory; and he took from the appellants a bond to convey to him the other tract upon the payment of \$900. in January, 1885, when it was estimated that that was the sum that would be due by him

on settlement at the close of that year. But in the view we take of the cause that question ceases to be material. Mullins had also executed chattel mortgages to secure all his indebtedness to the appellants. At the close of 1885, a settlement was reached by mutual agreement. The lands in dispute were valued at \$400. Mullins orally released to the appellants all further claim to them, and received a credit upon his account for that amount. He discharged the balance due upon his account by delivery of corn and payment of cash to the appellants, and received from them a receipt showing the full payment of all his indebtedness, and demanded and obtained satisfaction upon the record of his chattel mortgages. He took the chattels which had been released from the mortgages into Louisiana, and there disposed of them, retook the corn, and converted it to his own use, and now actively invokes the aid of a court of chancery to invest him with the title to the land. He alleges in his complaint that he had discharged his entire indebtedness to the appellants. It appears from his own testimony, however, as it does from all the other evidence in the cause, that the claim of payment alleged in his complaint is based solely upon the release of the lands, the delivery of the corn, and the cash payment made in the settlement above referred to. But if the lands are taken from the appellants, and their value, and that of the corn, withdrawn from the terms of the settlement, Mullins' debt will be in great part unpaid, but the security which the appellants held for its payment is gone, and Mullins cannot or will not restore it. It is manifest that it would be inequitable, under such circumstances, to cancel the deeds to the appellants, without first requiring Mullins to pay to them his entire debt. That would only require equity of him. *Anthony v. Anthony*, 23 Ark. 479; *State v. Morgan*, ante, 245.

But there is another consideration which puts a final *quietus* upon Mullins' claim for relief. His own testimony shows that, upon a fair settlement with the appellants, he released his interest in the lands to them for an adequate consideration, a part of which was the cancellation of securities which they held for payment of his debt, which was greater than the value the parties placed upon the lands. The law does not inhibit the mortgagee from purchasing the equity of redemption from his debtor, but demands the utmost fair dealing of him in the transaction. There is not a suggestion of unfairness or oppression in this case on the part of the appellants in making the settlement or taking the release. There is nothing to show that the lands were not taken at their fair market value. The price was fixed by arbitrators, one of whom was selected by Mullins, and the other by the appellants; and the proof shows that Mullins would not agree to any settlement whatever until the appellants consented to take the lands in part payment at the price fixed by the arbitrators. He does

not undertake to controvert these facts, but relies upon the statute of frauds to consummate his scheme. He argues that he has sold an interest in land by parol, and that the payment of the purchase money does not alone constitute a part performance of the contract sufficient to take it out of the operation of the statute. But it is a settled doctrine of equity never to lend its aid to one who invokes it for the purpose of perpetrating a fraud. Mullins is in that attitude. He induced the appellants to surrender to him the securities for his debt; and now, when the court cannot place them *in statu quo*, seeks to annul his compact, and leave them without land or security. In such a case the courts withhold their aid, and leave the deed, which is absolute in form, to carry the estate in fee, as it purports to do. *Peugh v. Davis*, 96 U. S. 332; *Trull v. Skinner*, 17 Pick. 213; 2 Washb. Real Prop. \*496, § 24. As was explained by Chief Justice SHAW in *Trull v. Skinner*, supra, the equitable interest of the party at fault is, in such case, divested, not by way of transfer, nor, strictly speaking, by way of release working upon the estate, but rather by an estoppel arising from the voluntary act of the party having the equitable interest, just as it is accomplished when one withholds his conveyances from record, and permits his grantor to convey to a *bona fide* purchaser without notice. The doctrine allowing a conveyance to absorb an interest in land which the conveyance alone did not convey, in order to prevent injury being done to one without fault, is of frequent application, and is illustrated in the cases of *Bramble v. Kingsbury*, 39 Ark. 131, and *Gill v. Hardin*, 48 Ark. 409, 3 S. W. Rep. 519. In the latter case, one who had executed an absolute deed, to have effect only as a mortgage, and who remained in possession of the land which he conveyed, was denied the aid of equity to assert his title against an innocent purchaser from the holder of the legal title, because the proof showed that he was not in position to ask equity. We make application of the same principle to the facts of this case. The decree will be reversed, and the cause remanded, with instructions to dismiss Mullins' cross-complaint, to cause the receiver to pass his accounts, and pay what he has collected to Bazemore & Harper, and to award them possession of the lands.

#### HICKEY v. THOMPSON et al.

(Supreme Court of Arkansas. Nov. 9, 1889.)

##### MARRIED WOMEN—CARRYING ON BUSINESS.

1. Debts incurred by a married woman in improving and cultivating her farm and raising crops, though her husband acts as her agent, are contracted in carrying on "business," within the meaning of *Manuf. Dig. Ark. §§ 4624-4626, 4630*, which authorize a married woman to "carry on any trade or business, and perform any labor or services on her sole and separate account," and provide that her earnings therefrom "shall be her sole and separate property;" that she may sue alone in respect thereto; and that judgments against her may

be enforced against such separate property the same as against that of a *feme sole*.

2. The objection that a note sued on was not due when the suit was commenced cannot be raised for the first time after trial.

Appeal from circuit court, St. Francis county; M. T. SANDERS, Judge.

*W. G. Weatherford*, for appellant. *Sanders & Watkins*, for appellees.

BATTLE, J. Appellees sued appellant, Jennie C. Hickey, on three several promissory notes, executed by her on the 14th of February, 1881, each for the sum of \$266.41, aggregating \$799.23, and bearing interest from the date of their execution. They allege that she was a married woman at the time when the debt evidenced by the notes was contracted, but that she had a separate estate, and was carrying on a trade and business on her sole and separate account, and that the debt sued for was for money, goods, and supplies advanced and sold to her for the maintaining and carrying on of her separate business of farming and planting, and were used by her in that way. She denied contracting the debt; pleaded that she was a married woman when it was contracted and the notes were executed; and denied that she was carrying on a trade and business on her sole and separate account. The issues were tried by a jury, and a verdict was returned in favor of appellees; and, her motion for a new trial having been denied, she appealed.

There was evidence adduced in the trial tending to prove that appellees sold and advanced moneys, goods, and supplies to be used and consumed in improving and cultivating a certain farm, and raising crops thereon; that, believing that the husband of appellant was the owner of the farm, and cultivating the same on his own account, they charged the moneys, goods, and supplies to him; that afterwards they discovered that the farm was owned, claimed, and cultivated by appellant; that she was engaged in the cultivation, and raising crops thereon, on her sole and separate account; that, in the borrowing of the money, and purchasing the goods and supplies, he was acting as her agent; and that when they discovered that fact they requested her to settle the account as her own indebtedness, and she did so by executing the notes sued on. If this evidence be true, were appellees entitled to recover judgment against her on the notes?

The validity of the notes depends upon her right to engage in farming. Did she have such right?

The statute expressly empowers a married woman to "carry on any trade or business," on her sole and separate account. It authorizes her to become something more than a trader, in the commercial sense. It says she may carry on any "business." The primary signification of the word "business" is employment; "that which employs time, attention, and labor." It is clear it was used in that sense in the statute; for it expressly

provides that she may carry on any trade or business, "and perform any labor or services, on her sole and separate account," and that her earnings "from her trade, business, labor, or services shall be her sole and separate property, and may be used or invested by her in her own name." It does not limit her right to engage in trade or business, but says she may carry on any trade or business. It follows, then, she may engage in farming. *Mansf. Dig. §§ 4624-4626; Netterville v. Barber, 52 Miss. 168; Snow v. Sheldon, 126 Mass. 332; Krouskop v. Shontz, 51 Wis. 204, 8 N. W. Rep. 241; Schouler, Husb. & Wife, § 309.*

*Walker v. Jessup, 48 Ark. 163*, cited by appellant in her brief, has no application to this case. In that case the defendant, who was a married woman, purchased lands at an administrator's sale, upon a credit, and executed her bond for the purchase money. The object of the suit was to recover a personal judgment against her on the bond, and a decree of foreclosure and sale. This court held that the plaintiff was not entitled to a personal judgment against her. The question involved in this case was not considered or discussed in that case.

The effect of the statute authorizing a married woman to "carry on any trade or business" on her sole or separate account is to invest her with all the rights, powers, and privileges of a *feme sole*, in respect to her separate business and the property invested therein, and subject her to the liabilities she would be subject to, in respect thereto, if she were unmarried. The right and capacity to purchase property in her own name, to be used about her separate business, is a necessary incident to the power conferred upon her to conduct the business on her separate account. It is unreasonable to suppose the intention of the statute, when it gave her this power, was to leave her under the common-law disability to bind herself by contract. The grant of the power, without words of limitation, necessarily carried with it the right to conduct business in the way and by the means usually employed in carrying on the same. Conceding her this power, her right to purchase on a credit cannot be doubted. Having this right, it necessarily follows that she can be compelled, through the courts, to abide by and perform such contracts to the same extent she could be if she were not married. To save any question upon this point, the statute expressly authorizes her to be sued alone in respect to her separate business, and provides that judgments recovered against her may be enforced against her sole and separate estate and property, to the same extent and in the same manner as if she were a *feme sole*. *Mansf. Dig. §§ 4625, 4626, 4630; Nispe v. Laparie, 74 Ill. 306, 308; Young v. Gori, 13 Abb. Pr. 13, in foot-note; Frecking v. Rolland, 58 N. Y. 422; Camden v. Mullen, 29 Cal. 564; Stew. Husb. & Wife, § 453.*

The fact that the moneys, goods, and supplies were charged, under a misapprehension of the facts, to her agent, does not relieve appellant of liability for the same. Appellees are entitled to judgment against her for the amount due therefor. This doctrine is well settled. Story, Ag. § 446, and cases cited; Mechem, Ag. §§ 695, 698.

The notes having been executed by appellant for moneys advanced and goods and supplies furnished to her, to be used in a business carried on by her on her sole and separate account, the presumption is the amounts thereof are correct. To the extent of her capacity to carry on a business on her sole account, she is subject to the presumptions in which the law indulges against those endowed with full capacity to act for themselves. But she is not estopped by the notes from showing that any part of them was given for a debt she could not legally contract, or for which her husband was solely responsible; and, if such a fact should be shown, appellees would not be entitled to a judgment for such part. The burden of proving the part for which she was not liable, if any, rested upon her. Having failed to make such proof, appellees were entitled to recover the full amount of the notes. *Klotz v. Butler*, 56 Miss. 337.

One of the notes sued on matured after the commencement of this action, and appellees recovered judgment for the amount due thereon. Appellant now insists that the judgment should be set aside on that account; but she did not avail herself of that fact as a defense against the recovery of the judgment, and only in her motion for a new trial objected to it, by saying that the verdict was excessive. She waived this defense, if it was a defense, and cannot take advantage of it after the trial.

Judgment affirmed.

*BLOCK et al. v. VALLEY MUT. INS. ASS'N.*  
(Supreme Court of Arkansas. Nov. 9, 1899.)

**MUTUAL BENEFIT INSURANCE—ASSIGNMENT.**

1. A provision in the insurance certificate of a mutual benefit society that "this certificate may be assigned, transferred, or set over, by and with the consent of the association, granted by its president or secretary," does not authorize an assignment by the insured, but by the beneficiary only.

2. In the absence of a statute making a distinction between a mutual insurance company and a mutual benefit society, the rights of one claiming insurance must be ascertained by the terms of the contract of insurance, regardless of the character of the company.

Appeal from circuit court, Cross county;  
J. E. RIDDICK, Judge.

*Sanders & Watkins* and *J. D. Block*, for appellants. *N. W. Norton*, for appellee.

**HEMINGWAY, J.** One Charles B. Guthrie obtained a policy of insurance upon his life from the Valley Mutual Insurance Company. It undertook, upon the conditions therein named, to pay to Mrs. Martha A. Guthrie, James M. Harvey, and Alice Guthrie \$1,000

within 90 days after proof of the death of Charles B. Subsequently, Charles B. and Mrs. Martha A. Guthrie assigned the policy to the plaintiffs, who thereafter paid all dues and premiums as they matured, according to its terms. Upon the death of the said Charles B., the plaintiffs claimed the amount due upon the policy, by virtue of the assignment; and the beneficiaries therein named, by virtue of the provisions of the policy. The court found that the plaintiffs acquired, by the assignment, the interest of Martha A. Guthrie, and no more; that they were entitled to recover her interest in the fund, and three-fourths of what they had advanced in keeping the policy alive; while James M. Harvey and Alice Guthrie were entitled to recover the balance. Judgment was rendered accordingly. As grounds for reversal, the appellants urge—*First*, that the insuring company is not a regular insurance company, but a mutual benefit company; *second*, that the policy of an insurance company differs from the certificate of a mutual benefit company in this: that the rights of the beneficiary in the one are vested upon its execution, while those rights in the other are subject to be divested, at any time until the death of the insured, by the substitution of another beneficiary. The record contains no part of the company's charter or articles of association, and but one clause of its by-laws. It is as follows: "The object of this association shall be for the purpose of mutually associating together a number of individuals into an agreement whereby the survivors mutually contribute for the relief of the representatives, legal heirs, or assignees of those of their number whom death may strike down." The policy sued on contains no reference to any other purpose than one of insurance, and provides the ordinary safeguards against the acceptance of bad risks, as well as against the continuance of risks accepted, unless the stipulated payments upon it are promptly made as they mature. These payments include "annual dues" and "mortality assessments," and a failure to pay either for 30 days after call effects a cancellation of the policy. It contains this clause, upon which appellant relies especially: "This certificate may be assigned, transferred, or set over, by and with the consent of the association, granted by its president or secretary."

The record discloses nothing further as to the character of the company. Upon this, the learned counsel for appellants say that they assume that it will be conceded to be a mutual benefit society. What feature is disclosed that does not belong to a mutual insurance company? The first by-law, in making a general declaration of its purpose, declares that it is to afford relief, but also declares that the relief will be given to "the representatives, legal heirs, or assigns of those of their number whom death may strike down;" and this is exactly what insurance companies are required to do. Yet this is

not benevolence, for it is undertaken for a stipulated profit, the continued payment of which is a continuing condition to its existence. If any other character of benevolence was contemplated by the company, the record does not disclose it. Certain it is that the policy exhibited contains no intimation of its existence. We have no statute distinguishing between insurance companies and benefit companies with insurance features. Such statutes have been enacted in other states. They define the properties of the latter that entitle them to privileges or exemptions not accorded the former. The distinguishing feature generally is that they contemplate gain, while these contemplate benevolence only. Within the scope of their benevolence is included, with many other fraternal objects, the providing of a fund to be paid upon the death of members, in which this is regarded as but an incident of the main object. Subjected to the tests made in those states, we have found no decision which leads us to think that the contract sued upon would be viewed in any other light, anywhere, than as an ordinary insurance policy. It exactly fits the definition of an insurance policy as made by Mr. Justice GRAY, which has been generally adopted as correct. *Com. v. Wetherbee*, 105 Mass. 160; *Nibl. Mut. Ben. Soc.* § 163. It is said that the character of the benefit association is dual: *First*, fraternal; *second*, and incidentally, financial. *Bac. Ben. Soc.* § 283. If the incident be eliminated from the case at bar, there is nothing left. That stamps it an ordinary insurance policy. *State v. Miller*, 66 Iowa, 26, 23 N. W. Rep. 241; *State v. Association*, 6 Mo. App. 163; *Farmer v. State*, 7 S. W. Rep. 220; *People v. Nelson*, 46 N. Y. 477. Moreover, we have found no case which recognizes any distinction between the mutual insurance and the mutual benefit society, except in states where the statute makes a difference. But, regardless of the character of the company, the rights of persons claiming insurance arises out of, and depends upon, contract, and must be ascertained and fixed by contract. Although the object of the company in entering into the contract may be benevolent, this purpose can import no new meaning to the unambiguous terms of a writing. When the courts are invoked, the contract measures the rights of one, and the obligation of the other, party; and relief must be granted, if at all, according to its terms. *Nibl. Mut. Ben. Soc.* §§ 163-165; *Bac. Ben. Soc.* § 304; *Holland v. Taylor*, 111 Ind. 125, 12 N. E. Rep. 116.

That the member of a mutual benefit society may change the beneficiary named in the certificate has been frequently held; not however, because of the character of the society, but because of the stipulation contained in the certificate expressly authorizing it. In most cases, such certificates as have been the subject of judicial discussion contained express stipulation that the beneficiary named might be changed; in others, the

articles of association or by-laws contain such provisions, and are, by the terms of the policy, made a part of it. The effect in each case is the same. If such a purpose was entertained in making the contract sued upon, it does not appear. The clause set out provides that the policy may be assigned. This does not mean that another beneficiary may be substituted by the insured, for substitution and assignment are quite different things. It simply intends that the beneficiary may assign his interest. The insured had no interest to assign. That was vested in the parties named. *Bliss, Ins.* § 318; *Bac. Ben. Soc.* § 292. He had no power of substitution, because none is reserved in the contract, or in the charter or by-laws of the association, incorporated into the policy. The learned counsel have shown very commendable industry in examining authorities, and equal skill in presenting them. We have carefully examined every case cited, and very many to which we have found references elsewhere. The result is that we are satisfied that the judgment of the circuit court is correct, and it is affirmed.

*WILLIS et al. v. McNATT et al.*

(*Supreme Court of Texas.* Nov. 12, 1889.)

ATTACHMENT—DAMAGES—MALICE—TRESPASS—JURISDICTION—REMARKS OF COUNSEL.

1. Attachment is wrongful where it appears that the affidavit on which it issued, which alleged that these plaintiffs were about to convert their property into money to defraud their creditors, was made by a person having no knowledge as to how plaintiffs conducted their business, and taking no steps to ascertain whether there was any ground for the writ; that plaintiffs' business was prosperous, and their mercantile standing was considered first class; that in conversation with defendants' agent, a few days before the writ issued, plaintiffs expressed their willingness to pay the debt, and suggested several arrangements as to how it could be done; and that, on the trial, this agent testified that the reason for issuing the writ was his apprehension that some other creditors might give defendants trouble, and that he intended to buy the goods at the sale, if he could get them cheap enough, the profits on such to go to defendants.

2. Defendants caused the writ to issue in G. county, directed to the sheriff of M. county, which they placed in the hands of their agent, who superintended the seizure and took possession of the goods. *Held*, that these acts constituted a trespass by defendants in M. county.

3. There being a dispute as to whether the property was sold under defendants' writ, or under an order of court issued on the application of subsequent attaching creditors, a verdict in plaintiffs' favor is supported by the officer's return, showing that, after applying part of the proceeds on an execution in favor of defendants he credited the balance on their attachment; other evidence also showing that a return of sale under the order was to be made at a certain date, but that the sale in question occurred thereafter.

4. Malice appears where the ground stated in the affidavit to procure the writ is known, or ought to be known, to be untrue by the attaching creditors, and plaintiffs may recover exemplary damages.

5. Since plaintiffs are entitled to interest on the value of the goods taken under the writ, the allowance of such interest by the jury does not render the damages excessive.

6. Language of counsel, provoked by that used

by the attorney of the opposite party, and which does not appear to have influenced the verdict, affords no ground for a new trial.

Commissioners' decision. Appeal from district court, Montague county; F. E. PINER, Judge.

*Stephens & Herbert and G. E. Mann, for appellants. Davis & Garnett, for appellees.*

HOBBY, J. The appellees, McNatt & March, brought this suit in the district court of Montague county, against P. J. Willis & Bro. for actual and exemplary damages resulting from an alleged wrongful and malicious attachment sued out and levied by the latter on the goods and merchandise of the former. The appellees, who were the plaintiffs below, alleged that the defendants, designing to oppress and harass plaintiffs, and destroy their business and credit, did on November 17, 1884, in the district court of Galveston county, file a suit against them, wherein they claimed that plaintiffs and one Morris were indebted to said Willis & Bro. in the sum of \$2,429.70; and on the same day said Willis & Bro. persuaded and induced one Thomas Lawson, as their agent, to make and file in said cause an affidavit for a writ of attachment, wherein is stated, as cause for such attachment, that said McNatt & March and Morris were about to convert a part of their property into money, for the purpose of placing it beyond the reach of their creditors; and that on the same day P. J. Willis & Bro. caused an attachment to be issued in said cause, directed to the sheriff or any constable of Montague county, Tex., and commanding said sheriff to forthwith attach enough of the property of said McNatt & March and Morris to make said sum of money and the costs of said suit. It is further alleged that this affidavit was untrue, and the attachment sued out was for the purpose of injuring or harassing plaintiffs. That appellants knew said affidavit to be untrue, but procured the same to be made. That said attachment was immediately placed by said Willis & Bro. in the hands of one Diehl to deliver to said sheriff of Montague county, Tex., for the purpose of having the same levied upon the property of said McNatt & March and Morris; and that said Diehl was then and there instructed by said Willis & Bro. to superintend the execution of said writ for them; and that said Diehl on November 19, 1884, acting under and representing P. J. Willis & Bro., entered the store-house of plaintiffs in Burlington, Montague county, Tex., and then and there unlawfully aided, assisted, and abetted said sheriff in seizing, taking, and detaining, under said writ of attachment, plaintiffs' entire stock of goods, of the alleged value of \$15,000; and that after seizing said goods said Diehl took and converted to his own use, under instructions from appellants, goods to the value of \$12,500. This levy, it was alleged, was made upon goods largely exceeding in value the amount called for in the writ of attachment;

which excessive levy was caused by said Diehl acting with full authority from appellants. That said goods were wrongfully held by the sheriff, directed by said Diehl, without any authority, and were sacrificed for the sum of \$6,171.33. And plaintiffs' damage was laid at \$8,000. It was also alleged that the goods were damaged by the manner of handling, moving, and selling the same, under the direction of Willis & Bro. Plaintiffs further alleged that at the time of the suing out and levy of said writ they were merchants in high standing and good credit, doing a large business and making \$5,000 per year, which business was destroyed by reason of said levy; claiming \$10,000 damages therefor, and also claiming exemplary damages to the extent of \$10,000. The defendants denied that any trespass was shown in Montague county, which gave the district court of that county jurisdiction over them; alleged that said writ was legally levied; was not excessive, because other writs were in the hands of the sheriff; and alleged that the attached goods were sold under an order of sale from the county court of Montague county, under a subsequent levy on the same property, under a writ of attachment in another suit. Defendants denied that there was any abuse of the writ sued out by them. They further alleged that before the suing out of the writ of attachment they had obtained a judgment against plaintiffs in the district court of Galveston county, Tex.; and that an execution was issued on said judgment on the same day that said attachment was sued out; and that the goods of McNatt & March were first levied on by virtue of said writ of execution; and that on the same day, the 19th of November, 1884, other attachments were levied upon said stock of goods; and that on November 20th an order of sale was issued out of the county court of Montague county, under one of said other attachments; and that the goods of McNatt & March were sold by virtue of said execution from Galveston county, and under said order of sale, and not under the attachment sued out by defendants. Plaintiffs denied that the sale was made under the order referred to, and say that the execution and attachment were levied on the goods at the same time; that the order of sale was illegal and void; that, after selling a sufficient quantity of the goods to satisfy the execution, the remainder was sold, without authority of law, under defendants' direction. There was a verdict and judgment for the plaintiffs below for the sum of \$5,894.37 actual damages, and \$2,750 exemplary damages.

The questions raised by the assignments are: *First*, That, under the charge and the evidence as to the plea in abatement, there was no jurisdiction. In other words, the position assumed by the appellants is that no such trespass was shown to have been committed by them, or under their authority, as would give the district court of Montague county jurisdiction, as to them, in this case. From the evidence in this case, it cannot be

seriously contended that there was any legal cause for the issuance of the writ of attachment. It was sued out upon the affidavit of Thomas Lawson, made at Galveston, who was one of appellants' agents. He had never been in Montague county, where appellees conducted their business, and did not know them, and does not appear to have taken any steps in the direction of ascertaining whether there was any ground for the writ. The affidavit stated that McNatt & March "were about to convert a part of their property into money, for the purpose of placing it beyond the reach of their creditors." Appellees were in debt, but it is shown by the facts that they were doing a prosperous business, and the undisputed evidence is that they were promptly and conscientiously applying the proceeds of their business to the payment of their debts, and that in a reasonable time they would be able to have liquidated all. Their business was prosperous, and their mercantile standing and capacity was considered first class. A few days prior to the issuance of the writ, Diehl, the authorized agent of appellants, had a conversation with them relating to the debt then due appellants. He was then informed by appellees that they were unable to pay it at that time, owing to the scarcity of collections and the condition of the crops, but that they would be able to do so if time was given them. They proposed to sell their entire stock of goods to appellants for 90 cents on the dollar in payment of their debt, and the balance which might be due them above the debt they desired appellants to pay to their other creditors. This offer was declined, as was an offer by appellees to have an agent of appellants placed in charge of the store and goods, with authority to apply the proceeds of sales to the liquidation of the latter's debt. Having a full knowledge of this desire on the part of appellees to pay the debt, and their willingness to make the above arrangements, looking to the consummation of that object, appellants sued out the writ. The record discloses no fact which authorized appellants to believe that the ground existed upon which the affidavit was made; on the contrary, appellees' conduct repelled the idea that they were "converting any part of their property into money, for the purpose of placing it beyond the reach of their creditors." The reason given by the agent, Diehl, for issuing the writ was the apprehension that some other creditor might give appellees trouble. If this was the motive which prompted the attachment, it not only afforded no defense for the wrongful issuance of the writ, but it would tend strongly to show, where the affidavit was untrue, that the affidavit was recklessly made, and the affiant did not believe it to be true when made, but sued out the writ for the sole purpose of securing a preference over some other creditor. *Carothers v. McIlhenny*, 63 Tex. 143. In addition to these circumstances, it was shown by Diehl, who was the traveling agent and financial adjust-

er of appellants, that he "intended to buy the goods, at the time the attachment was issued, provided he could get them cheap enough,—intended to buy them for as little as he could get, and afterwards sell them for all he could get, and Willis & Bro. would make the profit." He attended the sale, bid \$5,500 for the entire stock, and demanded that they should be knocked off to him in bulk. In case he "had bought, he had made an arrangement by which he was to sell them, and take a \$7,500 note in payment, and the balance he expected to be paid in money, or otherwise secured."

This agent, influenced by these motives, was sent to Montague county to levy the writ. He superintended the seizure, entered appellees' store, and took possession of the goods, and appropriated to his own use goods of the value of \$12,500. If these acts had been committed in person by appellants, they would have constituted a trespass in Montague county, for the redress of which jurisdiction would have attached in that county. It is urged that they directed no act, the commission of which gave jurisdiction to that county. The rule which applies to this feature of the case is stated by Judge Cooley as follows: That which the superior has put the inferior in motion to do must be regarded as done by the superior himself, and his responsibility is the same as if he had done it in person. And it is not limited to cases where the act is directed by the superior; for, so restricted, it would be of but little moment. He is liable for the servant's acts not only when they are directed by him, but when the scope of his employment or trust is such that he has been left at liberty to do, while pursuing or attempting to discharge it, the injurious act complained of. It is not merely for the wrongful act he was directed to do, but those he was suffered to do, that the master must respond. Cooley, Torts, 533. The application of this doctrine to the present case would make appellants liable for the acts of their agent, Diehl. These acts, together with the unauthorized sale of the goods under the writ of attachment in Montague county, which will be more fully explained hereafter, constituted a trespass in that county, for which a civil action in damages would lie. In so far as the question is involved, whether the facts disclosed by the record gave jurisdiction to the district court of Montague county, where the writ was levied, we are of opinion that it is a stronger case in its facts, supporting the jurisdiction of the county where the writ was levied, as to the appellants, than was the case of *Hilliard v. Wilson*, 65 Tex. 286, upon the same point. We are consequently of the opinion that the verdict is not, as is contended in the assignment, contrary to the evidence, because it fails to show such facts as would give the court jurisdiction over appellants.

What we have thus far said disposes also of the eleventh assignment, complaining of



the court's action in refusing a special charge to the effect that the "acts of Diehl, although having general authority from appellants, would not bind them by any acts of his in taking," etc., "any part of the goods under the writ, unless he had special authority from appellants," etc. This charge we believe to have been properly refused; and the general charge, containing the converse of the proposition, we think was rightly given.

The next question presented by the assignments is that the verdict is contrary to the evidence, because the testimony did not show that there was any abuse of the writ of attachment by appellants in making the levy; and that the sale of the goods was not made under said attachment, but under an order of sale issued out of the county court of Montague county. To the appellees' claim that the sale of the goods was made without authority, it was replied by the appellants that a judgment had been obtained by them in the district court of Galveston county upon two iron-clad notes, amounting to \$2,989.85, upon which execution issued, and was levied on the property of appellees at the same time the attachment was levied, and that the goods were sold under this execution. Appellees, in response to this, say that, after sacrificing and selling a part of the goods and satisfying the execution, the balance was sold, without any authority, under the attachment, and applied thereto. The sale of the balance of the goods, appellants claim, was made by virtue of an order of sale issued from the county court of Montague county. The proof bearing upon this branch of the case establishes clearly that the sale was made, under the attachment, four months prior to any foreclosure of the attachment; and the officer's return upon both of these writs shows that the sale was made under them. It appeared from his return of the execution that the goods levied on—the entire stock—brought \$6,171.33; that the costs amounted to \$1,041.52; leaving a balance of \$5,129.81, all of which was remitted to appellants, the execution for \$2,989.85 being satisfied, and \$2,139.96 being credited on the attachment. The return of the officer disclosing these facts was at least *prima facie* evidence, as between the parties to this suit, that the sale of the goods was not made, as claimed by appellants, pursuant to any order of sale, but under the execution in connection with the attachment. *Freem. Ex'ns*, § 364. If the verity of the return could be, as between the parties, questioned, still it is apparent, from other evidence in the case, that the sale was not made, as claimed by the appellants, under the order of sale. This order was issued by the county judge upon the application of the Gausse-Hunicke Hat Company, which had levied a subsequent attachment upon the property. (Several writs had been levied on the same goods after the seizure under appellants' writ.) That there was no sale under this order is established by the fact that the order required the return of the sale by the first Monday in January, 1885,

whereas, the sale of the property was not completed until the 15th January, 1885, two weeks after the order was *functus officio*. Again, there was no deposit of the money derived from the sale in court, and nothing done in connection with the sale, in compliance with article 174 of the Revised Statutes, regulating such sales. It is obvious, from the evidence, that appellants' defense to the charge that the sale of the property after the execution was satisfied was unauthorized,—that it was made pursuant to the order of sale referred to,—is not supported by the facts. The authority of the officer, who was acting under appellants' direction, having ceased when the execution was satisfied, the further sale under the attachment, and the application of the proceeds to it, was a trespass in Montague county, for which appellants were liable in damages in such county. The sale under the writ without authority was such an abuse of it as authorized, under the charge of the court under this feature of the case, a verdict for the appellees.

It is assigned as error that the verdict is excessive, in that it gives exemplary damages, when there was no malice, express or implied, shown. The verdict was for damages of this character in the sum of \$2,750. It is well understood that, when this process is maliciously sued out, such damages are recoverable. With reference to this assignment, it would seem to be only necessary to say, as we have before stated, that there was no foundation whatever for the writ. The fact that the ground stated in the affidavit, that appellees "were about to convert a part of their property into money, for the purpose of placing it beyond the reach of their creditors," was untrue, was known, or should have been known, to appellants. That this was sufficient to authorize the verdict was settled in *Jacobs v. Crum*, 62 Tex. 416. The apprehension that some other creditor might attach, afforded no sufficient reason for suing out the writ, but rather indicated a reckless disregard of appellants' rights, in connection with all the facts of the case. These circumstances, together with those heretofore mentioned, were sufficient to establish the fact that the writ was wrongfully and maliciously sued out. Such being the case, we cannot say the verdict was excessive.

The remarks of counsel which are called to our attention by the ninth assignment, and which were to the effect that "P. J. Willis & Bro. had a man at Galveston whose name is Lawson, and who made the affidavit against McN. & M. for the attachment, and who is paid by W. & Bro. to swear for them in obtaining attachment writs," is not unsupported by the evidence in the record. The further language of appellees' counsel below objected to, is as follows: "Gentlemen of the jury, Mr. ——— [counsel for appellants] told you that McN. & M. kept a place of gaming—a gambling hell—in the back part of the upper room of their store, etc.; but I tell you that the mercantile firm of W. & Bro. of Gal-

veston is 40 miles nearer hell than any place I know of." It appears from the language used that it was provoked by language from the counsel for appellants; and in such case it has been held that it will not afford ground for reversal, alone. Moreover, in this case it does not appear to have influenced the verdict. The remaining language complained of we do not think could have had any appreciable effect upon the cause.

The only assignment remaining which we think necessary to be considered is, in effect, that the verdict for actual damages is excessive, because, as claimed by appellants' brief, under the evidence, the highest value of the goods, which afforded the basis of the verdict, for such damages was only \$4,591.50, whereas the verdict was for the sum of \$5,394.37, actual damages. According to this estimate of the appellants, the excess would be \$702.77. Looking to this statement of the appellants, or to the evidence in the case, as to the value of the goods, the supposed excess is accounted for by the allowance of interest on their value at the rate of 8 per cent., and to which the appellees were entitled as a part of the actual damages found by the jury. There being no error in the record, we think the judgment should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

**WILLIS et al. v. YATES.**

(Supreme Court of Texas. Nov. 19, 1889.)

**APPEAL—DECISION—MODIFICATION.**

Where it appears from the record that a garnishee has sold the goods in controversy since the writ of garnishment was served on him, a judgment entered in the supreme court on the theory that the goods were still in his possession will be modified.

On motion for rehearing. For report of former opinion, see ante, 232.

*W. B. Abney and Fisher & Townes*, for appellants. *Matthews & Wood*, for appellee.

STAYTON, C. J. It appearing from the record that since the writ of garnishment was served on appellee he had sold the goods in controversy, and therefor received the sum of \$3,300, and it being thus apparent that he cannot deliver the goods to the proper officer, the motion to reform the judgment heretofore entered in this court (ante, 232) will be granted, and judgment now entered reversing the judgment of the court below, and here rendering judgment in favor of appellants for \$3,300, with interest thereon at the rate of 8 per cent. per annum from November 18, 1887, together with their costs in the court below and in this court. It is so ordered.

**TEXAS TRUNK RY. CO. v. JOHNSON.**

(Supreme Court of Texas. Nov. 19, 1889.)

**INJURIES TO PASSENGERS—INSTRUCTIONS.**

1. Where there is evidence, in an action for injuries sustained while traveling on a railroad train

which was derailed, that the injuries might have been received in a subsequent fall from a wagon, and the charge of the court clearly informs the jury that in estimating damages they are to take into consideration only such injuries as were caused by the derailment, further instructions on that point are properly refused.

2. Where there is evidence that, while the track was not in good condition, trains might be run on it, at a low rate of speed, with reasonable safety, and that at the time of the accident the train was running at a greater rate of speed than was allowed by the orders of the company, and that the wreck might have been caused by this, it is error to refuse to instruct the jury that if they find from the evidence that the injury sustained by plaintiff was the result of fast running of the train, and that the train was so run against the orders of the superior officers, and against the regulations of the company, then plaintiff can only recover actual damages.

3. The liability of a railroad company for exemplary damages does not depend on its ability to keep its road in such condition that it can be safely operated.

Appeal from district court, Kaufman county; ANSON RAINEY, Judge.

*Leake, Shepard & Miller and Mantion & Huffmaster*, for appellant. *Woods & Cunningham*, for appellee.

STAYTON, C. J. Appellee was injured while traveling on appellant's train, which was derailed, and seeks to recover damages, actual and exemplary. Appellant admitted its liability for such actual damages as might be found, but contested its liability for exemplary damages.

The evidence tended strongly to show that appellee's right arm was fractured, and its connections injured; but there was some testimony tending to show that these injuries may have been received in a subsequent fall from a wagon. The charge of the court clearly informed the jury that in estimating damages they would take into consideration only such injuries as were caused by the derailment. This charge was such that no juror having ordinary intelligence could have misunderstood it, and we are of opinion that the court did not err in refusing further instructions on that point. The practical effect of giving the charge requested, drawn as it was, after the court had given a proper charge, would have been to divert the mind of the jury from some of the issues of fact raised by the evidence, if not to induce the jury to believe that the court was of the opinion the evidence was not sufficient to show that the particular injury to which the charge referred was caused by the wreck.

There was evidence tending to show that, while the track was not in good condition, trains might be run on it at a low rate of speed with reasonable safety, and that the rules of the company required its employees not to run trains at a speed of more than 12 miles per hour. There was evidence, also, tending to show that the train was running at a rate of speed greater than allowed by the orders of appellant at the time of the accident, and that the wreck may have been caused by this. Under this state of facts, appellant asked the following instruction: "The court

charges the jury that, if they find from the evidence that the accident by which plaintiff sustained the injuries complained of was the result of fast running of the train, and that the train was so run against the orders of defendant's superior officers, and against regulations made in that respect by defendant, then, in that event, plaintiff will not be entitled to recover more than his actual damages in this suit." This was refused. A master is liable for actual damages for an injury resulting from the negligence of his servant, in the course of his employment, even though the act be in direct violation of the master's orders; but the same rule does not apply with reference to exemplary damages. If appellant's railway could be operated with safety at the rate of speed prescribed by it for the regulation of employes, then an injury resulting from a violation of such orders cannot be attributed to the gross negligence of appellant, nor to its indifference or disregard for the safety of passengers. Such gross negligence, indifference, or disregard for the safety of passengers must exist, to render the master liable for exemplary damages; and the charge requested should have been given.

The third assignment of error is that "the court erred in refusing to allow defendant to prove by its witness T. B. Donaho that during the time the present owners of said road owned the same, to-wit, over three years last past, there had been no dividend declared or paid to the defendant's stockholders; that the earnings and receipts from the operation of the railroad were not sufficient to pay operating and other expenses, and keep the road in repair; and that there was no money from the receipts of the road to make repairs and betterments, and furnish and place in position the necessary cross-ties; and that the owners of the road—of its stock—had to take out of their own pockets money to meet the deficits in the operating of defendant's road, and for the purpose of keeping it in repair, and in purchasing cross-ties for the road; and that during all that time the stockholders of defendant's company had not received a dollar from the receipts and earnings from the operation of defendant's road. Defendant offered to make this proof by said witness on the issue of exemplary damages claimed in plaintiff's petition, and to show that the owners of the stock of said road had not appropriated said receipts or earnings; but, on the objection of plaintiff, the court held such evidence incompetent, and refused to allow defendant to make said proof by said witness." The liability of a railway company for exemplary damages cannot be made to depend on the ability of the corporation to keep its road in such condition that it can be operated with safety to passengers. A corporation or individual who attempts to conduct a business public in its character, in the course of which the lives and limbs of persons dealing with them are imperiled, are held responsible in exemplary damages, whenever the means used to conduct the business are so

manifestly insufficient to enable them to conduct it safely as to manifest indifference to duty or reckless disregard for the safety of persons. The legal culpability is as great when the failure, in such cases, to furnish safe appliances results from inability arising from the want of sufficient money or credit, as it is when it arises, not from a lack of means, but from an indisposition to use them. The moral culpability may be greater in the one case than in the other, but the legal is the same, whether it results from the one cause or the other. There is no law which compels a railway corporation either to construct or operate a railway, though, if this be voluntarily undertaken, the failure to operate may give the state the right to withdraw the rights and powers given by the act of incorporation. A railway must be presumed to be operated by the company owning it, for its own benefit; and whether this consists in actual profit to stockholders, or the mere avoidance of facts which would authorize the state to demand a forfeiture, is immaterial, in so far as liability to persons for failure to use care may be in question. If a railway company elects to pursue the business of passenger carrier, with full knowledge that this is done without appliances reasonably sufficient, when carefully used, to enable it to safely transport them, it matters not, on a question of liability for an injury, what may be the cause or motive for such action. If the company has not the means to place its roadway in safe condition, it should cease to use it for the transportation of passengers; but if it elects not to do this, and for any reason continues to hold itself out as a carrier of passengers, and receives them, when its appliances are known to be insufficient, when carefully used, for the safe conduct of such a business, then, so long as damages are given for the purpose for which it is said exemplary damages are given, it must be held that such damages may be properly imposed. The law gives no guaranty to the stockholders of a railway or other corporation that its business shall yield dividends or funds sufficient to keep in repair the appliances with which its business is conducted, but holds them, as it does individuals, when they conduct a business public in its character, liable for damages, actual or exemplary, as the degree of negligence shown may warrant, under the rules of law applicable to the measure of damages. The court did not err in excluding the evidence offered; but, for its refusal to give the charge before referred to, its judgment must be reversed, and the cause remanded.

#### COOPER v. LEE.

(*Supreme Court of Texas. Nov. 15, 1889.*)

RESULTING TRUST—LIMITATION OF ACTIONS—ATTORNEY AND CLIENT.

1. Where defendant uses plaintiff's money to purchase land, taking title in his own name, with the understanding that he will afterwards con-

vey to plaintiff, which he refuses to do on plaintiff's subsequent request, and the parties stood in confidential relations to each other at the time of purchase, a trust results in plaintiff's favor.

2. In such a case, the statute of limitations does not begin to run until, on plaintiff's request to convey, defendant repudiates the trust.

3. Where an attorney exchanges land with his client, he must show that the trade was fair, and that he gave an adequate consideration for his client's land.

4. The relation of attorney and client does not excuse the client's neglect for more than two years to make any inquiries as to the condition of the title to the land obtained by him, or its situation and value, he having the deed therefor in his possession; and his action to rescind the exchange for fraud is barred by the four-year statute of limitations, where the use of these precautions would have resulted in a discovery of the fraud more than four years before its institution.

Appeal from district court, Harrison county; A. J. Boory, Judge.

*M. R. Geer, A. Pope, and H. McKay, for appellant. T. P. Young, for appellee.*

HENRY, J. J. H. Lee instituted this suit against John T. Pierce, on the 4th day of February, 1887, to recover two tracts of land,—one designated in the proceedings as the "Smith Place," and lying in Harrison county, and the other as the "Tarrant County Land," and lying in Tarrant county. Plaintiff's pleadings, as finally amended, substantially charge that about the 2d day of March, 1882, plaintiff, desiring to purchase from the estate of Joshua Smith the "Smith Place," requested defendant to act as his agent in making the purchase, and placed in his hands a check on a bank in the city of Marshall, for the sum of about \$800, with which to procure the funds to pay for the land, and that defendant, having procured the money with the check, paid it for the land, taking a deed for it in his own name, bearing date the 1st day of April, 1882, and subsequently duly recorded. The petition charges that this deed was taken by defendant to himself, with the understanding that he would afterwards convey the land to plaintiff; that plaintiff is the father-in-law of defendant, and lived in his house, as a member of his family, at the time the deed was executed, and up to the time of bringing this suit; that defendant is an attorney at law, and, as such, acted in this, as well as in many other matters, for the plaintiff; and on account of these confidential relations plaintiff reposed the utmost confidence in the defendant, and did not think he would refuse to convey the land to him, when he was requested to do so; but when he did request it, in the month of December, 1886, plaintiff refused. Plaintiff further charges that in the month of November, 1881, he was the owner of the "Tarrant County Land," and about that date defendant represented to him that it would be greatly for plaintiff's advantage for him to exchange said tract of land for another tract, or tracts, owned by defendant; and that plaintiff, influenced by said representations, and fully trusting the defendant on account of the confidential relations that existed between them, consented to the ex-

change, and executed, about said date, to defendant, a deed for said land; that the sole consideration for the sale and conveyance of said land was said other tracts of land which defendant pretended to own, and for which he at the same time executed to plaintiff a deed; that both deeds were prepared by defendant, or under his supervision; that plaintiff, on account of his trust in defendant, did not read the deed to him, and did not know the contents of it when he commenced this suit; that at the time of their execution defendant represented to plaintiff that it would be greatly to the interest of both parties not to record either of said deeds; that plaintiff did not record his deed, but defendant immediately caused the one to him to be recorded, and since then has appropriated the rents of the land conveyed by it; that after defendant executed said deed to plaintiff he, in the month of May, 1884, requested plaintiff to permit him to see it, knowing that it had not been recorded, and plaintiff returned it to him; that defendant has never returned the deed to plaintiff, and plaintiff has no means of ascertaining what land was conveyed by it; that plaintiff did not learn that defendant would refuse to return said deed to him until November, 1886, at which time he refused to deliver it to plaintiff. Plaintiff charges that defendant had then formed the design of defrauding him, by obtaining from him all his property without consideration, and that he then and there fraudulently represented to plaintiff that he owned the lands which he pretended to give in exchange for plaintiff's land, when in truth and fact he did not own the same. Plaintiff charges that his memory and eye-sight were then impaired by age, and that he does not believe he read the deed from plaintiff, and he is unable to state its contents; that when defendant requested plaintiff to examine said deed he fraudulently represented that he merely wanted to look over it, and promised to return it, but in fact his purpose was to get possession of and destroy or suppress it. Plaintiff charges that he did not learn of defendant's fraudulent design with regard to said land until the — day of November, 1886, when defendant refused to return the deed; and that he did not learn that defendant had no title to the lands that he pretended to give in exchange for said Tarrant county land until long after his refusal to return said deed. Wherefore plaintiff says his cause of action did not accrue until said refusal. Plaintiff charges that the lands for which defendant's deed to him was given are situated in a distant part of the state, and plaintiff had no access to the title papers thereof, nor to the records of said lands, and, being very old, and without money, he could not, by any diligence, have discovered the wrong that defendant was meditating; wherefore he says, if he had a cause of action prior to the refusal of defendant to return said deed, the same was fraudulently concealed, and could not have been discovered sooner by the use of any de-

gree of diligence. Plaintiff offered to reconvey to defendant the lands embraced in the deed to him. Plaintiff further averred that it was agreed between him and defendant that Pierce should take the deed to the "Smith Place" to himself, and that he should, when subsequently requested, convey the land to plaintiff; that defendant was first requested to make such conveyance on the — day of December, 1886; that defendant was the attorney and counselor in law matters, as well as the son-in-law, of plaintiff, and he reposed the utmost confidence in him, and he therefore says that his cause of action as to the Smith place did not accrue to him until the repudiation of the trust.

The defendant, John T. Pierce, died before judgment, leaving a will, which was afterwards probated, by which he devised his entire estate to his nieces, Richie and Mattie Godbold. He left surviving him his widow, Annie E. Pierce, and two minor children, John L. Pierce and Hope Pierce. A. H. Cooper, the appellant, was appointed administrator with the will annexed of the estate of said John T. Pierce, and, as such, was made a party defendant. Upon the suggestion of the administrator, the widow and two children and the two devisees of the deceased were made defendants. The widow and the two children of deceased appeared and entered their disclaimers, and were dismissed, with their costs. The administrator filed an amended answer, in which he defended as to the two tracts of land separately, designating plaintiff's allegations as to the "Smith Place" as the "first count," and those as to the Tarrant county land as the "second count." To the first count he interposed a general demurrer, and special demurrers as follows: *First*, "that it is insufficient, because it fails to show why, and for what consideration, Pierce accepted the trust, and fails to show any specific or expressed trust reposed in him by Lee to invest the money and funds of the latter in land, with legal title in the name of the former;" *second*, "that it affirmatively shows that Pierce was acting only in the capacity of attorney at law for Lee, and that he immediately, upon paying for the land, took the title in his own name, in violation of the relation of client and attorney, and that, if Pierce ever promised to reconvey the 'Smith Place' to Lee, it was long after he had converted the funds to his own use;" *third*, "because it fails to show any reason why Lee invested Pierce with such trust, when he was in every respect competent to act for himself;" and, *fourth*, "it shows that, if Lee ever had a cause of action against Pierce by reason of the premises, such cause of action accrued more than four years before the institution of this suit." To the second count he interposed a general demurrer, and special exceptions as follows: *First*, "because no facts are set forth sufficient to justify a rescission of the contract of sale;" *second*, "because it contains no allegations of fraud, accident, or

mistake sufficient to justify a rescission of the contract;" *third*, "because it does not offer to restore to defendant the condition occupied by Pierce at the date of the transaction;" *fourth*, "because it shows that plaintiff willingly entered into the transaction, and accepted Pierce's deed, keeping it for years, and failing to record it at his own peril, wherefore he ought not now to be heard to assert ignorance of the contents of the deed;" *fifth*, "because plaintiff's cause of action accrued to him long before the institution of this suit, and he, being fully advised of all the facts, did not institute suit to rescind within a reasonable time;" *sixth*, "it shows that plaintiff's cause of action accrued to him more than four years before he brought suit, and that it is barred by the statute of limitations." The administrator pleaded a general denial of both counts, and specially to both, in substance: That if Lee ever furnished Pierce with money to buy the "Smith Place," or make the exchange of the Tarrant county land, he did so with the fraudulent intent to hinder and delay his creditors, etc.; and that, by placing said titles in the name of Pierce, he gave to him, ostensibly, the appearance of wealth; and that for years Lee knew Pierce had and was using credit with the public with reference to such property, and that he was contracting debts upon the faith of his solvency, apparent from the ownership of this land and other property; and that if this property is taken from the estate of Pierce it will be wholly insolvent; wherefore Lee ought to be estopped, etc. The court properly sustained exceptions to this defense. No evidence was offered sustaining the issue of insolvency and purpose of defrauding creditors in making the conveyance, and the record does not bring that issue before us for decision in any manner. The devisees under the will of Pierce appeared and adopted the pleadings of the administrator. The court overruled all of defendant's exceptions to plaintiff's pleadings. There was a verdict and a judgment for plaintiff for the recovery of both tracts of land.

We think plaintiff's pleadings show a good, equitable title to the "Smith Place," unaffected by the statute of limitations, and all exceptions to that count were properly overruled. With regard to that issue, the court charged the jury as follows: "If you believe from the evidence that the money used by Pierce to purchase the Smith place was the money of John H. Lee, and that at the time Pierce purchased he knew that Lee desired it purchased for himself, then, in law, Pierce and his administrator hold it in trust for Lee, and you will find for plaintiffs as to the Smith place. Unless you find one or the other state of facts to exist, you will find for the defendant as to the Smith place. The burden is on the plaintiff to show such facts as will entitle him to recover under the charges given. That is, the deed to Pierce puts the title in him, and Lee must show the facts entitling him to the land before he can

recover." We think this charge presented the issue fully and correctly, and that no error was committed in the admission of evidence affecting it. We think, too, that the evidence sustains the verdict of the jury upon this branch of the case. No question seems to have been raised on the introduction of the evidence as to a variance between the evidence introduced to prove that the money used by Pierce to pay for the Smith place belonged to plaintiff, and the allegation in the petition that the money was procured by collecting a check given him by plaintiff for that purpose.

Upon the issue with regard to the Tarrant county land, the court charged as follows: "If from the evidence you believe that at the time Lee deeded the Tarrant county land to Pierce he was the attorney and general adviser, in law matters, of J. H. Lee, and the transaction was not fair and honest on the part of Pierce, and that Lee relied on him for advice in the matter, and that Lee did not receive a fair and adequate consideration for the land he then conveyed to Pierce, then you will find for plaintiff as to the Tarrant county land. And, in this connection, you are to consider just whether or not Pierce was the attorney and legal adviser of Lee. If you find he was Lee's legal adviser, and that Lee looked to him for advice in his law matters and business matters, then the burden is on the defendant to show that the trade for the Tarrant county land was fair, and that the consideration paid by Pierce for the land was adequate. If you find from the evidence that the consideration given by Pierce to Lee for the Tarrant county land was a fair and adequate consideration at the time the trade was made, then the fact that Pierce was Lee's attorney and adviser would not entitle Lee to have the sale set aside." "There is no question of limitation in this case. If you find from the evidence that at the time of the conveyance of the Tarrant county land Pierce was not the attorney and legal adviser of Lee, then the burden is on Lee to show that the trade was not fairly made, and that he did not receive adequate consideration for said land, and that he was induced by Pierce to make the transfer, for the purpose of depriving him of his property." No evidence was introduced by either party showing, or tending to show, either the condition of the title or the quality, quantity, or value of the land conveyed by Pierce to Lee in exchange for the Tarrant county land. The evidence shows that Pierce was Lee's son-in-law, and that Lee lived, from the date of the deeds in 1881 until he bought this suit, with the family of Pierce, and that Pierce was a practicing lawyer, and was the attorney and legal adviser of Lee. Except in so far as concerns the statute of limitations, we approve this charge, in its application to the facts of this case. In Pomeroy's Equity Jurisprudence it is said: "The presumption always arises against the validity of a purchase or sale between the client and attorney, made during

the existence of the relation. The attorney must remove that presumption by showing affirmatively the most perfect good faith, the absence of undue influence, a fair price, knowledge, intention, and freedom of action by the client, and also that he gave his client full information and disinterested advice." Volume 2, p. 489. Judge Story says: "The situation of an attorney or solicitor puts it in his power to avail himself, not only of the necessities of his client, but of his good nature, liberality, and credulity, to obtain undue advantages, bargains, and gratuities. \* \* \*

The law does not so much consider the bearing or hardship of its doctrine upon particular cases as it does the importance of preventing a general public mischief, which may be brought about by means secret, and inaccessible to judicial scrutiny, from the dangerous influences arising from the confidential relation of the parties. By establishing the principle that, while the relation of client and attorney subsists in its full vigor, the latter shall derive no benefit to himself from the contracts or bounty, or other negotiations, of the former, it supersedes the necessity of any inquiry into the particular means, extent, and exertion of influence in a given case,—a task often difficult, and ill supported by evidence, which can be drawn from any satisfactory sources. This doctrine is not necessarily limited to cases where the contract or other transaction respects the rights or property in controversy, in the particular suit in respect to which the attorney or solicitor is advising or acting for his client; but it may extend to other contracts and transactions, disconnected therefrom, or, at least, where from the attendant circumstance there is reason to presume that the attorney and solicitor possessed some marked influence, ascendancy, or other advantage over his client in respect to them. On the one hand, it is not necessary to establish that there has been fraud or imposition upon the client; and, on the other hand, it is not necessarily void throughout, *ipso facto*. But the burthen of establishing its perfect fairness, adequacy, and equity is thrown upon the attorney, upon the general rule that he who bargains in a matter of advantage with a person, placing a confidence in him, is bound to show that a reasonable use has been made of that confidence; a rule applying equally to all persons standing in confidential relations with each other. If no such proof is established, courts of equity treat the case as one of constructive fraud." 1 Story, Eq. Jur. §§ 310, 311; Kisling v. Shaw, 38 Cal. 425; Roman v. Mall, 42 Md. 514.

If the transaction was fraudulent, Lee had a cause of action for its rescission, growing out of the transaction itself; and four years is the period prescribed by our statute within which such action shall be brought. It is a well-established rule in this state that fraud will prevent the running of the statute of limitations until it is discovered, or until, by

the use of reasonable diligence, it might have been discovered. *Kennedy v. Baker*, 59 Tex. 160. In the case of *Bremond v. McLean*, 45 Tex. 19, it is said: "If the want of such knowledge will prevent the running of the statute, it is not sufficient for the plaintiff to assert merely the conclusion that he could not have discerned that the representations made him were false by the use of reasonable diligence, but he must state the facts upon which he relies, that the court may see whether they justify and support such a conclusion." In the case of *Kuhlman v. Baker*, 50 Tex. 630, the petition charged that plaintiff could neither read nor write, and was in the habit of going to defendant for advice; that defendant, knowing plaintiff had confidence in his representations, and for the express purpose of defrauding plaintiff, falsely represented that he was the owner of the land, and promised that he would make plaintiff a good title thereto; and that plaintiff was thereby induced to buy and pay for the land, taking from the defendant, and carrying home, what he believed to be a deed with warranty, but it proved to be only a quitclaim deed. The petition also alleged that plaintiff had been evicted by suit, and that he did not discover that his deed was a mere quitclaim until, on being sued for the land, he consulted counsel, and further charged that he could not by reasonable diligence have sooner made the discovery. Justice GOULD, delivering the opinion of the court, said: "The established rule in this court is that fraud 'will only prevent the running of the statute until the fraud is discovered, or by the use of reasonable diligence might have been discovered.' \* \* \* Our opinion is that if the alleged fraud constituted a sufficient reason why the plaintiff did not, at the time the deed was made, discover that it was a quitclaim, his subsequent failure to inform himself of the contents of his deed in so material a point was chargeable to his own neglect of ordinary precaution. There is no allegation of any act or representation of defendant, subsequent to the deed, tending to prevent its examination, nor does it sufficiently appear that the alleged confidential relation of the parties continued until the discovery." While we are not prepared to say that the relation of attorney and client, which, existing between Pierce and Lee, justified Lee in relying upon the representations of Pierce, so as to absolve him from the necessity of making any investigations before the transaction was completed, would immediately cease to protect him upon the completion of the transaction, so as to require him at once to make inquiries, to ascertain the truth of the representations upon which he had acted, we still do not, on the other hand, believe that the continued existence of the relation justified him in neglecting every precaution that a prudent man would exercise about his property. Notwithstanding the land was conveyed to him by his attorney, in whom he placed un-

limited confidence, ordinary prudence dictated to him, as a man of common sense, to take advantage of the two years that the deeds were in his possession, to learn from them what land had been conveyed to him, where it was situated, something about the condition of the title shown by the records, and something about its value, too. No confidence in his attorney relieved him from the duty of having his land assessed for taxes, and he could not do that without some knowledge of its situation and value. However good the title conveyed him, and however valuable the land was, it was subject to depredations, and liable to be lost by limitation, unless some attention was paid to it by the owner. We think it an unreasonable application of the rule that protects a client in his dealings with his attorney to hold that at the risk of the attorney the client may neglect every precaution of ownership. The same confidence that justifies the client when making a trade with his attorney, in relying upon his assurances, will, no doubt, entitle him to some reasonable time to ascertain such facts as usually come to the knowledge of owners about their own property; and, until such reasonable time has intervened, we do not think the statute of limitations should be held to have commenced running against the cause of action. The petition alleges that the trade, with regard to the Tarrant county land, was made in November, 1881. More than six years elapsed between that date and the commencement of this suit. Plaintiff may be allowed more than two years from the date of the transaction to ascertain such facts as it was his interest to learn, without regard to his confidential relations to other people, and still have more than four years left before he filed his suit. Conceding his right to a reasonable allowance of time, growing out of the circumstances under which he made the trade, before Lee could be required to begin to exercise diligence, we think it would be an unreasonable application of the rule to allow him as much time as is required to relieve him from the effect of the statute of limitations in this case. While plaintiff's pleadings contain allegations that the relation of attorney and client existed between him and Pierce in 1881 and 1882, and again in 1886, we do not find any allegation that the relation existed also during the intervening years; and, if it did not, there was nothing, of course, growing out of the relation to excuse him from the exercise of diligence during these years. We think the pleadings of plaintiff show that, after allowing him a reasonable time to begin the exercise of diligence to discover the fraud that was practiced upon him to procure from him a conveyance of the Tarrant county land, if he had exercised diligence from the expiration of such allowance, he would have discovered the fraud more than four years before he filed his suit, and that the court committed error in overruling the exception that set up the defense of four years' limitation,



and also in its charge on the same subject; for which the judgment must be reversed.

We find in the record quite a number of assignments of error not made in conformity with our rules. The appellee called our attention to them by a motion to strike them out. As the decision of the motion involved an examination of the record, we postponed it until the cause should be decided. Our opinion is that the motion should be sustained, in so much as it relates to assignments of error for the admission and rejection of evidence, and the refusal to give charges asked by defendant, and said assignments would not be considered for the purpose of reversing the cause; but, as we have concluded to reverse the cause on a ground properly assigned, and as the same questions about the introduction or rejection of evidence may come up on another trial, we have considered all of the evidence, and all of the bills of exception relating to evidence, and conclude that no error was committed, either in the admission or rejection of evidence. The judgment is reversed, and the cause remanded.

**WILLIAMS' ADM'R v. LUMPKIN *et al.***

(Supreme Court of Texas. Oct. 25, 1889.)

**COLLATERAL SECURITY—PLEADING—PARTIES.**

1. Plaintiff's intestate executed his note to defendant H., and deposited with him the note of defendant L., as collateral security; and H. sold the former, and assigned the latter as collateral, to defendant S. Plaintiff sued for the amount of L.'s note. *Held*, that defendant S. held L.'s note in trust, for the estate of plaintiff's intestate, subject to the payment to S. of the note of plaintiff's intestate to H., and was entitled to judgment against L. for the amount of the note, without first establishing his claim against intestate's estate.

2. L. having been summoned, as a defendant, to answer plaintiff's petition, it was not necessary that defendant S. should join in plaintiff's action, or file a cross-bill, and have said L. further cited.

Error from district court, Anderson county; F. A. WILLIAMS, Judge.

*Greenwood & Greenwood*, for plaintiff in error. *Gregg & Reeves*, for defendants in error.

HENRY, J. Plaintiff in error instituted this suit as administrator of T. J. Williams, deceased, alleging that Wilson Lumpkin executed to his intestate his promissory note for the sum of \$900, payable on the 11th day of January, 1887, secured by a mortgage on real estate described in the petition. He further charged that his intestate executed to defendant J. A. Heim his promissory note for \$131, and, to secure the payment of said note to said Heim, placed the note made by defendant Lumpkin in the hands of said Heim, as collateral security. He avers that Heim was authorized to collect the Lumpkin note, and, after applying for that purpose so much of the proceeds as were sufficient to satisfy the note due to him, was obligated to pay the balance to plaintiff's intestate. The petition charges that Heim, in violation of his promise, had pretended to sell said Lumpkin note

to defendant Silliman, who had notice, when he received such transfer, of all the facts connected with the transaction between plaintiff's intestate and said Heim; that Heim at the same time sold said Silliman plaintiff's intestate's note for \$131. The plaintiff prayed for judgment for the debt, and foreclosure of the mortgage, and, in the event that it appeared that Silliman had the right to collect the Lumpkin note, as collateral security for the payment of the 131-dollar note, then that the court would by its judgment direct that said note should be first paid out of the proceeds of the mortgaged property, provided the court should hold that it could so direct the payment of an unestablished claim against the estate of a deceased person. The defendants Lumpkin and Heim were duly cited to answer, but made default. The defendant J. M. Silliman appeared and answered, charging that he was the owner and holder of the Lumpkin note, and entitled to judgment for the debt and foreclosure of the mortgage, and against plaintiff quieting his title to the note, and praying that Lumpkin be cited to answer his complaint made by his answer. Silliman, in his answer, also prayed that if it be found true that Heim only held the Lumpkin note as collateral security for the payment of said 131-dollar note, then that defendant Silliman be subrogated to his rights and that the amount of said note, with interest thereon from the 1st day of February, 1887, amounting to the sum of \$150, be first paid out of the proceeds of the Lumpkin note and mortgage. Without other notice to Lumpkin than the original citation at the instance of plaintiff, the cause was tried with a jury. The jury, in response to special issues submitted by the court, found that the Lumpkin note was delivered to Heim by plaintiff's intestate, for the purpose of securing him in the payment of the aforesaid note to him, amounting, at the date of the verdict, to \$154.92; *second*, that plaintiff's intestate never authorized Heim to sell and transfer the Lumpkin note and mortgage absolutely, but only to secure the payment of his note executed to Heim; *third*, that Heim did not sell the Lumpkin note to Silliman absolutely, but sold to him the note executed to Heim by plaintiff's intestate, and merely transferred the Lumpkin note and mortgage as collateral security therefor. Whereupon the court decreed that J. M. Silliman held the legal title to the Lumpkin note, and was entitled to a judgment for the amount of said note, and foreclosure of the mortgage, as holder thereof, as collateral security for the note made to Heim; and that he held such note and mortgage in trust for the estate of T. J. Williams, subject alone to the payment of such amount due on the Heim note as he (Silliman) should establish against said estate, in due course of administration. The sheriff was ordered to return into the district court the proceeds of the sale of the mortgaged property, to be distributed in pursuance of the terms of the decree, as above stated. It was ordered that,

as against defendant Helm, plaintiff take nothing; and that any excess of the proceeds of the sale of the mortgaged property remaining after the payment of the amount adjudged upon the note, and the costs against him, be paid to said Lumpkin. From this decree plaintiff sued out a writ of error, and assigns errors as follows: *First*, that the court erred in rendering judgment in the name of J. M. Silliman against Wilson Lumpkin, because Silliman had no established claim against the estate of Williams, authorizing the rendition of a judgment in his name, etc., and because said Silliman failed to join plaintiff in error in his action, or to file a cross-bill and have said defendant Lumpkin cited, etc.; *second*, that plaintiff alone, under the pleadings, issues, and verdict, was entitled to a judgment, and in his own name, against defendant Lumpkin for the debt and for foreclosure of the mortgage, and the district judge could not lawfully make an order directing the administration of the debt, etc.

We do not think these objections are well taken, or that any error was committed of which the appellant can complain. The decree gives him all that he was entitled to recover. Under authority of the case of Huyler v. Dahoney, 48 Tex. 235, the court might have ordered the amount of the proceeds found to be due Silliman to be paid to him without requiring him to establish his claim in the administration of the estate of Williams, and without the necessity of further proceedings on his part. In his brief filed in this court, Silliman joins in the prayer of appellant for the reversal of the decree; but he did not assign error, and, the defendants Helm and Lumpkin having joined in the prayer to reverse, we cannot so dispose of the case. We think the pleadings of plaintiff alone sufficiently presented the case, as to all parties, to justify the decree as rendered, without it being necessary for the defendant Silliman to plead more than he did, or even so much; and that defendant Lumpkin, having been summoned, as a defendant, to answer plaintiff's cause of action, did not require to be further notified. The decree sufficiently indicates the amount of the judgment that plaintiff will be authorized to withdraw for him to be able to take the amount coming to him through the decree, even if the defendant Silliman does not proceed, as the decree directs, and as he may easily do, to establish his claim for his interest. The judgment is affirmed.

**KEATING IMPLEMENT & MACHINE CO. v. MARSHALL ELECTRIC LIGHT & POWER CO.**

(Supreme Court of Texas. Oct. 25, 1889.)

**MECHANICS' LIENS—FIXTURES.**

1. Const. Tex. art. 16, § 37, which provides that "mechanics \* \* \* shall have a lien, \* \* \* and the legislature shall provide for \* \* \* enforcement of said liens," creates the lien, and only leaves it for the legislature to provide the means of its enforcement; and a mechanic's lien, filed for

record within the time allowed by the statute, relates back to the time the work was done or the material was furnished, and takes precedence of any other lien acquired since that time.

2. The poles, wires, and lamps erected in the streets, for lighting purposes, by an electric light company, are real property.

Appeal from district court, Harrison county; A. J. BOOTY, Judge.

F. H. Prendergast, for appellant. F. B. Sexton, for appellee.

HENRY, J. The Westinghouse Electric Company filed its petition in the district court against the Marshall Electric Light & Power Company, claiming a debt of about \$5,000, and a mechanic's lien; charging that the defendant was insolvent, and praying for a receiver. A receiver was appointed, and the Keating Implement & Machine Company intervened. The defendant is a corporation created under the general laws of this state. It erected a house on a lot purchased and owned by it in the city of Marshall. The house was finished about the 15th April, 1888. The defendant purchased from the intervenor, plaintiff, and others machinery to be used in its business of generating electric lights, and erected in the streets of the city poles and wires, and other appliances proper for furnishing such lights to its customers. All of the contesting creditors filed their demands, claiming mechanics' liens, in the county clerk's office at different periods up to and including the 1st day of August, 1888; within four months of the dates that their respective debts become due, and of the date that each did the work or furnished the material. On May 3, 1888, the defendant executed to the intervenor a note for the sum of \$1,887.58, secured by a deed of trust on the defendant's lot and improvements, including its poles, wires, and attachments, and its personal property. The deed of trust, having been signed by the company, by its president, was acknowledged for record by him, and recorded in the county clerk's office on May 3, 1888, before any mechanic's lien had been fixed, by being filed with the county clerk. In addition to its deed of trust, intervenor fixed its mechanic's lien, by filing its claim with the county clerk within four months from the date of its accrual. The district court held, in effect, that intervenor had a valid mortgage, but that it did not give to it a prior lien upon anything, except the personal property of defendant, and that the poles, wires, etc., erected in the streets were parts of the realty; and rendered judgment accordingly. It is contended that because, when intervenor's deed of trust was recorded, no mechanic's lien had been recorded, and it then had no actual notice of the existence of such claims, its lien took priority over the mechanic's liens, notwithstanding they were subsequently duly filed with the county clerk, within four months from the dates of the accrual of the respective debts. The language of section 37, art. 16, of the constitution is that "mechanics \* \* \* shall have a lien,

\* \* \* and the legislature shall provide by law for the speedy and efficient enforcement of said liens." We think the constitution creates the lien at the time of the transaction, and only leaves it for the legislature to provide the means of its enforcement. As said by this court in the case of *Trammell v. Mount*, 68 Tex. 215, 4 S. W. Rep. 377: "The lien of a mechanic, though not fixed before record of the contract or bill of particulars, when it is fixed, relates back to the time when the work was performed, or the material furnished, and hence takes precedence of all claims to the property improved, which have been fastened upon it since that time. \* \* \* The registration does no more than preserve a lien which exists already." Appellant contends that the language of the act of 1885, in force when the liens in this case were fixed, being that contractors should have such lien "upon complying with the provisions of this act," meant that they should have such lien when they complied with the act, and not before. As the constitution itself creates the lien at and from the date of the transaction, subject only to be regulated by the legislature as to the time and method of its enforcement, we are not at liberty to give to this provision of the law the effect claimed for it. Within the period of time allowed by the statute for the lien to be fixed by being recorded, we think every person dealing with the property is charged with notice of the existence of the lien, without evidence of the existence of actual notice. Were it otherwise, the provision of the constitution creating the lien, as the result of the transaction in which it originates, would be disregarded.

In regard to the controversy as to whether the poles, wires, lamps, and other attachments for conveying the electricity should be treated as real or as personal estate, the master says in his report that he found it "impracticable to separate the poles, wires, lamps, and other attachments from the lot and improvements thereon." In the case of *Hutchins v. Masterson*, 46 Tex. 554, it is said: "The weight of the modern authorities establish the doctrine that the true criterion for determining whether a chattel has become an immovable fixture consists of the united application of the following tests: *First*. Has there been a real or constructive annexation of the article in question to the realty? *Second*. Was there a fitness or adaptation of such article to the uses or purposes of the realty with which it is connected? *Third*. Whether or not it was the intention of the party making the annexation that the chattel should become a permanent accession to the freehold; this intention being inferable from the nature of the article, the relation and situation of the parties interested, the policy of the law in respect thereto, the mode of annexation, and purposes or use for which the annexation is made. And, of these three tests, pre-eminence is to be given to the question of intention to make the article a permanent accession to the freehold, while the others are

chiefly of value as evidence as to this intention." We find no error in the proceedings, and the judgment is affirmed.

#### HANKINS v. STATE.

(Court of Appeals of Texas. June 29, 1889.)<sup>1</sup>

##### LARCENY—EVIDENCE.

On the trial of a defendant for the theft of a bull, all the evidence for the prosecution was that the bull, with other cattle, passed along a certain road, at a certain time; that the track of a certain horse was made along said road on the night the cattle were driven; and that defendant rode the horse in the direction the cattle were driven. Held insufficient to support a conviction.

Appeal from district court, Freestone county; R. HARDY, Judge.

David Hankins was convicted of the larceny of a bull, and appeals.

Asst. Atty. Gen. Davidson and Gardner & Gardner, for the State.

HURT, J. This conviction was for the theft of a bull, alleged to be the property of H. B. Stubbs. We have very carefully examined the facts of this case, and find them insufficient to support the verdict. The state relies upon circumstances to convict the appellant of the theft of the property. This is a legitimate and usual method of establishing the guilt of the accused; but the circumstances must possess such probative force as to establish guilt, with reasonable certainty. This must appear to this court; the rule being that the evidence must convince the jury of the guilt of the accused beyond a reasonable doubt. In the judgment of this court, his guilt must be shown with a reasonable degree of certainty. This guilt does not appear from the evidence. It is assumed, from other circumstances, that the bull, with other cattle, passed along a certain road at a certain time; and that appellant was with these cattle, because the track of a certain mare was made along said road on the night these cattle were driven by some one along the road. These facts, from which it was inferred that appellant was with the cattle, may all be true, and still not sufficient. Concede that appellant rode the mare along the road on the night the cattle were taken, and that he rode her in the same direction the cattle were driven. Still, it is not at all certain that they passed along the road at the same time, and not certain that he was driving, or assisting to drive, the cattle. In this case the presumption of guilt is derived from remote facts, presumed from other, uncertain facts. This will not suffice. The criminative facts must be proved beyond a reasonable doubt; and they must, with reasonable certainty, conduce to establish the guilt of the accused. Now, the testimony does not show that the tracks of the mare were so made as to show that the rider was driving the cattle. It was shown to be true of some of the horses. On the other hand, the evi-

<sup>1</sup>Publication delayed by failure to receive copy.

dence for the defense—conceding that appellant was along the road, riding the mare, on the night the cattle were driven—shows him to have been there, on said mare, innocently. We are not willing that this conviction should stand, resting, as it does, upon such uncertain evidence. The judgment is reversed, and the cause remanded for another trial.

#### CRANCH v. STATE.

(Court of Appeals of Texas. June 29, 1889.)<sup>1</sup>

##### LARCENY—EVIDENCE.

On the trial of an indictment for the theft of a bull, the evidence showed that the bull disappeared from its accustomed range without the knowledge of the owner; that a day or two after the alleged theft defendant was seen in possession of a bull which corresponded with the description of the alleged stolen animal. Witnesses for the defense testified to facts which established the defendant's presence at a remote place on the night of the theft, and identified the animal in defendant's possession as another than the alleged stolen animal. *Held*, that the evidence was insufficient to support a conviction.

Appeal from district court, Freestone county; RUFUS HARDY, Judge.

Thomas Cranch was convicted of the larceny of a bull belonging to one H. B. Stubbs, and appeals.

The state proved the ownership of the bull to be in Stubbs, as alleged, and that, without the knowledge of the owner, it disappeared from its accustomed range. It also proved an accurate description of the animal. The theory of the state was that the animal was one of a herd of several animals that were driven from the range on a certain night; and that defendant and one Hankins were the men who drove the said herd. The proof which nearest inculpated the defendant was that a day or two after the alleged theft he was seen in possession of a bull which corresponded with the description of the alleged stolen animal; which said animal he claimed to own. Witnesses for the defense testified to facts which established the defendant's presence at a remote place on the night of the theft, and identified the animal claimed by defendant as another than the alleged stolen animal.

*Bell, Bell & Bell and Kerven & Sims*, for appellant. *Asst. Atty. Gen. Davidson and Gardner & Gardner*, for the State.

HURT, J. This conviction was for the theft of a certain red bull, the property of H. B. Stubbs, and is a companion case to that of *Hankins v. State*, ante, 490, (just decided.) In this, as in the *Hankins Case*, the evidence is not sufficient to support the conviction, because of its inherent weakness and inconclusiveness. Reversed and remanded.

#### CHUMLEY v. STATE.

(Court of Appeals of Texas. June 26, 1889.)<sup>1</sup>

##### THEFT—NEW TRIAL.

1. On a trial for theft of a mule, a witness for the state testified that he was employed by the

owner of the animal to look after and water it; that he found it in defendant's possession; that defendant told him that he intended to appropriate it; that the owner offered a reward for the return of the animal; and that witness did not inform him that defendant had the animal until a year afterwards when, having been arrested for another theft, he made terms with the state to turn informer. *Held*, that the testimony of the witness must be treated as accomplice testimony.

2. Defendant's theory was that he got the mule from the person who gave the accomplice testimony, by trading a certain mare therefor. This person testified that he bought the mare from defendant at about the time of the alleged theft, and another witness testified that he was present, and witnessed the trade, by which defendant traded the mare and \$35 for the mule. He also testified that an absent witness was also present at the trade. Defendant alleged in his application for a new trial that he expected to prove these same facts by the absent witness. *Held*, that the testimony of the witness was so necessary and probably true as to entitle defendant to a new trial.

3. A witness for defendant was present on the day set for trial, but the case was continued till the next term. At the next trial day the witness was in jail in another county, and defendant's attorney caused attachment to issue to produce him. No return was made to the writ, but the witness was brought to the county of the trial, and placed in jail. He was not produced on the trial, but was discharged from custody on the evening before, which was not known to defendant's counsel, but was known to defendant, who supposed his counsel knew it, and that the witness would be present at the trial. The witness could not be found at the time of trial. *Held*, that there was sufficient diligence to entitle defendant to a new trial.

Appeal from district court, Milam county; J. H. HENDERSON, Judge.

Joseph Chumley appeals from conviction for theft of a mule.

*F. S. Henderson*, for appellant.

I submit that the court erred in refusing the defendant's application for continuance, based upon the absence of his witness Estes. The materiality and probable truth of the testimony of this witness becoming manifest upon the trial, I contend that the court committed further error in refusing to award defendant a new trial.

Upon the issue of diligence to obtain the presence of the absent witness at the trial, the record will demonstrate these facts: The said Estes was in attendance upon the court, as a witness in the case, at the fall term, 1888. The case was then continued, and at the spring term, 1889, it was set for trial on the 2d day of May. On May 3d, the said witness not being present, defendant caused an attachment to issue to Falls county for him; he being then in the Falls county jail. On May 4, 1889, said witness was brought to Cameron, where his case was pending, and placed in jail. No return was made on the writ, but the witness was placed in jail, and was not produced in court. On account of other matters, and not on application of defendant, this case was passed over from day to day after said May 4, 1889, until May 18, 1889, when defendant was brought from jail into court, for trial. Said witness, Estes, was on the evening of May 17, 1889, released from jail, and discharged from custody, by the sheriff of Milam county; he having given

<sup>1</sup>Publication delayed by failure to receive copy.

bond in the Falls county cases against him. The sheriff did not bring him into court, and did not notify defendant's counsel that he had discharged said witness. On May 18, 1889, when the case was called for trial, the witness was absent, and could not be found, although, according to defendant's information, he was in town that morning, and stated that he was waiting for this case to be called for trial.

Was this diligence? I maintain that, under the circumstances of this case, it was. It is true the court undertakes, in the explanation appended to the bill of exceptions, to argue that it was not diligence, because, according to the court's statement, the witness and the defendant were in jail together until the evening before the trial, and defendant knew when the witness was discharged from jail. Now, it may be assumed that the court put the facts just as strong as they could be made. So, here is the situation: Defendant, in jail at Cameron, wishes at his trial a witness who is in jail in Falls county. He takes the proper steps to have the witness brought to Cameron, and he is brought to Cameron, under attachment. He is not produced in court, but, by the sheriff of Falls county, is delivered to the sheriff of Milam county, as a witness and a prisoner. The sheriff of Milam county, on the evening before this case is to be tried, discharges said witness from his custody. Defendant's counsel are not notified of his discharge, and expect him to be present at the trial; but when the trial is called they inquire for him, and learn that he was in town a short time before, but cannot now be found. It is true that defendant knew that witness had been discharged from jail, but he did not know that he had been discharged from the attachment as a witness. On the contrary, he supposed that the sheriff had performed his duty as to said witness, by either taking his bond or recognizance, or by reporting to defendant's counsel. Now, if defendant had been a lawyer, he might have inquired more carefully into the discharge of said witness; but he was a prisoner of the state; he had exercised the court's process; had placed his witness in the hands of the court's officer; and had the right to rely upon the belief that the officer would do his duty. By whose fault was this witness discharged? By the sheriff's. Who was the keeper of this witness? The court's officer. So, I say the defendant is not to blame, but did use due diligence. But suppose he did not use strict diligence. Did he not use such reasonable diligence as would entitle his application to consideration, if the testimony of the witness was material, and probably true? He surely did. And this brings us to the second question:

Was the testimony material, and was it probably true? Its materiality is apparent, because its effect was to show that defendant did not steal the animal, but traded with the state's witness (John Ward) for it in Falls county. To determine the probable truth of

said testimony, it becomes necessary to review the substantial evidence adduced on the trial, or, at least, to epitomize the history of the case. The state's whole case was staked on the truth of John Ward's testimony. He alone testified to facts upon which defendant could by any possibility be convicted. He testified, in brief, that in June, 1887, he was searching for this very mule, under instructions from his employer, the owner. He was informed that the mule was near Cal Smith's place, in Falls county, about three miles from the Milam county line. On the very day the mule was missed, he was looking for it, near Cal Smith's; and on that day, or the next, and while he was still searching for the mule, he met defendant in Milam county, some three miles from the animal's range, and about a quarter of a mile down in Milam county, with the mule. He did not demand the mule, but did tell defendant that it was Drennan's mule; and defendant told him that it did not matter if it was; that Drennan would never get it; and that he was going to take it home. Defendant also said that nobody knew about the mule but Ward, and that if "I [Ward] told it, he would make peace with me. I afterwards saw the mule in Milam county. Defendant was trading it. He said it had gotten away from him, and he had followed and caught it." He also testified that, although he was at that very time searching for the mule for the owner, yet he made no report of the theft, and that, although he knew Drennan had offered \$50 reward for the mule, he never disclosed these facts until more than one year afterwards, when he (Ward) had been sent to jail, by an examining court, on the charge of cow-theft, and had made such terms with the state as that he might turn informer. The foregoing testimony was the state's case; and we maintain that it placed Ward in the attitude of an accomplice.

As part of his case, the defendant undertook to prove that Ward traded him the animal in Falls county. Ward, being asked about the trade, denied it, and said that the sorrel mare defendant claimed to have traded him for the mule had been purchased by him from defendant. Defendant showed by Smith and Bishop that on June 11, 1887, they saw Ward looking for the mule in Falls county; that Bishop had seen the mule that very day; and that Ward was looking for it about 2 or 3 o'clock P. M. He proved by John Estes that on Saturday before the second Sunday in June, 1887, said witness did, late in the evening, at a well on the Estes place, in Falls county, trade the mule to defendant for a sorrel mare and \$35; that said well was 5 or 6 miles from Cal Smith's place, where the mule ran, and 8 or 9 miles from the Wallace ranch, where Ward lived, and about the same distance from where defendant lived; and that Irvin Estes, the absent witness, was present, and saw the trade made. Defendant alleged in his application for continuance that he expected to prove the same facts by

Irvin Estes that he did prove by John Estes. Now, was not this evidence probably true, within the meaning of the law? Ward, in his testimony, gave a sensational account of the alleged theft; confessed that he had guilty knowledge of it; and that, although he was appealed to by all the motives which could prompt a faithful and honest servant to protect the interests of his employer, yet, from choice, he preferred to screen the thief. The law calls him infamous, and will not sustain a conviction on his uncorroborated testimony. It is characterized as improbable, until sustained by the proof. His testimony was flatly contradicted by the testimony of John and Irvin Estes. Their testimony made John Ward the thief.

The probability of Irvin Estes' testimony is sustained by the following reasons: (1) Ward's testimony is improbable. (2) Ward implicated himself in the theft. (3) Ward admitted that he did get the sorrel mare from defendant, and was in possession of her, about the time he says defendant stole the mule. (4) Ward was the last person seen by any disinterested witness on the range of the mule. (5) He was so seen on the day that the mule disappeared, at about 2 or 3 o'clock in the afternoon; and late in the evening, about the same date.—June 11th,—he was seen to trade the mule to defendant at Estes' well, as testified by John Estes. (6) The proposed testimony of Irvin Estes was natural and reasonable; was strongly corroborated by the other testimony in the case; and was only contradicted by John Ward, an accomplice. It was just as probable as Ward's testimony; was directed to the very issue in the case; and defendant ought to have had it on his trial.

*Asst. Atty. Gen. Davidson, for the State.*

WHITE, P. J. We think it most apparent, from the statement of facts in this case, that the evidence of the state's witness, John Ward, upon which this conviction mainly rests, must be treated as accomplice testimony; and that, to warrant the conviction upon this testimony, it must have been corroborated by other testimony, as to his material statements inculpatory of defendant. We do not believe the other facts do sufficiently corroborate this witness' evidence. Without Ward's evidence, no case is established against the defendant; and this evidence certainly comes in most questionable shape, in the light of other, undisputed facts. He was employed to look after and water this animal by the owner. He says he saw the defendant twice with it in his possession, and that defendant notified him that he (defendant) intended to appropriate it. All of this, he says, occurred a year before he (Ward) disclosed the fact to the owner, though the latter had offered \$50 reward for it.

Defendant's theory of the case was that he had purchased, or, rather traded, for the mule from this same witness, (Ward,) giving

him in the trade a sorrel mare and \$85. Ward admits that he owned a sorrel mare, but claims that he purchased her from defendant. Defendant's theory of the case, with the time, place, and circumstances of the trade with Ward for the mule, was testified to by his witness, John Estes, who further testified that one Irvin Estes was also present at said trade, and saw it made. Defendant made an application for continuance on account of the absence of this witness, Irvin Estes, which was overruled by the court for want of diligence, it being a second application, and again overruled in connection with the motion for a new trial, because, in the opinion of the court, the proposed testimony, in the light of the other evidence, was not probably true.

Was there sufficient diligence? And was the evidence probably true? These questions are so fully, fairly, ably, and, to our minds, conclusively presented and argued in the brief of counsel for appellant that we refer to his brief for the reasons which induce us to answer them in the affirmative. We are of opinion that the court erred in refusing the new trial; and we are further of opinion that the accomplice testimony, in addition to its own questionable character, is not sufficiently corroborated to warrant a conviction, which appears to have been based mainly upon it. The judgment is reversed, and the cause remanded.

#### COX v. STATE.

(Court of Appeals of Texas. June 26, 1889.)<sup>1</sup>

CRIMINAL LAW—VENUE—EVIDENCE OF DECEASED WITNESS—MISCONDUCT OF JURY.

1. Venue is an issue to which the doctrine of reasonable doubt does not apply, and which, like any other issue on a trial, may be proved by circumstantial evidence.

2. An indictment for the larceny of a horse contained four counts, the first alleging the ownership of the stolen animal in A.; the second, in B.; the third, in C.; and the fourth, in a person unknown. Defendant had been previously tried for the same theft, under an indictment alleging the ownership in A.; and on that trial a witness testified that on a certain day he saw some parties pen some horses; that he saw them rope a gray animal; and that one of these parties had a knife in his hand. The witness being dead, his testimony was reproduced on the second trial. After the evidence was closed the state dismissed as to the first three counts in the indictment. The theory of the prosecution was that the stolen animal had been thrown down, and the brand picked out. Held, that the dismissal did not destroy the competency of the reproduced testimony.

3. A mere statement by one juror to his fellows that defendant was a man of bad character; that he had been charged with divers thefts; that he had been known to harbor thieves; and that his witnesses were all of bad character,—is not *per se* ground for new trial. It must appear that the verdict was probably influenced by such statement.

Appeal from district court, Lampasas county; W. A. BLACKBURN, Judge.

Andy Cox was convicted of the larceny of a horse, and appeals.

<sup>1</sup>Publication delayed by failure to receive copy.

*Fisher & Ward*, for appellant. *Ast. Atty. Gen. Davidson*, for the State.

WHITE, P. J. It is not essential that the venue of an offense be established by positive testimony, but only that from the facts in evidence the jury may reasonably conclude that the offense was committed in the county alleged. The doctrine of reasonable doubt does not apply to the issue of venue. Circumstantial evidence is as competent to establish the venue as it is to establish any other issue in the case. Willson, Crim. St. § 1719. John Pool, state's witness, testified: "The sorrel 'L. F.' mare was 8 or 10 years old, and she and the gray filly [this latter being the alleged stolen animal] ran on the range in Lampasas county." "The black 'S. E.' mare and the sorrel 'L. F.' mare ran on the range together, and had been running on the range since I had lived there. The gray filly and the black horse ran in the same bunch." It was proved by several witnesses that the animals ranged on Indian branch and Patterson creek. The two Ellises, witnesses for the state, both testified that they lived "on Patterson creek, in Lampasas county, Texas." We are of opinion that the venue of the offense, which was alleged to be in Lampasas county, was sufficiently proved.

It appears that there had been a previous trial of this defendant for the theft of this same animal, under an indictment which alleged the ownership to be in one Sarah Sparlin. On that trial a boy named George Maloney had testified for the state, and had subsequently died. In the present case the indictment contained four counts, the first alleging the ownership of the animal in Sarah Sparlin, the second in Arminda Wolf, the third in F. L. Smith, and the fourth in some person to the grand jury unknown. On the trial the evidence of the deceased witness, George Maloney, as given on the previous trial, was reproduced by one Wood, who had heard him testify on that trial. No objection was made by the defense to the reproduction of this evidence by Wood; and the same went to the jury without objection of any character. His testimony was that he (Wood) had been of counsel for defendant on the former trial, and that he remembered the boy George Maloney, who then testified. Witness then said: "This boy testified that he was at the Baker pen one evening in May, 1886, when somebody penned some horses there in the pen; that he was at the pen, on a shed or on the fence, and saw some of the parties rope a grey animal, and throw it down, and saw some one with a knife in his hand, but did not know who it was. Some of the parties told him to get down and go away, and he did so." This is the whole of Maloney's testimony, as reproduced by Wood.

After all the evidence was in, the district attorney "*nolle prosequi*" the first three counts of the indictment, and announced that he would claim a conviction alone upon the last count, to-wit, the one alleging the

ownership of the animal to be in "some person to the grand jurors unknown." It is insisted that the whole case became changed after the count alleging ownership in Sarah Sparlin was dismissed, and that it was no longer the same case as that in which the deceased witness, Maloney, had testified; and that, being another and separate and distinct case, his evidence on the former trial became inapplicable, inadmissible, and illegal, and could not be used or further considered in support of any of the issues involved in the case upon which the prosecution now claimed a conviction. We have quoted the testimony in full; and it will be noted that at the time of its introduction it was both legal and admissible to prove the count alleging ownership in Sarah Sparlin, that being the identical charge in the indictment on the former trial. This is conceded on the part of appellant's counsel. It will be further noted that the deceased witness testified nothing as to ownership, and knew nothing about it. The facts testified to by him unquestionably related to the same transaction, to the same defendant, and to the same animal as were involved in the former trial, and were as pertinent to the one case as the other. Moreover, the right to be confronted by the witness, as to his testimony, and the right of cross-examination, had been fully accorded to, and exercised by, the defendant at the former trial. More than that, the facts deposed to by this witness only tended to show that the animal was thrown down, and defendant's brand picked upon her, in Baker's pen; and these same facts are substantially established by other testimony, which shows that she was unbranded when she was taken up by defendant, and that when she was seen next day, at Blalock's pen, by Pool and others, she had defendant's brand, which appeared to have been picked upon her. Under these facts and circumstances, it would appear that, to say the least of it, if we concede that the reproduced evidence was inapplicable to the allegation of ownership in the fourth count, simply because it had been admitted in support of the first count, which was no longer in the case, yet, nevertheless, as to the facts deposed to, it was in truth and in fact as applicable to the one count as to the other, because the witness knew nothing about and had testified to nothing concerning the ownership of the animal. Had the witness himself been alive and testifying, this evidence would, beyond question, have been admissible, legitimate, and pertinent to the issue in the fourth count. No good reason has been assigned why, under the circumstances, its reproduction, he being dead, was not equally as competent and legitimate. We are of opinion that it was both competent and admissible; and that, even if it had been objected to, or a motion made by defendant to withdraw it, such objection or motion should have been overruled. Nor did the evidence come within the rule which would require the court to limit or restrict it in the



charge to any specific purpose. It was not introduced for any specific purpose foreign to the main issue. The objection to the charge of the court, that it did not withdraw the evidence, is untenable.

It is urgently insisted that the verdict and judgment should be set aside on account of misconduct of the jury, or, rather, because the verdict was not a fair and impartial one by reason of new and additional testimony or statements made to the jury, in their retirement, and when they were considering of their findings, by one of their number. Affidavits impeaching the verdict were made by several of the jurymen, to the effect that after consultation they failed to agree, two of their number, to-wit, Lincecum, the foreman, and one Clayton, standing out against, and dissenting from, the majority; that, in this attitude of the case, another one of their number, one Raspberry, stated to the jury that the defendant was a man of bad character; that he had been charged with divers thefts; that he had been known to harbor thieves; and that his (defendant's) witnesses were all of bad character; that, after the statement of Raspberry, Lincecum and Clayton came over, and voted for conviction. On the trial of this issue, which was presented in defendant's motion for new trial, two jurors, Lincecum and Clayton, each testified that in finding and agreeing to the verdict, as returned by the jury, they were not influenced by anything which the juror Raspberry had said, but that they formed their verdict solely upon the law and testimony. A mere statement made by one juror to another, or his fellows, in reference to the character of the defendant, is not *per se* ground for new trial, (*Austin v. State*, 42 Tex. 355;) and, unless the verdict was probably influenced by the statement of a juror to his fellows as to the character for credibility of a witness for defendant, a new trial will not be granted on that ground, (*Anschlicks v. State*, 6 Tex. App. 524; *McKissick's Case*, 26 Tex. App. 673, 9 S. W. Rep. 269; *Lucas' Case*, 27 Tex. App. 322, 11 S. W. Rep. 448; *Willson*, Crim. St. § 2545.)

But while we have differed from learned counsel upon all the points heretofore discussed, we are constrained to agree with them as to the sufficiency of the evidence. We are of opinion that it is of too doubtful a character, upon the issue of fraudulent intent, to authorize us in upholding the verdict and judgment. All the evidence shows the defendant was employed in gathering his sister's horses. He did not know, and had never seen, the animal in question. It was running in the bunch with his sister's animals. All his acts with regard to the animal were open, without effort at concealment; and, to several offers made him to buy and bet the animal, he declined, because it was not his, but his sister's. He cut and turned out of those he had gathered such animals as he knew were not his sister's. It is true there is some evidence showing that his

brand was picked on the animal after he took her into possession; but, if he did so after he had taken the animal, believing it to be his sister's, this would not establish the fraudulent intent at the time of the taking. We believe that, under the facts exhibited on the record and the law as given in the charge, the verdict is not supported by the law and evidence, and the court erred, in this regard in not granting a new trial. Because the evidence is insufficient, the judgment is reversed, and the cause remanded.

#### BARKLEY v. STATE.

(Court of Appeals of Texas. Oct. 16, 1889.)

##### CARRYING WEAPONS.

Defendant saw, from his place of business, that his brother, at a polling place near by, was retreating before several persons, who were armed with sticks, and it reasonably appeared to him that his brother was in danger of serious bodily injury. He procured a pistol from his place of business, and went to the polling place, and succeeded in quelling the disturbance peaceably. *Held*, that he was not guilty of violating Pen. Code Tex. art. 163, prohibiting the carrying of a pistol within one-half mile of a polling or voting place.

Appeal from county court, Tarrant county; W. D. HARRIS, Judge.

*Bowlin & Bowlin*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

**WILLSON, J.** This appeal is from a conviction for carrying a pistol on an election day, during the hours the polls were open, within the distance of one-half mile of a polling or voting place. Pen. Code, art. 163. The facts proved are that an election was being held at Birdsville, a voting place; that, while the polls were open, Jim Barkley, a brother of the defendant, became involved in a difficulty near the polling place, and was being followed, and apparently attacked, by a crowd of persons, some of whom were armed with sticks or bludgeons. At this time the defendant, who was a merchant, was in his business house, about 75 yards from where the crowd was advancing upon his brother. He was informed that his said brother was in danger, and from his store he could see the crowd advancing upon his brother; could see his brother retreating; and could hear the loud talking of the crowd. He armed himself with a pistol, which he kept in his place of business, and went hurriedly to the scene of the difficulty, and, in a peaceable manner, quelled the disturbance and returned immediately to his store. It is clear from the evidence that the defendant, in leaving his store and in going to the place of the difficulty, acted upon the belief that his brother was in imminent danger of being killed, or seriously injured. He was warranted in such belief by what he could hear and see. It is furthermore clear from the evidence that the only motive which actuated him in going to the place with the pistol was to defend his brother from the apparent impending danger of being killed, or seriously injured, by the attacking crowd.

Upon the trial, counsel for defendant requested a special instruction, as follows: "If you find from the evidence that defendant carried a pistol within a distance of one-half mile of the Birdsville voting box, during the time the polls were open; and that, before he so carried the pistol, his brother, Jim Barkley, was in a difficulty at or near such voting box; and that defendant saw him retreating, with a number of persons apparently pursuing him, and apparently about to do some serious bodily injury to his said brother; and that defendant, reasonably believing from such appearance, as viewed from his standpoint, that his said brother was actually in danger of such serious bodily injury, then took the pistol, and went to the defense of his brother against such apparent danger, and for that purpose only,—you must acquit the defendant." This instruction was refused, and the defendant excepted, and presents this action of the court by proper bill. In the charge of the court given to the jury, the issue sought to be presented by the special instruction is not submitted to the jury. We are of the opinion that said special instruction should have been given. While the letter of the statute would not excuse, the spirit of it certainly does, when the purpose and intent accompanying the act is protection against apparent, present, and serious danger to human life, then about to be inflicted. In the interpretation of a penal statute, the legislative intent—the spirit of the law—must be considered, and regarded as of controlling importance and effect; and, although an act or omission may come within the strict letter of a statute denouncing an offense, such act or omission will not be held an offense, if it came not also within the intent or spirit of the law. Mr. Bishop says: "In favor of defendants, criminal statutes will be contracted by interpretation so as to avoid punishing those who, though breaking their letter, have not violated also their spirit." Bish. St. Crimes, § 281. Again, this author states the doctrine in another form; that is, "that the acts, to be punishable, must come not only within the words of the statute, but also within its reason and spirit, and the mischief it was intended to remedy." Id. § 282. Again, this eminent author says: "To punish one who has not violated the spirit of the law, however contrary to the letter his act may have been, is to strike a blow at the root of our jurisprudence, as well as to wrong the individual." Id. § 285.

A familiar illustration of the rule under discussion is that given by Blackstone of a statute making it a felony for any one to draw blood in the street. This statute was construed to not apply to a surgeon who drew blood from a person who had been seized with a fit. We cannot conceive that it was the legislative intent, in enacting article 163 of the Penal Code, to deprive a person of the right of using arms to protect himself, or even another, from death or serious bodily in-

jury, where the danger is immediate and imminent, and not merely prospective and probable. Such intent would be unreasonable, and in conflict with natural law. We would seriously doubt the validity of any enactment which would seek to punish a man for exercising the inherent right of necessary self-defense. Evidently, there was no intention on the part of the defendant to violate article 163 by the act of carrying the pistol. His sole purpose in carrying the pistol was to defend his brother from apparently imminent, serious, and pressing danger. Such act and intention we cannot think come within the spirit of said article, or within the mischief intended to be remedied thereby.

We are referred by the assistant attorney general to *Livingston v. State*, 3 Tex. App. 74, as a case holding a different view from that we have herein announced. In the *Livingston Case*, it does not appear that the threatened danger was imminent, immediate, and pressing. The defendant proposed to prove that his life was threatened, and was in danger, at the time it was charged he committed the offense. This proposed evidence was rejected. In passing upon this question, the court said: "The statute punishing the carrying of arms within one-half mile of the place of election makes no exception or reservation in favor of such class of cases." We do not think our view of the present case conflicts with the decision above referred to. A mere prospective, anticipated danger, which might not occur, or which might be avoided or prevented by other means than the use of arms, would not excuse a person from the operation of article 163, and we do not understand the *Livingston Case* as holding more than that such a state of facts furnished an excuse, under the statute. We think the facts of the *Livingston Case* brought it within both the letter and the spirit of the statute. We think it unnecessary to notice other questions presented. For the error in refusing the special instruction quoted the judgment is reversed, and the cause remanded.

#### HARMON v. KLINE *et al.*

(*Supreme Court of Arkansas*. Nov. 16, 1899.)

#### FIXTURES—ESTOPPEL.

A person who, as member of the town council, agrees that a town building, located on state land, shall be removed when the land is sold, and who subsequently purchases the land with the understanding that the building does not pass with it, is estopped from denying that it is personalty belonging to the town.

Appeal from circuit court, Johnson county; G. S. CUNNINGHAM, Judge.

The parties, plaintiff and defendant *et al.*, live at the town of Coal Hill. They, with other citizens, subscribed to a fund to build a city jail. Plaintiff (who was then a member of the town council) and defendants, with other citizens, determined to locate said jail on school land, belonging to the state, adjoining the town, and agreed that, whenever the

state sold said land, they would move the house off to other land to be provided by the town. At the sale of the lot, the sheriff announced that the house did not go with the land, and plaintiff bought the land with that understanding. Subsequently, he acquiesced in the use of the jail by the town. At length he announced that he intended tearing down the jail, and constructing near his residence "a storm-house." Defendants thereupon, at night, moved the jail off plaintiff's land, and he brought this suit for the alleged trespass. There was verdict and judgment for the defendants, and the plaintiff appealed.

*A. S. McKennon*, for appellant. *Kline et al.*, *pro se*.

**SANDELS, J.**, (*after stating the facts as above.*) A house built upon the land of another without permission and agreement becomes part of the realty; but where permission is first obtained, and agreement had to that effect, the building remains personalty. Under the facts of this case, plaintiff is estopped to treat the building other than as personalty belonging to the town of Coal Hill. **Affirmed.**

#### CLEVELAND *et al.* v. SHANNON.

(*Supreme Court of Arkansas. Nov. 23, 1889.*)

##### JUDGMENT—LIEN.

The lien of a judgment is superior to that of an unrecorded mortgage. Following *Hawkins v. Files*, 11 S. W. Rep. 681.

Appeal from circuit court, Washington county; *J. M. Pittman*, Judge.

On March 18, 1882, Juvan Bryant and wife mortgaged a tract of land to Alexander Shannon, which mortgage was not recorded until March 2, 1887. January 13, 1885, J. F. and John B. B. Cleveland recovered judgment against Bryant on a liability incurred in 1873. This action was to foreclose the mortgage, and said Cleverlands were allowed to interplead to have their lien declared and enforced, but the court found the mortgage lien superior to the judgment lien, and decreed accordingly; from which interpleaders appeal.

*C. R. Buckner, S. H. West*, and *B. R. Davidson*, for appellants. *A. M. Wilson*, for appellee.

**PER CURIAM.** The court erred in holding the lien of Shannon's mortgage superior to that of the judgment of appellants. *Hawkins v. Files*, 51 Ark. 417, 11 S. W. Rep. 681, and cases there cited. While we can base no judicial determination upon the facts disclosed in the case of *Bogan v. Cleveland*, ante, 159, (decided at the present term,) we deem it proper, to avoid complications respecting the land in controversy, to depart from the general practice in equity causes, and to remand this cause for further proceedings, and such decree as the chancellor may find proper upon all the facts. Reverse and remand.

v. 12s. w. no. 19—32

#### SITHEEN *et al.* v. MURPHY.

(*Supreme Court of Arkansas. Nov. 23, 1889.*)

##### TRIAL—INSTRUCTIONS.

Where plaintiffs sue upon a contract that has been altered after it was signed by defendant, and procure the court to instruct that it required a ratification of the contract by defendant, after the alteration, to give it validity, thus abandoning the contract, unless the proof shows a ratification, and that issue is found against them, they cannot complain of the action of the court in giving the instruction.

Appeal from circuit court, Garland county; *J. B. Wood*, Judge.

*R. G. Davies*, for appellants. *L. Leatherman* and *G. W. Murphy*, for appellee.

**PER CURIAM.** The plaintiffs sued Murphy upon a written contract which the proof showed had been altered after he signed it. The alteration consisted in the addition of a clause, the meaning of which is obscure. The plaintiffs seem to have interpreted this clause, while constructing the house, as conferring authority upon the architect to alter the specifications of the contract, or to authorize them to do so. There was nothing in the contract proper which conferred that authority. At the trial the plaintiffs treated the alteration as material, and as avoiding the contract, by procuring the court to instruct the jury that it required a ratification of the contract by Murphy, after the alteration, to give it validity, but that they were nevertheless entitled to recover upon the oral agreement to build the house, if the proof justified it. That was an abandonment of the written contract, unless the proof showed a ratification, and the jury found against the plaintiff upon that issue. The record shows that the instruction referred to was the first asked for and given, and the plaintiff did not seek to save the question as to the materiality of the alteration of the contract by requesting the court to declare that it was not material, or that it did not avoid it. Having tried the cause upon the ground of their own selection, they are not in position to complain of the court in permitting it. This makes it unnecessary to consider the rejected prayers for instructions in regard to fraud or mistake in executing the written contract. Our attention is not directed to any exception that relates to the appellants' rights to recover upon the oral contract, and none was urged to the charge given by the court. The exception to the latter was, in gross, to a series of propositions, some, and perhaps all, of which are correct. **Affirmed.**

#### ARNETT v. GLENN.

(*Supreme Court of Arkansas. Nov. 23, 1889.*)

##### WIFE'S SEPARATE ESTATE—PAYMENT.

Money paid to a husband's creditor by a debtor of the wife cannot be applied to the debt due the wife for her individual money, though it was paid on the express agreement of the husband that it should be so applied, where no authority of the wife is shown for such transaction.

Appeal from circuit court, Independence county; J. W. BUTLER, Judge.

Action by Bertie Arnett against John W. Glenn, on a note given by defendant to plaintiff for money belonging to her separate estate. Defendant had paid a draft drawn by plaintiff's husband in favor of a creditor of the husband, on the husband's promise that this should go as a credit on plaintiff's note. Plaintiff had no knowledge of the transaction until payment of the note was demanded, and then refused to ratify it or allow it as a credit on the note. From a judgment allowing it as a proper credit, plaintiff appeals.

Appellant, *pro se*. Robert Neill, for appellee.

**PER CURIAM.** If the husband held the note with express authority to collect it, he could only have made such collection as would inure to the benefit of his wife. He could not accept in its payment the satisfaction of his own debt, without proof that the wife gave her assent, either express or implied, to this misuse of her funds. *Williams v. Johnston*, 92 N. C. 532; *Compress Co. v. Manufacturing Co.*, 64 Tex. 337. There was no proof that Mrs. Arnett ever authorized such conduct. The judgment is reversed, and cause remanded.

#### TITSWORTH v. FRAUENTHAL.

(*Supreme Court of Arkansas*. Nov. 23, 1899.)

##### LANDLORD'S LIEN—REPLEVIN—PARTITION OF CHATTELS.

1. Where a landlord purchases the cotton crop of his tenant, though he thereby extinguishes his lien, he acquires, as against a prior mortgagee, an absolute title to an undivided interest in such cotton, equal to the amount of his lien.

2. The mortgagee cannot maintain replevin for any particular lot of such cotton, as to which he is only an owner in common with the landlord, as replevin cannot be resorted to as a means of partitioning property held in common.

Appeal from circuit court, Logan county; J. S. LITTLE, Judge.

Replevin by Max Frauenthal against E. N. Titsworth to recover two bales of cotton of the crop raised by defendant's tenant, which was mortgaged to plaintiff, but was subsequently purchased by defendant, to secure his rent, and supplies furnished to the tenant. There was judgment for plaintiff, and defendant appeals.

C. A. SeEVERS, for appellant. Sam Frauenthal, for appellee.

**PER CURIAM.** The plaintiff's title to the two bales of cotton replevied was no greater than to the other bales of the same lot. The landlord's lien was extinguished, as the court held, by the transfer of the cotton upon which the lien existed; but the title of the landlord to an undivided interest in the cotton, equal in value to the amount of the lien extinguished, became absolute by his purchase. As to the remaining interest he was only a purchaser whose rights were subsequent to those of the mortgagee. But the mortgagee

had not a superior title to any particular part of the lot of cotton, but, at most, was only an owner in common with the landlord. Replevin cannot be resorted to as a means of partitioning property held in common. *Hart v. Morton*, 44 Ark. 447, and cases there cited; *Ward v. Worthington*, 33 Ark. 830. It was error, therefore, to allow the action to be maintained. Reverse and remand.

#### MCQUEENEY v. PHOENIX INS. CO.

(*Supreme Court of Arkansas*. Nov. 23, 1899.)

##### INSURANCE—CONDITIONS OF POLICY.

A policy of insurance on a dwelling-house and a house to let, which stood close together, provided that "if the above premises shall become vacant or unoccupied \* \* \* this policy shall cease," etc. The insurance was for separate sums, but the consideration paid was a gross sum. The buildings were destroyed when the dwelling-house alone was occupied. Held, that the contract was indivisible, and that the premises were not vacant, within the policy, so as to discharge the company from liability for loss of the other house.

Appeal from circuit court, Garland county; J. B. WOOD, Judge.

L. Leatherman, for appellant.

**HEMINGWAY, J.** The appellant brought suit against the appellee upon a policy of insurance, whereby, in consideration of a stated premium, it insured him against loss by fire in the sum of \$1,000; the amount being apportioned as follows: \$600 upon a residence, and \$400 upon a frame house, to let. It was alleged and admitted that both houses were destroyed by fire during the term of policy. The policy contained the following clause: "If, during this insurance, the above-mentioned premises shall become vacant or unoccupied, or if the occupation or the possession of such premises is changed, except as herein specially agreed to, in writing, upon this policy, then and from thenceforth, so long as the same shall continue vacant or unoccupied, or shall be so appropriated, applied, or used, this policy shall cease, and be of no force and effect." The two houses covered by the policy were about 30 feet apart, and in the same inclosure. At the time of the fire one was occupied by the assured, as a residence, while the other was unoccupied. The company paid the loss on the residence, but declined to pay the loss on the other house, because it was vacant. The assured instituted this suit to recover the loss upon the latter house. The controversy depends upon the construction of the clause recited. The appellant contends that the two houses comprised the premises, within its meaning, and that the premises were occupied so long as either house was occupied. The appellee contends that each house comprised separate premises, within its meaning, and that upon either house becoming vacant the insurance upon it was suspended. The court sustained the contention of appellee; and this raises the only question presented for our consideration. The appellee in-

sured two houses, for separate sums. The consideration paid was a gross sum. The rate of insurance is not disclosed. Whether it was the same upon each house, or different, does not appear.

The construction of this and similar clauses in policies of insurance has often received judicial consideration; and there is, perhaps, no question upon which the conflict between different courts is more clearly defined. An examination satisfies us that the cases decided in different courts cannot be harmonized; and we have attempted to ascertain and follow those most in consonance with correct principle. The learned judge who tried this cause, following one line of decision, seems to have considered that the clause should be construed in the same way, in this contract, as a like provision would be construed in a several policy on each of the subjects insured. In other words, that the contract, though entire in form, is divisible in substance. That it was competent for the parties to make such a contract is conceded. That they so intended is not obvious from the clause under consideration. The natural significance of the terms employed is that if the entire premises should become vacant the entire policy should cease during such vacancy. If the parties had intended to make a separate contract as to each subject of the contract, their purpose might have been easily accomplished by saying that if the premises, or any part thereof, should become vacant, the insurance, *pro tanto*, should cease. Such intention is often so manifested in similar policies; and we see no reason why it would not have been done in this case, if it had been entertained. Mr. Parsons says: "If the consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items." 2 Pars. Cont. 519; Johnson v. Johnson, 8 Bos. & P. 162; Miner v. Bradley, 22 Pick. 457. In the case of McClurg v. Price, 59 Pa. St. 420, it is said: "If the consideration is single, the contract is entire, whatever the number or variety of the items embraced in its subject." Our attention is called to no case in which the correctness of this statement of the general rule is denied or questioned. It has been stated and approved by many authors and courts. But it is said that "a policy of insurance is a contract so different from those in which these general rules have been laid down that it is doubtful whether they can be applied to this peculiar contract, or in what manner the application of them should be made." Quarrier v. Insurance Co., 10 W. Va. 530. In what the difference consists, or why those general rules which the wisdom of our jurisprudence has formulated to govern in the consideration of contracts should not be applied in construing insurance policies, is not stated, nor apparent to us. We can see no good reason why a contract which, if made between individuals, would be entire, should be divisible

if made between an individual and an insurance company. Mr. Wood and Mr. May each seems to think that the general rule applies to insurance policies; and that, where the amount of insurance is apportioned to distinct items, but the premium paid is gross, the contract is entire. May, Ins. §§ 189, 277; 1 Wood, Ins. 384. This view is sustained by the courts of last resort in the states of Maine, Massachusetts, Pennsylvania, Maryland, Virginia, Wisconsin, Michigan, and Minnesota. It receives support from the courts of New Hampshire and Vermont, although not expressly approved by them; and the supreme court of West Virginia, in a case much like the one before us, held the contract entire. Day v. Insurance Co., 51 Me. 91; Lovejoy v. Insurance Co., 45 Me. 472; Richardson v. Insurance Co., 46 Me. 394; Friesmuth v. Insurance Co., 10 Cush. 587; Kimball v. Insurance Co., 8 Gray, 83; Lee v. Insurance Co., 3 Gray, 583; Gottsman v. Insurance Co., 56 Pa. St. 210; Association v. Williamson, 26 Pa. St. 196; Insurance Co. v. Assum, 5 Md. 165; Bowman v. Insurance Co., 40 Md. 620; Moore v. Insurance Co., 23 Grat. 508; Hinman v. Insurance Co., 36 Wis. 159; Schumitsch v. Insurance Co., 48 Wis. 26, 3 N. W. Rep. 595; Insurance Co. v. Resh, 44 Mich. 55, 6 N. W. Rep. 114; Plath v. Association, 23 Minn. 479; McGowan v. Insurance Co., 54 Vt. 211; Baldwin v. Insurance Co., 60 N. H. 422; Bryan v. Insurance Co., 8 W. Va. 605. Opposed to this view, we find decisions of the courts of last resort in the states of New York, Illinois, Missouri, Kentucky, and Nebraska, and the decision before referred to, in Quarrier v. Insurance Co., supra. Merrill v. Insurance Co., 73 N. Y. 462; Insurance Co. v. Anapow, 51 Ill. 283; Insurance Co. v. Lawrence, 4 Metc. (Ky.) 9; Koontz v. Insurance Co., 42 Mo. 126; Loehner v. Insurance Co., 19 Mo. 628; Insurance Co. v. Schreck, 43 N. W. Rep. 340. The force of the Kentucky case is much impaired by the fact that it relied on the case of Clark v. Insurance Co., 6 Cush. 342, which has never been followed in its own state, but impliedly overruled in several later cases. The New York supreme court had held such contracts entire before the case of Merrill v. Insurance Co., supra, was decided, (Smith v. Insurance Co., 25 Barb. 497;) and since then the superior court of the state has held such a contract entire, (Herrman v. Insurance Co., 45 N. Y. Super. Ct. 402.) The case of Merrill v. Insurance Co., supra, is placed upon the fact that there was a separate valuation of the subjects of insurance. It is more reasonable, we think, to hold that the sole effect of the apportionment of the amount of insurance to the different subjects insured is to limit the extent of the insurer's risks upon each item to the amount named. It cannot be said to make a several contract as to each subject of insurance; for a consideration is necessary to each contract, and, the consideration being in gross, there is no way to apportion it to the several contracts, so as to

sustain each by its proper consideration. It would not do to apportion it according to the amount of the risks upon the different items; for it is not true that the rates are uniform, but they vary according to the hazard of the risk. This court, in the case of *Jackson v. Jones*, 22 Ark. 158, held a contract to sell 1,500 bushels of wheat at 40 cents per bushel to be an entire contract. There the subject of the contract was divisible and the consideration apportionable; but the parties had manifested a desire to make one contract, and not 1,500, and the court declined to substitute, by construction, other contracts for the one made by them. That contract was much more favorable to the contention of the appellee than the one we are considering. The undertakings of the appellee are divisible, and might be the subject of several contracts; but the consideration paid by the appellant was not divisible, upon any basis disclosed by the contract, and there could not be a division into several contracts, unless there could be an apportionment to each of its appropriate consideration. Determined by the ordinary rules, this contract was entire. We see no reason why it should be determined by any other rule. As it was entire, the two houses comprised the premises; and, so long as one of them was occupied, the policy was not suspended. The judgment is reversed, and the cause remanded for a new trial.

#### NICHOLS v. STATE.

(Court of Appeals of Texas. Oct. 19, 1889.)

##### THEFT—INDICTMENT—VENUE.

1. Pen. Code Tex. art. 727, provides that if the property came into the possession of a person accused of theft, by lawful means, the subsequent appropriation of it is not theft; but if the taking, though lawful, was obtained by any false pretext, or with any intent to deprive the owner of the value, and appropriate the property, and the same is so appropriated, the theft is complete. Defendant was indicted for general theft, and the evidence showed that the stolen property was handed to him by the owner, and that the theft might have been committed by his retaining it. *Held*, that the court should have instructed that, in order to convict, the jury must find that the intent to deprive the owner of the value of the property existed at the very time of acquisition.

2. Since Pen. Code Tex. arts. 744, 745, define theft from the person as a distinct offense, and essentially different from ordinary theft, one cannot be convicted thereof, under an indictment for ordinary theft.

3. The venue of a prosecution for theft from the person is confined to the county wherein the offense was committed.

Appeal from district court, Dallas county;  
R. E. Burke, Judge.

Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. Appellant was convicted, in the district court of Dallas county, for the theft of a watch, alleged by the indictment to have been stolen in Limestone county, and subsequently brought by the accused into Dallas county. With regard to the original taking, the evidence of the prosecuting witness, Mastop, was to the effect that he

handed his watch to the defendant, to look at, in Kosse, Limestone county, but that he is not certain whether the defendant, after he had looked at and examined it, handed it back to him or not. His best recollection was that defendant did not return it to him. He states, however, that, if defendant did return him the watch, then he is certain he (Mastop) put it in his pants pocket before going to sleep; and that after he woke up he found his watch pocket on the floor, and the watch gone; that, if defendant returned him the watch, he put it in his pants pocket, in which case it must have been taken out while he (Mastop) was asleep, and without his knowledge. He was not sure if the watch was given back to him, but he thought it was not.

Two theories clearly present themselves upon this state of facts: (1) Theft of property, the possession of which was lawfully acquired; (2) Theft from the person.

Mastop handed his watch to defendant, and defendant's possession of the same was therefore originally lawful. In order to make defendant guilty of theft, under the circumstances, the state was further required to show, either that the possession of the property was obtained by a false pretext, or that, at the very time the possession of the property was obtained by the accused thus lawfully, there existed in his mind the fraudulent intent to deprive the owner of the value of the property, and to appropriate the same to his own use, and that he did so appropriate the property. The fraudulent intent must have existed at the very time of acquiring the possession of the property, because no subsequent fraudulent intent, and no subsequent fraudulent conversion or appropriation, would be sufficient to establish his fraudulent intent at the time of the acquisition. Pen. Code, art. 727; *Willson*, Crim. St. §§ 1268, 1269; *Guest's Case*, 24 Tex. App. 235, 5 S. W. Rep. 840; *Cunningham's Case*, 27 Tex. App. 480, 11 S. W. Rep. 485; *Graves' Case*, 25 Tex. App. 333, 8 S. W. Rep. 471. Defendant was indicted simply for the theft of the property. To have held him liable for a conversion of property, after he had lawfully acquired possession thereof, under the provisions of the act of March 8, 1877, (Pen. Code, art. 742a; *Willson*, Crim. St. § 1292,) it would have been essential that the indictment should have charged conversion by a bailee. Proof which would support a conviction for the theft defined by the said act of March 8, 1877, (Pen. Code, art. 742a,) would not authorize a conviction for theft under an indictment for general theft. *Taylor's Case*, 25 Tex. App.

- This article provides that, if the property came into the possession of a person accused of theft by lawful means, the subsequent appropriation of it is not theft; but, if the taking, though lawful, was obtained by any false pretext, or with any intent to deprive the owner of the value, and appropriate the property, and the same is so appropriated, the theft is complete.

97, 7 S. W. Rep. 861. The indictment being for general theft, and the possession of the defendant being a possession acquired from and with the consent of the owner, and therefore lawful, the court should, as part of the law applicable to the facts of this phase of the case, have instructed the jury substantially that before they could convict in the case they must find that the intent to deprive the owner of the value of the property existed at the very time of the acquisition, and that, unless they so found, no subsequent fraudulent intention, appropriation, or conversion would make his previous original and lawful taking theft. Pen. Code, art. 727; Willson, Crim. St. §§ 1268, 1269. The learned trial judge did not instruct the jury as to these well-established principles of law,—principles which were directly applicable to the case, as made by the allegations and proof, in so far as general theft of the property was concerned; and the charge was consequently defective, in not setting forth distinctly the law applicable to the case.

With regard to the second theory or phase of the case. If, after acquiring possession of the watch, to look at it, defendant returned it to Mastop, the owner, and Mastop placed it in his pocket, and went to sleep, and if, during the sleep of Mastop, defendant privately stole the watch from his person, without the knowledge of said Mastop, then defendant would be guilty of a different offense from that stated in the indictment; that is, the specific offense denounced by our Code as "theft from the person," (Pen. Code, arts. 744, 745,) and, this offense being essentially different from ordinary theft, a conviction thereof could not be had, under an indictment for ordinary theft. *Harris v. State*, 17 Tex. App. 132; *Graves' Case*, 25 Tex. App. 333, 8 S. W. Rep. 471; Willson, Crim. St. § 1312. The learned trial judge submitted no instruction to the jury upon this phase of the case, and refused a requested special instruction presenting the law applicable thereto.

Again, another and important view of the facts is that, if the case made was one of "theft from the person," then the district court of Dallas county would have no jurisdiction to try said case, because such offense could only be legally prosecuted in the county of the venue where the offense was completed, to-wit, in Limestone county. When a party is prosecuted in a county other than that in which the theft was committed, a complete offense must be shown in the county of the prosecution, in order to warrant a conviction. *Roth v. State*, 10 Tex. App. 27. "Theft from the person" can transpire only in the county where the actual, overt act of taking was committed, and can be prosecuted only in the county where the act was committed. It cannot, like ordinary theft, be prosecuted in any county through or into which the thief may carry the property. *Gage's Case*, 22 Tex. App. 123, 2 S. W. Rep. 638; *Clark's Case*, 23 Tex. App. 612, 5 S. W. Rep. 178;

Willson, Crim. St. § 1312; *West v. State*, 12 S. W. Rep. 685. For the errors pointed out and discussed the judgment is reversed, and the cause remanded.

# JACKSON v. STATE.

(Court of Appeals of Texas. Oct. 28, 1890.)

## MURDER—EVIDENCE—INSTRUCTIONS.

1. On a trial for murder, committed as the result of a quarrel, where there is evidence that defendant had in good faith abandoned the original difficulty, and that deceased and his wife renewed, provoked, and pressed the conflict, defendant is entitled to an instruction as to the law in case of abandonment of the difficulty by defendant.

2. Evidence of a former attack on defendant by deceased, with a knife, is competent, as tending to support evidence given on the trial that deceased was a violent and dangerous man, and provoked the difficulty which resulted in his death.

3. Such evidence is also admissible where there was evidence of former threats by deceased against defendant, as tending to show that defendant acted in self-defense in killing deceased.

4. There being evidence that defendant provoked the quarrel, the court instructed that to one who brings on an affray, intending to wreak his malice, the plea of self-defense is not available, though his own life is imperiled, and, if defendant provoked a contest, "with the apparent intention of killing, or doing some serious bodily injury," he is guilty of murder, though he may have done the killing suddenly, without deliberation, and to save his own life; but if the slayer provoked the contest "without any intention to kill or inflict serious bodily injury," and did the killing suddenly, without deliberation, it would be manslaughter. *Held*, that the instruction was correct, and it was proper for the court to underscore the quoted portion, so as to direct the jury's attention specially to the intent with which defendant provoked the difficulty, and the law as controlled by such intent.

Appeal from district court, Freestone county; RUFUS HARDY, Judge.

The conviction was for manslaughter. The proof for the state shows that defendant and deceased met at a party on the fatal night; that the defendant accused the deceased of circulating slanderous reports about him; that the deceased denied having done so; that defendant thereupon proposed to take deceased to a certain house, to prove the charge by a certain person; that the deceased refused to go; that defendant thereupon demanded that deceased should leave the yard with him, to "settle" the difficulty; that deceased refused to go, whereupon the defendant seized him, to drag him out of the yard; that a scuffle ensued in the course of which the deceased struck the defendant with a steelyard pea, and the defendant fatally cut the deceased with a knife. The evidence for the defense was to the effect that the defendant taxed the deceased with circulating lies about him; that the deceased denied the charge, and proposed to confront the defendant's informant that night with his denial; that defendant refused to go that night, upon the plea that it was too late; that deceased, acting with his wife, who had joined him, pressed the discussion to a quarrel; that defendant left the yard, protesting that he would have no difficulty with deceased; that then, urged by his wife to go out of the yard, the deceased followed the defendant, and struck him a severe blow



with a steelyard pea; that the two then "clinched;" and that, in the scuffle, the defendant inflicted the fatal cut. The charge of the court, referred to in the opinion, reads as follows: "You are further instructed, as a qualification of, and in addition to, paragraphs 3, 4, 5, and 6, just read, of this charge, that to one who brings on an affray, or who prepares himself for an encounter, in which he intends to wreak his malice, the plea of self-defense is not available, though his own life is imperiled in the affray. If the slayer provoked a contest with the deceased, *with the apparent intention of killing him, or, doing him some serious bodily injury*, he is guilty of murder. Although he may have done the act of killing suddenly, without deliberation, and in order to save his own life, the law allows no justification in such case, and no reduction of the grade of homicide below that of murder. But if the slayer provoked the contest, but provoked it *without any intention to kill, or inflict serious bodily injury*; and suddenly, without deliberation, did the act of killing,—while the homicide would not be justifiable, it would be manslaughter. If a person by his own wrongful act, bring about the necessity of taking the life of another, to prevent being himself killed, he cannot say that such killing was in his necessary self-defense; but the killing will be imputed to malice, express or implied, by reason of the wrongful act that brought it about, or malice from which it was done."

*J. D. Childs*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

**WILLSON, J.** We are unable to perceive the soundness of the objections urged by counsel for the defendant to the charge of the court. Instructions upon the law governing where a difficulty has been provoked by the defendant were demanded by the evidence. Upon this phase of the case the law is correctly expressed in the charge, without unnecessary repetition, and without giving it undue prominence. That certain words in the charge were underscored is an objection which seems to us to be hypercritical, and without merit. The purpose of the underscoring is manifest, and could not have been misconstrued by the jury. That purpose was to attract the attention of the jury to the intent with which the defendant provoked the difficulty, if he did it, and the law, as controlled by such intent. It was favorable to the defendant in this respect. In all respects, we think that the charge of the court, as to the issues submitted by it, is full, sufficient, and correct. But we are of opinion that the evidence required an instruction as to the law in case of an abandonment of the difficulty by the defendant. Such instruction was requested by counsel for defendant, and was refused. In this refusal, we think, the court erred. There is evidence in the record tending to show that the defendant had in good faith abandoned the original difficulty, and

that the deceased and his wife, acting together, renewed, provoked, and pressed the conflict which resulted fatally to deceased.

Other errors are assigned and insisted upon by counsel for defendant, only one of which we shall discuss, as the remainder are of a character not likely to arise on another trial. Defendant offered to prove that a few days prior to the homicide the deceased had made an unprovoked, violent attack upon him, with a knife, attempting to take his life. Upon objection made by the state, said proposed evidence was rejected, upon the ground that it was irrelevant. We think the evidence should have been admitted. It was rendered pertinent and competent by other evidence adduced on the trial. It tended to support the theory of the defendant that the deceased was a violent and dangerous man, and provoked and pressed the difficulty which resulted in his death. It was admissible, also, upon the same ground, of threats made by deceased, as tending to show that defendant, in killing deceased, acted in self-defense. Because of the errors we have specified the judgment is reversed, and the cause remanded.

#### PULLEN v. STATE.

(Court of Appeals of Texas. Oct. 23, 1893.)

#### MURDER—EVIDENCE.

On a trial for murder a woman testified that a few hours before the murder she saw defendant and a companion on the street; that they asked deceased to lend them money; that on his refusal defendant said, "I will lay your body down and have all your money by morning;" that defendant afterwards was in a retired place, apparently trying to open a knife, and asked her where deceased had gone; and that two hours later she saw deceased, lying face down, near by. She also identified a knife in evidence as one which she had borrowed of defendant before the killing. A witness testified that the knife in evidence belonged to him; that defendant had borrowed it, in the presence of four others; and that it had been returned to his pocket while he was asbed. Four witnesses testified that they were present at the time defendant was said to have borrowed the knife, and that he did not then borrow it. A physician testified that he examined the knife, and found dried blood on it. *Held*, that the evidence was insufficient to convict of murder.

Appeal from district court, Tyler county; *J. F. LANIER*, Special Judge.

The proof shows that Drake was killed, late at night, by a knife stab in the throat. The principal witness was a woman, who testified, in substance, that a few hours before the killing she borrowed a knife from the defendant, for a few minutes; which knife she identified as that in evidence. *En route* to a saloon that night, she saw the defendant and one New on the streets of Woodville, engaged in a whispered conversation. At about the same time she observed the approach of Drake. New called to Drake to lend him some money. Drake refused upon the plea that he had no more than he needed. New reminded him that he (New) had recently loaned him money. Thereupon defendant said to Drake: "Yes, let us have some money. We have been gambling, and

are broke." Drake, who was drunk, replied: "You d——d son of a b——h, you can't have my money." Defendant replied: "You call me a son of a b——h! I will lay your d——d body down, and we will have all your money by morning." Drake asked: "What do you mean?" Defendant laughed, and replied: "Oh, nothing. That is a way we have of talking." Defendant and New then walked off; and witness, a few minutes afterwards, saw defendant, squatted on the ground between a saloon and a barber-shop, apparently trying to open a knife. When he got the knife open, he placed his hand on the gallery, and, as witness passed, asked her: "Do you know where that [man] went we tried to get money from a while ago?" Witness replied in the negative, and went into the saloon. When she left the saloon, about three hours later, she saw Drake, lying face down, on the gallery. She learned next morning that he was dead. As witness was retiring that night, after she got home from the saloon, New came into her yard, and called her, saying that he wanted to speak to her; but she did not go out to him. One Ben Horn testified that the knife in evidence belonged to him. He spent the fatal night at the defendant's house; going to that house before supper. When defendant came to supper he borrowed the witness' said knife, four persons being present, and took it away with him after supper. Witness did not see defendant again that night, but on the next morning he found his knife in his breeches pocket, into which pocket it had been surreptitiously placed after he went to bed. A physician testified that he examined the said knife on the day after the killing, and found a small quantity of dried blood on the large blade. The four witnesses in whose presence Horn testified he loaned the knife to defendant testified that they were with Horn at the time he claimed to have loaned the knife to defendant, but that Horn did not lend him the knife, in their presence.

*Asst. Atty. Gen. Davidson, for the State.*

WHITE, P. J. This appeal is from a judgment which has condemned the appellant to the penitentiary for life, for the alleged murder of Lewis Drake. The conviction was had upon evidence entirely circumstantial. We have given the evidence, as disclosed in the record, our most mature consideration, and it fails to impress us with that probative force, cogency, and conclusiveness such as should command our confidence in the justice and correctness of the verdict and judgment rendered. Appellant may be guilty of the terrible crime of which he has been convicted; but, in order to establish his guilt, the law requires that the evidence should exclude, to a moral certainty, every reasonable doubt that the accused, and no other person, committed the crime, and exclude every other reasonable hypothesis than that of his guilt. *Pogue v. State*, 12 Tex. App. 283; *Lovelady v. State*, 14 Tex.

App. 545; *Dugger's Case*, 27 Tex. App. 95, 10 S. W. Rep. 763; *Willson, Crim. St.* § 1057. We do not think appellant should be held to be legally convicted, upon the evidence exhibited in the record before us; therefore the judgment is reversed, and the cause remanded.

#### WALKER v. STATE.

(*Court of Appeals of Texas. Oct. 28, 1899.*)

#### CRIMINAL LAW — CONFESSIONS AND ADMISSIONS.

1. One on trial for murder had stated, on his own examining trial, that what he testified as state's witness on the examining trial of another, accused of the same offense, was the truth, and that he had no more to say. Such testimony was reduced to writing, but was sworn to by defendant, and was not attested by the magistrate. *Held*, that it was inadmissible against him, as a "voluntary statement," under Code Crim. Proc. Tex. art. 262, which provides that an accused may make a voluntary statement before the examination of the witnesses, which shall be reduced to writing and signed, but not sworn to, by him, and which shall be attested by the magistrate.

2. Article 750 provides that the confession of an accused shall not be used, if made when in custody, unless it be made in his voluntary statement, taken before an examining court, in accordance with law, "or be made voluntarily, after having been first cautioned that it may be used against him, or unless, in connection with such confession, he make statement of facts or circumstances, that are found to be true, which conduce to establish his guilt." *Held*, that such testimony was not admissible under this section, as defendant was in custody when it was made, and was not warned that it might be used against him, nor was it accompanied by a statement of facts or circumstances which would conduce to establish his guilt, if true.

Appeal from district court, Chambers county; L. B. HIGHTOWER, Judge.

Upon the trial of defendant, Robert Walker, for murder, two witnesses testified that they were present at the examining trial of one Brown, charged with the same murder; that defendant was then in custody, "suspected" of complicity in the crime; that the state introduced him as a witness against Brown, without warning him that whatever statement he made could be used in evidence against him; that he thereupon testified against Brown, stating facts which inculpated himself, as an unwilling or coerced participant in the murder; that subsequently the defendant was placed upon his own examining trial, and was informed that he was at liberty to make a voluntary statement, if he desired; that he stated that what he had testified on the examining trial of Brown was the truth, and that he had no more to say. Upon this proof the state admitted in evidence the defendant's statement, reduced to writing, on the examining trial of Brown, and adopted by him on his own examining trial. Code Crim. Proc. Tex. art. 262, provides that, "if the accused shall desire to make a voluntary statement, he may do so before the examination of any of the witnesses, but not afterwards. His statement shall be reduced to writing, \* \* \* and shall be signed by the accused, but shall not be sworn to by him; \* \* \* and the mag-

istrate shall, in every case, attest, by his own certificate and signature, to the execution and signing of the statement." Article 750 provides that the confession of a defendant shall not be used if, at the time it was made, he was in confinement, or in the custody of an officer, unless it "be made in the voluntary statement of the accused, taken before an examining court, in accordance with law, or be made voluntarily, after having been first cautioned that it may be used against him, or unless, in connection with such confession, he make statement of facts or of circumstances, that are found to be true, which conduce to establish his guilt." Verdict of guilty, and defendant appeals.

*Douglas & Lanier*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

**WILLSON, J.** We are of opinion that the written statement admitted in evidence against defendant, over his objection thereto, is incompetent evidence, and should have been rejected. Said statement cannot be considered a voluntary statement, such as is provided by statute. Code Crim. Proc. art. 262. It was not made by defendant as a voluntary statement. It was sworn to by him. It was not authenticated as a voluntary statement by the magistrate before whom it purports to have been made. It is clear to our minds that the statement was not admissible in evidence as a voluntary statement, under article 750, Id.

Was said statement otherwise admissible? We do not think it was. When made, the defendant was in custody charged with the murder to which said statement related. He was not warned that his statements might be used as evidence against him. His confession of his own connection with the murder contained in said statement is not accompanied by a statement of facts or circumstances that were found to be true, conducing to establish his guilt. No such fact or circumstance appears to have been discovered or found to be true by reason of any statement made by him.

Holding, as we do, that the admission in evidence of said statement was error, it is unnecessary that other questions presented in the record should be determined. Judgment is reversed, and the cause remanded.

#### SCOTT v. STATE.

(Court of Appeals of Texas. Oct. 23, 1889.)

##### CRIMINAL LAW—INSTRUCTIONS.

Refusal to instruct as to the law of circumstantial evidence is error, where such is the only evidence in the case.

Appeal from district court, Comanche county; **F. H. CONNER**, Judge.

Indictment of **John H. Scott** for theft. Verdict of guilty, and defendant appeals.

*Asst. Atty. Gen. Davidson*, for the State.

**WILLSON, J.** As presented by the statement of facts, this is a case of circumstantial evidence; there being no direct evidence that defendant took the cow. Such being the character of the evidence, an instruction explaining the rules of law applicable thereto was demanded. Such instruction the court failed to give, and for this error the judgment must be reversed, and the cause remanded.

As to other matters complained of by defendant, we find no error, except, perhaps, the refusal of the court to grant defendant's application for postponement. It is unnecessary, however, that we should determine that question. Judgment reversed, and cause remanded.

#### In re JOHNSON.

(Court of Appeals of Texas. Oct. 24, 1889.)

##### BAIL ON CHARGE OF MURDER.

In Texas a person arrested for murder is entitled to bail where it appears that deceased, a constable, was killed while trying to arrest accused, and that accused was not aware of his official character, and was not apprised of his purpose, in making the arrest.

Appeal from district court, Williamson county; **W. M. KEY**, Judge.

Application by **Thomas J. Johnson** for *habeas corpus* for bail. Johnson took forcible possession of his child from his wife, at the town of Granger, and started from the town in a hack, first discharging his rifle. **Charles R. Eanes**, the constable, followed with a *posse* to arrest him for discharging his gun. They came in sight of Johnson several miles from town, and a running fight was carried on for some distance, Johnson firing the first shots. Finally Johnson got out of his hack and advanced towards the *posse*. Eanes advanced, and told Johnson to surrender. He refused, and in the firing which followed Eanes was fatally shot. It nowhere appears in the record that Johnson was aware of the official character of the deceased; but it does appear that the deceased at no time apprised Johnson that he was an officer, or that his purpose was to arrest him for discharging fire-arms in Granger. From an order denying the application relator appeals.

*D. E. Patterson*, for relator. *Asst. Atty. Gen. Davidson*, for the State.

**WHITE, P. J.** Appellant was refused bail upon the hearing of a writ of *habeas corpus* sued out by him after his arrest upon an indictment for the murder of one **Charles R. Eanes**, and he has appealed from said judgment refusing him bail.

From a careful inspection of the facts connected with the killing, as set forth in the statement of facts before us, we are of opinion that appellant is entitled to bail; wherefore the judgment is reversed, and appellant is admitted to bail upon his executing a bond, with good and sufficient sureties, conditioned as the law directs, in the sum of \$5,000.

## KELLY v. STATE.

(Court of Appeals of Texas. Oct. 23, 1889.)

## CRIMINAL LAW—SEPARATION OF JURY.

Code Crim. Proc. Tex. art. 687, provides that after the jury has been impaneled and sworn, to try a felony, they shall not separate until they have returned a verdict, unless by permission of court, with the consent of counsel, and in charge of an officer. After the jury had been impaneled and sworn, and one witness examined, on trial for theft, a juror separated from his fellows during adjournment, — a whole night. His affidavit alleges that "no one said anything to him about the case," and that his separation in no way influenced his finding. It did not appear where or with whom he was during the interim, nor what part he took in the deliberations, nor whether he influenced his fellows. *Held*, that the separation was ground for new trial, under article 777, subd. 8, providing that misconduct of the jury shall be ground for a new trial.

Appeal from district court, Tarrant county; R. J. BOYKIN, Special Judge.

Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. This appeal is from a judgment of conviction for theft of property over the value of \$20, with punishment assessed at seven years in the penitentiary. There is no statement of facts in the record, and but one question is presented for decision, and that is as to the separation of one of the jurors from his fellows; which question is made fully to appear by appellant's motion for new trial, with accompanying affidavits in relation thereto.

One of the statutory grounds for new trial is "when, from misconduct of the jury, the court is of opinion that defendant has not received a fair and impartial trial; and it shall be competent to prove such misconduct by the voluntary affidavits of a juror; and a verdict may, in like manner, be sustained by such affidavit." Code Crim. Proc. art. 777, subd. 8. Separation of a jury has generally been considered a species of "misconduct" coming within the operation of this rule. *Early v. State*, 1 Tex. App. 248. It is expressly provided by our Code that after the jury has been impaneled to try any case of felony they shall not be permitted to separate until they have returned a verdict, unless by permission of the court, with the consent of the attorney representing the state and the defendant, and in charge of an officer. Code Crim. Proc. art. 687.

The affidavit of Bays, the juror whose separation from the rest of his fellows is the matter complained of, states that after the jury had been impaneled and sworn, the indictment read, the defendant had pleaded not guilty, and one of the state's witnesses had been examined, the court adjourned until 9 o'clock A. M., the next morning. It seems that he understood the court to excuse the jury until that time; and he immediately separated from his fellows, and was gone from that time, — that is, from 5 o'clock P. M. on April 1, until 9 o'clock A. M., April 2, — some 15 or 16 hours, a whole night having

intervened. In an affidavit made by the officer having charge of the jury, the officer says that the juror Bays "did make his escape, and leave the rest of the jury, and remain separate and away from [his] care and keeping, and from the balance of the jury; and that he does not know where the said Bays was, or with whom he associated during that time." Bays does not say in his affidavit where he was, or with whom he associated. He states, however, that "no one said anything to him about the cause, and that his separation in no manner had anything to do with, or in any manner influence, him in finding a verdict."

"The mere separation of a jury is not cause for new trial. In addition to separation in contravention of law, (Code Crim. Proc. art. 687,) it must be further made to appear that by reason of such separation probable injustice to the accused has been occasioned," (*Ogle v. State*, 16 Tex. App. 361; *Defriend's Case*, 22 Tex. App. 570, 2 S. W. Rep. 641; *Boyett's Case*, 26 Tex. App. 690, 9 S. W. Rep. 275; *Willson, Crim. St. § 2372*.) "To warrant the setting aside of a verdict and granting of a new trial, upon the ground of irregularities and misconduct of a jury, it must be either shown as a fact or presumed as a conclusion of law that injury resulted from such misconduct. When it is clear that the party against whom the verdict has been found, was not injured by the misconduct, the verdict will not be disturbed." *People v. Lyle*, 6 Crim. Law Mag. 76. In all the cases decided in this state, where the separation has been of one or more jurors, and the verdict has been upheld, we think it will, upon inspection, manifestly appear that the facts stated sufficiently, of themselves, show the improbability that any injustice or wrong could have been done. On the other hand, when there is a strong probability that injustice and wrong could have been done, this court has never hesitated to set aside the verdict upon the ground that the law in such case would presume injury and prejudice to the accused. *Wright v. State*, 17 Tex. App. 152; *Warren v. State*, 9 Tex. App. 630; *Wilson v. State*, 18 Tex. App. 577.

We have no statement of facts in this case, and consequently we cannot say that it was impossible or improbable that the defendant could in any manner have been injured. Moreover, there is no affidavit or statement from any of the other jurors, showing that they were in no manner specially influenced in finding their verdict by anything said or done by the juror Bays after his return to the jury; or what active part, if any, he took, and the extent of his action, in procuring the finding of the verdict which was rendered. Under the facts as they are presented to us in the record, we do not believe we would be warranted in sanctioning the verdict and judgment. The judgment is therefore reversed, and the cause remanded for new trial.

## FOSTER v. STATE.

(Court of Appeals of Texas. Oct. 30, 1889.)

## ANIMALS—ILLEGAL BRANDING.

A conviction for illegally branding a colt cannot be sustained where the evidence fails to show that the colt was the property of the complaining witness, and that the branding was done with intent to defraud.

Appeal from district court, Gonzales county; GEORGE MCCORMICK, Judge.

W. M. Atkinson, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. This conviction is for illegally branding a colt alleged to be the property of George Bond. After a careful consideration of the evidence contained in the statement of facts, we must say that, in our judgment, the conviction is wrong. There was no sufficient proof that the colt was the property of George Bond. No witness testified that it was Bond's colt. Bond himself never saw the colt. There was testimony tending strongly to show that it was not Bond's colt. But, even if the colt belonged to Bond, the evidence fails to show that defendant branded it with the intent to defraud. On the contrary, we think it is shown that no fraudulent intent existed. Defendant branded the colt openly. He did not conceal, or attempt to conceal, the act, and gave as a reason for branding it, a desire to prevent it from being stolen. It would be dangerous and wrong, we think, to sanction a conviction based upon such uncertain and unsatisfactory evidence as presented to us in this record. The judgment is reversed, and the cause remanded.

## OWENS v. STATE.

(Court of Appeals of Texas. Oct. 30, 1889.)

## LARCENY—INDICTMENT—VARIANCE—EVIDENCE.

1. A conviction for the theft of a cow cannot be had, under an indictment which alleges the ownership in B., and the possession in A. and W., where the evidence shows that the possession was not in A. and W. jointly, but in B. alone.

2. An assumption in the charge that defendant took the cow, instead of presenting that issue hypothetically to the jury, is error.

3. Testimony that one night soon after the cow was recovered by the prosecuting witness, two men came to his premises, and attempted to drive her out; and that on that day defendant was seen in the town of M. near by, in company with two men, and that he then wore a straw hat; and that on said night three men, one of whom was wearing a straw hat, were seen lying in a fence corner, near the house of the prosecuting witness, was properly admitted.

Appeal from district court, Falls county; J. R. DICKENSON, Judge.

W. J. Owens was indicted for the theft of a cow. On the trial the prosecuting witness and his son testified that when he recovered his cow from the possession of the defendant's brother, who claimed to have acquired her from the defendant, the prosecuting witness drove her to his home, and put her in his pen. Some nights afterwards two men came to the said pen and attempted to drive her out, but were prevented by the said wit-

nesses. The state was then permitted to prove by certain witnesses that they saw the defendant and two other parties in Marlin, near the house of the prosecuting witness, on the day of the alleged attempted rescue of the cow, and that defendant then wore a straw hat. Other witnesses testified that they saw three men lying in a fence corner, near the house of the prosecuting witness, on the night of said attempted rescue; one of the witnesses declaring that one of said men wore a straw hat. To all of this testimony the defense objected; and from a verdict and judgment of guilty the defendant appeals.

Goodrich & Clarkson and P. P. Norwood, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. In the first count in the indictment the defendant is charged with theft of a cow, the property of J. E. Brown; it being alleged that said cow was taken from possession of B. W. Allen and George Williams, who were holding the said cow for said Brown, the owner thereof. It was upon this count that the defendant was found guilty by the jury, and adjudged to be guilty by the court. We must set aside the conviction because the evidence does not sustain the allegation in the indictment as to the possession of the cow at the time she was taken, if taken at all. A joint possession of the cow in Allen and Williams is alleged in the said count, and the evidence is conclusive that they did not jointly possess the cow. Allen testified that he did not at any time have possession of the cow; had nothing whatever to do with her. Neither did Williams' connection with the cow constitute possession of her. We think that the evidence shows that at the time the cow was missing she was in the possession of her owner, Brown; she was on her accustomed range, and therefore in his possession. If this conviction had been upon the last instead of the first count in the indictment, the allegation of possession would be sustained by the evidence, as in said last count the allegation is that the cow was taken from the possession of Brown, the owner thereof.

There were several exceptions made and reserved to the charge of the court, two of which, we think, are well grounded: *First*, the charge should have not submitted to the jury the first count in the indictment, as there was no evidence sustaining the allegation in said count as to possession of the cow; *second*, the charge, in several of its paragraphs, assumes that the defendant took the cow, instead of presenting that issue hypothetically to the jury. In the other respects in which the charge is excepted to, we think it is correct and sufficient; and we think the special charges requested by defendant were not improperly refused, because they were embraced, substantially, in the charge given.

We see no error in admitting the testimony objected to by defendant as to the transaction at Brown's cow-pen. This testimony

was relevant; and, if the defendant was one of the parties who attempted to drive the cow out of Brown's pen, such conduct was strongly criminative against him; and circumstances proved tend to show that he was one of said parties. For the reasons and errors stated the judgment is reversed, and the cause remanded.

STATE *ex rel.* ALLEN, Collector, v. VAUGHAN.

(Supreme Court of Missouri. Dec. 2, 1889.)

PUBLIC SCHOOLS—CORPORATIONS—TAXATION—REPEAL OF STATUTES.

1. Acts Mo. 1863-64, p. 650, created the corporation, "The Trustees of the Bridgeton Academy." The trustees were authorized to receive all the school moneys that might be due and coming to the inhabitants of the town of Bridgeton, or to the residents of the commons thereto attached; the town and commons being then attached for school purposes. In addition to the branches taught in the common schools of the state, Latin and higher branches of mathematics should be taught in the academy. It was provided that the children of the town and commons should be charged a small fee when it was absolutely necessary in order to continue the institution; but the children of those who were wholly unable to pay should be educated free of all charge. Acts 1870, p. 167, gave the trustees of the town power to levy a tax, not exceeding 1 per cent. a year, on all taxable property of the town and commons, for the support of the academy. *Held*, that it was a public corporation, and the tax was legal.

2. The special act incorporating the academy is not repealed by the various acts relative to boards of education and school districts, as they relate only to such as are organized under general laws.

Appeal from circuit court, St. Louis county; W. W. EDWARDS, Judge.

James A. Henderson, for appellant. John W. McElhinney, for respondent.

BLACK, J. This is a suit by the collector of St. Louis county, to recover school taxes levied for the years 1882 and 1883 upon the lands of the defendant, lying in the commons adjacent to the town of Bridgeton, in that county. The agreed facts upon which the case was tried are these: The Bridgeton school mentioned in the petition, and for the benefit of which the taxes were levied, is the "Bridgeton Academy," incorporated by the act of February 12, 1864. The taxes were duly and properly levied by the trustees of the town of Bridgeton, provided the said trustees had authority to levy the same, for such purposes, upon the lands described in the petition. Opposition was made in 1876, by the tax-payers of Bridgeton and the Bridgeton commons, to the levy of a tax for the support of the Bridgeton academy, on the ground that there was no authority for the levy of such a tax; and no such tax was thereafter levied until the year 1882. The academy was, however, kept in operation during that time. Defendant's lands do not lie in the corporate limits of the town, but in the commons adjacent thereto. It is conceded that, if the board of trustees of the town of Bridgeton have authority to levy the taxes in question, then the judgment should be af-

firmed; and this is the only question presented by the record.

By the act of congress of March 18, 1812, certain outlots and commons were reserved for the support of schools. The legislature passed acts for the sale of these lands and the investment of the proceeds, and the appropriation of the income to the support of schools. By the act of March 21, 1863, (Acts 1862-63, p. 246,) all the commons, with the inhabitants thereof, belonging to the corporation known as "The Inhabitants of the Town of Bridgeton" were attached to the town, for school purposes. By the second section the inhabitants of the common lands have conferred upon them all the rights of the inhabitants of the town in educating their children at the public schools. The school funds belonging to the town and to the inhabitants of the commons are consolidated, and put under the management of the trustees of the town. The act says: "And said inhabitants of said commons, and their property within the limits of said commons, shall no longer be under the jurisdiction and control of the trustees or directors of any other school-district, for school purposes." The legislature, by the act of February 12, 1864, (Acts 1863-64, p. 650,) created a corporation by the name of "The Trustees of the Bridgeton Academy," to be under the management of nine trustees, six of whom are to be residents of the town of Bridgeton, and three residents of the commons. The act says the trustees of the academy "are authorized to receive all state school moneys, township school moneys, and county school moneys that may be due and coming to the inhabitants of the town of Bridgeton, or to the residents of the commons thereto attached." The eleventh section enacts: "In addition to the branches taught in the common schools of the state, the Latin language and higher branches of mathematics shall be taught in said academy." The act of March 16, 1870, (Acts 1870, p. 167,) amending the charter of the school, gives the trustees of the town of Bridgeton power "to levy a tax, not exceeding one per centum annually, on all the taxable property of the town of Bridgeton, and the common lands attached to said town, \* \* \* for the support of Bridgeton academy."

1. The point made, that Bridgeton academy is a private corporation, and for that reason taxes cannot be levied to support it, cannot be sustained. When the act creating the corporation was passed, the commons had been attached to the town, for school purposes. The act, as a whole, shows clearly that the inhabitants of the town and of the commons are incorporated for school purposes. This case, in this respect, is unlike that of *Perryman v. Bethune*, 89 Mo. 159, 1 S. W. Rep. 231. The institution has conferred upon it all the public school funds going to the town, and to the district of the county known as the "Commons;" and the children in both districts of the county are

alike entitled to the benefits of the school. It is one of the common schools of the state, and is designed to carry out, in part, the public school system of the state; and is a public corporation. 1 Dill. Mun. Corp. (3d Ed.) § 28. The tenth section of the charter enacts that the children of the town and commons "shall only be charged a small fee, not exceeding fifty cents per month, when it is absolutely necessary to sustain, continue, and operate said institution: provided, however, the children of those who are wholly unable to pay shall be educated free of all charges whatever." We suppose the tax authorized by the act of 1870 was designed to take the place of this fee; but, be that as it may, the power to collect the fee, when public funds are insufficient to support the school, does not make the corporation a private one.

2. The further claim is that the special act incorporating the academy has been repealed. No express repeal is claimed; but the contention is that the special act is repealed by force of general laws. Chapter 46, § 1, and chapter 47, Gen. St. 1865, recognize the continued existence of these schools organized under special acts. The same is true of section 1 of the act of March 21, 1870. Section 15 of that act relates to the board of education or school directors of any city, town, village, or district before that date organized under any general law, and has no application to these schools organized under special acts. The first section of the act of April 26, 1877, (Acts 1877, p. 407,) simply authorizes any city, town, or village, with the territory attached thereto, to organize into a single school-district. There is nothing in the act showing any intention to repeal any special act. Section 7142, Rev. St. 1879, likewise provides that any city, town, or village may, with the territory attached thereto, be organized into a single school-district, to be known as school-district of ——. That section goes on to say: "And every city, town, and village which has heretofore organized, under any law of this state, as a board of education, shall hereafter be known and styled 'The School-District' of such city," etc. The legislature, in speaking here of "a board of education," manifestly has reference to boards authorized to be formed under that name by prior general laws. No language is used which can by any fair interpretation be said to include the "Trustees of the Bridgeton Academy." We have examined all the statutes to which our attention has been called, and, instead of disclosing any intention to repeal these special school charters, an intention is manifested not to interfere with them. The legislature has left it to the people, to organize under the general law, if they desire, or remain under these special charters. The fact that no taxes were levied from 1876 to 1882 cannot change the result. The judgment is affirmed.

RAY, C. J., and BAROLAY, J., absent. The other judges concur.

**CLAFLIN et al. v. SYLVESTER et al.**

(Supreme Court of Missouri. Dec. 2, 1889.)

**ATTACHMENT—PRIORITY—WITHDRAWAL OF PLEA—GENERAL ASSIGNMENT.**

1. The lien of an attachment will not be set aside or postponed in favor of junior attachments, where it appears that the debts sued for were *bona fide*; that the attachments were not sued out for the benefit of the debtors, or to aid them in hindering or defrauding other creditors; and that the only object of the attaching creditor was to get preference for himself.

2. The withdrawal, after return of process duly served, of a plea in abatement entered to an action commenced by a writ of attachment, does not vitiate the lien of the attachment, as the character of the judgment will still be one in the enforcement of the lien acquired by the levy of the attachment.

3. In proceedings to set aside a prior attachment lien, so that a junior attachment may become a first lien on the attached property, the court will not consider the question whether the original attachment was a part of a general assignment of the debtors, which would inure to the benefit of all the creditors.

Error to St. Louis circuit court; GEORGE W. LUBKE, Judge.

*Nathan Frank and Albert Arnstein*, for plaintiffs in error. *Henry D. Laughlin*, for defendants in error.

BRACE, J. This is a proceeding under the provision of section 447, Rev. St. 1879, whereby Sylvester Hilton & Co., and 32 other subsequent attaching creditors of Leubrie Bros., seek by motion to set aside or postpone the lien of two prior attachments,—one in favor of H. B. Claffin & Co., for \$39,698.80, and one in favor of Jacob Friedman & Co., for \$24,549.78, on the grounds—*"First*, that the debts sued for by Claffin & Co. and Friedman & Co. were, and are, not *bona fide* debts due and owing by the Leubrie Bros.; *second*, that the attachments thereon were levied collusively, for the purpose of giving the Leubrie Bros. the control of the property taken thereunder; *third*, that said attachments were not sued out adversely, in good faith, but in furtherance of a conspiracy between the Leubries and plaintiffs, for the purpose of preventing the *bona fide* creditors of the Leubrie Bros., including these movers, from collecting their just demands." On the 19th of December, 1884, Claffin & Co. and Friedman & Co., defendants in error, sued out their said attachments, and caused the same to be levied on the stock in trade of the Leubrie Bros. Later, on the same day, Leubrie Bros. made a voluntary assignment for the benefit of all their creditors. After such assignment was made, plaintiffs in error, being 33 other creditors of the Leubrie Bros., sued out attachments against them, and caused the same to be levied upon the same property taken under the prior writs of defendants in error. Thereafter a sale of the property was had by the sheriff, and sufficient of the proceeds thereof to satisfy the claims under the two prior attachments of defendants in error are in the hands of the sheriff. Upon the return-day of the writ in each of these two cases, Leubrie Bros., the



defendants therein, filed pleas in abatement, verified by affidavit. Afterwards these pleas were withdrawn. The attachments were sustained; and thereupon defendants in error, plaintiffs therein, took judgment each for the amount hereinbefore stated, for which amount and costs each were awarded execution, to be satisfied out of the property attached and sold by the sheriff. The application of the money to the payment of these judgments was stayed in the trial court, to await the decision of this joint motion filed in each case by plaintiffs in error, the later attaching creditors. On the hearing of the motions they were overruled, the order staying the payment of the fund in the sheriff's hands upon the executions in favor of defendants in error was vacated at the cost of the movers, and they sued out this writ of error.

1. While this proceeding may be considered in its nature one of equitable cognizance, and we might not feel concluded by the findings of the trial court upon the facts, yet, in the absence of any abstract of the evidence such as our rules require, and which the plaintiffs in error in this case have not seen proper to furnish, the presumption will be indulged that those findings are supported by the evidence. *Craig v. Scudder*, ante, 341, (opinion at this term;) *Jayne v. Wine*, 11 S. W. Rep. 969. The issues, and the probative force of the evidence given, are so clearly stated, and three of the five points in the brief of counsel for plaintiffs in error for reversal, made on the evidence, are so satisfactorily disposed of by the learned judge who tried the case, in his able opinion, which we find in this record, that as to them we are content to simply quote the following passages from that opinion: "To authorize the sustaining of these motions, the evidence must be sufficient to warrant a finding that these attachments were in fact fraudulent, either because the debts sued for therein were not *bona fide* debts; or that the attachments were suffered, or procured to be made, for the use and benefit of the defendants; or that they were contrived between the parties with the intent to hinder, defraud, or delay the other creditors of the debtors. Now, as to the first of these elements, all the evidence disproves any assertion that the debts sued for and claimed by Claflin & Co. and Friedman & Co. were not actual, *bona fide* debts of Leubrie Bros. This was virtually conceded by counsel for the attaching creditors after the close of the evidence. The evidence also fails to show that these attachments were gotten out and suffered to become final upon any understanding, either express or implied, that the debtors, Leubrie Bros., were in any manner to be benefited thereby, or to have the use or control in the future of the property, or the proceeds thereof, which was taken under the writs. There are some circumstances shown tending in that direction; but the positive evidence of the debtors and of their manager, and of the attorneys

for the debtors and for the attaching creditors, is so strong the other way that those circumstances disappear. A careful review of the evidence also satisfies me that it is insufficient to prove that the Leubries suffered these attachments to be sued out, levied, and made final with any intent to hinder or delay their other creditors, further than as such intent was lawful, to the end that these creditors might obtain a preference over the other creditors; and, even if the circumstances in evidence were sufficient to deduce therefrom an actual fraudulent, and therefore unlawful, intent on the part of the debtors, the evidence is far from sufficient to justify a finding that the [two] attaching creditors intended, on their part, more than to get for themselves such preference by extraordinary diligence, in getting out and levying their writs before other creditors, and before the debtors had completed their voluntary assignment, until these plaintiffs had effected their levies. It is not averred, and no proof has been offered pointedly to deny, that the grounds of attachment upon which these plaintiffs proceeded, or some of them, did not exist. There is also no proof that the pleas in abatement were afterwards withdrawn, in consequence of any express agreement to that effect. All that the proof justifies to be found upon this point is that the creditors had the best reasons for believing that the debtors would not resist the attachments, unless it suited them to do so. And, the debts claimed by each of these creditors being actual and now due, the case is, therefore, nothing more nor less than that of a failing debtor preferring several of his creditors to the exclusion of the others. So long as the laws of this state permit that to be done, it is wholly immaterial whether the preference be given by payment, by conveyance, by mortgage, by delivery of goods or valuables, by confession of judgment, or by suffering an attachment. Of all these modes of preference, the last two may be commended,—because of their publicity; because thereby the taking of more of the debtor's assets than will be necessary to satisfy the creditors' demand is prevented; and because the creditor subjects his claim to the examination of the court. Counsel for the movers have asked the court to sustain their motions, on their allegations that those attachments were not adversarial in fact, and that the process of attachment invoked by the plaintiffs, with the passive aid of the debtors, was an abuse of the court. Assuming that the section of the statute which has been hereinbefore quoted is sufficient to warrant such action upon this ground, how can it be said that the process was abused, when it was founded upon actual debts, and the purpose of taking out the process was to accomplish what was lawful in itself, *i. e.*, obtaining or giving a preference to the creditors suing? \* \* \* If, in the cases at bar, it had been averred and shown in fact that no ground for attachment existed, or that the creditors and

debtors contrived the commission by the debtors of an act which would furnish grounds for attachment, it might be said that the court's process was designedly abused, and authorized the court's vacating all the proceedings, and leaving the parties where they were when they came into court."

2. The fourth point made by counsel for plaintiffs in error is that the attachment proceedings were abandoned, and the lien lost, by the withdrawal of the pleas in abatement. This position is not sustained by any of the authorities cited. In the case of *Gilbert v. Gilbert*, St. Louis court of appeals, (not yet reported,) mainly relied on to support this position, it was held that a consent judgment, entered in an attachment suit before the return-day of the writ, upon the voluntary appearance of the defendant and waiver of service, operated a discharge of the attachment lien. While expressing no opinion in regard to that case, it is sufficient to say that is not this case. The judgment here was not a consent judgment before the return-day of the writ, but one rendered *in invitum*, in due course of law, after the return-day of the writ, duly served. The fact that the defendants therein withdrew their plea in abatement does not change the character of the judgment as one in the enforcement of the lien acquired by the levy of the attachments in the cause in which it was rendered. If the simple withdrawal of a plea in abatement could have this effect, the plaintiffs in error would be in no better condition than the defendants in error, if, as stated in the brief of their counsel, the pleas in their cases were also afterwards withdrawn, and judgment rendered. The fact that they were not so quickly withdrawn as in the cases of the prior attaching creditors neither distinguishes their judgments from those rendered in favor of the prior attaching creditors, nor in any way affected the rights of the parties *quoad* the property attached. These rights are affected by the priority of the attachments, but not by the priority of the judgments.

3. The fifth point in the brief of counsel for plaintiffs in error was not in the case tried by the court below. The question raised by it was not tried by that court, and is not before us for determination. This is an action to set aside a prior attachment lien, for fraud, actual or constructive, in order that subsequent attachments may be let in against the debtor's attached property; not to maintain the prior attachments, the judgment and lien perfected thereunder, as a part of the general assignment for the benefit of plaintiffs in error, defendants in error, and all other creditors under the deeds of assignment, but to cut out the two prior attachment liens, so that they may not stand between the attachments of the plaintiffs in error and the attached property. It will be time for this court to determine whether the attachments of defendants in error were a part of the general assignment of the Leubrie Bros. only when that question is properly presented on appeal,

in a case wherein it has been ruled upon between proper parties, in an issue raising it in the trial court. It is not so presented in this case. *Sexton v. Anderson*, 95 Mo. 373, 8 S. W. Rep. 564; *Chase v. Foster*, 98 Mo. —, 11 S. W. Rep. 760. Finding no error in the record, the judgment of the circuit court is affirmed. All concur, except RAY, C. J., and BARCLAY, J., absent.

THOMPSON *et al.* v. ISH *et al.*

(Supreme Court of Missouri. Dec. 2, 1889.)

WILLS—TESTAMENTARY CAPACITY—UNDUE INFLUENCE—WITNESS—PRIVILEGE OF PHYSICIAN.

1. In a suit to set aside a will for incapacity and undue influence, statements made by testatrix before its execution, and relative thereto, are competent to prove the previous state of her mind and affections.

2. Evidence of the contents of a revoked will is admissible to show the intention of testatrix at the date of its execution.

3. Where the contestants, on the cross-examination of defendant devisee, elicit the fact that he was in debt, and his property heavily incumbered, evidence that some of the contestants are well situated pecuniarily is competent, as tending to show that testatrix considered the circumstances of the respective parties in making her will.

4. The defendant devisee may waive the protection of Rev. St. Mo. 1879, § 4017, which provides that information acquired by a physician, in his professional capacity, shall be privileged, and may introduce the attending physician of testatrix as a witness.<sup>1</sup>

5. Defendant may call witnesses, and plaintiffs' witness himself, to show that the latter said he knew nothing about the case, and only swore as directed by another, though such statement was made after he had been discharged.

6. It is harmless error for the court, in excluding evidence of the professional standing of a physician before his testimony was in, to remark that his "character and standing as an eminent physician is part of the history of Missouri; and, if the courts and juries take notice of facts of history, the evidence is immaterial."

7. Testimony as to the skill of a physician who had testified in the case, by another, who knew him, and spoke from such knowledge, is admissible to show the value of his evidence.

8. The admission of evidence that testatrix "was known to the community as a strong-minded

<sup>1</sup> The statutes rendering physicians incompetent to testify as to information acquired while acting professionally do not create an absolute disqualification, but one which may be waived. *Carrington v. City of St. Louis*, (Mo.) 1 S. W. Rep. 240; *Railroad Co. v. Martin*, (Mich.) 8 N. W. Rep. 173; *Scipps v. Foster*, Id. 216; *Fraser v. Jennison*, Id. 882; *Adreveno v. Association*, 84 Fed. Rep. 870. The privilege, however, is for the benefit of the patient, continues indefinitely, and cannot be waived by the physician. *Storrs v. Scougale*, (Mich.) 12 N. W. Rep. 502. It cannot be waived after the patient's death, by his executor. *Loder v. Whelpley*, (N. Y.) 18 N. E. Rep. 874. *Contra*, under the *Michigan* statute, *Fraser v. Jennison*, (Mich.) 8 N. W. Rep. 882. The patient waives it by calling the physician to testify to the information thus acquired. *Carrington v. City of St. Louis*, *supra*. But for the patient to testify that a certain physician treated her for certain injuries, does not waive the privilege, *Williams v. Johnson*, (Ind.) 18 N. E. Rep. 872; and a waiver of the privilege as to one physician, by calling him to testify, does not waive it as to another, *Dutton v. Village of Albion*, (Mich.) 24 N. W. Rep. 786. When the patient waives the privilege, and the question is relevant and material, the court should compel the physician to answer. *Valensin v. Valensin*, (Cal.) 14 Pac. Rep. 397.

woman" is error, but not prejudicial to plaintiffs, where there is abundant competent evidence to the same effect.

9. An instruction as to testamentary capacity which does not withdraw from the jury the circumstances of old age, and weakness of body and mind, but merely asserts that, if testatrix possessed a disposing mind, these circumstances alone did not disable her from making the will, which the jury was to determine from all the facts in evidence, including the fact that she gave all her property to defendant, and that "soundness of mind means the ability to know and comprehend that one is disposing of his property by will, the general value and character of the property, and to whom the same is being given," is proper.<sup>1</sup>

10. It is not error to instruct that if the paper was dictated by testatrix, and expresses and embraces her directions, it was not procured by undue influence, and that, if she had the mental capacity to make a will, such paper is her will, though from association, kindness, or other reasons defendant had influence with her, and had transacted some of her business; but that, if she was under his influence to an extent which destroyed her liberty and free agency in the disposition of her property by the will, and caused her to dispose of it in accordance with his wishes, and not her own, then it is not her will.

11. An instruction that the revoked will could not be considered, unless it was signed by testatrix in the presence of two witnesses, who signed the same at her request, and not the request of her attorney, was properly refused, as the will was offered solely to show her intention at the time of its execution.

Appeal from circuit court, Ray county;  
GEORGE W. DUNN, Judge.

*Wallace & Chiles and R. A. De Bolt*, for appellants. *J. D. Shewalter*, for respondents.

BLACK, J. This is a suit to set aside the will of Martha Ish, late of Lafayette county. The will bears date the 17th April, 1883, and she died on the 2d day of May, following, at the advanced age of nearly 80. She left surviving her three daughters and one son, the defendant James D. Ish, and a number of grandchildren, who are the children of her four deceased children. Mrs. Mary Handy, one of the surviving daughters, is not named in the will. To the other children and grandchildren, except James D. Ish, the testatrix gave \$1 each, and to James D. Ish she gave the residue of her estate, consisting of 470 acres of land, of the value of about \$16,000, and some personal property, of no great value. Though Mary Handy and some of the grandchildren are made co-defendants with James D. Ish, he is the only real defendant, and will be designated as the defendant. The will is assailed on two grounds: *First*, want of mental capacity on the part of deceased; *second*, undue influence exercised by James D. Ish, who is alleged to have been her confidential adviser and agent. There were two mistrials

in Lafayette county, when the venue was changed to Ray; and a trial there resulted in a verdict sustaining the will. The evidence took a wide range on both sides, so that it is out of the question to give more than an outline of it. The husband of Martha Ish died testate in 1869, leaving to her the lands in question, and to the defendant James D. Ish the home place. Martha Ish continued to live with the defendant on the home place until she died, in 1883. In April, 1882, she executed a will, whereby she gave her lands, except 40 acres, to James D. Ish, and the balance of her property she devised and bequeathed to her children and grandchildren. That will was made in view of a contemplated visit to two of her daughters, Mrs. Rice and Mrs. Handy, who resided in the state of California. She made the visit, returning to this state with her son, the defendant, in November of that year. She is shown to have been a woman of more than ordinary strength of mind and determination, and attended to her property affairs partly herself, and partly through the defendant. She became confined to her room in March, 1883; and the will in question was executed on the 17th April, as before stated. Dr. Henderson, who was her physician, and is an attesting witness, testified that she began to give way in March; that she had tumors on her head, one of which she believed to be a cancer, and from which she believed she would die; that she had partial paralysis on one side; that she was a large, fleshy woman, and had to be raised up by others to sign the will, and she made two efforts before she completed her signature; that her mind was then, and up to the last of the month, good, though she suffered much from the tumors, and a pain in her arm. Mr. Rathbun, who prepared both wills, says he took the old one to the house, and read it to her, and she said she wanted to change it, and gave him directions as to the changes; that he was in her room from 10 to 8 o'clock, except at dinner time; that her voice was strong, and he saw no change in her mind; that when the new will was signed the old one was destroyed; that he took the names of the children from the old will, and no one discovered the omission of the name of Mrs. Handy. There is much other evidence tending to show that Mrs. Ish was perfectly rational at, before, and after she signed the will, and that it was her own act. On the other hand, Mrs. Handy says her mother was not in a condition to transact any business on the 18th March. Mrs. Thompson, one of the plaintiffs, was with her mother from 20th March to 18th April, and again after the will had been executed. She describes the condition of her mother, and her evidence is to the same effect. Says she never heard of the will until after the death of her mother. The evidence of these ladies, and that of some other witnesses, tends to show that the will was the result of solicitation on the part of defendant, and that, in the absence of the sisters, he con-

<sup>1</sup>See, on the general subject of mental testamentary capacity, *In re Bull's Will*, (N. Y.) 19 N. E. Rep. 503, and note; *Kerr v. Lunsford*, (W. Va.) 8 S. E. Rep. 493, and note; *Bannister v. Jackson*, (N. J.) 17 Atl. Rep. 692; *O'Brien v. Dwyer*, Id. 777; *McCoon v. Allen*, Id. 820; *Middleditch v. Williams*, Id. 826; *Campbell v. Campbell*, (Ill.) 22 N. E. Rep. 620.

trolled her actions. There is evidence tending to show that he induced her to leave California before she had completed her visit; and, on the other hand, there is evidence to the effect that he went for her, at her own request.

1. The court awarded the opening and closing of the case to defendant. It appears the testator, in the month of May, 1882, and just before going to California, went to Lexington, stopped at a hotel, and sent for Mr. Rathbun to prepare her will. He says, after speaking in general terms of the interview: "She said she wanted Don. Ish to have her land, except 40 acres, which she might want to use." She talked freely with the landlord, with whom she was acquainted, and consulted him as to the best method of carrying out her intentions. He advised her to make a deed; but she did not adopt the advice. To the admission of these statements the contestants objected. In the early case of *Gibson v. Gibson*, 24 Mo. 227, the plaintiff offered to prove that the testator said he had never made a will; that, if he signed one, they got him drunk, and made him sign it. The statements were offered as proof of the facts stated, namely, that he never made a will, and that, if he signed one, they made him do it while drunk. The evidence, it was held, was properly excluded, when offered for the sole purpose of proving the facts stated; but the court goes on to say that the declarations of the testator are clearly admissible when the condition of the testator's mind is the point of contention, or it becomes material to show the state of his affections. The charges here are that Mrs. Ish did not possess testamentary capacity, and that the will is not her will, but that of the defendant. It becomes material to these issues to know what were her previous purposes, intentions, and the state of her mind; and her statements at, before, and after making the will in question are competent evidence for these purposes. *Rule v. Maupin*, 84 Mo. 588. It is true these statements were not of the *res geste*; but that is not essential to the admission of such evidence. The value of such declarations diminish, of course, in proportion as they are remote from the date of the act in question. Indeed, the objections to all this evidence concede the competency of these statements for the purposes just stated. The court did not, however, so state at the time the evidence was admitted, but, by an instruction given at the close of the evidence, told the jury that they could only consider the statements made by Mrs. Ish before and after the date of the will in question as showing the state of her mind and of her affections. This was sufficient.

2. Nor did the court err in allowing the witness Rathbun to testify as to the contents of the will of April, 1882. That will, it is true, had been revoked by the execution of the new and the destruction of the old one. The evidence was not, however, offered for the purpose of establishing it as the will of

Mrs. Ish. It was offered for the purpose of showing her fixed purpose and intention at that date. It differs from the one in question only in this: that by the first she gave to her children and grandchildren, other than James, sums amounting in all to about \$300, and by that will they were made residuary devisees; so that by it they would have received the 40 acres of land and some \$300, instead of \$1 each. By both wills she gave the bulk of the property to James, and they are substantially the same. If, as we have seen, the declarations of the testator are admissible when the issues are want of testamentary capacity and undue influence, then it must be competent to put in evidence, for like purposes, this former will. It tends to show that for a year before making the will in question she had formed the purpose of giving the bulk of her property to the defendant. The fact that she had formed that purpose at that date tends to show that the present will was not the result of undue influence, exercised by defendant in her last sickness, and when she had become weaker in body, and probably in mind. Says Redfield: "Evidence of former wills and of other pecuniary arrangements for the wife is also admissible, as having a bearing upon the question whether the testator has understandingly, and of his own free will, changed his settled views." 1 Redf. Wills, (4th Ed.) 538. The law allows a wide range of testimony on the issues of undue influence and weakness of mind, and it seems former wills may be introduced to show undue influence; and, on the other hand, they may be introduced to show the previous purpose of the testator in regard to the disposition of his property, and thus shed some light on the question whether the contested will was the testator's own free act. *Id.* 537; *Love v. Johnston*, 12 Ired. 358; *Hughes v. Hughes*, 31 Ala. 520.

3. During the trial, defendants introduced some evidence, over the objections of plaintiffs, to the effect that Mrs. Rice and Mrs. Thompson were well provided for, by reason of the fact that their husbands were large property owners; the one residing in the state of California, and the other in this state. In considering this objection, it is to be remembered that plaintiffs, in their cross-examination of James D. Ish, drew out the fact that he was in debt, and his property heavily incumbered. Mrs. Ish had been living with him for about 14 years, and became attached to his wife, who appears to have treated the old lady with kindness and affection. It is not unreasonable to believe that the testatrix, in making a disposition of her property, would take into consideration the fact that some of her children were in good circumstances, and that others were not. If such considerations would naturally have some influence upon her mind, it is difficult to see why they may not be put in evidence, keeping within reasonable bounds. The triers of the facts should be placed in the position of the testatrix, as

near as possible, so as to be able to consider all the evidence from her point of view, when she made the will in dispute. We conclude there was no error in the admission of this evidence.

4. A far more difficult question arises over the deposition of Dr. Joseph Wood, which was read in evidence by defendant. Dr. Wood was called in to consult with Dr. Henderson three or four days after the will in question had been executed. He says: "I remained at her residence all night, and had two good, long conversations with her on the subject of her disease. She gave me a very satisfactory description of her disease." Being then asked his opinion as to the condition of her mind, he says: "I believe, and am of the opinion, that Mrs. Ish was perfectly sound in her mind at the time I had the conversations with her." This and other portions of the deposition were objected to on the ground that Dr. Wood was, under the statute, an incompetent witness, and could not disclose the matters testified to by him. Section 4017, Rev. St. 1879, provides: "The following persons shall be incompetent to testify: \* \* \* Fifth. A physician or surgeon, concerning any information which he may have acquired from any patient, while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." This statute is very emphatic, and it places the seal of secrecy upon information acquired by observation as well as that acquired by oral communication. *Gartside v. Insurance Co.*, 76 Mo. 446. There can be no doubt but the information upon which Dr. Wood based his opinion was acquired from the testatrix while attending her in a professional character, and the information was necessary to enable him to give her and her attending physician advice concerning her disease. The opinion which he expresses is based upon the information thus acquired. The physician being prohibited from disclosing the information, he certainly cannot give an opinion based upon his knowledge thus acquired. He is no more at liberty to give an opinion upon such knowledge than he is to detail the facts revealed to him by the patient. The protection afforded by the statute may, however, be waived by the patient, and he does waive it by calling the physician to give evidence of information acquired in a professional character. *Groll v. Tower*, 85 Mo. 249; *Carrington v. City of St. Louis*, 89 Mo. 212, 1 S. W. Rep. 240; *Blair v. Railroad Co.*, 89 Mo. 337, 1 S. W. Rep. 367. In the first of these cases the widow brought suit to recover damages for injuries received by her husband, and from which injuries he died. It was there said: "Where the evidence of the attending physician is offered by the patient or his representatives, it is competent and admissible. When it is offered by the opposite party, the physician cannot testify, against the objection of the patient, or his representatives." And accordingly it was

ruled that the physician should have been allowed to testify, when offered by the widow. The Michigan statute is in substance and effect the same as our statute. *Comp. Laws 1871, § 5943*. In *Fraser v. Jennison*, 42 Mich. 209, 8 N. W. Rep. 882, a will dated in May, 1877, was contested on various grounds, and among them unsoundness of mind and undue influence. The proponents of the will, who were special administrators appointed by the probate court, proved by a physician that he had been employed by the testator, in a professional capacity, from September, 1876; and the physician was then allowed to testify that the mind of the deceased was sound, and to describe the particulars of the disease. *COOLEY, J.*, after quoting the statute and saying the trial court did not err, uses this language: "This statute, as we have held, covers information acquired by observation while the physician is in attendance upon his patient, as well as communications made by the patient to him; \* \* \* but the rule it establishes is one of privilege for the protection of the patient, and he may waive it, if he sees fit. *Scrippe v. Foster*, 41 Mich. 742, 3 N. W. Rep. 216. And what he may do in his life-time, those who represent him after his death may also do, for the protection of the interests they claim under him." On the other hand, a different ruling prevails in the states of New York and Indiana. Section 833 of the New York Code relates to ministers, section 835 to attorneys, and section 834 provides that "a person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." And section 836 provides that "the last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing, the patient, or the client." It seems to have been the practice in the surrogate court to admit the evidence of the attending physician of the testator in the probate of wills. *Allen v. Public Administrator*, 1 Bradf. Sur. 221; *Whelpley v. Loder*, 1 Dem. Sur. 368. But in *Westover v. Insurance Co.*, 99 N. Y. 56, 1 N. E. Rep. 104, which was an action by an executor on a policy of insurance, it was held by the court of appeals that the executor could not waive the privilege of the statute; and the argument goes to the extent, we think, of holding that no one but the patient himself can make the waiver. *Renihan v. Dennin*, 103 N. Y. 577, 9 N. E. Rep. 320, was a case tried on appeal from the judgment of a surrogate court, admitting a will to probate, and it was held that the attending physician of the deceased was not a competent witness. This ruling was followed in contested will proceedings in the subsequent cases of *In re Coleman*, 111 N. Y. 220, 19 N. E. Rep. 71; *Loder v. Whelpley*, 111 N. Y. 239, 18 N. E. Rep. 874. The Indiana statute is not essentially different from the statute of

this state; and in *Heuston v. Simpson*, 115 Ind. 62, 17 N. E. Rep. 261, the court followed the rule of the court of appeals of New York in a testamentary case. The statute of this state, and that of New York, prohibit the physician from disclosing the information acquired under the circumstances specified; but the New York statute goes further, and says the prohibition shall apply to every examination of the designated persons,—a physician being one of them,—unless “expressly waived by the patient.” It not only creates the privilege, but defines by whom it may be waived, and says the waiver must be express. Our statute contains no such qualification. The difference in the statutes may fairly lead to different results. Notwithstanding our statute provides for no exception, still, it deals with a privilege, and it must be taken as established law that the privilege may be waived by the patient; and we have held that it may be waived by the representative, and in this our ruling accords with that of the supreme court of Michigan, under a like statute. If the patient may waive this right or privilege for the purpose of protecting his rights in a litigated cause, we see no substantial reason why it may not be done by those who represent him after his death, for the purpose of protecting rights acquired under him. Some light may be thrown upon this question by analogy from the rules of law applied to confidential communications between client and attorney. Such communications, it is held in *Russell v. Jackson*, 9 Hare, 390, must not be revealed, in cases where the rights and interests of the client, or those claiming under him, come in conflict with the rights and interests of third persons; but this rule, it is held, does not apply to cases of testamentary disposition of property by the client. The disclosure in such cases, it is considered, can affect no right or interest of the client, and is therefore not within the reason of the rule. Taylor says: “In stating that the privilege does not terminate with the death of the client, care must be taken to distinguish between cases where disputes arise between the client’s representatives and strangers, and those in which both the litigating parties claim under the client.” As to the latter class of cases, he says: “It would be obviously unjust to determine that the privilege should belong to the one claimant rather than to the other.” 1 Tayl. Ev. § 928, p. 798. See, also, *Blackburn v. Crawford*, 8 Wall. 175; *Scott v. Harris*, 113 Ill. 454. It is difficult to see why the rule of exclusion should apply in case of a physician, and not of an attorney. An attorney is declared, by the third clause of section 4017 of our statutes, to be incompetent to testify concerning communications made to him, “without the consent of the client.” The clause in relation to physicians does not contain this quoted qualification, but the third clause is simply declaratory of the common law; and, if the difference between the clauses argues anything, it should be that the physician can-

not testify, with or without the consent of the patient. Whatever may have been the rule at common law, the statute places attorneys and physicians on substantially the same ground. We conclude, as before, that when the dispute is between the devisee and heirs at law, all claiming under the deceased, either the devisee or heirs may call the attending physician as a witness.

5. The plaintiffs, in putting in their evidence, called and examined Sawney Brown, (colored.) Nearly, if not quite, a week thereafter, and when the defendant produced evidence in rebuttal, he called the witness Brown, and asked him if he did not at a designated time, and in the presence of named persons, say he knew nothing about the case, and only swore to what Joe Lightner told him to swear. The witness denied making the statement; and the named persons were called and testified that he did make it. The objections made to all this evidence are that Brown had been discharged as a witness, and that the question asked to lay a foundation to impeach him related to a date subsequent to that at which he had testified. In the first place, there is nothing to show that the witness Brown had been discharged, and, if he had, it can make no difference. The law is not so lame that a witness can admit that he has testified to matters of which he knew nothing, and it then be out of the power of the opposite party to impeach him. It would have been error for the court to have ruled otherwise than it did. The argument is made that this witness was entrapped into foolish talk by a friend of the defendant, but the argument addresses itself to the jury, and not to this court. The witness made a full and lengthy explanation, and the question of his veracity was one for the jury to determine.

6. The defendant attempted to show the reputation and standing of Dr. Wood, whose deposition had not yet been read, as a physician and surgeon, by another physician. The judge excluded the evidence, but remarked from the bench: “Dr. Wood’s character and standing as an eminent physician is part of the history of Missouri; and, if the courts and juries take notice of facts of history, the evidence is immaterial.” These remarks of the judge were improper, and should not have been made, but do not constitute reversible error.

7. The witness Rathbun testified: “Mrs. Ish was known to the community as a strong-minded woman.” This evidence ought to have been excluded; and why it was drawn out we cannot conjecture. Testamentary capacity cannot be proved by neighborhood rumors. *Brinkman v. Rueggiesick*, 71 Mo. 553. As the evidence is reported, we do not understand the witness to speak of the date of the last sickness of Mrs. Ish, but of a prior date. In view of the vast amount of competent evidence to the same effect, we do not see how this statement of the witness could have prejudiced the plaintiffs. The

judgment should not be reversed for this error.

8. Dr. Henderson, who testified in behalf of defendant, both as a physician and a subscribing witness, stated on cross-examination that he had no diploma, and did not graduate at a medical college, but had a certificate as a registered physician, and attended a private medical school, but did not graduate. Later in the case the defendant called Dr. Alexander, who said he knew Dr. Henderson, and, being asked his opinion of the qualifications of Dr. Henderson as a physician, said: "I regard him as above the average of doctors in Missouri." It is, of course, for the court to determine in the first instance whether a witness who is offered as an expert possesses the proper qualifications; but the value of the evidence which the witness may give is a question for the jury, and, as that value must depend much upon the skill of the witness in his craft or profession, we can see no serious objection to the admission of evidence which goes to show the extent of his skill. Dr. Alexander knew Dr. Henderson, and it is from that knowledge, and from that alone, he speaks; and this he could do. *Laros v. Com.*, 84 Pa. St. 200.

9. Twelve instructions were given at the request of the defendant, and nineteen at the request of plaintiffs,—one of them having been modified by the court. On the question of capacity to make a will, the court, at the request of defendant, in substance directed the jury that a person of sound mind, above the age of 18 years, has the right to dispose of his or her property to any person, and to leave others unprovided for; that neither old age, sickness, feebleness, nor bodily infirmity, nor mere weakness of mind, incapacitates the making of a will; "that soundness of mind means the ability to know and comprehend that one is disposing of his property by will, the general value and character of the property, and to whom the same is being given." "And if, therefore, the jury believe from the evidence that Martha Ish signed the paper read in evidence as her will; \* \* \* that at the time she had sufficient mind and memory to know that she was disposing of her property by will, to whom she was giving it, and the general nature and character of the property,—then she was of sound mind, and, unless procured by undue influence, as afterwards defined, you will find said paper to be her will, even though the jury may believe from the evidence she was old, infirm, sick, and feeble, and nigh unto death at the time she signed it, and for these or other causes her mind was not as vigorous and strong as it had once been, and her body was weak and feeble." The fifth instruction for plaintiffs is in these words: "*Fifth*. The jury are instructed that, to constitute a sound and disposing mind and memory in said Martha Ish, \* \* \* it was not only necessary that she should have then been capable of comprehending the nature and extent of her property, and the persons who [were] intended to be

provided for by the will, but she must also have been able to dispose of her property with understanding and reason; and it is not sufficient that she was then merely capable of understanding what she was engaged in." The instructions for the defendant do not, as seems to be supposed, withdraw from the consideration of the jury the circumstances of old age, weakness of body, and a want of a vigorous mind. They simply assert that, if she possessed a disposing mind, these circumstances alone did not disable her from making a will. Other instructions for the plaintiffs left it to the jury to take all these facts in evidence into consideration, including the fact that she gave all her property to defendant. These definitions and descriptions of a sound mind, namely, the ability on the part of the testatrix to know that she was disposing of her property by will, and to whom she was giving it, and the general nature and character of her property, come up to the standard of a sound and disposing mind repeatedly asserted by this court. *Brinkman v. Rueggessick*, 71 Mo. 556; *Appleby v. Brock*, 76 Mo. 814; *Jackson v. Hardin*, 88 Mo. 178; *Myers v. Hauger*, 11 S. W. Rep. 974.

10. For the defendant the court gave this instruction upon the subject of undue influence: "If the jury believe from the evidence that said paper was dictated by Mrs. Ish; that it expresses her directions, and embraces such bequests and devises as she then desired to make,—then the jury are instructed the same was not procured by undue influence; and if \* \* \* she had the mental capacity to make a will, as elsewhere defined, you will find said paper to be her will, even though you may believe from the evidence that from association, kindness, or other reasons, James D. Ish had an influence with his mother, and at times looked after and transacted some of her business." And at the request of the plaintiffs the court gave the following instruction: "*Eleventh*. If the jury believe from the evidence that the mind of deceased, Martha Ish, either from sickness, disease, age, bodily and mental decay, and overbearing confidence, was subject to the dominion and control of her said son, James D. Ish, and that he exercised such power and influence over her mind and will, in the disposition of her property by such will, as to destroy her liberty and free agency, and to cause such disposition of her property to be made as to suit the purposes and wishes of defendant, James D. Ish, and not her own, then such will, in law, is not the will of said Martha Ish; and the jury will find the issue submitted to them for the plaintiffs, and against such will." Other instructions were given at the request of contestants, reciting the various circumstances in evidence, and informing the jury, if they were true, they should be considered in determining the question of undue influence, and were facts from which undue influence might be inferred. They are in their scope such instructions as it was said should have been given in the case of *Harvey v. Sul-*



lens, 46 Mo. 147. The influence which a child may acquire from association with, and attention and acts of kindness to, a parent will not invalidate a will. The influence of a wife or child upon a testator, while he has power to deliberate and estimate the inducements, will not avoid the will, if the influence is exerted in a fair and reasonable manner, and without fraud or deception. The influence of one occupying such relation to the testator to avoid the will must be such as to overreach and destroy the free agency and will power of the testator. *Brinkman v. Rueggessick*, supra; *Jackson v. Hardin*, supra, *Myers v. Hauger*, supra. The instructions given upon the subject of undue influence are favorable to the contestants.

11. The twentieth instruction, to the effect that the will of 1882 could not be considered, unless it was signed by Martha Ish, in the presence of two witnesses, who signed the same at her request, and not at the request of her attorney, was properly refused. That will was offered for the sole purpose of showing her then fixed purpose and intention as to the disposition of her property, and it is immaterial whether it was formal in its execution or not. Besides, the evidence is all to the effect that it was formally executed.

From the numerous questions raised in the briefs, we have selected and disposed of those which we think call for special notice. No substantial reason is shown why the judgment should not stand, and it is therefore affirmed.

RAY, C. J., and BARCLAY, J., absent. The other judges concur.

#### STATE v. MEYERS.

(*Supreme Court of Missouri*, Dec. 2, 1889.)

HOMICIDE — INDICTMENT — CONFESSIONS — EXPERT EVIDENCE — VERDICT — APPEAL.

1. Under Rev. St. Mo. § 1993, which provides that no assignment or joinder in error is necessary in criminal prosecutions, but the court shall render judgment on the record before them, the sufficiency of an indictment will be reviewed on appeal, whether or not defendant's objection thereto is defective.

2. Under Rev. St. Mo. § 1282, which provides that murder committed in the perpetration of robbery, etc., shall be deemed murder in the first degree, the usual form of indictment is sufficient, irrespective of the manner in which the crime was committed; and so much of an indictment as charges the murder to have been committed in the perpetration of robbery is surplusage.

3. Under the Missouri Bill of Rights, § 22, which declares that in criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation, the conclusion of an indictment, which does not show that the grand jurors charge the murder, is insufficient, and not cured by Rev. St. Mo. § 1821, which provides that no indictment is invalid for omitting to allege that the grand jurors were impaneled, sworn, or charged, etc.

4. Under Rev. St. Mo. § 1834, which provides that the jury must ascertain the degree of murder of which the defendant was guilty, a verdict that "we, the jury, find the defendant guilty of murder in the first degree, as charged in the second count in the indictment," is sufficient.

5. Where exceptions are not taken when the instructions are given or refused, it is too late to raise objections thereto on motion for a new trial.

6. Defendant confessed that after he met his accomplice they walked from a distance in search of work, and, after arriving in town, tired and hungry, and having received something to eat from a lady, they strolled about various buildings to get warm; that late at night they sought shelter in the depot, and found deceased, the only person there, sleeping on a chair; that after a while his accomplice said that he had seen deceased have some money, and suggested that they hold him up, and secure it; that defendant objected, but finally acceded, and they went out on the platform, and consulted how to execute their design; that his accomplice finally got a coupling-pin, and told defendant merely to stand deceased with it, while he got the money; that defendant at first refused, but, upon being accused of cowardice, and being in a frenzy, struck deceased two blows on the head; that they then secured the money, and made their escape. Similar confessions were made to others, and there was evidence to corroborate the same, and to identify defendant, and establish his proximity to the scene of the murder on the night in question. *Held*, that a conviction for murder in the first degree was sustained.

7. Such confession will be presumed to have been voluntary, unless the contrary is shown.

8. Evidence that defendant pleaded guilty at a former term of court, which plea the court refused to receive, is inadmissible, and does not require a special objection.

9. Where the depositions of physicians who had treated defendant professionally, to the effect that his mind had been seriously impaired by masturbation, are first read to or by experts, they may answer questions as to the mental condition of a person so afflicted; whether such insanity is permanent, and easy or hard to cure; and whether a person insane from such cause one year before would remain so down to the time of the trial.

Appeal from criminal court, Jackson county; HENRY P. WHITE, Judge.

The second count of the indictment upon which the defendant was tried, convicted, and sentenced reads this way: "And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that Charles Meyers and John Bogard, on the 3d day of January, 1888, at the county of Jackson and state aforesaid, did feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought, make an assault upon James Weir, [intending and attempting then and there the money and property of said James Weir, from the person and against the will of the said James Weir, and by force and violence to the person of said James Weir, then and there to feloniously rob, steal, take, and carry away;] and did then and there, [while so intending and attempting, and in execution of such intent and attempt,] feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought, with a certain iron weapon and means, an exact description whereof is to these jurors unknown, which they, the said Charles Meyers and John Bogard, then and there had and held in their hands, strike and beat him, the said James Weir, thereby giving to him, the said James Weir, in and upon the head of him, the said James Weir, certain mortal bruises, wounds, contusions, and fractures, of which said mortal bruises, wounds, contusions, and fractures, the said James Weir, then and there, thence continually languished

until, on the 10th day of January, 1888, he there died. And so said Charles Meyers and John Bogard, in manner and form aforesaid, and by the means aforesaid, did feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought, kill and murder the said James Weir, against the peace and dignity of the state. **BLAKE L. WOODSON, Prosecuting Attorney.**"

**Frank M. Lowe, for appellant. The Attorney General, for the State.**

**SHERWOOD, J., (after stating the facts as above.)** 1. It seems that the counsel for the defendant objected *ore tenus* to the introduction of any evidence because of the insufficiency of the indictment, but such a method of objection avails nothing. *State v. Risley*, 72 Mo. 609. In the motion in arrest, however, it is stated: "That the second count in the indictment, upon which the verdict was found, does not state facts to constitute a cause of action." It is unnecessary to inquire whether such a general objection is good or not, by reason of the fact that in criminal prosecutions no assignment of error, or joinder in error, is necessary; and by reason of the fact that our statutory duty requires that, in the absence of such assignment of error, we proceed and render judgment upon the record before us. *Rev. St.* 1879, § 1993; *State v. Barnett*, 68 Mo. 300; *State v. Krieger*, 68 Mo. 98; *State v. Davidson*, 73 Mo. 428. And such general objection, if insufficient, is also healed by the further consideration that, if the defect in the indictment be a material one,—one available on motion in arrest,—it is equally available in this court on appeal or error. *McGee v. State*, 8 Mo. 495.

2. An indictment in the usual form, charging the murder to have been done deliberately, premeditatedly, etc., is sufficient, under our statute, to charge murder in the first degree, no matter whether the murder be committed in the perpetration of robbery, rape, etc., or otherwise. *State v. Hopkirk*, 84 Mo. 278; *State v. Kilgore*, 70 Mo. 546; *State v. Green*, 66 Mo. 631. The perpetration, or the attempt to perpetrate, any of the felonies mentioned in the statute, during which attempt, etc., the homicide is committed, stands in lieu of, and is the legal equivalent of, that premeditation, deliberation, etc., which otherwise are the necessary attributes of murder in the first degree. The correctness of this view is recognized in Pennsylvania, from which statute section 1232 is derived.<sup>1</sup> *Com. v. Flanagan*, 7 Watts & S. 415. See, to same effect, *Titus v. State*, 49 N. J. Law, 36, 7 Atl. Rep. 621. The rule was the same at common law. It was not necessary to charge that the murder was committed in the perpetration of another crime. It sufficed to charge it in common form, and then, upon proof that the crime

was done in the perpetration, etc., this answered the ends of the prosecution, and stood in the stead of proof of "malice aforethought." 2 *Bish. Crim. Law*, § 694; *Fost. Cr. Law*, 258 et seq.; 1 *Hale*, P. C. 465. As will have been observed, in the present case the pleader has evidently endeavored to draw an indictment based upon the allegation of facts occurring in the perpetration of a robbery, and resulting in the crime of murder. I have never met with but one precedent where the endeavor was made to charge a murder committed in the attempt to perpetrate another felony; and in that case the endeavor failed. *Titus v. State*, 49 N. J. Law, 36, 7 Atl. Rep. 621. As before seen, it is wholly unnecessary to do more, when murder is committed in the perpetration, etc., than to make the charge in the ordinary way for murder in the first degree, and then show the facts in evidence; and, if they establish that the homicide was committed in the attempt, etc., this suffices. It is immaterial, in the case at bar, to determine whether the pleader has succeeded in the indictment before us, because, if you strike out that portion of the indictment which I have marked in brackets, there will be sufficient left to form the body of a good charge of the crime, so far as concerns that portion of the count. The authorities abundantly sustain the position that if after striking out a portion of an indictment, enough be left to make a valid and substantial charge of the crime intended to be charged, no essential part of the case being omitted after the striking out occurs, then such striking out is permissible. *Whart. Crim. Pl.* § 158. Treating of this topic, that redoubtable old warrior of criminal jurisprudence, Chitty, says: "But, though the indictment must in all respects be certain, yet the introduction of averments, although superfluous and immaterial, will seldom prejudice. For, if the indictment can be supported without the words which are bad, they may, on arrest of judgment, be rejected as surplusage." 1 *Chit. Crim. Law*, 173; *Id.* 281, 233, 238. Elsewhere he says: "It is a general rule, which runs through the whole criminal law, that it is sufficient to prove so much of the indictment as shows the defendant has committed a substantive crime therein specified; and, in the case of redundant allegations, it is sufficient to prove part of what is alleged, according to its legal effect, provided that that which is alleged, but not proved, be neither essential to the charge nor describe or limit that which is essential." *Id.* 250. To the same effect, see *King v. Morris*, 1 *Leach*, 109; *King v. Redman*, 1 *Leach*, 477. That portion of the count must therefore be ruled not obnoxious to criticism, after striking out the portion of it mentioned, or, what amounts to the same thing, treating it as surplusage.

3. The conclusion of the count remains to be discussed. Is it sufficient in law? Precedents are very good witnesses of what the law is. Going back to the time of Coke, his form for the conclusion of an indictment for

<sup>1</sup> *Rev. St. Mo.* § 1232, provides that murder committed in the perpetration, or attempt to perpetrate, arson, rape, robbery, burglary, or mayhem shall be deemed murder in the first degree.

murder is: "*Et sic juratores predicti super sacram suum quod predictus Jacobus Heydon modo et forma predictis predictum Edwardum Savage felonice et ex malitia sua precoxigata interfecit et murtheravit, contra pacem dictae domine Regine Coronam et dignitatem suam.*" Heydon's Case, 4 Coke, 41b. The form, being translated, is the same in Chitty. 3 Chit. Crim. Law, 750. Wharton uses the same form. Whart. Hom. § 849. Bishop, also. 2 Crim. Proc. §§ 536, 541, 548, 564. And the same form of a conclusion is to be found in 4 Bl. Comm. (Cooley's Ed.) app. 445, as well as in 3 Burns, J. P. 822. A very careful examination of the old forms and precedents has failed to discover a single instance where a form of the conclusion in a count for murder has been like that used in the present record. Instances, after close investigation, have been found where allusions are made to the conclusion of a count for murder, and to the substance or effect of such conclusion. 1 East, P. C. c. 5, § 117, p. 847; Wingfield's Case, Cro. Eliz. 739; 2 Hawk. P. C. c. 25, § 57; Id. c. 23, § 79; 1 Hale, P. C. 427; 2 Hale, P. C. 187, 188. But in none of those instances is the form for the conclusion of a count for murder given, and indeed, the last authority cited refers to Heydon's Case, supra, where I have quoted the form given by Coke. So that Hale evidently approves that form. All the authorities show, the proper conclusion of an indictment for murder marks the feature of that offense which distinguishes it from manslaughter. Without such conclusion, the previous words charge but the latter offense. 2 Bish. Crim. Proc. §§ 536, 548, 550; 3 Chit. Crim. Law, 737; 1 Chit. Crim. Law, 243. Hence the importance of the conclusion in the count for murder. That conclusion, in order to be valid, charges murder as the result of the previously made allegations. 3 Chit. Crim. Law, 738. Of course, if a crime is to be charged, it must be done by the grand jurors upon their oaths. It does not appear that the grand jurors have charged murder in the conclusion before us. We have, it is true, a very liberal statute concerning indictments, etc.; section 1821, among other things, declaring that "no indictment shall be deemed invalid for an omission to allege that the grand jurors were impaneled, sworn, or charged," etc.; but it will be noticed that this section, broad as it is, does not profess to cure an omission where the grand jury fail to make a charge of a crime committed. And, as previously seen, the conclusion of a count for murder is just as essential as the other portions of the count. Nor is it thought that the other language employed in the section referred to cures the defect mentioned. State v. Pemberton, 30 Mo. 376. Our bill of rights declares that "in criminal prosecutions the accused shall have the right to \* \* \* demand the nature and cause of the accusation." Section 22. And an indictment means just what it did at common law. Ex parte Slater, 72 Mo. 102. The legislature

may change it in form, but it cannot change the substance of its material averments, without impinging upon constitutional guaranties. Hawkins says "that in an indictment nothing material shall be taken by intentment or implication." 2 Hawk. P. C. c. 25, § 60. This salutary doctrine, if ever applied, should be applied in indictments for capital crimes. In consideration of the authorities, and the reasons to be deduced from them, it must be ruled that the conclusion of the aforesaid count is insufficient in law, and without precedent to support it.

4. Another ground mentioned in the motion in arrest is "that the verdict is not sufficient to sustain the judgment." The verdict returned is as follows: "We, the jury, find the defendant guilty of murder in the first degree, as charged in the second count of the indictment." There is no merit in the objection. The verdict is in strict conformity to section 1234, Rev. St., in that it "ascertains" as a fact, just as the statute intended, the degree of murder of which the defendant was guilty, and in this particular differs radically from the verdicts in the cases of State v. Montgomery, 11 S. W. Rep. 1012, and State v. Jackson, ante, 367, (decided the present term.)

5. Regarding the instructions, as no exceptions were saved to the giving or refusing of them when given or refused, it was too late to raise the point in the motion for a new trial. State v. McDonald, 85 Mo. 539, and cases cited. Exceptions in criminal causes occupy the same position as do those in civil actions. Rev. St. § 1921; State v. Griffin, ante, 358, (decided at the present term,) and cases cited.

6. The substance of the confession made by defendant to Levene is the following: "He said that his home was in Altoona, Pa. His parents lived there, and were respectable; and that his father was working in the car shops. That he drifted west, and went to Fort Leavenworth, and engaged himself as a member of the band. He was discharged from there, for some reason or other, and came to Kansas City. He had no place to stop, and he drifted to the basement of the Delmonico Hotel; and there he first met John Bogard. They exchanged experiences. Both were looking for work; and Bogard suggested that they go around the city next day, and try and find something to do. This was about the 29th or 30th of December, 1887. They started around the city the next day, but, being unable to get work, Bogard said he was acquainted in Independence, and that they might get work there. They started out, and walked there; and when they arrived, being tired and hungry, they first looked around for something to eat, and a lady gave them something. After that they went to the room of the Y. M. C. A. and stayed there a while. Then they went around town, and drifted to the Liberty-Street depot. Sat there awhile, and then went over to the electric light works to get warm. Remained there

awhile, and talked to the fireman or engineer. Then went again to the depot. The second time they went there, Bogard remained; and he went back to the works, to get warm. About half past 10 or 11 o'clock, he returned to the depot; and he and Bogard then went over to the works and asked the fireman to let them sleep there; and he complied. They stayed there until about 2 o'clock, when the fires were put out, and it got very cold; and they got out and went to the depot. When they came back to the depot, there was no one in there but this man, James Weir, tilting back on a chair, sleeping. They remained in there awhile, talking about what they should do; and, not knowing what to do, Bogard said: 'There is a man sitting over there who has got plenty of money.' Myers asked him how he knew. Bogard said he saw him have the money. Myers asked him, 'What about it?' Bogard said: 'Let's hold him up, and get the money away from him.' Myers said he objected to it, and Bogard said: 'If you don't do it, I will take it from him.' They then went out on the platform, and talked it over there. They then got to talking about the method they should employ. They hadn't anything to do it with. \* \* \* Bogard said: 'I'll get something for you,'—and he went out to the rear of a train, and pulled a coupling-pin, and handed it to Myers; and told him to hit him on the head with it,—only to stun him, not to kill him,—and, while he was in that condition he would take the money away. Myers refused to do it, and Bogard said: 'You are a God damned coward. If you don't do it, I will.' Myers said he didn't like to be called a coward. That Bogard called him a coward, and 'agged' him on, and in a frenzied state of mind (his mind was unsettled, he said) he approached Weir, and hit him two blows on the head. That brought him on the floor. Then Bogard went through his pockets, and drew out the money. They then rushed over to the electric light building; and, when he asked Bogard to divide the money, he gave him the silver, and kept the bills. They walked about town, and stayed there until morning. Bogard said they had better separate; that they had better not be seen together that morning. He advised Myers to leave town,—to take the train to Kansas City, and go back to Topeka,—which he did, and from there went on to Fort Leavenworth, where he joined the troops." Similar confessions were made to others and there was ample other evidence to corroborate the *extra judicial* confessions, to identify the defendant, and to establish his proximity to the scene of the crime on the night of its commission, etc. The evidence abundantly sustained the conviction, and the evidence of the confessions was properly received; and there was nothing in the nature of those confessions, or the way in which they were made, that ought to have rendered them inadmissible. A confession is presumed to be voluntary, unless the contrary is

shown or something appears in the confession, or its attendant circumstances, to combat such presumption. *State v. Patterson*, 78 Mo. 695; *State v. Hopkirk*, 84 Mo. 278.

7. At a previous term of the court the defendant had been called before the court, the indictment read to him, and he then pleaded guilty. This plea the court very properly refused to receive, and it was not entered of record. At the time the trial occurred, the prosecution was permitted, over the objection of the defendant's counsel, to introduce the deputy-clerk and others to prove the facts that the indictment had been read to the defendant, and that he had pleaded guilty thereto. Such testimony should not have been admitted. The confession being what is termed "a plenary judicial confession," that is a confession made before a tribunal competent to try him, was sufficient whereon to found a conviction. 1 *Rosc. Crim. Ev.* (8th Ed.) 40. Consequently, the trial court might have proceeded at once to pass sentence upon the accused. But this fact, surely, did not authorize the reception of the plea of guilty in evidence, after the court had refused to receive that plea, and had placed the defendant upon his trial. No one would contend, if the plea of guilty had been entered of record, that such plea could have been received in evidence against the defendant; and yet the same principle is involved, whether the plea actually go upon record or not. In either case, it must, if received in evidence, be conclusive of the defendant's guilt. Like the previous question in parliamentary bodies, evidence of such a plea, having been made before a tribunal competent to try the party making it, cuts off debate, and determines all issues. The course, therefore, pursued by the trial court in this regard was plainly inconsistent. The plea of the defendant should either have been received, and sentence passed accordingly, or that plea should never have been heard of again. By refusing to receive the plea, and granting the defendant a trial, this, of necessity, meant a trial with the issues of fact to be determined by the jury, and not to be determined by the previous plea of the defendant, which admitted all that the state desired to prove. In short, the trial court could not refuse to receive the defendant's plea of guilty at one time, and then use it against him at another. The cases cited by the state, and many others, have been examined; but none have been found to sanction the introduction of such evidence. Nor can the error of the reception of such evidence be healed or glozed by reason of the general objection made to its introduction,—that it was incompetent, immaterial, etc. Such objections are obviously bad, where the evidence is competent in any way or manner to establish the contention of one of the adverse parties; but here the evidence was wholly inadmissible, in whatever shape offered, and therefore, does not fall within the rule requiring special objections to be made.

8. Depositions of the physicians had been taken at the home of defendant, in Altoona. They had treated the defendant professionally for disease resulting from masturbation; and their testimony tended to establish that his mind had been seriously impaired, if, indeed, he had not been rendered insane, by the practice of that vice. One of them testified that in his opinion "his mind was entirely gone," and the other that "he was a mental wreck." There was much other testimony of non-experts to the same effect, tending to show either an insane mind, or one very closely bordering on insanity. Upon the basis thus established, it was proposed to prove by experts who were in attendance, and who had read or heard the depositions read, what was the mental condition of one who had become insane in consequence of the habit contracted by the defendant; whether such insanity was permanent in its character, easily cured, or hard to cure. Defendant's counsel, the proper basis having been laid in the depositions aforesaid, proposed to ask one of the experts the question whether a person who was insane, from the cause mentioned, one year before that, would remain insane down to the time of the trial. This question was also rejected. It is true, experts may be required to give their opinions upon an hypothetical case,—a case substantially similar to that shown by the testimony in the given case; but this is by no means the extent to which they may be examined. The authorities abundantly show that physicians may be examined as to the nature and effect of disease; the effects of particular poisons upon the human system; the effect of particular treatment; and, generally, as to insanity in its various indications and manifestations. 1 Whart. Ev. (3d Ed.) § 441; 1 Greenl. Ev. (14th Ed.) § 440; Whart. Crim. Ev. (9th Ed.) §§ 412, 417, 418. These remarks are, of course, subject to the conditions that the questions asked the physicians are pertinent, and relevant to the points presented by the testimony previously adduced. In the case at bar the relevancy of the questions was apparently within the rule above stated, and should have been answered by the witnesses.

There are various other errors assigned,—some of which were not properly preserved; others, in which there is no merit; and still others, as to which it is unnecessary to express an opinion, owing to the disposition made of this cause; but, for the errors aforesaid, the judgment will be reversed, and the cause remanded. All concur, but BARCLAY, J., who defers an expression of opinion.

#### DUFFEY *et al.* v. WILLIS.

(Supreme Court of Missouri. Dec. 2, 1890.)

##### HOMESTEAD—ABANDONMENT.

Defendant left his homestead for several years, doing business in other places part of the time. The homestead property was rented from month to month, and was at one time vacated by the tenant; and defendant then intended to return

to it, but was prevented by his business. There was evidence that defendant's residence elsewhere was temporary, and that he intended to return. He acquired no new home elsewhere. Held, that a finding that he had not abandoned his homestead was warranted.

Error to circuit court, Carroll county; JAMES M. DAVIS, Judge.

*Crawley & Son*, for plaintiffs in error.  
*Jas. H. Wright*, for defendant in error.

BLACK, J. The question here is whether the defendant lost, by abandonment, his right to have a house and lot in Carrollton, Carroll county, set off as a homestead. The plaintiffs recovered a judgment against defendant for \$228.80 in March, 1885, for goods sold in that year. Execution was issued in November, 1885, and levied upon the house and lot. The appraisers appointed by the sheriff valued the property at \$700, and set the same off as a homestead. Plaintiffs moved to set aside the appraisers' report. This motion was submitted to the court on agreed facts, but before the court ruled upon it the sheriff sold the property; and thereupon defendant filed motion to set aside the sale. This motion was supported and opposed by affidavits, which were read as evidence, without objection. The court sustained the motion to set aside the sale, and overruled the one filed by plaintiffs. The defendant owned, and with his family resided on, the property, at and prior to the spring of 1882. At that time he moved to Springfield, in another county in this state, and remained there from 6 to 12 months. He then returned to Carroll county, and began a mercantile business, in a small way, at a place called "Clione." From there he moved his goods and family to Hale, a small village in the same locality. In May, 1885, which was after the date of the judgment, and before the execution was issued thereon, he closed out his business, and moved back to the property in question, at Carrollton. The agreed facts filed with the first motion state that it was his intention, when he went to Hale, "to live and do business there indefinitely." In his affidavit filed in support of the second motion, defendant says: "I returned from the south-west in a few months, without having made any effort to get any home there, or without trying to purchase any property. I did business, during the years 1883 and 1884, in Clione and Hale, in this county, about eighteen months; but I have never owned or claimed any homestead, except my home in Carrollton. I went into business in Clione and Hale because I thought I could make some money there, and thus better my condition. I moved back to Carrollton, into this property, some time in May, '85, and have occupied it with my family ever since. I have never, at any time, since the purchase of said property, had the least intention of abandoning it as a homestead. If I had been successful in business, and had had a good chance to sell said property, I might have sold it, and invested the proceeds in another home." The

property was rented out from 1882 to May, 1885. The defendant's agent says it was rented from month to month only; that in July, 1884, and before the date of plaintiffs' judgment, he terminated the lease, and got possession of the property, because defendant wanted to move back at that date. The agent goes on to say: "Mr. Willis never gave up the property as his home, but, from what he said and wrote to me, he always intended to move back to it."

In *Smith v. Bunn*, 75 Mo. 559, Isaac Smith lived on the premises until the death of his first wife, when he broke up house-keeping, moved his household goods, and leased the premises for three or five years. He then married, and within a few weeks died, having made some preparations to move back to the premises. His widow claimed the property as her homestead, but it was held these facts made out a *prima facie* case of abandonment. In *Kaes v. Gross*, 92 Mo. 648, 3 S. W. Rep. 840, the plaintiff and her first husband had acquired a homestead. He died, and she married again, and moved to the home of her second husband, in another county, and had resided at her last home for nearly four years. It was held she had abandoned her former homestead. The present case, it will be readily seen, differs from those just cited in this: that there is here evidence of an intention to return on the part of defendant. It was also worthy of note that defendant acquired no new home upon which the homestead right could attach. This case is more like that of *Potts v. Davenport*, 79 Ill. 456, where the homestead claimant rented his farm for one year, reserving two rooms, and moved to Chicago, expressing an intention to return, if the climate and other matters suited him. He remained there for three years, and then returned. And it was held the evidence supported his continued homestead right to the farm. The cases before cited from this court assert or recognize these principles: That when a homestead has been sought the question of abandonment is one of fact, and each case must, in a great measure, rest upon its own particular facts; that the right of a homestead exemption ceases to exist when the occupant leaves the premises, with a view of acquiring a residence elsewhere, and with no intention to return; and that the intention to return must be formed at the time of the removal from the premises, in order to preserve and continue the homestead exemption. The defendant's residence at Springfield is without any great significance; but his residence at Clione and Hale, and doing business at those places, make a *prima facie* case of abandonment of the Carrollton homestead. On the other hand, it appears the Carrollton property was rented from month to month only. It was vacated by the tenant in July, 1884, but the defendant then intending to move back; but his business prevented him from so doing. The evidence of the agent tends to show that defendant never gave up his Carrollton home,

and that his residence elsewhere was temporary. The letters to the agent, and a detailed statement of the conversations, would be more satisfactory evidence; but we must take the case as we find it. Taking the agreed statement and the evidence as a whole, we are of the opinion the trial court did not err in holding that the defendant had not at any time abandoned his Carrollton homestead. At all events, the finding of the circuit court is not against the evidence, but is supported by it. The judgment is therefore affirmed.

RAY, C. J., and BARCLAY, J., absent. The other judges concur.

#### EMMEL et al. v. HAYES et al.

(Supreme Court of Missouri. Dec. 2, 1889.)

#### RES ADJUDICATA.

A judgment in ejectment, sustaining defendants' equitable title to the land, is a bar to a subsequent suit in equity, by the same plaintiffs against the same defendants, to remove defendants' claim as a cloud on plaintiffs' title.

Appeal from circuit court, Greene county; JAS. R. VAUGHN, Judge.

C. W. Thrasher and F. S. Heffernan, for appellants. Goode & Cravens, for respondents.

BRACE, J. This is a proceeding in equity, in which the plaintiffs seek to set aside a deed of trust executed by Thomas O'Callaghan to Thomas K. O'Day to secure the payment of a debt of \$3,000 to defendant James Hayes, on the ground that the same is fraudulent, and a cloud upon plaintiffs' title to the land described in the petition, and therein conveyed to secure said pretended debt. The title set up and shown in this suit is the same as that passed upon in the case of *Simmons v. Heatlee*, 94 Mo. 482, 7 S. W. Rep. 20, and in *Emmel v. Headlee*, Id. 22, (decided at the same term, but not [officially] reported,) in which the plaintiff sought to recover in ejectment the same premises in action against the said Thomas O'Callaghan and his tenant, and in which it was held that the equitable title of the defendant O'Callaghan, resting upon an executed parol contract, was superior to the legal title of plaintiffs herein. While the judgment in one action of ejectment is not necessarily a bar to a second action between the same parties for the same property, (*City of St. Louis v. Lumber Co.*, ante, 248, and cases cited,) yet when, in an action of ejectment, an equitable title is set up and tried, the issues upon such equitable title to the same premises, between the same parties, become *res adjudicata*, and may not by them be inquired into again, (*Chouteau v. Gibson*, 76 Mo. 38; *Preston v. Rickets*, 91 Mo. 320, 2 S. W. Rep. 793.) The same issue made in this case between the legal title of the plaintiffs and the equitable title of the defendant O'Callaghan was tried, upon the same evidence, in the said two ejectment suits be-

tween these plaintiffs and defendant O'Callaghan; and the equitable title of said defendants, having been sustained in them, cannot be again inquired into in this case. The judgment of the circuit court is therefore reversed, and the bill dismissed. All concur, except RAY, C. J., and BARCLAY, J., absent.

#### MOOERS v. MARTIN.

(Supreme Court of Missouri. Dec. 2, 1889.)

##### LANDLORD AND TENANT—RECOVERY OF POSSESSION.

A demand for and statement of less rent than is due is not fatal to an action for rent in arrear and possession of the premises, brought under Rev. St. Mo. § 8098 et seq., which provide that "whenever any rent has become due and payable, and payment has been demanded by the landlord, \* \* \* and payment thereof has not been made, the landlord, or his agent, may file a statement, verified by affidavit, \* \* \* setting forth the terms on which the said property was rented, and the amount of rent actually due," and that payment has been demanded and not made, and providing for the procedure in such cases.

Case certified from St. Louis court of appeals.

Action by L. P. Mooers against Charles Martin, under the Missouri landlord and tenant act, for rent in arrears, and recovery of possession of the demised premises. A subsequent action for other rent alleged to be due was dismissed. Rev. St. Mo. § 8098, provides that "whenever any rent has become due and payable, and payment has been demanded by the landlord, or his agent, from the lessee, or person occupying the premises, and payment thereof has not been made, the landlord, or his agent, may file a statement verified by affidavit, with any justice of the peace," etc., "setting forth the terms on which the said property was rented, and the amount of rent actually due to such landlord; that the same has been demanded; \* \* \* and that payment has not been made," etc. This section, and the following ones, provide for the procedure in such cases. A judgment for plaintiff was reversed by the circuit court on appeal. This judgment was reversed by the St. Louis court of appeals, and judgment entered for plaintiff, and, Judge LEWIS dissenting, on the ground that the judgment was contrary to a decision of the supreme court, the case was certified to this court.

*Broadhead & Haussler* and *W. M. Hazel*, for plaintiff. *L. D. Seward*, for defendant.

RAY, C. J. This case has been transferred to this court from the St. Louis court of appeals, under the provisions of section 6 of the constitutional amendment adopted in 1884. The case is reported in 23 Mo. App. 654, where the majority opinion of that court, and the dissenting opinion of LEWIS, J., will be found. These opinions make any further statement of facts by us unnecessary.

At the time of the trial there was, we think, under the facts of the case, no question of practical value or importance as to whether plaintiff had waived the defendant's forfeiture of the possession by the institution of the

second suit for the October rent, for the reason that defendant had voluntarily restored to plaintiff the possession of the premises before the date of the trial. The judgment authorized by the statute is for the recovery of the possession, and for the amount of the rent due, with costs. However actions or questions of this sort may have been anciently regarded, our statute looks both to a recovery of the possession and of the money due as rent, and is as summary as to one as to the other; both being provided for in one and the same judgment. Section 3100. Plaintiff, it seems, demanded, on October 20th, the rent for October, as well as the two preceding months of September and August. By the terms of the lease, the rent became due the 1st of each month; so that the October rent was past due, though not fully earned, when demanded. In the suit in question, however, plaintiff, in his affidavit, omitted the October rent, and states the amount actually due to be the rent of the two prior months. There was no question that the rent thus demanded in this action for said two months of August and September was due when suit was brought, and still due and unpaid at the time of trial. Upon the given facts, we think the statute and law are to be understood and applied as the same are understood and construed by the majority opinion of the court of appeals, and, as there held, that the judgment of the circuit court for defendant was erroneous. A demand and suit for less rent than is due, whether in this form of action or otherwise, ought not, we think, to be held fatal. Its effect upon the residue not claimed is immaterial in this action. It is not necessary to again review the authorities, or argue the question *in extenso*; both of which have been done by the court of appeals. The majority opinion of said court is satisfactory to us, and we therefore concur therein, and affirm its judgment. All the judges concur, except BARCLAY, J., absent.

#### ENEBERG v. CARTER et al.

(Supreme Court of Missouri. Nov. 18, 1889.)

##### CONVERSION—JUDGMENT—LIEN.

Testator, by his will, declared that, after the satisfaction of certain devises and bequests, "I desire the remainder of my estate to be equally divided between my children," naming them. "I desire that my executor will dispose of all my real estate as soon as it can be done without loss to my estate." Held, that the will did not operate by its own force to convert the land into money, so as to place it beyond the lien of a judgment recovered against one of the children before the sale by the executor, which lien, by Rev. St. Mo. 1879, §§ 2354, 2730, 2781, 2787, attaches to any interest of the debtor in land, whether legal or equitable.

Appeal from circuit court, Jackson county; TURNER A. GILL, Judge.

Action by John F. Eneberg against John L. Carter and others, to set aside certain conveyances. Judgment for plaintiff, and defendants appeal.



*Charles W. Freeman and Karnes & Krauthoff*, for appellants. *James T. Clayton and Johnston & Lucas*, for respondent.

SHERWOOD, J. The clauses of the will which form the basis of the present contention read this way: "(7) After all the devises and bequests above provided for have been satisfied, I desire the remainder of my estate to be equally divided between my children Mary D. Carter, Marion Alexander, Annie R. Carter, Elizabeth C. Webb, and John L. Carter." "(9) I hereby appoint Jesse P. Alexander, of Jackson county, executor of my estate. I desire that my executor will dispose of all my real estate as soon as it can be done without loss to my estate." The testator died in 1875. On the 2d day of March, 1882, a judgment in favor of the Kansas City Lumber Company was rendered against John L. Carter for five hundred and odd dollars, on which judgment execution was issued to the sheriff on the 27th day of February, 1883, and his levy of the execution resulted on the 7th day of April, 1883, in a sale of Carter's right, title, and interest in certain lots in the City of Kansas. Plaintiff, being the purchaser, and receiving a sheriff's deed on the date last mentioned, placed the same on record. Carter, on the 5th day of January, 1883, conveyed, or attempted to convey, his interest, being an undivided one-fifth in the land in controversy, to said Alexander. The petition charges that this conveyance, as well as other mesne conveyances made and participated in by the defendants, were fraudulently made with a view to evade the collection of the judgment aforesaid; that there was no consideration for any of said conveyances; and asks that, so far as concerns Carter's undivided one-fifth interest in the land, said conveyances be set aside and for naught held. Upon hearing the testimony the court granted the prayer of the petition, and decreed accordingly; hence this appeal.

As seen from the premises, the heart of this cause is involved in the question: Had Carter, the devisee, such an interest in the land that the lien of the judgment could operate thereon? Under our statutory provisions, all interests of a debtor in land, whether legal or equitable, are bound by the lien of a judgment rendered in the same county, and consequently are subject to sale under an execution issuing upon such judgment. Rev. St. 1879, §§ 2354, 2730, 2731, 2767; *Slattery v. Jones*, 96 Mo. 216, 8 S. W. Rep. 554. So that it may be safely affirmed that it is a general rule—a rule almost without exception—that the interests of a defendant debtor in land are never beyond the reach of an execution. Taking this as the predicate for investigation, the inquiry arises: Do the circumstances already detailed exempt the case of the defendant Carter from the operation of the general rule? The claim is made by counsel for the defendants that the clause of the will operated as an equitable conversion of the land covered by it, and that such con-

version was of even date with that of the death of the testator.

1. If this be true, then the rendition of the judgment created no lien, and the plaintiff took nothing by the sheriff's sale and its accompanying incidents. *Freem. Ex'ns*, (2d Ed.) § 183, and cases cited. Taking it for granted that the words employed by the testator in the ninth clause of his will were of such a nature as to authorize the land to be converted into money, and the money thus raised to be distributed among the five residuary legatees or devisees, as to which concession see 3 Pom. Eq. Jur. §§ 1159, 1160, and cases cited; and conceding, further, that, if a conversion of the land into money took place, it occurred upon the death of the testator, (Id. § 1162, and cases cited; *Fletcher v. Ashburner*, 1 White & T. Lead. Cas. Eq., 4th Amer. Ed., 1159, and cases cited;) and conceding that the power conferred by the ninth clause of the will upon Alexander was something more than a mere naked power,—was a trust of such a character that it would be recognized and enforced by a court of equity,—conceding all these things, I say, the question still recurs: Did the clause of the will in controversy operate by its own force, and without action on the part of the executor, to convert the land into money, and thus place it beyond the lien of the judgment and the execution issued to enforce it? I am not of the opinion it did, and for these reasons: "It is a well-known maxim that an heir at law can only be disinherited by express devise or necessary implication, and that implication is defined to be such a strong probability that an intention to the contrary cannot be supposed." 2 Pow. Dev. 199. And his title cannot be defeated unless there was a disposition of the subject to some other person capable of taking. 2 Fonbl. Eq. 51; *Habergham v. Vincent*, 2 Ves. Jr. 224; *Pickering v. Lord Stamford*, 3 Ves. 493. In the present case there was certainly no express devise in fee to the executor, nor were there any such words in the will as to raise a fee in him by force of a strong implication. Therefore the fee remained in the heirs at law, both by the devise to them, as well as by the statute of descents, until it should be divested by a sale by the executor under the terms of the will, and until such sale no conversion could occur. *Greenough v. Welles*, 10 Cush. 571; *Co. Litt. 236a*; *Warnford v. Thompson*, 3 Ves. 513; *Hilton v. Kenworthy*, 3 East. 553; *Schauber v. Jackson*, 2 Wend. 13; *Lancaster v. Thornton*, 2 Burrows, 1027; *Bowman v. Mathews*, *Forrest*, 163; 1 Pow. Dev. 233; *Beadle v. Beadle*, 2 McCrary, 586, 40 Fed. Rep. 315; *Compton v. McMahan*, 19 Mo. App. 494; *Crittenden v. Fairchild*, 41 N. Y. 289; 1 Pom. Eq. Jur. § 371. I have been able to find no case where the doctrine of equitable conversion has been so applied as to cut out and dominate the title of the heir, except where the donee of the power took a fee by necessary and inevitable implication, or where such fee was in express terms conferred upon such

donee; otherwise the title remains vested in the heirs until the donee of the power actually exercises it. From the foregoing it follows that the judgment lien and execution had something upon which to operate; that plaintiff took a title; that the present proceeding was the proper one in which to assert that title; and therefore judgment affirmed. All concur, except RAY, C. J., absent, and BARCLAY, J., not sitting.

**BOOGHER v. HOUGH et al.**

(Supreme Court of Missouri. Dec. 2, 1889.)

**MALICIOUS PROSECUTION—PROBABLE CAUSE.**

1. The presumption of probable cause, which ordinarily prevails when it appears on the face of a petition for malicious prosecution that plaintiff was convicted in the trial court, but judgment reversed on appeal, is rebutted by further allegations that the conviction was procured by fraud in depriving plaintiff of the testimony of his principal witness by joining him as co-indictee.

2. In view of the allegation that plaintiff was deprived of the testimony of his principal witness by defendants' acts, it is unnecessary to allege that he was thereby prevented from making a defense.

3. Where the evidence shows that there was frequent opportunity to serve the writ for the arrest of plaintiff's co-indictee, and that the officer once informed him that he had the same, and the officer's testimony, that he was informed by defendants' attorney that they did not care about the co-indictee, but were after plaintiff, is not directly contradicted, and the co-indictee testifies that he executed the libelous instrument for which they were prosecuted for other persons than plaintiff, the question of probable cause is for the jury.

Appeal from St. Louis circuit court; AMOS M. THAYER, Judge.

W. C. Marshall, for appellant.

Krum & Jonas, B. T. Farish, and Paul F. Coste, for respondents.

A judgment of a court of competent jurisdiction in favor of plaintiff, though afterwards reversed, is conclusive evidence of probable cause for instituting this suit. *Griffin v. Sellars*, 2 Dev. & B. 492, (1837); *Whitney v. Peckham*, 15 Mass. 243, (1818); *Bacon v. Towne*, 4 Cush. 236, (1849); *Cloon v. Gerry*, 13 Gray, 201, (1859); *Dennehey v. Woodsum*, 100 Mass. 195, (1868); *Kaye v. Kean*, 18 B. Mon. 839, (1867); 2 Greenl. Ev. § 457, and note; *Kirkpatrick v. Kirkpatrick*, 39 Pa. St. 238, (1861); citing 1 Hill. Torts, 494; *Whitney v. Peckham*, 15 Mass. 243; *Griffin v. Sellars*, 2 Dev. & B. 492; 2 Greenl. Ev. §§ 452, 457; *Herman v. Brookerhoff*, 8 Watts, 240. A verdict of guilty in a criminal prosecution, though obtained by false testimony, and afterwards set aside for newly-discovered evidence, and a verdict of not guilty returned, is conclusive evidence of probable cause in a subsequent action for malicious prosecution. *Parker v. Huntington*, 7 Gray, 36, (1855); *Parker v. Farley*, 10 Cush. 279, (1852.) As a general rule, in an action for malicious prosecution, the fact that, in the prosecution complained of, the plaintiff was convicted, is conclusive evidence of probable cause. The only exception

to the rule is the case in which the plaintiff sets up that his conviction was fraudulently procured by the defendant by means which prevented the plaintiff from setting up his defense. *Miller v. Deere*, 2 Abb. Pr. 1, (1855); *Burt v. Place*, 4 Wend. 591, (1829); cited by appellant. By another group of decisions it is said: "Such conviction is conclusive evidence of probable cause, unless it was obtained chiefly or wholly by the false testimony of the defendant." *Witham v. Gowen*, 14 Me. 362; *Payson v. Caswell*, 22 Me. 212, (1842); *Ulmer v. Leland*, 1 Greenl. 135, (1820); *Reynolds v. Kennedy*, 1 Wils. 232; *Goodrich v. Warner*, 21 Conn. 432; *Palmer v. Avery*, 41 Barb. 290, (1864.)

RAY, C. J. Plaintiff brings this action against defendants for a malicious prosecution. It appears that plaintiff had been formerly jointly charged with one Taylor in an information for criminal libel, and that upon a trial thereof plaintiff was convicted in the lower court, but that upon appeal the judgment was reversed for error in law, and plaintiff discharged. See 71 Mo. 631. In the present action the court gave, at the close of the evidence for plaintiff, the instruction nonsuiting plaintiff, who, failing in his motion to set the same aside, has appealed to this court. The conviction above referred to appears on the face of the amended petition in the present suit, and ordinarily, at least, this would be conclusive evidence of the existence of probable cause, although the same may have afterwards been reversed on appeal, and the party discharged. See cases cited in briefs of counsel. The plaintiff, however, further alleges that his said conviction was procured by the fraudulent practices and abuse of legal process on the part of these defendants, in this: that defendants caused said Taylor to be joined with plaintiff in said information for the fraudulent and wrongful purpose of depriving plaintiff of the testimony of said Taylor, well knowing that Taylor would be the principal witness on whom he would rely to prove the facts said Taylor was expected to prove, which said testimony of said Taylor is set out in the amended petition herein, in substance, that he (Taylor) wrote and prepared, and caused to be filed with the insurance department of this state, the instrument containing the libelous matter charged in said criminal information; and that this plaintiff, Boogher, did not write, prepare, suggest, aid, or assist him herein. The amended petition also further charges that the defendants directed the officers not to arrest said Taylor, and that he was not prosecuted on said charge, and that upon plaintiff's said trial compulsory process to detain and secure the attendance of said Taylor as a witness in his behalf was denied plaintiff by the trial court, at the instance and upon the objection of defendants that said Taylor, being a co-defendant, was not a competent witness for plaintiff. These allegations that the former conviction was

thus obtained by the frauds and unfair means alleged, we think sufficiently obviates and countervails the force and effect of plaintiff's admission in his amended petition that he was convicted of said charge as aforesaid. The pleading is to be taken in its entirety. The fraudulent and oppressive acts charged to have been committed by defendants to procure the judgment overcame the force and effect which the judgment would otherwise have. *Burt v. Place*, 4 Wend. 591.

Again, defendants also assail in this, as in the lower court, the sufficiency of the amended petition, upon the ground that it does not charge that the plaintiff was by the alleged acts of defendants prevented from making a defense to the said charge of criminal libel, but merely states that plaintiff was thereby deprived of the testimony of his principal witness. Practically, this is or may be, we fear, a distinction without a difference. The defendant, we apprehend, is in fact fraudulently deprived of the substance of his defense when he is fraudulently deprived of the principal means of establishing it. The terms employed in the allegations as to the character of this witness, and the matters set out as to the testimony he would have given if permitted, show, we think, that he was not merely a witness, or an ordinary witness, in the cause, and that his testimony would not be merely cumulative. Again, the plaintiff, as defendant in said criminal trial, could not of his own motion and choice determine whether he would proceed to trial or not, but may have been obliged so to do, and to seek and endeavor to make the best defense he could, without the benefit of his principal witness therein; and, besides all this, it may be remarked that the alleged fraud and oppression of defendants, if such there was, was not consummated, so to speak, or at least fully developed and made effective, until after the plaintiff (defendant in said prosecution) had been put upon his trial, and the court had sustained the objection of the prosecution to the competency of said Taylor as a witness for plaintiff. The incompetency of Taylor, if any, it is true exists by force and operation of law, but the objection was one which the prosecution could waive; and if it be true, as charged, that Taylor was fraudulently joined with plaintiff in said information for this very purpose, then entering said objection was a part of the evidence of the alleged purpose of fraudulently depriving plaintiff of Taylor's testimony. But enough on this point, and as to the sufficiency of the petition.

Passing, now, to the evidence for plaintiff, it may be briefly said to support, or at least that it tends to support, the allegations set out in the petition. It shows frequent opportunity on the part of the officer to serve the writ on said Taylor. Indeed, the officer at one time informed Taylor that he had the writ for his arrest. But the officer testifies that he understood and was informed, in substance, by the attorney for the prosecution,

that they did not care about Taylor; that it was Boogher they were after. There is, so far as we see, no evidence directly or squarely conflicting with the officer's testimony as aforesaid. It also further appears by the testimony of said Taylor herein that the application to the insurance department, which contained the libelous matter, was written and signed by him as attorney for certain parties other than plaintiff. These facts upon the *ex parte* showing look strongly in the direction that defendants did not in good faith cause said criminal information to be filed and issued against said Taylor with a view to his prosecution and punishment, if guilty as charged, but favor and countenance, we think, the claim of plaintiff that it was done for the purpose charged, of maliciously and fraudulently preventing plaintiff from obtaining the testimony of Taylor in his behalf. If believed by the jury, they were sufficient to overcome the effect of the former verdict, or at least to destroy the conclusive effect thereof, and to leave the former conviction merely a circumstance to be considered along with the rest of the evidence in the cause. These facts, if such they were, would manifestly tend to show the malice of defendants. The question of probable cause, being thus not concluded by the verdict, was, we think, for the jury, under all the facts and circumstances in evidence. Probable cause is a question of fact, or a mixed question of law and fact. The legal effect of the evidence offered to show the same is for the court, but the rule is, we think, well settled that the court cannot determine the question as a matter of law unless the facts, when taken as true, are insufficient to make out a case. Upon the *ex parte* showing of plaintiff, such, we think, was not the case here, and we think the trial court was in error in so holding. We therefore reverse the judgment, and remand the cause. All concur, except BARCLAY, J., not sitting.

#### HOWARD *et al.* v. RUSSELL *et al.*

(Supreme Court of Texas. Nov. 19, 1889.)

APPEAL — DISMISSAL — EVIDENCE — DOCUMENTS — TRACED COPIES — DECLARATIONS AS TO RELATIONSHIP.

1. Under Rev. St. Tex. art. 2301, requiring an appellant to file a bond payable to the judge, and "conditioned to prosecute his appeal," etc., but not requiring it to be given in any sum, a bond is not void because given for a stated amount, and the appeal on which it is given should not for that reason be dismissed. *Hicks v. Oliver*, 10 S. W. Rep. 97, followed.

2. The exclusion of traced copies of signatures is harmless error, where authenticated photographic copies of the same signatures are already in evidence.

3. An entry on the minutes of a Masonic lodge is admissible in evidence, where it is 30 years old, the presumption being, after such a length of time, that it was correctly made.<sup>1</sup>

<sup>1</sup> On the admissibility of ancient instruments in evidence, see *Railway Co. v. Locke*, (Tex.) 13 S. W. Rep. 80, and note; *Prigden v. Green*, (Ga.) 7 S. E. Rep. 97, and note.

4. The testimony of one not an expert is incompetent to prove the mental condition of a person whose deposition has been read in evidence, at a time other than when the deposition was given, or to give his opinion of the value of the deponent's testimony.

5. In support of the theory that a decedent was a brother of a witness who does not bear the same name, it is competent to show that decedent changed his name, and also to show the circumstances that induced such change, as detailed by himself at the time it was done.

6. Such witness testified that he was once introduced by decedent to a third person, who remarked, "You look enough alike to be kin folks," whereupon decedent replied, "O, no; not kin, exactly." *Held*, that decedent's reply was relevant to the issue as to whether he was witness' brother, and the remark which elicited such reply was admissible, in order to make it intelligible.

7. Statements contained in an encyclopedia as to the date of settlement of a town are not admissible to disprove the statement of a witness that on a certain date he received a letter postmarked and mailed at such town, as there is better evidence to be had in the records of the post-office department.

Appeal from district court, Fannin county; W. A. EVANS, Special Judge.

*Evans & Evans, Robert H. Taylor, M. F. Moore, and Walton, Hill & Walton*, for appellants. *Taylor & Galloway, Richard B. Semple, and T. A. Green*, for appellees.

GAINES, J. W. W. Russell, one of the appellees, instituted this proceeding in the county court of Fannin county. It was an application for his appointment as administrator of the estate of Thomas C. Bean, deceased. The applicant alleged that Bean had died intestate, being at the time of his death a resident of that county; that he had left an estate of the probable value of \$200,000, and that a necessity existed for an administration by reason of the fact that there were debts against the estate. The applicant further alleged that he was not disqualified to act as administrator, and that he was a person of good character, residing in the county, but did not claim that he was a creditor of the estate, or of the next of kin, of the deceased. Appellant H. P. Howard filed an answer contesting the application, alleging that he was of the next of kin to the deceased, and that he resided in the state of Texas, and praying that the administration be granted to him. Sarah A. Dove also appeared and contested Russell's application, averring that she was an heir and of the nearest of kin to the deceased, and praying for the appointment of H. P. Howard. J. W. Saunders also filed an objection to the appointment of an administrator, alleging that he was a brother of the deceased, and praying that in the event an administration should be deemed necessary that he be appointed. The case was tried in the county court, and resulted in a judgment in favor of Howard, from which Russell appealed to the district court. E. J. Short and others intervened in the suit in the district court, claiming to be assignees of all the interest of J. W. Saunders, the alleged brother of the deceased, in the estate, and opposed the appointment of Howard as administrator, and prayed for the appointment of Rus-

sell, should the appointment of an administrator be considered necessary. John S. Bean and others, claiming to be next of kin and heirs of the deceased, also intervened and opposed the appointment of Howard, and prayed the appointment of Russell in the event letters of administration were granted. The case was tried before a jury in the district court, and resulted in a verdict and judgment in favor of Russell. There was a motion in the district court to dismiss the appeal on the ground that the bond was not in conformity with the statute, which describes the nature of the obligation to be given upon appeals from the county court in matters of probate. Rev. St. art. 2201. The bond is given for a definite sum, and we have held this is sufficient, although the statute does not provide that the obligation shall name any particular amount. *Hicks v. Oliver*, 71 Tex. 776, 10 S. W. Rep. 97. There was no error in overruling the motion to dismiss the appeal.

The contestant Howard claimed and offered testimony tending to show that the deceased was a son of one Colmore Bean, who was a brother of George Bean, and it was admitted that Howard was a grandson of George Bean. The proof showed that the deceased was about 70 years of age at the time of his death, and that he was never married, and it also tended to establish that, if he was the son of Colmore Bean, his father and mother were dead, and that his brothers and sisters were also dead, and had left no descendants. There was evidence tending to show that a Colmore Bean, who was a brother of contestant Howard's grandfather, had lived in Washington city from about 1812 to about 1818; that from there he had moved to Northumberland county, Va., and that from there he had moved to Palmyra, Mo., about the year 1836; that he had removed thence to Fayetteville, Ark., and thence to Fannin county, Tex., about the year 1843. There was testimony tending very strongly to show that Thomas C. Bean, the deceased, was the son of this Colmore Bean. In order to show that the Colmore Bean who had lived at these several places was one and the same person, the contestant offered in evidence an oath of allegiance to the republic of Texas, signed and sworn to by Colmore Bean, before the chief justice of Fanning county, on the 3d day of April, 1845, accompanied with a photographic copy of the application of membership to a Masonic lodge in Palmyra, Mo., signed by Colmore Bean, and found among the records of that lodge; also, a photographic copy of a power of attorney purporting to have been signed by Colmore Bean in Northumberland county, Va., dated March 30, 1824, and found among the records of the supreme court in the District of Columbia; and also photographic copies of two subsistence vouchers, signed by Colmore Bean, and found among the archives of the United States treasury department. These last were dated in 1813. After the photographic copies

of such documents had been introduced, the contestant also offered to introduce in evidence traced copies of the same signatures. These latter copies were made by the custodians of the respective documents, by placing transparent paper over the signatures and tracing the writing on the paper with a pen. The keepers of the originals testified to the identity of the tracing, and the manner in which the work was done. This evidence was, in our opinion, correctly excluded. We have been cited to no case in which such tracings have been used, and this fact seems to us an argument against the evidence. The art of tracing copies of documents upon transparent paper is not, we think, of very recent origin; and it would seem that if such tracings were properly admissible in evidence some precedent for such practice could have been shown. But, however that may be, the photographic copies, which in each were proved to be of the exact, or nearly the exact, size of the originals, were admitted, and we think they should be deemed more accurate representations of the originals than any ordinary traced copies. An inspection of the photographic copies, in comparison with the signature to the oath of allegiance, cannot leave a doubt that they were written by the same hand; and hence it follows that if the court erred in excluding the traced copies the error was immaterial. The evidence was merely accumulative, upon a question upon which no additional proof was needed.

The contestant also offered in evidence a copy from the minutes of Palmyra lodge of Masons, of the date of June 30, 1836, showing that on that day Colmore Bean was present in the lodge, as a visitor from Benevolentia Lodge 10, of Virginia. It was shown that the original minutes could not be had, and it was proved by the testimony of the secretary of the lodge that he was the custodian of the minutes, and the writing offered was a true copy from the minutes. The testimony in the case showed that Colmore Bean was a Mason; that he subsequently became a member of Palmyra lodge; that he had lived in Northumberland county, Va.; and that there was in that county such a lodge as Benevolentia lodge. The evidence offered therefore tended to prove that the Colmore Bean who came to Palmyra in 1836, and moved thence to Fayetteville, Ark., and thence to Bonham, Tex., was the person of the same name who at one time lived in Northumberland county, Va. The evidence tended to prove the issue, and was relevant. There is some question as to its legality; but the recitals in ancient documents have been admitted in proof of facts therein stated, even as to persons not parties to them. In this case the entry on the lodge minutes was more than 30 years old, and we think the presumption should be, after such a lapse of time, that the entry was correctly made. Copies of church registers have been admitted, in cases of pedigree, in courts of highest authority in this country. *Lewis v. Marshall*, 5

*Pet. 469; Hyam v. Edwards*, 1 Dall. 2; *Kingston v. Lesley*, 10 Serg. & R. 383; *Stoevers v. Whitman*, 6 Bin. 416. It would seem, therefore, that in a case like this, in order to prove a fact occurring 50 years ago, the record of an ancient and well-established society may be resorted to upon a question of pedigree.

We are of opinion that the court did not err in excluding the certificate of W. A. Short, secretary of Federal lodge, of the District of Columbia. It may be assumed that the witness in his deposition swore to the correctness of the certificate; but the certificate states merely the conclusion of the witness, derived from the lodge records, as to the times when Colmore Bean became a member of that lodge, and the date at which he received his demit. It appears that the entries showing these facts might have been established by examined copies. The production of a copy of the entire records was not necessary, and hence the argument that they were so voluminous as to make an exception to the general rule falls to the ground. It may be that testimony that the records showed nothing in relation to certain facts was admissible.

The contestant read the deposition of one Mary Ann Hutchinson, who testified that she was 84 years old and resided in Washington city. She further testified that she knew a Colmore Bean at one time in that city, and that he had two brothers, named respectively George and John; and that he was a carpenter. The other testimony in the case showed beyond contradiction that the Colmore Bean who lived at Palmyra, Mo., and subsequently came to Bonham, was a carpenter. It was also in evidence that the Colmore Bean who lived in Northumberland county, Va., was also a carpenter or joiner. The testimony of this witness was important to the contestant. Her testimony was taken in November, 1887. Such being the case, the applicant was permitted, over the objections of contestant, to read to the jury the deposition of a witness residing in Washington city, who, after testifying, in effect, that in January, 1888, he visited Mrs. Hutchinson at her residence, proceeded as follows: "This was a small, one-story frame dwelling with a front and back room. The door was opened by a robust and respectable looking woman, about sixty years of age, who inquired my business; and, on my stating that I wished to see Mrs. Hutchinson, in order to procure some information from her, she conducted me, after some hesitation, into the back room. On one side of this room was a couch, on which lay a very old woman, covered with a coverlet. From her appearance, I judged her to be a very feeble woman. I stated that the object of my visit was to get information from her about Colmore, George, Richard and John Bean, who lived a long time ago in the county, or in that part of Washington city. As soon as I had done speaking, the woman in attendance upon the invalid forbade her to speak, saying: 'You know you have been told not to talk upon

that subject.' The invalid, however, paid no attention to her attendant, but began to talk rapidly, and in an incoherent way, about Colmore Bean, frequently repeating: 'I did know Colmore Bean. He lived here on the hill.' I spoke quietly to her, trying to calm her nerves, which were evidently in an exhausted condition; and the old lady continued to talk, not addressing herself to me, particularly,—a part of the time covering her head with the coverlet. I explained to the attendant that I did not wish to disturb Mrs. Hutchinson, but I would like to get what she knew, and I presumed there was no objection to her telling me what she knew about the family. But the attendant repeated her direction to the invalid to be silent, telling her that talking upon that subject would upset her, and that she knew it. I soon saw that any conversation with Mrs. Hutchinson was quite impracticable, and I bid them good morning, and left." The witness further testified: "The mental condition of Mrs. Hutchinson, to the best of my judgment, was that of great debility, owing to old age and broken down constitution. Her appearance was that of a person who had gone through in her life a great deal of hardship. I have already stated that she was lying on a couch in the back room of this house. I should say that she was over seventy-five years of age, or about that. I have seen persons no older than that who had been broken down by hard work. I cannot tell whether her mental condition was temporary or permanent, as it may have been owing in part to a temporary sickness. I do not know how long she had been in that condition. Her surroundings were those of a poor person, sick, and in charge of a nurse. From what I saw of her, I should consider her testimony worthless. She talked, while I heard her, loud enough and distinctly enough; but what she said was so disconnected that I was unable to attach any meaning to it, except to the simple phrase that she did know Colmore Bean. I have no other means of telling how long she had been in this condition than the statement of her attendant. In my best judgment, Mrs. Mary Ann Hutchinson, at I saw her, could not repeat with accuracy occurrences of forty to sixty years ago, or, indeed, make any consecutive statement of facts. I do not think, in fact, she could make a coherent statement which would require forty or fifty words to state it." In our opinion the testimony should have been excluded. Admitting, for the sake of the argument, that it was competent to show the mental condition of the witness Mrs. Hutchinson at the time her deposition was given, it does not follow that this could be established by testimony of her condition at some other time. The witness by whom her weakness of intellect and failure of memory were sought to be shown was not an expert, and his opinion as to the value of her testimony was clearly incompetent.

We think the entire testimony of the wit-

ness Birney, which was objected to, should have been excluded.

J. W. Saunders testified that the deceased, Thomas C. Bean, was his brother; that the name of deceased was not Thomas C. Bean, but Thomas L. Saunders; that some time about 1834 his brother came to him, and stated that he had killed a man in Obion county, Tenn., and had fled the country; and that he then announced that he would change his name to Thomas C. Bean. The witness further testified that Bean then left, going west; that the witness next saw him in St. Louis, Mo., in 1850, and that he then said that he lived at Bonham, Tex. This evidence, which was given much more in detail, was objected to by contestant, but was admitted over his objection. In support of the theory that J. W. Saunders was the brother of deceased, it was clearly competent to show that the latter had changed his name, and we think, also, it was competent to show the circumstances which induced the change, as detailed by himself at the time it was done. The applicant was also permitted to prove, over contestant's objection, by one Jones, that on one occasion, on the streets of Bonham, he was introduced by Thomas C. Bean to J. W. Saunders, and that witness remarked to Bean, "You look enough alike to be kin folks," and that Bean replied: "O, no; not kin, exactly." We think the reply of Bean was relevant, and that the remark of the witness which elicited the reply was also admissible, in order to make the latter intelligible. In order to corroborate the testimony of Saunders as to the reasons which induced the deceased to assume a name, the applicant read the depositions of two witnesses, residing in Obion county, Tenn., who testified that they had heard that one William Crutchfield was killed, about 1834, near Reel Foot lake, in that county, while assisting in surveying land, by Thomas L. Saunders. The evidence was objected to, and should have been excluded. The testimony was clearly hearsay. J. W. Saunders testified, in effect, that about six months after his brother absconded from Tennessee, which occurred in 1834 or 1835, he received a letter from him, signed "THOMAS BEAN," postmarked and mailed at Camden, Ark. In order to disprove this, contestant offered to read in evidence so much of the text of the American Encyclopedia as related to Camden, Ark., and which contained the statement that that town was settled in 1842, and that previous to that time it had only been a place at which hunters and trappers congregated, and had been known by the name of "Ecore a Fabre." The applicant objected to the introduction of the evidence, and the court sustained the objection. In this there was no error. If the fact be as contestant sought to prove, there is better and more satisfactory evidence than the statements in the work offered in evidence by contestant. The records of the post-office department will probably supply indisputable testimony as to the date when the post-office

at Camden, Ark., was established, and when it received that name.

We are of opinion that there was no error in rendering judgment against Sarah A. Dove for costs. She appeared in the suit, alleging that she was next of kin to the deceased, and prayed for the appointment of Howard. She made common cause with Howard by her pleading, and thereby made herself responsible for the costs in the event the applicant prevailed in the suit. She did more than assent to Howard's appointment. She contested the application of Russell, E. J. Short and others, who intervened in the suit, although they did not show facts that entitled them to administer, did show by allegation that they had an interest, which, if the allegations were true, entitled them to oppose Howard's appointment. Having been successful in their opposition, they were entitled to recover their costs. Rev. St. art. 2198. We do not consider it proper to discuss the evidence, in view of the fact that the case will be remanded. The other questions presented by the assignment may not again arise, and need not be considered. For the errors indicated, the judgment is reversed, and the cause remanded.

#### MCKAY et al. v. PARIS EXCH. BANK.

(Supreme Court of Texas. Nov. 23, 1889.)

##### JUDGMENT—AMENDMENT.

Where a judgment, revived after the debtor's death, directs execution against his executors, instead of against his estate in their hands, and executions issue accordingly, and sales thereunder are made, it is too late to amend the judgment and executions.

Appeal from district court, Red River county; E. D. McLELLAN, Judge.

*Sims & Wright, H. McKay, T. J. Armistead, and T. J. Brown, for appellants. H. D. McDonald and Burdett & Conner, for appellees.*

HENRY, J. On the 23d day of November, 1877, the Paris Exchange Bank recovered a moneyed judgment against J. N. Norris, J. W. Hardison, and B. H. Epperson. Epperson died in 1878, leaving an independent will, in which R. B. Epperson and J. P. Russell were appointed executors. The will was probated, and the executors qualified. In 1879, said judgment being unpaid, the bank filed a petition in the district court to revive it against the executors. The judgment was revived accordingly; that part of it directing the issuance of execution being in the following words: "It is therefore ordered, adjudged, and decreed by the court that execution issue upon said judgment against J. P. Russell and R. B. Epperson, as the executors of the estate of B. H. Epperson, deceased, and against John N. Norris and J. W. Hardison." On the 9th day of February, 1880, execution issued on the revived judgment against "J. P. Russell and R. B. Epperson, executors of the estate of B. H. Epperson," and com-

manding the sheriff "to cause to be made of the goods and chattels, land and tenements, of J. P. Russell and R. B. Epperson, executors of the estate of B. H. Epperson," etc. Under this execution the sheriff sold a number of tracts of land belonging to the estate of B. H. Epperson to W. B. Aiken, one of the appellees. Subsequently in May, 1880, an *alias* execution was issued upon the same judgment, commanding the sheriff to levy upon the goods, etc., "of J. P. Russell and R. B. Epperson, as the executors of the estate of B. H. Epperson." This execution was levied upon a number of tracts of land, "as the property of the estate of B. H. Epperson, deceased, J. P. Russell and R. B. Epperson being the executors of the will of B. H. Epperson." W. B. Aiken was the purchaser at the sale made under said execution of a part of these tracts. Deeds for the lands sold were made by the sheriff to the purchaser. The same lands were subsequently sold under other executions against the estate of B. H. Epperson to other parties. Before the institution of the proceedings in this case the executors of B. H. Epperson had been removed, and while the administration of his estate was still unclosed there was no administrator thereof. The commencement of this cause was by a motion filed in the district court by the Paris Exchange Bank and W. B. Aiken, in the original cause of the bank against Norris, Hardison, and B. H. Epperson, to which the widow and children, and other claimants of the lands purchased by Aiken, were made parties defendant, to correct said judgment and executions. The motion, after describing the judgment and reciting the previous proceedings, charges that in entering the judgment of revival, "through a clerical misprision, said judgment directs such execution to be levied on the property of said executors, instead of upon the property of said estate in their hands, and that when the executions were issued, by similar clerical misprisions, the same were made to run against the property of said executors instead of against the estate of B. H. Epperson in their hands." The motion concludes with a prayer "for an order amending said revived judgment and the said two executions so as to make them conform to what they should have been." All parties, except one, who were made defendants resisted the motion. The court granted the relief prayed for, ordering that the revived judgment be amended so as to read "that execution issue upon said judgment against the estate of B. H. Epperson in the hands of J. P. Russell and R. B. Epperson, his executors," etc., and that both of said executions be so amended "as to run against the estate of B. H. Epperson in the hands of his executors," etc. From this judgment the defendants prosecute this appeal.

We are of the opinion that the exceptions to the motion should have been sustained, and the proceeding dismissed. If judgments or executions are defective in particulars that



may affect the title to property sold under them, it is too late, after sales have been made, to amend either so as to have the effect of affecting such sales. It is well understood that, for a sheriff's deed to convey title to lands, it must be supported by a valid judgment and execution. The prudent purchaser will always satisfy himself that they exist. If no judgment is found against the party whose property is being sold, or if the execution under which the sale is made does not direct the sale of such person's property, or if the execution is not supported by the judgment, the probable effect will be to deter bidders, and, by preventing competition, cause a sacrifice of the property sold. When uncertainty in any of these respects is cast upon the proceedings, and the purchaser may thereby have been enabled to buy the property for a less price than it would have sold for if the proceedings had been proper and regular, we think it would be without warrant of law and inequitable to remove the difficulty for his benefit, and at the expense of the party whose property had been sold, and of his other creditors, if he had any. Where the proceedings are amendable, we deem it to be the better rule to require it to be done before a sale has been made. When the defect is one of substance, it will not be contended that it may properly be remedied for the benefit of the purchaser, after the sale, by amendment. If it is one of form only, we see no reason why it may not be disregarded or supplied in any suit in which the question may become involved. In deciding this appeal we do not intend to express any opinion as to the sufficiency or insufficiency of any of the proceedings under which the sales were made. Such questions will not be decided unless they shall arise in suits between the different claimants of the property. The judgment will be reversed, and one rendered here dismissing the motion, at the cost of appellees.

**GULF, C. & S. F. RY. CO. v. BAIRD.**

(*Supreme Court of Texas. Nov. 26, 1889.*)

**CARRIERS—CONNECTING LINES.**

By a contract between plaintiff and "the L. & N. Ry. and its connecting lines," it was agreed that certain cattle should be carried from Decatur, Ala., to Fort Worth, Tex., the liability of the L. & N. Ry. as carrier to cease at its terminus, New Orleans. From that point the cattle were hauled over several roads, in the same cars, and were finally delivered to the defendant road, in the state of Texas, which delivered them at Fort Worth, and collected all charges for carriage and feeding from plaintiff. Rev. St. Tex. art. 4251, provides that every railroad company shall, for a reasonable compensation, draw over its road without delay the passengers, merchandise, and cars of every other railroad company which may enter and connect with its road. *Held*, that the facts were insufficient to fix any liability upon defendant, as member of a partnership, or as joint contractor, for injuries received by the cattle on roads other than its own; its action in hauling such cattle, as it was required to do by law, not of itself amounting to a ratification of the contract.

Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

Action by W. C. Baird against the Gulf, Colorado & Santa Fe Railway Company for injuries to cattle shipped over defendant road and connecting lines. There was judgment for plaintiff, and defendant appeals.

*Leake, Shepard & Miller* and *J. W. Terry*, for appellant. *Ball & McCart*, for appellee.

STAYTON, C. J. On February 27, 1883, appellee delivered to the Louisville & Nashville Railway Company at Decatur, Ala., several car-loads of cattle for transportation to Fort Worth, Tex. At the time the cattle were shipped a written contract was made, the first part of which was as follows: "Live-Stock Contract. Decatur, Ala., Station, Feb. 27, 1883. Agreement made between the Louisville & Nashville Railroad Company and its connecting lines, of the first part, and W. C. Baird, of the second part, witnesseth: That whereas, the said Louisville & Nashville Railroad Company and its connecting lines, as common carriers, transport live-stock only as per above tariff, now, in consideration that the said party of the first part will transport for the said party of the second part one car-load of cattle [— head, more or less] from Decatur to Fort Worth, Texas, station at the rate of one hundred and sixty-five dollars per car-load, and a free passage to the owner or his agent on the train with the stock, [if shipped in car-load quantities,] the same being a special rate, lower than the regular rate mentioned in the said tariff, the said party of the second part thereby relieves said party of the first part from the liability of a common carrier in the transportation of said stock, and agrees that such liability shall be only that of a private carrier for hire; and it is further distinctly understood by the parties hereto that all liability of the said Louisville & Nashville Railroad Company as carriers shall cease at New Orleans, when ready to be delivered to the owner, consignee, or carrier whose line may constitute a part of the route to destination." The shipping contract contains many other provisions not now necessary to refer to, and is signed by J. W. Golden, "agent of the company," and by appellee. No tariff of charges referred to is found in the record. The substance of appellee's petition is thus correctly stated in brief of his counsel: "Plaintiff's petition contains two counts. In the first count he alleges, in substance, that on the 27th day of February, 1883, the defendant, being a common carrier of live-stock, had been, and was at that time, doing business with other railway companies or connecting lines, and more especially with the Louisville & Nashville Railroad Company, the Galveston, Harrisburg & San Antonio Railroad Company, the Texas & New Orleans Railroad Company, the Louisiana, Western & Morgan Railroad Company, and the Louisiana & Texas Railroad Company; that defendant was at said date associated with said other companies and lines of railroads for the purpose of carrying live-stock and other freight from Decatur, Ala.

bama, to Fort Worth, Texas, and that these different railroads formed a continuous line for the transportation of freight between said points, over which they, each and all, gave through bills of lading, and contracted with shippers for through rates, which contracts and bills of lading were mutually honored, respected, and carried out by said railroad companies, they apportioning the receipts among themselves; that on said date plaintiff delivered to defendant, and defendant, by and through the said Louisville & Nashville Railroad, as its agent, received at said Decatur, the cattle in controversy, to be carried to Fort Worth; that said defendant and its connecting lines, in violation of their duty as common carriers, and contriving and intending to injure him, etc., acted so negligently in the carriage of said cattle that they were delayed, mistreated, and starved to the extent of causing the death of a great number, and injuring the remainder, to his damage \$4,190. The second count restates the same cause of action, but alleges, in detail, that defendant's line of road proper extended from Rosenberg junction to Fort Worth, and proceeds to give the points at which the different lines of railroads connected with each other, forming a line from Decatur to Fort Worth. It then alleges that the cattle were delivered to the L. & N. R. R. at Decatur, to be transported from there to New Orleans, and from thence to Fort Worth; and that the said L. & N. Ry. agreed and undertook to carry same to Fort Worth for the price of \$150 per car-load; that said L. & N. Ry. did not furnish plaintiff with a bill of lading for his cattle, but after they had been loaded on the cars presented to him a printed contract, and required him to sign the same before the cattle were shipped out, and that he was forced, in order to get his cattle shipped, to sign same; that by the terms of said contract the liability of said L. & N. Ry. was to cease at New Orleans, but that there was no provision in said contract affecting the liability of any of the other lines of railroad which might carry the cattle to Fort Worth; that said cattle were thereupon carried by said L. & N. Ry. to New Orleans, where they were delivered to the L. & T. Ry., which carried them to Vermillionville, and delivered them to the L. W. Ry., which carried them to Orange, where they were delivered to the T. & N. O. Ry., which carried them to Houston, where they were delivered to the G., H. & S. A. Ry., which carried them to Rosenberg, where they were delivered to defendant railway, which carried them to Fort Worth; that at said place of Fort Worth defendant collected from plaintiff all the freight bills and feed bills, and all other charges for the whole route; that the Morgan road, which took his cattle at New Orleans, did not give him any bill of lading at all, nor did any of the roads between New Orleans and Fort Worth; that these last-named roads, from New Orleans to Fort Worth, formed a continuous and connecting line from New Orleans to Fort Worth, each recognizing and

carrying out the contracts of the other, and making through rates over the other roads respectively," etc., "and, in substance, that the damage all occurred between New Orleans and Rosenberg junction."

Appellant alone was sued, and among other defenses it pleaded that neither the Louisville & Nashville Railroad Company, nor its agents at Decatur, Ala., had the right to contract with plaintiff for transportation of his cattle over its road; denied that the company or its agents had made a contract to transport cattle over defendant's line, or that it by contract was bound so to do, but that it had been accustomed, in obedience to the statutes of this state, to receive cars from the Galveston, Harrisburg & San Antonio Railway Company when tendered to it, whose connection with appellant's road was shown; and that if it received the cars loaded with cattle, as alleged, it received them at Rosenberg junction in cars of that company, upon its demand that they should be transported to Fort Worth by appellant, and that if it received compensation for such services this was not through any copartnership or other contract made with any of the railway companies named in plaintiff's petition, but a fair and reasonable rate charged by it for services rendered in accordance with its statutory obligation to transport cars of other companies, and that it transported the cattle to Fort Worth, and there delivered them to appellee, without injury while in its possession. In the next paragraph of the answer the defendant pleaded the contract to which we have referred, made it an exhibit, claimed the benefit of any of its provisions, and asserted that the express limitation to the effect that the Louisville & Nashville Railroad Company should not be bound beyond the terminus of its own line for the performance of the contract inured to the benefit of any carrier over whose line the cattle passed; and alleged, if the cattle were injured while in transit, this occurred while they were on the roads of other companies. The proof showed that an agent of appellee, in charge of the cattle, was given free transportation by the several roads over which the cattle passed, and that appellant returned him in the same manner from Fort Worth so far as its line extended. The evidence shows that the cattle were carried to New Orleans without injury, and that *en route* to Fort Worth they passed over the several railways, as alleged in the petition. There was a great deal of evidence on behalf of plaintiff to show that the cattle received very severe treatment at New Orleans, and between New Orleans and Houston, and especially in the yards at Houston of the Texas & New Orleans Railway, and that a number of the cattle died, and the remainder arrived at Rosenberg, and were delivered to defendant, in a very bad condition. There was no evidence to contradict these facts. Plaintiff offered evidence to show that the cattle were badly treated at Belton, on the defendant's line, where they

were stopped to be watered and fed; and defendant offered evidence tending to rebut the same. Otherwise, there was no delay or injury attempted to be proven on defendant's line. The evidence shows that most of the damage was done on the railway lines before delivery to defendant. When the cattle reached Fort Worth, plaintiff had to pay the agent of defendant the whole amount of the freight charges and feed from Decatur, Ala., to Fort Worth. The agent of defendant collected the money, and delivered the cattle to the plaintiff. The money was sent by the agent to the treasurer of the defendant at Galveston, whose business it was to settle with the other companies. The cattle came all the way from Decatur in the cars furnished at that point by the Louisville & Nashville Railway Company. Oscar G. Murray, a witness for defendant, testified as follows: "During the year 1883, I resided at Galveston, Texas, and was general freight agent of the G., C. & S. F. Ry. Co. My duties and powers as general freight and passenger agent of the defendant were to fix the rates to be charged for freight and passengers over defendant's road, and to make such arrangement for interchange of traffic with connecting lines as from time to time became necessary or desirable. I had occupied this position with the defendant since August 1, 1880. It was my duty to make freight rates on the contracts of the character referred to above. Other agents employed by defendant under the direction of its traffic department were authorized, from time to time, to make rates for freight and passengers over the defendant's road, subject to my approval. To the best of my recollection, the defendant had not, during the year 1883, or at any previous time thereto, since August 1, 1880, any freight arrangement or partnership agreement with the Louisville & Nashville Ry. Co. The defendant did not at any time delegate any authority to the L. & N. Ry. Co., or to the agent of that company at Decatur, Ala., to make contracts for the shipment of plaintiff's cattle, or any other freight, over the G., C. & S. F. The defendant, from time to time, announced the rates which it would accept upon shipments of cattle and other freight offered it for transportation by other railway companies connecting with it, which, together with the usual and customary rules regulating the receipts of freight in good order, and the interchange of cars, was the only arrangement which existed during the year 1883 applying to traffic received at Rosenberg or Houston from connecting lines, destined to Fort Worth. The defendant was under no contract to do this for the L. & N. Ry. Co., but acted only under a duty, imposed by the law of Texas upon all railroad companies, to receive and transport the cars and freight offered by all connecting lines. The defendant's facilities for shipping freight to the territory reached by its lines, and the rates as charged upon traffic received from connecting lines, were made known from

time to time by furnishing such rates to the railway companies connecting immediately with the defendant's road, and for their information and guidance."

The charge given by the court made the liability of appellant for injuries resulting from the failure of duty in connecting lines to depend on the existence of a partnership between them, but contained no clear statement of the law, which, applied to the facts, would enable the jury to determine whether a partnership existed, though it may have contained a true statement of the law applicable to the liability of joint contractors, not partners, for failure of duty of one or more of them. Charges were asked by appellant, and refused by the court, which would have enabled the jury correctly to determine whether a partnership existed, but the charge in which this was done may have been faulty in another respect.

The main question in the case arises on an assignment of error which questions the sufficiency of the evidence to sustain the verdict against appellant. The contract evidently was one for the transportation of the cattle from Decatur, Ala., to Fort Worth, Tex., and it bound the Louisville & Nashville Railway Company to do this, through its own and connecting lines, for the stipulated price. It does not follow from this, however, that there was any joint obligation resting on each of the companies over whose lines the cattle might pass. If the Louisville & Nashville Railway Company had not authority, by virtue of the existence of a partnership between itself and the other lines over which the cattle were to pass, or by virtue of an agency conferred on it by the other companies empowering it to make a contract which would bind them jointly, then the contract was simply the contract of the company that made it, by which it was bound to transport the cattle on its own line as far as that extended, and beyond that to furnish transportation through other lines.

In the absence of stipulations to the contrary, the company making the contract for through carriage would be responsible for a loss or injury occurring on connecting lines, through facts that would fix liability on it for a loss occurring while the cattle were on its own line. In other words, its liability would be that of a common carrier through the entire distance the cattle were to be transported under the contract. The company making the contract, however, as was done in this case, might lawfully contract that its liability as a common carrier should terminate when the cattle were safely transported over its own line, and delivered to the connecting carrier. The reason for this is that a common carrier is under no obligation to contract for the carriage of goods beyond its own line, and, when it assumes to impose an obligation on itself for the further transportation of freight, this must be done by contract, express or implied, in which it may stipulate that its liability as a common car-

rier shall cease with the safe delivery to the next carrier of the thing to be carried. In the absence of partnership or authority to make a joint contract binding on all carriers over whose lines freight is to pass, connecting lines are but the agencies employed by the contracting carrier to perform its own contract. That a contract for through transportation over the connecting lines of several railway companies, as between themselves composing a partnership, or holding themselves out as such, is binding on all, and one responsible for the act of another, results from the fact that the contracting company has power so to bind all. It is upon the same ground, when no partnership exists, that several carriers may be jointly bound by a contract made by one in the exercise of an agency conferred on it by the others. It perhaps, but seldom, if ever, occurs that a partnership exists between several railway companies, and to us it is evident that the facts proved were not sufficient to show that any such relation existed between any two or more of the companies owning the lines of railway over which appellee's cattle were transported; and so, if we exclude the evidence offered by appellant from our consideration, the evidence as clearly fails to show that appellant ever did any act from which appellee could have understood that any co-partnership existed. It is not contended that there is evidence tending to show that appellant had expressly empowered the Louisville & Nashville Railway Company to make a contract by which it would be jointly bound with that company or any other. In the absence of proof of express authority, facts may be shown which will be sufficient to authorize a jury to find that the power actually existed, but we do not find such evidence in the record before us. The contract relied on does not, in terms, purport to be the contract of appellant, but does purport to be a contract between the company that made it and its connecting lines on the one part, and the shipper on the other. Not being named in the contract, appellant would have had no right whatever, when the cattle reached New Orleans, to have demanded that they should be sent over any road with which its own had any connection, unless such right was acquired through some prior arrangement with the company that executed the contract. That company might have sent the cattle to their place of destination through any other connection than that selected, and no carrier over whose road they were sent would have had any ground for complaint against that company or appellee by reason of anything that appears in the contract. It might be true, however, if the shipping contract was in fact made for the benefit of appellant, but without prior authority, that it might make it its own by ratification, and with the other lines thus become bound; but ratification cannot be presumed against appellant from the fact that it received the cars from another railway company, hauled them to their

destination, and there collected the entire sum due for transportation. A railway company cannot be held to have ratified a contract from the fact that it performed some of the services contemplated by it, when it is not at liberty, contract or no contract, to refuse to render the service. At the time the cars in which appellee's cattle were, were received by appellant, the law provided that "every such company shall, for a reasonable compensation, draw over their railroad, without delay, the passengers, merchandise, and cars of every other railroad company which may enter and connect with their railroad;" and it provided, in case of disagreement as to compensation, how this should be adjusted. Rev. St. art. 4251. Article 4253, Rev. St., provided penalty for failure to comply with the provisions of article 4251; and article 4255 further provided a mode by which railway companies could be compelled to render for other companies the services contemplated by article 4251. The regulation of these matters, and others intimately connected with them, has been extended by subsequent legislation. Act April 2, 1887, Gen. Laws, 110. In the face of such legislation, the evidence should show something more than that a through shipment was made, which would require the freight to pass over several lines of railway to its destination; that a price was fixed for the entire transportation, and collected by the last carrier,—before it ought to be held that this was a joint contract for transportation that would render each carrier liable for failure of duty on the part of other carriers in the connected lines. So far as the evidence shows, appellant may have collected and retained a sum sufficient to cover its local rates from Rosenberg to Fort Worth, although the entire sum would not have given the same compensation per mile to each of the connecting lines; but if it only retained out of the gross sum received a sum in proportion to the number of miles it hauled the cars, this would not affect the question, unless it was done in pursuance of a prior contract, voluntarily made. The manner in which the entire sum paid for the carriage of the cattle was collected was doubtless that usual and most convenient to all parties interested, and it very fully appears that appellee was not prepared when the cattle reached their destination at once to pay the freight due on them. No inference can be drawn from the facts proved that appellant collected the entire freight because entitled to do so as a joint contractor, rather than in part in its own right, and as to the balance, as agent for the other carriers who had assisted in the transportation. The law compelled appellant to furnish feed for the cattle, and that it did so, and collected sum due therefor, together with such sum as other carriers had so expended, does not tend to show that a partnership existed between any of them, nor that they were joint contractors, and therefore the one liable for the failure of duty on the part of another. Nor does the fact that

transportation may have been given by each company over its line to a person who accompanied the cattle on their way to and return from place of destination tend to show a partnership or joint contract. The part of the contract which limited the liability of the Louisville & Nashville Railway Company as a common carrier to its own line, which it might lawfully do, is inconsistent with a holding that the contract was one made by a member of a partnership or joint contractor; and if there was no joint liability when the written contract was made, when did it come into existence, and whom does it bind? According to appellee's theory of the case, every carrier over whose line the cattle passed is liable for an injury received by them while on any one of the lines; but the contract declares that this is not true as to the only carrier who was bound by the contract, either for through or partial transportation. Giving due weight to every fact proved by appellee, we deem them insufficient to fix liability on appellant for any injury to the cattle occurring while they were in the hands of other carriers; and the evidence offered by appellant, uncontradicted by inferences fairly deducible from facts proved, or by the direct evidence of any witness, is such as to clearly show that the Louisville & Nashville Railway Company had no power to bind appellant by the contract made. Appellant is liable as a common carrier to appellee for any injury to his cattle while in its possession, unless relieved therefrom by the rules applicable to the transportation of that kind of property; but this is the extent of its liability under the facts proved. The court below should have granted a new trial, and for its refusal to do so its judgment will be reversed, and the cause remanded.

#### WILLIAMS v. SILLIMAN.

(Supreme Court of Texas. Oct. 20, 1889.)

##### MORTGAGES—CONSIDERATION—PRINCIPAL AND SURETY—COSTS.

1. The desire to indemnify a surety against loss is a sufficient consideration for the execution of a mortgage to him, after the execution of the note upon which he is bound.

2. Costs of collection, as being an incident of the debt, are embraced in and secured by such a mortgage.

Appeal from district court, Anderson county; F. A. WILLIAMS, Judge.

*Greenwood & Greenwood*, for appellant. *Gregg & Reeves*, for appellee.

HENRY, J. Appellee sued appellant as administrator of the estate of T. J. Williams, deceased, charging that the deceased executed his promissory note to one Bryan, which appellee signed as his surety. The petition alleges that on two different days, both subsequent to the execution and delivery of said note, the deceased, for the purpose of securing appellee against loss on said note, executed to him two mortgages upon real estate therein described. It further charges that

Bryan afterwards brought suit on said note, and recovered judgment thereon against deceased as principal, and appellee as surety, for the sum of \$830, to bear interest at the rate of 12 per cent. per annum, which judgment, and the costs of suit, amounting to \$46.24, appellee subsequently paid off and discharged; and that on the 6th day of June, 1888, Bryan, in consideration of such payment, transferred and assigned the judgment to appellee. The petition charges that plaintiff presented his claim, duly verified, to the administrator, and that it was by him rejected. He prayed judgment for the amount of his debt and for foreclosure of his mortgages. The defendant answered, and there was a verdict and a judgment for plaintiff for the amount of his claim and for foreclosure of the mortgages. The defendant appeals, and insists that errors were committed, as follows: (1) The jury erred in finding that not only the Bryan judgment, but the cost of its recovery, were secured by the mortgages, when in fact said mortgages were void because they were mere voluntary instruments given without consideration, each one being of subsequent date to the promissory note; and because the mortgages were not intended as security for the payment of the costs, and appellee having failed to pay the judgment until long after the death of his principal, could not acquire a lien on the land by paying off the judgment. (2) The court erred in assuming in its charge that the voluntary mortgage gave a valid lien. (3) The court erred in construing the mortgage to give a lien for costs paid on the judgment. We find no error in the proceedings. The desire to indemnify his security against loss was a sufficient consideration for the execution of the mortgages. The costs, as an incident of the debt, were embraced by the mortgages. The judgment is affirmed.

#### ROWELL v. WESTERN UNION TEL. CO.

(Supreme Court of Texas. Nov. 5, 1889.)

##### TELEGRAPH COMPANIES—NEGLIGENCE—DAMAGES—MENTAL SUFFERING.

A general demurrer to the petition, in an action for damages against a telegraph company, is properly sustained, where the only damage alleged is the mental and physical suffering of plaintiff and his wife, resulting from defendant's failure to deliver a message relating to the health of plaintiff's mother-in-law.<sup>1</sup>

Appeal from district court, Marion county; JOHN L. SHEPPARD, Judge.

*Todd & Rowell*, for appellant. *Stemmons & Field*, for appellee.

GAINES, J. The following statement of this case is taken substantially from appellant's brief: Appellant and his wife reside at Jefferson, Tex., and on the night of Octo-

<sup>1</sup> Respecting mental sufferings as an element of damages in actions for failure to deliver telegrams, see *Telegraph Co. v. Simpson*, (Tex.) 11 S. W. Rep. 385, and note; *Telegraph Co. v. Cooper*, (Tex.) 9 S. W. Rep. 598, and note.

ber 7, 1887, received, through the defendant, the following telegram: "Athens, Texas, Oct. 7, 1887. To Mrs. Josie Rowell, Jefferson, Texas, care of J. H. Rowell: Your mother is worse; come if you can; dangerously sick. [Signed] W. C. Scott." Early next morning appellant delivered to and paid appellee the regular charge (45 cents) to send the following telegram: "To W. C. Scott, Athens, Texas: How is mother? If no better, Josie comes to-night. Answer my expense. [Signed] J. H. ROWELL." This telegram, constituting said Scott as appellant's agent to convey to him this information, was promptly delivered; and at once, in reply thereto, and in pursuance of such agency, the said W. C. Scott delivered to and contracted with appellee to send immediately the following reply: "Athens, Texas, Oct. 8, 1887. To J. H. Rowell, Jefferson, Texas: Telegram received. Mother some better. Doctor said not dangerous. [S'g'd] W. C. Scott." This message appellant charges was never delivered at all, through the negligence of appellee's agents and servants. Appellant alleges actual damages from the failure of appellee to perform its contract undertaken at Athens, from loss of time and business to himself and mental distress, at \$100, and for mental and physical sufferings of his wife, \$2,400. The appellee filed a general demurrer and a general denial. The court, upon the general demurrer, dismissed the petition and the cause, and appellant prosecuted this appeal. The only assignment is: "The court erred in sustaining defendant's general demurrer to plaintiff's petition and cause of action, and in dismissing the case over plaintiff's exception." We are of opinion that the demurrer was properly sustained. The damage here complained of was the mere continued anxiety caused by the failure promptly to deliver the message. Some kind of unpleasant emotion in the mind of the injured party is probably the result of a breach of contract in most cases, but the cases are rare in which such emotion can be held an element of the damages resulting from the breach. For injury to feelings, in such cases, the courts cannot give redress. Any other rule would result in intolerable litigation. We regard this case as differing in principle from that of *Stuart v. Telegraph Co.*, 66 Tex. 580, and others in which damages for mental suffering have been allowed. The only damages recoverable under the petition was the price of the message, a sum of which the court had no jurisdiction. The suit was therefore properly dismissed, and the judgment is affirmed.

#### WOOD COUNTY v. CATE. (No. 2,774.)

(Supreme Court of Texas. Nov. 26, 1889.)

STATUTES—CONSTRUCTION—PENALTIES FOR EXCESSIVE FEES—PLEADING—AMENDMENT.

1. Rev. St. Tex. tit. 43, art. 2421, provides that "if any of the officers named in this title shall demand and receive any higher fees than are pre-

scribed to them in this title, or any fees that are not allowed by this title, such officers shall be liable to the party aggrieved for fourfold the fees so unlawfully demanded and received by him, to be recovered in any court of competent jurisdiction." County judges are among the officers named in this title. *Held*, that the penalty prescribed by this section is not applicable to the case where a county judge demands and receives a greater amount than is allowed by law for the disbursement of the school fund; compensation for such service not being allowed by such title, but by Rev. St. tit. 78, art. 3745.

2. Where the amount claimed in an amended petition brings it within the jurisdiction of the court, it should not be dismissed on the ground that it sets up a new cause of action.

Commissioners' decision. Appeal from district court, Wood county; FELIX J. McCORD, Judge.

*White & Edwards*, for appellant. *John M. Duncan, Horace Chilton, and H. M. Cate*, for appellee.

ACKER, J. Wood county sued H. M. Cate, ex-county judge, to recover \$264, alleged to have been demanded and received by him on allowances made by the commissioners' court during his two years' term of office, from November, 1884, to November, 1886, for disbursing the school fund of said county, in excess of the compensation allowed by law for such service, "together with threefold that amount added thereto as a penalty, making a total of one thousand and fifty-six dollars," and also the sum of \$143.58 of the permanent school fund of plaintiff county, alleged to have been unlawfully withheld from plaintiff by defendant. Appellee answered by general demurrer, and special demurrer to that part of the petition which sought to recover the penalty of threefold the amount alleged to have been unlawfully demanded and received. The demurrers were sustained, and plaintiff filed an amended petition, alleging that defendant had demanded and received, through the orders and allowances of the commissioners' court, during the four years he held the office of county judge, from November, 1882, to November, 1886, the aggregate sum of \$528 for disbursing the school fund of said county, in excess of the compensation allowed by law for such service. Plaintiff also claimed in its amended petition the sum of \$143.58, alleged to have been unlawfully withheld by defendant from the permanent school fund of plaintiff county. The defendant's demurrer to the amended petition was sustained, and judgment entered dismissing the suit for want of jurisdiction, from which this appeal is prosecuted.

Under proper assignments of error, it is contended that the court erred in sustaining the special demurrer to so much of the original petition as sought to recover the penalty of threefold the amount alleged to have been unlawfully received by defendant, and in sustaining the defendant's demurrer to the amended petition. The penalty was sought to be recovered under article 2421, tit. 42, Rev. St., which provides: "If any of the officers named in this title shall demand and re-

ceive any higher fees than are prescribed to them in this title, or any fees that are not allowed by this title, such officer shall be liable to the party aggrieved for fourfold the fees so unlawfully demanded and received by him, to be recovered in any court of competent jurisdiction." Title 42 prescribes the fees that various state and county officers are authorized to demand and receive for certain specified services, the county judge being one of the officers named, but his compensation for disbursing the school fund is not prescribed in that title. The compensation of a county judge for services rendered in disbursing the school fund of his county is allowed and fixed by title 78, art. 3745, Rev. St., (article 3788, Sayles' Civil St.) We think it clear that the case made by the original petition is not within the purview of article 2421. To give that statute such enlarged application would violate established rules for the construction of statutes penal in their nature.

We think the court had jurisdiction of the case made by the amended petition, and that it erred in sustaining the demurrer thereto, and dismissing the suit. The amounts claimed aggregate the sum of \$671. It is true that the amended petition set up a new cause of action, which would have entitled defendant to a continuance, and might have subjected plaintiff to payment of costs, in the discretion of the court, but it brought the case within the jurisdiction of the court, and should not have been dismissed. *Ward v. Lathrop*, 11 Tex. 287. For the error indicated, we think the judgment should be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

#### WOOD COUNTY v. CATE. (No. 2,775.)

(Supreme Court of Texas. Nov. 26, 1889.)

STATUTES—CONSTRUCTION—PENALTIES FOR EXCESSIVE FEES.

Rev. St. Tex. tit. 42, art. 2421, provides that "if any of the officers named in this title shall demand and receive any higher fees than are prescribed to them in this title, or any fees that are not allowed by this title, such officers shall be liable to the party aggrieved for fourfold the fees so unlawfully demanded and received by them, to be recovered in any court of competent jurisdiction." County judges are among the officers named in this title. *Held*, that the penalty prescribed by this section is not applicable to the case, where a county judge demands and receives a greater amount than is allowed by law for the disbursement of the school fund, compensation for such service not being allowed by such title, but by Rev. St. tit. 78, art. 3745.

Commissioners' decision. Appeal from district court, Wood county; FELIX J. McCORD, Judge.

*White & Edwards*, for appellant. *John M. Duncan, Horace Chilton, and H. M. Cate*, for appellee.

ACKER, J. Wood county sued H. M. Cate, ex-county judge, to recover \$264—alleged to

have been demanded and received by him on allowances made by the commissioners' court, during the two years he held the office of county judge, from November, 1884, to November, 1886, for disbursing the school fund of said county, in excess of the compensation allowed by law for such service, "together with threefold that amount added thereto as a penalty, making a total of one thousand and fifty-six dollars." The defendant answered by general demurrer, and special demurrer to that part of the petition which sought to recover the threefold penalty, and also special demurrer on the ground that the court did not have jurisdiction of the amount involved in the suit. The demurrers were sustained, and judgment entered dismissing the suit for want of jurisdiction, in which appellant insists that the court erred. The penalty was sought to be recovered under article 2421, tit. 42, Rev. St., which provides: "If any of the officers named in this title shall demand and receive any higher fees than are prescribed to them in this title, or any fees that are not allowed to them by this title, such officer shall be liable to the party aggrieved for fourfold the fees so unlawfully demanded and received by them, to be recovered in any court of competent jurisdiction." Title 42 prescribes the fees that various state and county officers are authorized to demand and receive for certain specified services, the county judge being one of the officers named, but his compensation for disbursing the school fund is not prescribed in that title. The compensation for services rendered by the county judge for disbursing the school fund of his county is allowed and fixed by title 78, art. 3745, Rev. St. We think the defendant was not liable for the penalty sought to be recovered. To give article 3745 of the Statutes such enlarged application would violate established rules for the construction of statutes penal in their nature. Exclusive of the penalty, it is clear that the court did not have jurisdiction of the amount sued for. We are of the opinion that there is no error in the judgment of the court below, and that it should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

#### PEARCE et al. v. TOOTLE et al.

(Supreme Court of Texas. Nov. 19, 1889.)

PLEADING AND PROOF—EXCESSIVE VERDICT—REMITTITUR—COSTS.

1. In an action on an open account, where the petition alleges that the goods were sold on August 4, 1888, and the account shows another item of a subsequent date, a verdict for plaintiffs, which includes the latter item, is not excessive, as the plaintiffs are not confined to the proof of the time alleged in the petition.

2. Where a *remittitur* for the excess of a verdict is not filed until after a writ of error has been sued out, the judgment will be reversed, and defendants in error adjudged to pay the costs.



Error from district court, Hunt county; E. W. TERHUNE, Judge.

*Matthews & Neyland*, for plaintiffs in error. *R. L. Porter*, for defendants in error.

GAINES, J. This suit was brought in the court below by defendants in error against plaintiffs in error upon an open account for goods sold and delivered. The defendants, after pleading, withdrew their answer, and there was a judgment *nil dictit*. It is here claimed that the judgment is for a greater sum than is warranted by the petition. The petition alleges that the goods were sold on the 4th day of August, 1888, and refers for particulars to an itemized account attached to and made a part of the petition, as an exhibit. In the account items amounting to \$1,304.62 are dated August 4, 1888, and others amounting to \$43.31 are dated August 11, 1888; and it is insisted that, because of this discrepancy between the allegation of the date of sale in the petition and the dates shown in the exhibit, the verdict is excessive for the latter amount. The assignment of error in this particular is not well taken. The plaintiffs in establishing their case were not confined to the proof of the time alleged in their petition. If the defendants had made defense, and had urged the variance as an objection to the evidence on the trial, it would have been unavailing.

It is also insisted that the judgment allows too much interest by the sum of \$16.66. This is conceded by defendants in error. They filed a *remittitur* of the amount in the court below, but this was done after the writ of error had been sued out. If the *remittitur* had been entered before the proceedings to bring the case to this court had been instituted, the judgment would have been affirmed. This court having acquired jurisdiction of the case by the acceptance of service of the citation in error, before the excess was remitted, we think the judgment should be reversed and reformed here, and that defendants in error should pay the costs of the proceedings instituted for the revision. The excess being evidently the result of an error in calculation, the judgment might have been amended upon motion in the court below. Rev. St. arts. 1354, 1355. For this reason we have had some difficulty in coming to the conclusion that defendants in error ought to pay the costs. The practice in this court in such cases has not been quite uniform, the matter of costs especially being considered a subject in the discretion of the court. But the general rule seems to be to allow the plaintiff in error his costs where the judgment has been by default, and the *remittitur* is not entered before the writ of error is sued out. *Westall v. Marshall*, 16 Tex. 182; *McNairy v. Castleberry*, 6 Tex. 286; *Chrisman v. Davenport*, 21 Tex. 483; *Arnold v. Williams*, Id. 413; *Howe v. Merrell*, 36 Tex. 319; *McDonald v. Grey*, 29 Tex. 80; *Reed v. Her-ring*, 37 Tex. 160; *Cornelius v. Thompson*, 27 Tex. 31. When the judgment is by de-

fault or *nil dictit*, the defendants virtually admit the correctness of the demand made in the petition; and where the amount is a matter of calculation only, he has the right to rely upon the presumption the court will do its duty, and see that the judgment is for the proper amount. If, therefore, the plaintiff willfully causes or negligently permits an excessive judgment to be entered, it would seem but just that he should pay the costs of its correction in any tribunal which has the power to reform it. When a case has been contested below, and there is small error as to the amount of the judgment, and the appellant fails to ask its correction in the court below, a different rule ought usually to prevail. The judgment is reversed, and here rendered for the amount adjudged by the court below, less the *remittitur*. The defendants in error will be adjudged to pay the costs.

FRAZIER v. EAST TENNESSEE, V. & G. R. Co. et al.

(Supreme Court of Tennessee. Oct. 28, 1889.)

RAILROAD MORTGAGES — PRIORITY OF JUDGMENT LIENS — POWER TO MORTGAGE — CONSTITUTIONAL LAW — TITLE OF ACTS.

1. Complainant, an engineer, who had been injured, entered into a contract with the company for the settlement of his claim for damages, whereby the company was to pay him \$90 per month for five years, complainant to do such work in the company's shops as he should be called upon to do, and which he might be physically able to do; his ability to be determined by a certain physician. The payments were made regularly until the railroad went into the hands of a receiver, when they stopped. During the time he was paid, complainant was wholly unable to render any service in the shops, and was not called upon to do so. For the rest of the time covered by the contract, it was shown that he was unable to do anything in the shops, but after his payments stopped he ran a small grocery, rendering services which could have been procured for \$35 per month. Held, that the sum agreed to be paid complainant was in liquidation of his claim for damages for personal injuries, and his claim was a lien superior to a mortgage executed by the company, under Act Tenn. March 24, 1877, prohibiting railroad companies from making any mortgages creating liens superior to judgments for timber furnished or work and labor done, or for injury to persons or property, incurred in the operation of the road.

2. In a creditor's bill to enforce his judgment against the purchasers of the road at foreclosure sale, it was error to abate complainant's claim by the value of his labor in his own store. As he was not called upon to render services at the company's shops, and was unable for a considerable part of the time to have rendered such services, he was not obliged to remain idle, if there was work of a kind which he could do, and his earnings would not be at the loss of his time to the company.

3. On foreclosure sale the property was purchased by a committee of the holders of the bonds, duly authorized to purchase as trustees for the creditors. The committee bid in the corporate property; a small part of the price being paid in cash, the remainder in bonds of the company, under a scheme agreed upon by the bondholders. The title was by deed and decree conveyed to the purchasers, who organized as defendant corporation. After the organization the property was regularly conveyed to the new corporation by the holders of the legal title. Held, that defendant, the new corporation, was not an innocent purchaser, as against complainant's judgment.

4. The charter of the E. T. & V. R. Co. (Acts Tenn. 1847-48, p. 195) which conferred on the company power to mortgage, for the purpose of completing its road and equipping it with everything necessary to give it full operation, did not authorize the execution of bonds and mortgage for any other purpose than that of completing and equipping the original lines authorized by the charter, and a mortgage executed more than 25 years after such completion and equipment, and not purporting or shown to be for any such purpose, or to secure the renewal of bonds originally for such purpose, will not be presumed to have been executed for such purpose.

5. Act Tenn. March 24, 1877, entitled "An act to amend the law in relation to the consolidation of railways," regulated and defined the terms on which railroad corporations should have the power to consolidate, and defined the powers of such consolidated companies. The third section contained a proviso that no company should have power to give any mortgage, or other kind of lien, which should be valid and binding against judgments and decrees and executions "for timbers furnished and work and labor done on, or for damages done to persons and property in the operation of, its railroad." Held, that the proviso was germane to the subject of consolidations, and the title sufficiently indicative of this subject, within the constitutional provision that no bill shall embrace more than one subject, that subject to be expressed in the title.

6. Act Tenn. March 15, 1881, conferring the power to mortgage in very broad terms, and extending such power to all railroad companies then existing, or which might thereafter be created, did not repeal the limitation upon the power contained in Act March 24, 1877, there being no repealing provision in the act, and no such repugnancy between the two acts as to imply a repeal.

7. The proviso in the act of March 24, 1877, was not intended to be limited to such consolidations as should thereafter occur.

Appeal from chancery court, Knox county;  
HENRY R. GIBSON, Chancellor.

*Ingersoll & Peyton*, for complainant. W. M. *Baxter*, *Henderson & Jouroleman*, and *Thornburg & Sanford*, for defendants.

LURTON, J. Some time prior to 1860, there existed two separate railroad corporations, —one known as the "East Tennessee & Virginia Railroad Company," and the other as the "East Tennessee & Georgia Railroad Company." Each owned, and was operating, an independent line of railway, under charter granted by this state. Under the internal improvement acts of 1851-52, state bonds to a large amount were loaned to each company, and thus each became largely indebted to the state. By an act passed February 25, 1869, railroad companies so indebted were permitted to consolidate, and adopt the name and charter of either of the consolidating companies. Under this act, these two corporations consolidated, adopting the name and charter of the East Tennessee & Virginia Railroad. Subsequently, by an act passed December 17, 1869, this consolidation was recognized, and the name of the consolidated company changed to "East Tennessee, Virginia & Georgia Railroad Company." On June 15, 1881, this consolidated company executed to the Central Trust Company of New York a mortgage to secure an issue of \$22,000,000 of its bonds. This mortgage was known and described as its "Consolidated First Mort-

gage," and all the corporate property and franchises of the consolidated company, including certain other roads, either purchased or built after the consolidation above referred to, were included therein. On the same day another mortgage, known as the "Income Mortgage," was executed to the same trustee, to secure \$16,500,000 of bonds, known as its "Six per cent. Income and Mortgage Bonds." All the corporate property and franchises of the company were conveyed herein, subject, however, to the consolidated first mortgage, and in addition the income of the road was pledged. Default having been made in the payment of interest upon the bonds thus secured, such proceedings were had in the United States circuit court for the eastern division of Tennessee as resulted in the sale of the mortgaged property and franchises. The purchasers at the sale were a committee of the holders of the bonds, duly authorized to purchase as trustees for the creditors. This committee bid in the entire corporate property for the sum of \$10,000,000. Of this sum, \$100,000 were paid in cash; the remainder of the bid being paid in bonds of the company, under a scheme agreed upon by the holders of bonds. The title was, by deed and decree, conveyed to the purchasers. Subsequently these purchasers, by virtue of an act passed March 12, 1877, organized as a corporation, and adopted the name of the "East Tennessee, Virginia & Georgia Railway Company." After this reorganization the purchased roads were regularly conveyed to the new organization, by the persons in whom the legal title stood, for the nominal consideration of \$10. This foreclosure sale occurred May 25, 1886, and the other proceedings shortly thereafter, and during same year.

Complainant, claiming to be a creditor of the old and insolvent corporation, files this bill under the provision of sections 1492-1496, 3431, 4294, 4295, Code. The old corporation, as well as the new, are the parties defendant. The bill is filed upon the theory that under the law of this state, at the time the foreclosed mortgages were executed, regulating the execution of mortgages by railroads in this state, that the East Tennessee, Virginia & Georgia Railroad Company had no power to make a mortgage of its property in this state which should be valid as against judgments for timber furnished or work and labor done, or for injury to persons or property, incurred in operation of the road in this state, and that the property of the insolvent and debtor corporation in the hands of the reorganized corporation is subject to the demands of all such creditors; the purchasers thereof having no other or higher title than the mortgagees had. The bill is filed under sections 4294, 4295, and 3431, as a creditors' bill, to reach and subject assets of an insolvent corporation, and apply them equally to all creditors of the preferred class. A large number of creditors, having judgments unsatisfied for injuries sustained in the operation of the old road, or work and labor or timber fur-

nished, have come in by petition, and been allowed by interlocutory orders to become co-complainants in the original bill. The learned chancellor, upon the whole case, decreed as follows: (1) That complainant was a creditor, and as such was entitled to judgment and decree against the East Tennessee, Virginia & Georgia Railroad Company, and that his claim was for injuries sustained in the operation of said railway in this state after the execution of the foreclosed mortgages, and while the road was being operated by the mortgagors. (2) That the East Tennessee, Virginia & Georgia Railroad Company was an insolvent corporation, and that since June, 1886, had parted with all its property and franchises, and had ceased to perform its functions as a common carrier; and that complainants have no means at law of obtaining satisfaction of their several demands, unless they may compel satisfaction from the property of said corporation in the hands of the new organization. (3) That the mortgages of June, 1881, under which the new company claims title, were subject to the provisions of the act of March 24, 1877, by which act said company was prohibited from making any mortgages or creating any lien superior to claims of the class to which complainants belong. (4) That the East Tennessee, Virginia & Georgia Railway Company is not an innocent purchaser. (5) That a receiver should be appointed, and empowered to take possession and sell a sufficiency of the property of the insolvent debtor corporation, owned by it at the date of the foreclosure sale, and situated in this state, and now in possession of the reorganized company, to satisfy the several judgments determined in this cause to be entitled to priority over the mortgages of June, 1881. From this decree the East Tennessee, Virginia & Georgia Railway Company have appealed, and assigned errors upon each of the several matters so decreed. The original complainant, Frazier, has likewise appealed from so much of the decree of the chancellor as held that his claim should be abated by the sum of \$1,491.

We will first dispose of the first assignment of error filed by the railway company, which challenges the character of Frazier's claim, and insist that it is neither for damages to his person nor for work and labor, but for a breach of contract, and that, therefore, he is not a creditor of the class entitled to invoke the provisions of the act of 1877. Frazier, in January, 1883, was an engineer in the service of the old corporation, and was badly injured by the overturning of an engine. On the 9th August thereafter he entered into a contract with the company for the settlement of his claim for damages thus sustained. This contract is too lengthy to set out. Its substance and legal effect was that the company, on its part, agreed to pay him the sum of \$90 per month for five years. He, on his part, agreed to do such work in the shops of the company as he should be called upon to do, and which he might be physically able to do. If any question should arise as to his ability

to do the work, then it was agreed that Dr. Deadrick should settle such question; and, if he should decide that complainant was able to do the work required, then his payments should be abated for the time so lost. The contract further provides that all his medical bills should be paid by the company, and that the sum of \$1,800 should be paid to him as an advance payment upon the contract. In consideration of the foregoing, Frazier released the company from all liability for any damages he might otherwise recover. For several months he was regularly paid the agreed sum of \$90 per month. But when the road passed into the hands of a receiver he was notified that his name had been dropped from their pay-roll. Thereafter he was paid nothing more. Neither before nor after this action of the receiver was he ever called upon or required to render any service. During the time he was paid, he was utterly unable to render any service, and for the greater part of the remainder of the period covered by the contract he continued to labor under disabilities so severe as to have made it physically impossible that he should render any services in the shops of the company. After his payments were stopped, it is shown that for a part of the time he engaged himself in the management of a small family grocery, and that the service he was able to render was such as could probably have been procured at \$35 per month. The chancellor was of opinion that his monthly claim should have been abated to the extent that he had been able to make earnings in this avocation, and accordingly he abated the gross sum due by \$1,491. We are of opinion that the sum agreed to be paid complainant under this contract was in liquidation of his claim and right of action for personal injuries. The agreement that he should, if able, render services in their shops, if called upon, was a mere incident of the settlement, and the sums agreed to be paid him are not for work and labor, but are agreed payments in liquidation of damages, to be reduced by the value to them of his services to them in their shops, if he should ever be called upon to so labor, and should be physically able. This demand is therefore one for personal injuries. We think it was error to abate his claim by the value of his labor in his own store. He was never called upon to perform any labor for defendant, and was unable, if he had been, to have rendered service in their shops for any considerable part of the time. He was under no obligation whatever to remain idle. If there was work of a kind which he could do, he was clearly entitled to its fruits, as it was not earned at the loss of his time to defendant. His time and labor belonged to himself, unless he was able to work in their shops, and wrongfully refused to so work when called. To save himself and family from want, he was compelled, in pain and suffering, to engage in the little business he undertook. If defendant had kept its contract with him, he would not, perhaps, have been driven to the necessity he

was. It does not lie in the mouth of the defendant to say, under these circumstances, that it was entitled to his time. The assignment of error as to this matter is sustained, and judgment will go for the full amount of the monthly payments in arrear.

We come now to the principal question, which involves the right of complainants as judgment creditors, the judgments being mainly for personal injuries sustained in the operation of the road in this state, to satisfaction out of the property of the old corporation in the possession and ownership of the East Tennessee, Virginia & Georgia Railroad Company. We have already stated the title of this company. It is most manifest that the defense of innocent purchaser without notice cannot be sustained. They must stand or fall upon their title as mortgagees. The proceedings in the foreclosure suit are not pleaded or relied upon in bar of the claim now presented, though a demurrer, as well as the answer, interposes the defense that the remedy of complainants was against the purchase money. There are two answers to this: *First*, the purchase money was never paid, save in bonds, except a comparatively small sum, necessary to pay costs and counsel fees; *second*, the foreclosure proceedings do not undertake to clear the title of the property sold, and no steps seem to have been taken to bring creditors of the class represented by complainants before the court. If, therefore, the mortgages under which the reorganized company acquired title were involved as to the judgments of complainants, we see no difficulty in a court of equity following the property, and subjecting it, in the hands of any but innocent purchasers, to the satisfaction of these prior liabilities. Any liens placed upon the property by the new company are not affected by any decree in this cause, inasmuch as the holders are not parties, and are therefore not concluded. We only decide that the corporation is not an innocent purchaser, and its assignment of error to this effect is not well taken.

The claim of priority in favor of the judgments of complainants is rested in the bill upon a provision in the act of March 24, 1877, in the following words: "And provided, further, that no railroad company shall have power under this act, or any of the laws of this state, to give or create any mortgage or other kind of lien on its railway property in this state which shall be valid and binding against judgments and decrees and executions therefrom for timbers furnished and work and labor done on, or for damages done to persons and property in the operation of, its railroad in this state." The railway company interpose a number of objections, going both to the applicability and constitutionality of this provision to the mortgages under which they claim title. The first is that under the charter of the old company it had power to mortgage, and that this general power conferred in their charter is a contractual right, which could not be affected by any

subsequent legislation limiting the power conferred. The charter has not been made part of the transcript, and it is insisted by complainants that it is not such an enactment, being a special charter, as entitles us to take judicial notice of its terms. This charter is not a mere private act. It was granted in 1847, and is published, as a public act, with the other public acts of that session. Acts 1847-48, p. 195. It has been since more than once referred to in other public acts. Such an act is entitled to judicial notice. *Perry v. Railroad Co.*, 55 Ala. 413; *Hall v. Brown*, 58 N. H. 93; *Whart. Ev.* § 294. The fifteenth section of the charter granted to the East Tennessee & Virginia Railroad is the only section relied upon as containing the grant of power to issue bonds and mortgage its property. This section is as follows: "Sec. 15. The said company may at any time increase its capital to a sum sufficient to complete the said road and to stock it with everything necessary to give it a full operation and effect, either by opening books for new stock, or by selling new stock, or by borrowing money on the credit of the company and on the mortgage of its charter and works; and the manner in which the same shall be done, and in either case, shall be prescribed by the stockholders at a general meeting; and any state, or any citizen, corporation, or company of this or any other state or country, may subscribe for and hold stock in said company, with all the rights, and subject to all the liabilities, of any other stockholder." The power here conferred is limited to one purpose,—that of completing its road, and equipping it with everything necessary to give it "full operation." This old road was completed, and in full operation, for perhaps 25 years before the execution of the mortgage in question, and it is nowhere pretended in the pleadings or proof that either of these mortgages were executed for the purpose of completing, or putting into "full operation," the line of road contemplated and authorized by the charter of the old corporation of the East Tennessee & Virginia Railroad. The power of a railway corporation to execute a mortgage of its franchises, or of corporate property essential to its operations, must, by the great weight of authority, be expressly conferred. Such a power is generally implied when the corporation is one strictly private, as a factory or mill. The reason for the distinction is found in the nature of the obligations and duties imposed upon a corporation in many respects a public corporation. Such a corporation cannot, without express authority, abdicate the functions and duties imposed for public purpose, by either a sale or a lease. For the same reason, it may not make a mortgage, for a foreclosure would bring about a sale and abandonment of its powers and responsibilities. *Jones, Ry. Sec.* §§ 1-10; *Mallory v. Oil-Works*, 2 Pickle, 603, 8 S. W. Rep. 396; *Thomas v. Railroad Co.*, 101 U. S. 71. We are of opinion that the limited power conferred in the charter was not sufficient to au-

thorize the issuance of bonds and execution of a mortgage for any other purpose than that of completing and equipping the original lines contemplated and authorized by the charter; and that mortgage, executed more than 25 years after the completion and equipment of the lines of the road authorized by the original charter, and not purporting or shown to be for any such purpose, or to secure renewal of bonds originally for such purpose, will not be presumed, in the absence of proof or allegation, to have been executed for the purpose named in such charter.

The next objection is that the proviso in the act of 1877 is obnoxious to section 17, art. 2, of the state constitution, which provides that "no bill shall become a law which embraces more than one subject, that subject to be expressed in the title." The title of the act of March 24, 1877, is "An act to amend the law in relation to the consolidation of railways." The first section amends the acts of December 12, 1871, and March 12, 1875, by extending those acts to all railroad corporations "now existing, or hereafter to be created, in this state, whether under a general or special law or laws, or by virtue of statutes of any other state, ratified and confirmed by the authority of the state of Tennessee." The second section authorizes any corporation existing, or hereafter created, under the laws of this state, or any other state, ratified by this, to consolidate itself with any other railroad whose lines shall connect with or intersect the road of such corporation desiring consolidation. The third section defines the rights and powers of the consolidated roads. Among other powers conferred upon the consolidated companies is that of issuing bonds, and to secure same by a mortgage upon its property and franchises. Three provisos are included in this third section. The first declares that "nothing in this act shall be understood or construed to give or to transfer to, or confer upon, any such consolidated company, or person operating such consolidations of railroads, as provided for in this act, or in any other law of this state, any franchise, right, or immunity, or exemptions not now granted by the laws of this state to the railway companies which may form part of such consolidated company." The two following provisos and the concluding section are as follows: "Provided, further, that no exemption from taxation, under the revenue laws of this state, of railroad property and franchises, and capital stock thereon, contained in railway charters or other railway law of this state, shall be by this act, or any other law of this state providing for such consolidation, transferred to or conferred upon such consolidated company, or the property and franchises and capital stock therein, of such consolidation of railroads, or of the property appertaining thereto, and used in the operation thereof; and that the state shall have the power, by appropriate legislation, to prevent unjust discriminations against and extortions

for freights and passage over all railroads in this state; and provided, further, that no railroad company shall have power, under this act or any of the laws of this state, to give or create any mortgage or other kind of lien on its railway property in this state which shall be valid and binding against judgments and decrees, and executions therefrom, for timbers furnished and work and labor done on, or for damages done to persons and property in the operation of, its railroad in this state. Sec. 4. Be it further enacted that this act take effect from and after its passage; the public welfare requiring it." The act of 1871, amended and extended by the act under consideration, was an act entitled "An act granting certain powers to existing railroad corporations." This act empowered any existing railroad corporation of this state to acquire by purchase or other contract any other railroad. *Second.* The right to hold, use, and operate any road theretofore purchased or acquired. *Third.* The right to consolidate with any other connecting or intersecting road. *Fourth.* It gave power to any existing railroad corporation to issue bonds for any purpose within scope of its powers, or to meet indebtedness already incurred, and power to mortgage its property and franchise to secure such bonds. By a proviso the act was declared not to operate so as to affect any lien in favor of the state, or creditors of such corporation, and that such consolidation shall not be complete until approval of majority of stockholders. By the second section the companies indebted to the state on account of state aid are excluded from the benefits of this act until they should have paid off such indebtedness. The act of March 12, 1875, so amended this act of 1871 as to extend it to all consolidations existing under the joint legislation of this and another state or states, and companies incorporated by another state, where roads connect or intersect in this or another state.

Does this act of 1877 contain more than one subject, within the meaning of the constitutional enactment that no act shall become a law which contains more than one subject? The leading case in this state construing this clause of our constitution is that of *Cannon v. Mathes*, 8 Heisk. 504. The case arose upon the construction of an act entitled "An act to fix the state tax on property," the fourth section of which increased the state tax on privileges 50 per cent. upon the existing basis. Chief Justice NICHOLSON, in delivering the opinion of the court, quoted with approval the view of Judge Cooley as to the purpose of the clause in question, as follows: "That 'the general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act, relating to that alone, would not only be unreasonable, but would actually render legisla-

tion impossible.' He adds: 'The generality of a title is no objection to it, so long as it is not made to cover legislation incongruous in itself, and which, by no fair intendment, can be considered as having a necessary or proper connection. The legislature must determine for itself how broad and comprehensive shall be the object of a statute, and how much particularity shall be employed in the title defining it.' The learned chief justice then concludes by saying: "We concur in these general views as sound and practical, and by them the validity of the act in question must be tested." The court held in the case then under consideration that an examination of the different sections of the act indicated that the general subject of the act was state revenue, and that a tax upon privileges was germane to the subject of a tax on property. Concerning the title of the act, the court, after determining that the object of the constitutional provision concerning the title of acts was to prevent surprises or fraud upon the legislature by means of provisions in bills of which the title gave no intimation, and which might therefore be overlooked, and carelessly or unintentionally adapted, laid down the rule for the construction of this claim as to the titles of bills to be that "any provisions of the act directly or indirectly relating to the subject expressed in the bill, and having a natural connection therewith, and not foreign thereto, should be deemed embraced in it." This liberal rule of construction finds illustration in a number of cases by this court. The case of *Morrell v. Fickle*, 3 Lea, 79, is in point. An act entitled "An act to establish a chancery and law court at Bristol, in the county of Sullivan," was held to embrace the establishment of separate chancery and circuit courts at Bristol, and that the establishment of two separate courts constituted but one subject; that subject being the establishment of such additional courts for Sullivan county as were needed,—and this subject was sufficiently indicated by the title. In *State v. McConnell*, 3 Lea, 333, it was held that an act entitled "An act to create and establish the sixteenth judicial circuit in this state," which detached the county of Trousdale from the seventh circuit, and attached it to the fifth circuit, was valid. This conclusion Judge COOPER put upon the solid ground that "the establishment of a new judicial circuit in a state already divided into circuits must necessarily require some change in the circuits previously existing; and such change may well be considered as germane to the subject, and embraced in a caption embodying the general object." In the case of *Luehrman v. Taxing Dist.*, 2 Lea, 428, an act entitled "An act to repeal the charter of certain municipal corporations, and to remand the territory and inhabitants thereof to the government of the state," was held to embrace a provision turning the corporate property of such municipalities over to the state, to remain public property for the uses to which it had hith-

erto been applied. So, in the same case, it was held that an act entitled "An act to establish taxing districts in this state, and to provide the means of local government for the same," was valid, and embraced but one subject, sufficiently indicated by the title, although the act granted municipal franchises to the communities within the limits of the taxing districts, and gave to the corporations thus created all the legislative, judicial, and police powers of an incorporated city, and contained specifications and punishments."

The learned counsel have in argument pressed upon us the case of *Ragio v. State*, 2 Pickle, 272, 6 S. W. Rep. 401, seeming to find in it some principle of construction hostile to that laid down in *Cannon v. Mathes*. That case does not contain any rule or principle for the construction of the constitutional clause in question in any way antagonistic to the well-settled doctrine heretofore frequently announced by this court. In the ascertainment of the general subject of an act, this court must look to the provisions of the particular act under consideration. If, upon our knowledge of affairs, the act seems to contain matters not germane, but incongruous, we must declare it obnoxious to the provision prohibiting two subjects. In the *Ragio Case* the title was exceedingly restrictive, and implied legislation closing only barber-shops on Sunday. Upon the facts as they appeared in that case, we thought that there was no necessary connection between barbering and keeping bath-rooms. Both might have been prohibited in an act under a title broad enough to comprehend the two things. We therefore held that the subject of the act, as indicated by the title, was the prohibition of barbering on Sunday, and that the closing of bath-rooms was not germane to such a title; the two occupations not being necessarily so connected as to be embraced under the one head of "barbering." The subjects of legislation are infinite. The determination as to whether the several provisions of an act are congruous and germane become largely a question of fact. Particular decisions cannot often be controlling in determinations of subsequent cases arising out of this constitutional provision. Cases will only serve as illustrations of the application of the liberal rule of construction adopted in *Cannon v. Mathes*, and frequently approved in subsequent cases. The *Ragio Case*, upon its facts, was rightly decided, and no rule of decision is laid down in that case, or is to be drawn from the decision, which in any way conflicts with the earlier cases on the same subject.

Let us test the constitutionality of the act of 1877 by the principles so clearly announced by Chief Justice NICHOLSON: "The object of the act is to regulate and define the terms upon which the state was willing to confer upon railroad corporations the power to consolidate, and to define the powers of such consolidated companies." We have already seen that a railway corporation may not, without express authority, abdicate its func-

tions and duties, either by a sale or lease or mortgage. *A fortiori*, it may not lose its own identity by suffering consolidation with another. It would therefore seem to need no support of argument that when the state, by legislation, undertook to confer upon all railroad corporations the power to absorb another, or to suffer an absorption by consolidation, it might well couple the grant of so extraordinary a power with the condition or proviso that the corporations so empowered to consolidate should not have power, before or after such consolidation, to make any mortgage, or create any lien, which should affect the class of creditors to which complainants belong. This provision seems to be directly connected with the subject, "consolidation," in that it is a condition upon which the power to consolidate, and the unlimited power thereafter to execute mortgages, is granted. The subject of the act is sufficiently indicated by its caption, even under a more rigid construction of the constitutional claim on this matter than the well-settled rule would require. If the title of this act had been "An act defining the terms and conditions upon which the power to consolidate is granted to all railroad corporations, and defining the powers of consolidated companies," it would be hardly more explicit than the title of this act, which purports to be an act amending the whole law on the subject of consolidations. Now, if in the act with the supposed title the first section had provided "that no railroad company shall have power to make any mortgage or create any lien which should be superior to judgments for timbers furnished, or work and labor done, or injuries to persons or property," and the second section, "that all such corporations should have power to consolidate," etc., we would then have an act which by the most rigid construction would contain but one subject, and that subject distinctly indicated by the title; but any fair construction of the act as actually worded, and its title as written, brings us to the same result. The proviso is germane to the subject of "consolidation," and the title sufficiently indicative of this subject to prevent surprise or fraud, or the unintentional adoption of the act in ignorance of this provision.

It is next insisted that this limitation upon the power to mortgage contained in the act of 1877 is repealed by the act of March 15, 1881. This latter act confers the power to mortgage in very broad terms, and is extended to all railroad companies existing under the laws of this or another state, and to all companies which might thereafter be created. The act contains no repealing provisions, and in no way refers to any former act upon this subject. It does not, therefore, in terms undertake to repeal any former legislation. Repeals by implication are not favored. An act will never be held to repeal by implication another act, unless it clearly appears that the two acts cannot stand together. The repugnancy between the two acts must be plain

and unavoidable. *Hockaday v. Wilson*, 1 Head, 114; *Buchanan v. Robinson*, 3 Baxt. 152; *Insurance Co. v. Taxing Dist.*, 4 Lea, 644. The act of 1877 contains the proviso in favor of what may fairly be called the claims arising from operation of the railway. The act of 1881 does not contain it. This proviso in favor of operating expense and damage for personal injuries is not an uncommon or unusual one in this state. It first appears in our legislation in the act of February 19, 1873. This was an act entitled "An act to authorize certain railroad companies of this state to issue consolidated or income bonds, and to mortgage their property to secure the same, for the purpose of paying off their indebtedness." By the third section power is given to any railroad company in the state, owing outstanding, floating debts, to issue bonds, to be known as "Income Bonds," for an amount sufficient to pay off such indebtedness, and to secure same by a mortgage of its "rents and profits," and all of its other property. This is perhaps the first general legislation expressly authorizing a mortgage of the income of railroads, and its power is conferred upon the provision that "no such mortgages shall bar any judgment against such roads for work or labor done, or damage to persons or property." Acts 1873, p. 8. Thus we see that it was the clear purpose of the legislature that the power to mortgage income should be coupled with the proviso that claims of the character presented by complainant's should not be affected.

Again, by Act 1877, c. 12, p. 17, being an act authorizing purchasers at a foreclosure sale of a railroad to organize themselves into a corporation, and settling the power of such reorganized company, the same proviso is repeated, and in such broad terms as to indicate the purpose of the legislature that this disability should apply, not only to companies so reorganized thereunder, but that no act authorizing mortgages should be held as authorizing a mortgage or lien which should affect such claims. Claims of the class represented by complainants are for the most part exceedingly meritorious, as against creditors by bond and mortgage, for the reason that such claims arise from the necessary operation of the road while in the hands of the mortgagor by agreement with the mortgagees. Possession, with the right to operate and receive the income, it would seem, should involve the right and duty to apply such income primarily to operating expense. Without this is done, there can be no operation of the road by the debtor corporation, and no payments of interest to the mortgagees. Hence it would seem that a mortgage upon a going railroad to secure a debt to mature at a distant date, whereby the mortgagor is left in possession, would contemplate, even where the income is mortgaged, that the operating expenses, including damages incident to such operation, should be a first charge upon such income, and that only the net income, after



payment of all such charges, should pay, or be applicable to payment of, mortgage debt. In such case, if income was applied to payment of mortgage debt or interest, and operating expenses were left unpaid, it would follow that creditors of the latter class ought to be allowed to marshal the assets, and receive satisfaction out of the *corpus*, to the extent that income had been diverted from payment of operating expenses. *Clay v. Railroad Co.*, 6 Heisk. 421; *Fosdick v. Schall*, 99 U. S. 285; *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. Rep. 675; *Gilman v. Telegraph Co.*, 91 U. S. 608; *Railroad Co. v. Cowdrey*, 11 Wall. 459; *Parkhurst v. Railroad Co.*, 19 Md. 472; *Ellis v. Railroad Co.*, 107 Mass. 1.

It is unnecessary, however, to decide that such claims would be entitled to priority of satisfaction out of income. The state of the pleadings do not perhaps raise this, and it is unnecessary, in the view we have of the statute. We only allude to this equitable principle, in connection with its repeated expression in our legislation prior to the act of 1881, that we may in this light ascertain whether there is such repugnancy between the act of 1881 and that of 1877 as to indicate a legislative intent that the former provisions should by the latter be abrogated. This intent we do not see, and the repugnancy is not obvious. The two acts may stand together, and in such case it is our duty to so declare.

The argument that the proviso in the act of 1877 was intended to apply only to such consolidations as should thereafter occur is practically disposed of by the view we have already announced as to the true construction of that act. If the view we have taken is correct as to the meaning of that act, then it is a proviso affecting all railroad companies alike, whether they shall thereafter consolidate or not.

It is unnecessary to determine whether the provisions of the act of February 19, 1878, and that of March 16, 1877, limiting the power of railroad corporations with respect to their power of mortgaging property, do not as effectually operate to give superiority to the claims of creditors of the class protected by the subsequent act of March 24, 1877. It is enough to decide, as we do, that the proviso of the act of March 24, 1877, is a valid and constitutional limitation upon the power of the East Tennessee, Virginia & Georgia Railroad Company to mortgage its property in this state; and that complainants are entitled to the relief they seek against the property of that corporation in this state, now in the custody and control and ownership of the reorganized corporation. In view of the well-known fact that railroads are now for the most part built with bonds, and operated largely for the benefit of such creditors, the legislation whereby the debts and liabilities created by the mortgagees in the course of this operation, as operating expenses, are secured as against such bond, is salutary in a high degree, and rests upon principles of un-

questioned equity and right. The decree of the chancellor will be affirmed as soon as it is modified as directed herein.

**CUMBERLAND TELEPHONE & TEL. CO. v. TURNER et al.**

(*Supreme Court of Tennessee. Dec. 5, 1889.*)

**FOREIGN CORPORATIONS—SERVICE OF PROCESS—REPEAL OF STATUTE.**

Act Tenn. 1887, c. 226, which provides that any non-resident corporation, "found doing business in this state," shall be subject to suit here, defines "doing business in this state" as "any transaction with persons, or having any transactions concerning any property situated in this state, through any agency whatever, acting for it within the state," and requires service of process on the agent "found within the county where the suit is brought," and that the clerk shall mail a copy of the process to the home office of the corporation, does not, by implication, repeal the provisions of Code Tenn. §§ 2831-2834, (Mill. & V. Code, §§ 3536-3539,) regulating the service of process on foreign corporations having a resident local agent, and does not apply to such corporations.

Error to circuit court, Sumner county; A. H. MUMFORD, Judge.

*W. C. Dismukes and Vertrees & Vertrees*, for plaintiff in error. *Geo. W. Boddie*, for defendants in error.

LURTON, J. Plaintiff in error is a foreign corporation, doing business in this and other states. Among other lines, it has one in the city of Gallatin, and a line extending from that place to Scottsville, Ky. It was sued in the circuit court of Sumner county, upon a cause of action originating in that county, for injuries sustained by reason of alleged negligence in the care and maintenance of their line of wire in that county. The company has an office in Gallatin, and a local resident agent. Process was served upon this local agent, the return showing that neither the president, cashier, treasurer, or secretary resided in the county. There was judgment by default. Appellant thereupon filed a petition praying that the execution be superseded, upon the ground that service upon its agent was insufficient to give the court jurisdiction; that the act of 1887, c. 226, required that, in addition to such service, the clerk of the court was required to notify such foreign corporation of the pendency of such suit, by letter, and the plaintiff to cause a copy of the writ of summons to be served personally upon some one in their principal office in the state of their creation. The service made was sufficient if the appellant had been a domestic corporation. Code, § 2834; *Toppins v. Railroad Co.*, 5 Lea, 604. Sections 2831-2834 (Mill. & V. Code, §§ 3536-3539) of the Code regulate the mode in which corporations may be sued. These sections apply equally to domestic and foreign corporations having an office or agency and a resident local agent in the county in which suit is brought. *Railroad Co. v. Walker*, 9 Lea, 475; *Peters v. Neely*, 16 Lea, 280. The word "officer" in section 2834 has been held to be a misprint, and to mean "office." 5 Lea, 604. It was,

however, held that the provisions of the Code above cited did not apply to the case of a foreign corporation, having no resident agent or local office, but which was alone represented by a traveling agent not resident in this state. 9 Lea, 475. To meet this defect, the act of 1887, c. 226, was passed. This act provides that any non-resident corporation, "found doing business in this state, shall be subject to suit here, \* \* \* so far as relates to any transaction had in whole or in part within this state, or any cause of action arising here, but not otherwise." The second section defines what is meant by "being found doing business in this state" as embracing "any transaction with persons or having any transaction concerning any property situated in this state, through any agency whatever acting for it within the state." The third and fourth sections require service of process upon such agent "found within the county where the suit is brought," and, that the notice shall be effectual, the additional requirement is added that the clerk of the court shall "immediately mail a copy of the process to the home office of the corporation by registered letter," and file with the papers in the cause a certificate of the fact of such mailing, and make minute thereof upon the docket. The plaintiff is himself required "to lodge at the home office of the company, with any person found there, a written notice from him or his attorney, stating that such suit has been brought, accompanied by a copy of the process and the return of the officer thereon, of which fact affidavit shall be made by the person lodging the same," etc. This act does not in terms undertake to repeal the Code provisions, in so far as they applied to service of process upon foreign corporations, and we are unable to see that there is any such conflict between the former provisions and this act as to operate as a repeal by implication of the former. The Code provisions covered every case where the foreign corporations had a local office and resident agent. It did not cover the case of a corporation having no resident agent, but doing business through and by means of traveling agents. 9 Lea, 475. This act enlarges the Code provisions, and is not a limitation. The act does not apply to the appellant or other foreign corporations having resident agents in the county where suit is brought. The petition was properly dismissed. Judgment affirmed.

**FARMERS' & TRADERS' BANK v. BANK OF ALLEN COUNTY et al.**

(Supreme Court of Tennessee. Dec. 19, 1889.)

**SERVICE BY PUBLICATION—CHECKS—LIABILITY OF INDORSER.**

1. In Tennessee, there is no authority for service by publication against the non-resident defendants in an action at law by the holder of a check against the payee and the non-resident drawer and drawee.

2. The assurance by the drawee bank that a check is good, and will be paid, is not such a certification of the check as will release from liability the payee, where the holder cashes the check on

his indorsement and presents it for payment in the due course of business.

Error to circuit court, Sumner county; MUMFORD, Judge.

S. F. Wilson, for plaintiff in error. J. J. Turner, C. R. Head, and George Boddie, for defendants in error.

FOLKES, J. The plaintiff, an incorporated banking institution of this state, brought its action in the circuit court of Sumner county against three defendants, to-wit, J. F. Carter, a citizen and resident of Sumner county upon whom personal service was had. The Bank of Allen county, an incorporated institution of Kentucky, doing business in said state, with no agent or representative in this state; and against Roe. B. Elliot, also a non-resident of the state of Tennessee. The two non-resident defendants, the Bank of Allen County and Elliot, were sought to be brought in by publication only. Upon a simple affidavit that they were non-residents, publication was had, reciting "that the ordinary process of law cannot be served upon them;" therefore, ordered that publication be made, notifying them to appear, etc. At the appearance term a declaration was filed against the three, wherein it is alleged that on or about the 18th day of October, 1888, defendant Carter presented to plaintiff bank a check for \$180.15, drawn by defendant Elliot upon the defendant Bank of Allen County, payable to the order of said Carter, and by the latter indorsed. Plaintiff bank was requested to cash said check, and the same was cashed as requested. That "before cashing the same the plaintiff bank communicated with the defendant bank in respect to said check of defendant Elliot, giving the amount and date of it, and informing it that said check was presented to it, and that plaintiff would cash it, if it was good, to which the defendant bank replied that it was good, or all right, or to that effect; and thereupon plaintiff cashed the same, paying the amount thereof to defendant Carter, less the cost of transmitting the same for collection." It is then alleged that the check was on the same day started in the usual channel to the defendant bank, which it reached in due course, and to which it was presented, and payment demanded and refused; whereupon the same was duly protested for non-payment, and notice duly given to Elliot, the drawer, and Carter, the indorser, both of whom likewise refused to pay. Wherefore plaintiff sues, etc., for the amount of said check, interest, and protest fees. The check and notarial protest are exhibited with the declaration. On a motion to dismiss, treated by the counsel and court as a plea in abatement, without objection to the form, the suit was dismissed as to the two non-resident defendants, and upon the demurrer of Carter the suit was dismissed as to him; and the plaintiff has appealed in error.

We will first consider the case as to the non-resident defendants. Granting that upon the case made in the declaration the drawer,

payee after indorsement, and drawee are each liable, the conduct of the drawee amounting in legal effect to the certification of the check, which may be given orally as well as in writing, such liability is not joint, but several. Being several, where is the authority of law for bringing in by publication, in a court of law, without property in this state attached or otherwise impounded, non-resident defendants, simply because of assumed privity with resident defendants, predicated alone upon the fact that they are each parties to a piece of commercial paper? We know of no such law, nor has our attention been called to any statute or decision of this or any other state that sustains jurisdiction to render any judgment in such case against the non-resident. Of course, if the position of defendant, which is sustained by some authority, be correct, namely, that by certifying the check the drawee bank becomes primarily and solely liable, discharging thereby the drawer and indorser, there could be no jurisdiction acquired over the non-resident drawee by uniting therewith the drawer, and resident indorser, against whom no judgment could be rendered by reason of their discharge. We have, therefore, in deciding that no jurisdiction was had over the non-resident drawee, assumed the liability of the other parties to the paper, which latter proposition we will consider more fully when we come to dispose of the demurrer interposed by the indorser, who was served with process.

Counsel for plaintiff have most earnestly pressed upon us in the argument the idea that the case of *Taylor v. Rountree*, 15 Lea, 725, is an adjudication sustaining the jurisdiction by publication as to non-resident parties on the check, by reason of the jurisdiction obtained by service of process on one of them, sufficient to warrant a personal judgment against such non-resident. To our mind, there is nothing decided in the case mentioned to justify the contention of plaintiff in the case at bar. Among other things, that case is distinguishable from this by the fact that there the suit was in a court of chancery, which clearly had jurisdiction to foreclose the mortgage upon land situated in the county where the bill was filed, and for the purpose of foreclosing such mortgage, publication as to the non-resident mortgagors was necessary, and authorized. With jurisdiction thus acquired, it was held that the court had power to render a personal judgment for the entire amount of the mortgaged debt, the ascertainment of the amount of which was necessary to the judgment of foreclosure, notwithstanding the land ordered to be sold was worth less than the debt. The learned judge writing the opinion placed the power to pronounce such judgment upon a construction of section 4352, subsec. 1, *Thomp. & S. Code*, (section 5095, *Mill. & V. Code*), which reads: "Personal service of process on the defendant in the court of chancery is dispensed with in the following cases: (1) When the defendant is a non-resident of the state."

The other subsections need not be stated. This is found in article 3 of chapter 3; the title to the chapter being, "Of the Practice of Courts of Chancery." The case evidently proceeds upon the idea that the chancery court, having jurisdiction of the property of the non-resident, upon which publication was authorized, could after such publication render judgment for the entire debt. Such, also, is the case of *Kyle v. Phillips*, 6 Baxt. 43, which differs from the *Taylor v. Rountree* Case only in the fact that the one was the enforcement of a vendor's lien, while the other was the foreclosure of a mortgage. Here we have a case at law, with nothing to authorize a publication, save the relation of the parties to the same piece of commercial paper, upon which there is a separate and successive liability to a common plaintiff. This will not do. It cannot be sustained upon any ground. With publication unauthorized, we do not reach the question in the *Taylor and Wife* Case, as to what character of judgment might be rendered in a case where publication is authorized. Without wishing to be understood as approving or disapproving the two cases referred to, it is sufficient to say that they furnish no authority for plaintiff's contention in the case at bar. They are as far from furnishing an analogy as is *Walker v. Cottrell*, 6 Baxt. 257, where is considered the jurisdiction given by sections 3524 and 3538 (*Thomp. & S. Code*) in attachment cases. It results, therefore, that there was no error in the judgment of the court in dismissing the suit as to the non-resident defendants.

This brings us to the consideration of the defense interposed by Carter, the indorser and payee of the check. The three grounds of the demurrer need not be stated separately. Briefly stated, they present the contention that, under the case as made in the declaration of a certification of the check by the drawee bank, the said drawee is alone liable. It may be conceded, for the purposes of this case, that ordinarily the certification of a check releases the drawer and other parties thereto. This is certainly true where the holder, instead of presenting the check and demanding payment, as is contemplated by the drawer, presents it for certification, and retains it thereafter for his own convenience or purpose. His duty was to demand payment, and if refused, to notify the drawer. The bank, for its own protection, usually charges up the check, when certified to its depositor; and, as the drawer cannot thereafter check upon the same fund, it would be unjust that the money should be left in the bank at his risk, and he remain liable upon the extended check. The same consideration would be controlling as to the rights and liability of an indorser upon the check under like circumstances. The check in such a case becomes, as said in some of the authorities, a *quasi* certificate of deposit, and circulates as the representative of so much cash in the certifying bank. But, as we know

from common experience, the drawer himself sometimes has his check certified before he undertakes to use it. In such event, it does not lose its character as a check, and he would remain liable, upon notice, after refusal of the bank to pay, just as though the check had been uncertified; and so would any indorser, signing as such, after the certification, remain liable, when there was no want of due diligence on the part of the holder. So that, granting all that is or can be claimed for the defendant Carter as to the effect generally of certifying checks, we are unable to discover any principle that will exonerate him under the case made in the declaration. The check sued on was not presented for payment by the holder, and a certification of the same accepted in lieu of payment. The check was by the payee presented to a bank other than the drawee, and in a different state, with a request that the same be cashed, which the other bank agreed to do upon the payee indorsing the same; and, upon obtaining information from the drawee bank that the check was good, thereupon the bank cashing the same did exactly what was expected by the payee would be done,—forwarded the same for payment. How has the payee and indorser been damaged? If required to make good his indorsement, he is in no worse attitude than he was prior to the cashing of the check by the plaintiff, nor than he would have been had he presented it himself to the drawee bank, and been refused payment. In both and in either event he has recourse over on the drawer. While there are well-recognized distinctions between a check and an inland bill of exchange, a check may, under the facts of a particular case, take on many of the qualities and attributes of a bill of exchange. So that, while it may be ordinarily true that a payee of a check has no right of action against the bank upon which it is drawn, it is manifestly true that where the drawee bank has, before an opportunity for presentment for payment, agreed with the holder, who advances value thereon, to pay it, such drawee becomes, as to such check, in legal effect the acceptor of a bill of exchange, and as such primarily liable; and the drawer and indorsers become successive sureties for the payment to the legal holder, who is free from negligence or fraud. See 2 Pars. Notes & B. 57 *et seq.*; Bank v. Merritt, 7 Heisk. 190, 191; Bank v. MiHard, 10 Wall. 152; Bank v. Bank, Id. 647; Andrews v. Bank, 9 Heisk. 211; Schoolfield v. Moon, Id. 171; 1 Pars. Notes & B. 353. The check having been presented in a reasonable time, as shown in the declaration, and duly protested, Carter, as indorser, is liable to plaintiff. What is a reasonable time depends upon the locality of the party, and the means of communication.

We need not consider the conflict—more apparent than real—concerning the question as to whether, in general, the holder of a certified check has the bank only for his debtor, with the drawer and indorser discharged, or whether, in an accepted check, like an ac-

cepted bill of exchange, the drawer is to be treated as a surety for the acceptor, and the indorser as a surety for prior indorsers, and for the drawer; for the reason that the result would be the same, under the facts of this case, as to defendant Carter, as we have seen. 2 Daniel, Neg. Inst. §§ 1601-1606. Like many such conflicts, each contention is correct, under the particular facts of the cases out of which the conflict is supposed to arise. In my opinion the true rule can be briefly stated to be that where the holder of a check which the drawer and indorsers expect and contemplate to be presented for payment, only, for his own convenience or purpose, accepts a certificate of the check instead, and the check is thereafter not paid, without fault of the drawer or indorsers, they are discharged. And on the other hand, they remain liable where the certification was procured by the drawer before it was issued, and where it was indorsed after such certification, upon the refusal of the bank to pay, unless the delay, negligence, or fraud of the holder can affirmatively be shown to be the occasion of the loss.

Without further discussion, it is sufficient to say that our judgment as to Carter's liability is placed upon the particular facts of the case, as shown in the declaration, to-wit, that he procured the plaintiff to cash the check upon his indorsement of same, with the knowledge that the check would have thereafter to be presented to the drawee bank, who had announced that the same was good, and would be paid, and upon the further fact that the plaintiff did, as soon as possible, in due course present the check and demand payment, and upon refusal had same protested, and notice given. In such a case, under all the authorities with which we are acquainted, the indorser is liable to the holder. Let the judgment as to Carter be reversed, and cause remanded for further proceedings.

#### GRAHAM v. MOREYNOLDS.

(Supreme Court of Tennessee. Dec. 10, 1889.)

PLEADING—STATUTE OF LIMITATIONS—MAINTENANCE—WITNESS—CROSS-EXAMINATION.

1. In an action for seduction and breach of promise of marriage, an issue on the statute of limitations is not raised by an allegation in the declaration that plaintiff was 21 years of age on a certain date, and a plea by defendant that she had attained her majority more than 12 months before suit was brought, and defendant, in addition to such plea, can plead the statute directly.

2. Defendant's plea that the suit was not the suit of plaintiff, but the suit of her father, and was instituted without plaintiff's knowledge, and prosecuted without her consent, and against her will, was properly stricken out, since it presented the question of maintenance, which is a question for the court, and not for the jury.

3. It was not error for the court to allow such a plea to stand as an application for a rule on plaintiff's attorneys to show by what authority they prosecuted the suit, and to discharge the rule after the attorneys had answered by filing the affidavit of plaintiff that the suit was prosecuted by her direction.

4. Nor can defendant complain that the affi-

davit of plaintiff was *ex parte*, especially when plaintiff was on the stand during the trial as a witness, and defendant had an opportunity to examine her.

5. Defendant's application for an order to compel plaintiff to appear personally at the trial, so that he might cross-examine her, was properly refused, where such application was made before the trial, and before any attempt had been made to take her testimony by deposition or otherwise.

6. It was proper to allow defendant to ask plaintiff's mother, on cross-examination, if her husband did not say that if she did not swear plaintiff's child to defendant he would send her to hell, there being evidence that her husband was a violent and desperate man; that he was not on friendly terms with defendant; that his wife and daughter were afraid of him; that he had threatened to do plaintiff bodily harm if she did not swear her child to defendant; and that the witness had made statements out of court contradictory to her testimony.

Appeal from circuit court, Marion county; D. C. TRUET, Judge.

*W. L. Aiken and W. E. Donaldson*, for appellant. *W. D. Spears, Foster V. Brown, W. J. Clift, and Lewis Shepard*, for appellee.

WEBB, Special Judge. This is a suit for seduction and breach of marriage promise, and originated in the circuit court of Marion county. Verdict and judgment were for the plaintiff. Defendant moved for a new trial, which was refused; and he has appealed in error to this court. Numerous errors have been assigned. Two of the assignments are to the action of the circuit judge on the pleadings: *First*, on motion of the plaintiff's attorney, the circuit judge struck out the defendant's plea of the statute of limitation of one year; *second*, on motion of the plaintiff's attorney, the circuit judge also struck out the defendant's fourth plea, which was that this suit was not the suit of the plaintiff, but the suit of her father, James W. McReynolds, and was instituted without her knowledge, and prosecuted without her consent, and against her will. We will consider these assignments in their order. The statute of limitation is a legal defense, which the defendant was entitled to have the benefit of; and, if the action of the trial judge in striking out this plea has deprived him of that defense, it was error. Plaintiff's counsel contend, however, that this action of the trial judge did not deprive the defendant of the benefit of the defense, but that there was another plea interposed, and not stricken out, under which defendant could and did have the full benefit of this defense. Let us see how this is. The first count in the declaration is as follows: "The plaintiff, who avers that she is a single woman, and was twenty-one years of age on October 26, 1887, sues the defendant for \$50,000." Then follows a statement of her cause of action. The defendant's sixth plea is that the plaintiff attained her majority of 21 years more than 12 months before the suit was brought. This is the plea under which it is claimed that the defendant had the benefit of the defense of the statute of limitations. It is clear that the circuit

judge treated the averment in the declaration that the plaintiff was 21 years of age on October 26, 1887, as an averment that she had attained her majority at that time. The defendant also so treated it, and traversed this averment, by his sixth plea, and we will so treat it.

It is also clear that the circuit judge thought that said averment in the declaration, and the traverse thereof by the sixth plea, made an issue upon the statute of limitations, were equivalent to a plea of the statute and a replication that plaintiff had attained her majority within 12 months, and that under this issue the defendant could have the benefit of the defense of the statute; and this is the position now assumed by plaintiff's counsel before this court. In the view of the circuit judge and of the plaintiff's counsel, the defendant had filed two pleas of the statute of limitation,—one setting up that defense directly, and the other traversing said averment in the declaration; thus tendering the same issue twice. Hence the circuit judge struck out the defendant's second plea, which set up the statute directly, and left the defense of the statute to depend upon the other issue; so that, if the defendant had the benefit of this defense at all, it was under the issue presented by the sixth plea. The sole issue presented by this plea was whether or not the plaintiff had attained her majority within 12 months before suit brought. It is clear that, except in reply to a plea of the statute, the right of the plaintiff to recover could not be affected by the fact that she had attained her majority more than 12 months before the suit was brought. In the absence of the plea of the statute, her right to recover would be as complete at 50 years of age as at 21; and, though she should admit on the witness stand that she attained her majority more than three years before suit was brought, and the jury should so find the fact, nevertheless, the court would be compelled to pronounce judgment in her favor, in case the jury should find for her on the merits of the case. Again, even if the plea of the statute had not been stricken out, the plaintiff, in her replication to that plea, would aver that she had attained her majority within 12 months, thus making the same issue twice. But the issue made by the replication would be material, because made in reply to the plea of the statute, while the issue made upon the averment in the declaration by the sixth plea would be immaterial, because not in reply to the plea of the statute. The logic of the plaintiff's contention is that the averment in the declaration was made in anticipation of, and in reply to, the plea of the statute, which, she assumed, would be filed by the defendant, and would operate to make an issue on that plea, when the plea should be filed, and that for this purpose it was a material averment. Conceding this to be so, for the sake of the argument, still, when the plea to which said averment is a reply is stricken out, as was done in this case, the averment in the decla-

ration stands as a reply to nothing, and its materiality is destroyed. In any aspect of the case, the averment in the declaration that the plaintiff had attained her majority within 12 months before suit brought was wholly immaterial, and the traverse of this averment by the sixth plea raised an immaterial issue, under which the defendant could not have the benefit of the statute of limitations. It was therefore error in the circuit judge to strike out defendant's plea of the statute.

The action of the circuit judge in striking out the defendant's fourth plea was not error. This plea presented an issue of maintenance, for the jury to try. It is the province of the court, and not the jury, to try the question of maintenance and determine whether it exists, and, if it does, to dismiss the suit. It was not a proper question to be submitted to the jury.

Furthermore, in the same order, striking out this fourth plea, the court ordered that the plea should stand as an application for a rule on the plaintiff's attorneys to show by what authority they prosecuted the suit in the plaintiff's name; and the rule was made accordingly. Defendant excepted to this order, except that portion of it making the rule on plaintiff's attorneys. In answer to the rule, plaintiff's attorneys filed the affidavit of the plaintiff herself, in which she swears that the suit is prosecuted by her direction, and for her benefit, and that she ratifies and approves all that has been done by her attorneys in the case. Upon this affidavit the rule was discharged, and this is assigned as error. We know of no better way for an attorney to show by what authority he prosecutes a suit in the name of the plaintiff than by producing the sworn statement of the plaintiff that he has her express authority. Certainly, the defendant has no right to complain. He still has the right at any stage of the case to show maintenance, if it existed, and have the suit dismissed by the court. *Webb v. Armstrong*, 5 Humph. 379. Nor can the defendant complain because the affidavit was *ex parte*, especially in view of the fact that the plaintiff was examined on the stand, as a witness, on the trial of the cause, and defendant had full opportunity to get at the truth of the matter.

It is assigned as error that the circuit judge refused to make an order compelling the plaintiff to appear personally at the trial, so that defendant might cross-examine her before the jury. The application for this order was made by the defendant before the trial, and before any attempt had been made to take the plaintiff's testimony by deposition, or otherwise. The circuit judge was correct in refusing to make the order as applied for, and at the time applied for; moreover, the plaintiff was personally present at the trial, and testified before the jury, so that no injury resulted to defendant from the refusal of the court to make the order.

Several errors to the rulings of the court in excluding evidence offered by the defendant

are assigned. One is as follows: Mrs. McReynolds was asked on cross-examination if her husband, James W. McReynolds, did not say that if she did not swear plaintiff's child to the defendant he would send her to hell in a minute. The circuit judge refused to allow her to answer the question. The contention of the defendant's counsel is that James W. McReynolds was the agent of the plaintiff for the conduct of this suit, and that all of his acts and declarations in relation thereto should have gone to the jury as the acts and declarations of the plaintiff. As proof of such agency, counsel refer to an affidavit made by the plaintiff during the progress of the cause. We find such an affidavit in the record, and that it was offered in evidence by the defendant, but excluded by the court, and made a part of the record by bill of exceptions. But no error has been assigned to the action of the court in excluding this affidavit, so that it is not before us, and we cannot look to it. Whether it would have the effect contended for if properly before us, it is not now necessary to decide. But we think the witness should have been allowed to answer the question upon the ground that her answer might affect her credibility as a witness. The proof shows that James W. McReynolds is the husband of the witness Martha J., and the father of the plaintiff, and that they live with him; and there is proof tending to show that he is a violent and desperate man, and that he was not on friendly terms with the defendant, or with his wife's father, and that his wife and daughter were afraid of him. There is also proof tending to show that he had importuned the plaintiff in relation to this suit, and threatened to do her bodily harm if she did not swear her child to the defendant. There was also proof tending to show that the wife and daughter made statements as to the paternity of the child which were at variance with the statements made by them on the witness stand. The object of the question propounded was to show by Mrs. McReynolds that her evidence had been dictated or influenced by her husband. If he did make the threat, and if this threat influenced her to give testimony which was not true, this admission from her would have destroyed her credibility as a witness; or, if she had admitted the threat, but denied that it influenced her, still it would have been a proper matter to be left to the jury, as affecting her credibility; and, if she had denied both the threat and influence, the defendant might be able to contradict her. As the question was intended to draw this admission from her, we think that she should have been allowed to answer it.

We find that the charge of the court is in the main correct, but, as the case must be retried, we do not deem it necessary to pass upon the special assignments of error to the charge, or any other assignments of error not hereinbefore considered, and we intimate no opinion on the merits of the case. For

the errors indicated, the judgment of the circuit court will be reversed, and the cause remanded for a new trial.

### GRAVES *et al* v. REED.

(Court of Appeals of Kentucky. Nov. 14, 1889.)

#### TRUSTS—LIABILITY FOR DEBTS OF BENEFICIARY.

Gen. St. Ky. c. 63, art. 1, § 21, provides that estates of every kind held in trust shall be subject to the debts of the persons for whose benefit they are held, as if such persons owned the same interest in the property as they own in the use or trust thereof. *Held*, that the estate of a *cestui que trust* is properly subjected to the payment of a note made by him and his wife, and secured by mortgage on the trust-estate.

Appeal from circuit court, Fayette county.  
"Not to be officially reported."

This was an action by Henry S. Reed, as executor of Martha Reed, against J. D. Graves and Teresa C., his wife, and G. W. C. Graves, on a promissory note executed by the first two defendants, and secured by a mortgage, executed by all the defendants, upon 50 acres of land, which was allotted to J. D. Graves as his portion of certain land devised to G. W. C. Graves in trust for his children, of whom J. D. Graves was one. Plaintiff prayed judgment for the amount of the note, with interest and costs, and for a sale of the land mentioned, or so much thereof as might be necessary. There was judgment accordingly, and defendants appeal.

G. J. Bronston, for appellants. J. M. Tanner, for appellee.

PRYOR, J. The only question made apparent from the record arises as to the liability of the trust fund or trust-estate to pay the debt of the appellee. While the legal title is in the trustee, the beneficial interest is in the appellant, and the estate was properly subjected to the payment of the debt. Gen. St. c. 63, § 21, art. 1. Judgment affirmed.

### HENNING'S ADM'R v. LOUISVILLE LEATHER CO.

(Court of Appeals of Kentucky. Dec. 7, 1889.)

#### DEATH BY WRONGFUL ACT—PARTIES—"HEIR."

The word "heir" in Gen. St. Ky. c. 57, § 8, which provides that "the widow, heir, or personal representative" of one whose life is lost by the willful neglect of another may sue the person causing the death, and recover punitive damages, means "child," and does not include parents or collateral relatives. Following *Jordan's Adm'r v. Railway Co.*, 11 S. W. Rep. 1013.

Appeal from court of common pleas, Jefferson county.

"Not to be officially reported."

Aaron Kohn, A. J. Speckert, and D. W. Baird, for appellant. Byron Bacon and Earnest Macpherson, for appellee.

LEWIS, C. J. This is an action by the father and administrator of Frank Henning, deceased, a child seven years of age, to re-

cover for destruction of his life by alleged willful neglect of the defendant, appellee. According to ruling in *Jordan's Adm'r v. Railway Co.*, 11 S. W. Rep. 1013, (decided at the last term of this court,) demurrer to the petition was properly sustained, and the judgment dismissing the action must be affirmed.

### COMMONWEALTH v. HOURIGAN.

(Court of Appeals of Kentucky. Nov. 19, 1889.)

#### MURDER—EVIDENCE—WITNESS—IMPRISONMENT—INSTRUCTIONS—AMENDMENT—BILLS OF EXCEPTIONS.

1. On a trial for murder a witness may use a diagram of the place where the killing occurred, which he has verified by observation and measurement.

2. Where a witness for the state testifies on cross-examination that he did not make certain statements out of court, as to which he was not directly examined, and which are merely collateral, defendant cannot impeach him by showing that he did make such statements.

3. Where defendant's testimony as to an alleged conversation with a certain person is excluded, it is proper to refuse to allow the other person to testify thereto.

4. Defendant testified that, about a year before the killing, deceased had applied to him as a physician; told him that he had seduced a certain girl, and had given her medicine, from which she was suffering, and wanted defendant to relieve her; that, on defendant's refusing, deceased became angry, and threatened him. *Held*, that it was competent for the state to show, as tending to contradict this testimony, that at the time indicated there was nothing the matter with the girl.

5. Evidence is admissible as to defendant's general character for morality and truthfulness at the time he testifies, and it need not relate to the time of the killing.

6. Danger to defendant from deceased, incurred by defendant's own wrongful act, and rendered excusable on the part of deceased thereby, is no excuse for killing deceased.

7. It was proper to modify an instruction that if defendant, without malice, in sudden heat and passion, but not in necessary self-defense, killed deceased, he was guilty of voluntary manslaughter, "but mere words, however opprobrious or insulting, are not sufficient provocation to reduce a killing from murder to manslaughter," by striking out the words quoted.

8. It is improper to instruct specially as to a mere matter of evidence already before the jury, and thus give undue prominence thereto.

9. Allowance of an amendment to an affidavit for a continuance by defendant, and the granting of a continuance thereon, are within the discretion of the trial court.

10. Crim. Code Ky. § 282, provides that bills of exception in criminal cases shall be prepared, settled, and signed as in civil cases. Civil Code Ky. § 337, subsecs. 3, 5, provide that if the bill of exceptions be approved by the judge he shall sign it, and, if not approved, he shall correct it; that one objecting to the judge's corrections may file his exceptions as written, if attested by the affidavits of two by-standers; and that where a trial judge does not preside when a motion for new trial is overruled the bill of exceptions may be certified by by-standers. *Held*, that where a trial judge refuses to sign a bill of exceptions it may be certified by by-standers.

Appeal from circuit court, Taylor county;  
W. E. RUSSELL, Judge.

"To be officially reported."

Thomas J. Hourigan was convicted of murder, and was granted a new trial. The commonwealth appeals. Instruction No. 2, re-



ferred to in the opinion, was as follows: "If the jury believes from the evidence, to the exclusion of a reasonable doubt, the accused, at the time, place, in the manner, and with the weapon stated in instruction No. 1, did unlawfully and feloniously shoot and kill Samuel B. Hays, not in his necessary or apparently necessary self-defense, from death or great bodily harm, but without malice, in sudden heat and passion, then the jury should find the accused guilty of voluntary manslaughter, and fix his punishment at confinement in the penitentiary for a term not less than two nor more than twenty-one years,"—the court striking out the following: "But mere words, however opprobrious or insulting, are not sufficient provocation to reduce a killing from murder to manslaughter." Instruction No. 3, asked by the commonwealth, was as follows: "If the jury believe from the evidence that defendant, at the time he killed Sam B. Hays, if he did kill him, had reasonable grounds to believe, and did believe, that he was then and there in danger of death, or great bodily harm, at the hands of the deceased, and that he had no other apparently safe means of escape, they should acquit, unless, by his wrongful act, defendant made the harm or danger to himself necessary or excusable on the part of deceased; in which event they cannot acquit on the ground of self-defense." Instruction marked "B" was as follows: "The court instructs the jury that it is admitted by the commonwealth as true that within twelve months before the killing of Sam Hays, said Hays, at Riley's Station, in Martin county, Ky., threw defendant's saddle-pockets out of Hays' store, and cursed and abused defendant."

*Finley Shuck*, for the Commonwealth.  
*Avritt & Russell*, for appellee.

**HOLT, J.** At the June term, 1889, of the Taylor circuit court, the appellee, Thomas J. Hourigan, was convicted of murder for killing of his brother-in-law, Samuel B. Hays, and his punishment fixed by the jury at confinement in the penitentiary for life. A new trial was granted. During the progress of the trial the commonwealth excepted to various decisions of the court, and now, although the case has not been finally disposed of, it questions by appeal their correctness, in order that there may be, in the language of the Criminal Code, a "correct and uniform administration of the criminal law." Its right to appeal, although there has been no final disposition of the case, was declared in the case of *Com. v. Matthews*, ante, 333, (decided by this court on November 14, 1889.) It is now urged in its behalf that no error was committed upon its part upon the trial of this case; that a new trial was therefore improperly granted; and that this court should reverse the order granting it, and by mandate order a judgment to be entered in conformity to the verdict. Where the only question presented is whether a new trial should be granted, the law has wisely left it to the judgment of the

trial court. It witnesses the entire conduct of the trial. It has every opportunity to know whether it has been a fair one, and conducive to justice, both to the public and the individual. Section 281 of our Criminal Code has therefore provided that its decision upon a motion for a new trial shall not be subject to exception.

We will now inquire as to the correctness of the decisions of the court of which the state complains. After it had overruled a motion by the appellee to continue the case, based upon his written affidavit, it allowed an amended affidavit to be filed, and then held that it would continue the case, unless the commonwealth's attorney admitted the truth of the matters stated in the affidavits. This was a matter in the discretion of the court. If an iron rule were established, forbidding the amendment under any and all circumstances of an affidavit for a continuance, it would be devoid of reason, and would often result in injustice.

It is urged upon the part of the appellee that no question arising during the trial can be considered by this court, because, as is claimed, there is no bill of exceptions. The judge below, acting upon the idea, doubtless, that there could be no appeal by the commonwealth, in the absence of a final judgment, refused to sign, or even consider, any bill of exceptions. One was tendered in open court upon the part of the state, and the court asked to sign it, and then to order it to be filed. If satisfactory to him, the judge should have signed it. If not, he should have corrected it, or had it done, and then signed it. Upon its refusal, upon the ground that no bill of exceptions was proper in the case, the affidavits of several by-standers were attached to the bill, stating, in substance, that it contained a true version of what took place upon the trial. All this is shown by the record before us. Section 282 of the Criminal Code provides that the bill of exceptions in a criminal cause shall be prepared, settled, and signed as in civil cases; and subsections 3, 5, § 337, Civil Code, are: "(3) If the bill of exceptions be approved by the judge, he shall sign it, and it shall be filed as part of the record, but not spread at large on the order book. If not approved, he shall correct it, or suggest the correction to be made, and sign it. A party objecting to the judge's correction of an exception, which purports to state the evidence, may, within five days after the bill is signed, file the exception as written by him, if its truth be attested by the affidavits of two by-standers." "(5) If the judge who presided at the trial do not preside when a motion for a new trial is overruled, the bill of exceptions may be certified by by-standers." Prior to the adoption of the Code of Practice, if a judge refused to sign any bill, it could be certified by by-standers. *Kennedy v. Trustees*, 4 J. J. Marsh, 543; *Arnold v. Leathers*, 2 Dana, 287. If this be not still the law, then in case of a refusal a party would be remediless. It has been held by this court

that where a judge certifies by bill his own rulings, and the exceptions thereto, it cannot be controverted by affidavits, although what he may certify as the evidence in the case may be so controverted when in the form of a bill of evidence. *Garrott v. Ratliff*, 83 Ky. 384. In this case, however, he refused to sign any bill. It was held in *Hayden v. Ortkelss*, 83 Ky. 396, that where further time is given to prepare and present a bill, and the absence, by reason of death or otherwise, of the judge who presided at the trial prevents its being signed by him within the allotted time, that it may be certified by bystanders; and, in our opinion, a fair construction of all the Code provisions relating to this subject, considering also the rule existing prior to their adoption, authorizes such a course in a case where the judge refuses to sign any bill whatever.

Upon the trial the court erroneously refused to let a witness use, or even refer to, a diagram of the place where the killing occurred, although the witness had by actual observation and measurement verified it. Such a course is often necessary to a correct understanding of the case by the jury.

A witness was introduced by the state, and upon his main examination testified to the circumstances of the killing as he saw them. Upon cross-examination, he was made to say that he did not at a certain time and place say that he would make it hot for the father of the deceased when he came over to Campbellsville; and that a month or two before the killing, or at any time, he did not say that he had heard the deceased say he was going to put on a false face, and go to Tom Hourigan's, and beat him nearly to death, if he did not kill him. Subsequently the accused was permitted, by way of contradiction, to call a party, and prove that the witness did make such statements. This should not have been permitted. The matter to which the contradiction related was drawn out by the cross-examination by the accused of the state's witness. The statement was not competent as substantive testimony. It was *res inter alios*. The credit of a witness may, of course, be impeached by proof that he has made statements out of court contrary to those made in court, and considerable latitude is allowed in this direction; but if they relate to a collateral fact, not relevant to the issue, this cannot be done. The question is whether the matter is altogether irrelevant. Clearly, what the witness may have said to the third party was so in this instance. The witness made no voluntary statement as to it, nor did the main examination relate to it in the least. He was asked as to it for the sole purpose of contradiction; and a witness cannot be cross-examined as to a distinct, collateral matter for such a purpose. *Crittenden v. Com.*, 82 Ky. 164; 1 Greenl. Ev. § 462; 2 Phil. Ev. 900.

The conversation between Miss Yowell and the accused, as detailed by the latter, was subsequently excluded by the court; and it

therefore properly refused to let her testify as to it, or whether it ever occurred.

The appellee also testified that about a year before the killing the deceased applied to him as a physician, to prescribe for a young lady, the deceased telling him, in substance, at the time that, having seduced her, he had given her medicine, from which she was suffering; and that he wanted the accused to relieve her; and that upon his refusing to do so the deceased became very angry at him,—threatened to whip him, and said he would make him sorry for it. The commonwealth, by way of contradiction, thereafter offered to prove by the young lady, her mother, and stepfather, that at the time indicated there was nothing the matter with her. It is true, their testimony would not have shown conclusively that the conversation, as detailed by the accused, never took place, but it would have so tended; and, while but an indirect contradiction, yet it was competent, to enable the jury to judge of the probability of its ever having taken place.

The testimony offered by the commonwealth as to the statements of the accused to various parties as to why his wife, who was a sister of the deceased, had left him, was not competent. It had not sufficient bearing upon the issue to authorize its introduction, nor did it go far enough, by way of contradiction of anything to which the accused had testified, to make it competent. If the cause of the difference between the accused and his wife was proper for investigation upon this trial, it would have been endless.

Witnesses were called by the state and asked as to the general character of the accused for morality and truthfulness at the time he testified in the case. This was proper. The inquiry should have related to that time, and the court incorrectly held that it must relate to the time of the killing. *Mitchell v. Com.*, 78 Ky. 219.

The court properly modified instruction No. 2, relating to manslaughter, by striking out the words, "but mere words, however opprobrious or insulting, are not sufficient provocation to reduce a killing from murder to manslaughter."

Instruction No. 8, asked by the commonwealth, relative to self-defense, should have been given. If the accused, by his own wrongful act towards the deceased, had made any danger to himself necessary or excusable upon the part of the deceased, then the accused had no right to present such danger as an excuse for taking the life of the deceased. Instruction B, asked by the defense, was improperly given. It relates merely to a matter of evidence which was already before the jury, and undue prominence should not have been thus given to it.

Save as indicated, the jury appear to have been properly instructed, and this opinion is ordered to be certified to the lower court as the law of the case.

## POWERS v. REYNOLDS.

(Court of Appeals of Kentucky. Dec. 5, 1889.)

## DISQUALIFICATION OF JUDGE—TRANSFER.

1. Where a case is improperly transferred, under Carroll's Code Ky. § 886, providing for a transfer from the vice-chancellor's court to the Jefferson common pleas, upon an affidavit that the vice-chancellor will not try the case impartially, the fact that the party against whose objection the transfer was made has had an impartial trial does not cure the error.

2. Objection to the transfer of a case is properly made in the court where the suit was instituted, and a motion to remand, in the court to which the case is sent, is unnecessary, as the exception to the error reserved at the time of the transfer follows the record to the court of appeals.

On application for rehearing. For former report, see ante, 298.

"To be officially reported."

*Matt O'Doherty* and *R. T. Colston*, for appellant. *C. B. Seymour* and *Barnett, Miller & Barnett*, for appellee.

PRYOR, J. The argument embodied in the petition for a rehearing is that appellant obtained a fair and impartial trial in the court to which the case was transferred, and for that reason he is not prejudiced by the ruling of the court in which the transfer was originally made. If the fact is that the substantial rights of a party have not been affected because the trial was an impartial one, then it must follow that, if an objection had been made in the court to which the case was remanded that the transfer was contrary to law, it could not have availed, for the same reason. We think, where the case is instituted in the proper court, and a transfer made to another court, under this section of the statute, without legal cause, over the objection of the party opposing the transfer, that it does affect his substantial rights, and this court will not inquire whether the trial was properly conducted and determined in the court to which the case was carried.

The only question is, should the objection and exception, in a case like this, be made in the court transferring the case, or in the court to which the case is sent? The objection was made where the suit was instituted, and a decision adverse to the plaintiff, (now appellant;) and if the same objection had been raised in the court trying the case, and that court had held that the transfer was improper, then the plaintiff would have had conflicting opinions from two courts of equal dignity and jurisdiction, and denied a trial by both, when the litigant was certainly entitled to be heard in the one court or the other. The objection had been made in the court where the action was instituted, and became a part of the record when transferred from the proper jurisdiction. The court trying the case, as well as the parties and counsel, had notice of the objection; and it was not necessary to make a motion to remand when it was the duty of the court to try the case, subject to the exception that had already been taken to the proceeding. That cases re-

lating to a change of venue, and heretofore decided, bear some analogy to this class of cases is conceded; but those were cases where the party applying for a change of venue had failed to file the record within the time required by the statute, in the court to which the transfer was made, or for causes that did not arise or exist in the court from which the transfer was made, and therefore the necessity of making a motion to remand.

There can be no doubt, as a general rule, where a trial has been had by a court having jurisdiction of the subject-matter, the parties appearing in the conduct of the trial and making no objection, that it is too late to raise the question after verdict, or in this court, for the first time. In this case, however, the appellant is brought into court against his consent, upon an affidavit that has been adjudged to be sufficient by one judge, and to require the judge presiding in the court in which the trial was had to pass on the same facts would produce a legal battle-door between the two upon an issue that when decided would not be final, and leave the appellant in court without the power to compel either tribunal to hear his case. In the case of *Vinsen v. Lockard*, 7 Bush, 458, no objection was made to the transfer from the Lawrence court to the Greenup circuit, and this court held that, as no objection was made in the latter court to the venue, it was too late to make the question in this court. This statute being considered is one peculiar in its character, and should be so construed with reference to its practical effect as will insure to parties litigant a trial in the one venue or the other. The judge may, for personal reasons not disclosed, decline to try the case, and a change to some other tribunal is made necessary; and in such a case it is not proper for the court trying the case to inquire into the reasons influencing the judge to decline presiding at the trial. Where, however, the record shows, by an orderspread upon the order book or by a bill of exceptions, that the judge leaves the bench because of an affidavit making objections to his presiding, the affidavit being clearly defective, it is error, when exceptions are reserved, to transfer the case; and, to prevent conflicting opinions, arising on purely legal questions, that are not final between courts of similar jurisdiction, the court to whom the case is transferred should try the case, and, exceptions being reserved at the time the transfer is made, the error will follow the record to this court. Any other construction of this provision of the statute would, in effect, nullify it, and often result in denying a trial, leaving the parties without a remedy. While interlocutory orders and rulings may ordinarily be disregarded at any time during trial, in this character of case the ruling should be regarded as made by the same court; and, therefore, the exceptions being reserved in the court where the action was instituted, the error will be available in this court. Petition overruled.

**PADUCAH LUMBER CO. v. PADUCAH WATER SUPPLY CO.**

(Court of Appeals of Kentucky. Dec. 5, 1889.)

**WATER COMPANIES—BREACH OF CONTRACT—PARTIES.**

1. Where the contract of a water company with a city declares that it is made for the benefit of the inhabitants, and, *inter alia*, for the protection of private property against destruction by fire, the owner of property which is taxed for water-rent, and is destroyed by fire through the company's failure to supply a sufficient quantity of water to extinguish the same, may, in his own name, sue the company on its contract with the city, under Civil Code Ky. § 18, which requires that every action must be prosecuted in the name of the real party in interest.

2. As the contract contemplates a supply of water sufficient to usually extinguish fire before serious injury ensues, and as the only exemption from liability contained therein is for damages occasioned in the exercise of due diligence, while repairing or extending the works on notice, the necessary inference is that the company would be liable for damages resulting from its failure to so furnish water sufficient to extinguish fires, in the absence of such excuse.

3. The provisions of the contract authorizing the city to rescind it for failure of the company to furnish an adequate supply for five months, and that the rents should cease in case the water supply was cut off more than five days, do not release the company from liability for its non-performance while the contract is in force.

4. The destruction of plaintiff's property by fire is such a proximate result of the company's negligence in failing to supply a sufficient quantity of water as entitles him to a recovery.

Appeal from court of common pleas, McCracken county.

"To be officially reported."

*Husbands & Husbands* and *Gilbert & Reed*, for appellant. *Burnet & Dallam*, for appellee.

LEWIS, C. J. The buildings, machinery, and other property of appellant, a corporation engaged in the lumber and planing-mill business in the city of Paducah, having been, in 1887, destroyed by fire, it instituted this action to recover damages therefor of appellee, also a corporation; and the city of Paducah, having, as alleged, refused to join as plaintiff, was made likewise defendant to the action, though no recovery against it is sought.

In the petition it is stated, in substance, that in consideration of the grant by the city of Paducah to appellee, as assignee of one Jones, of the franchise and right to construct, maintain, and operate for the term of 40 years water-works, including the laying of pipes and erection of hydrants in all the streets, avenues, and public grounds of the city, and agreement to pay \$40 annual rent for each of 150 hydrants, besides the privilege given to charge and collect of the inhabitants limited rates for private use of water, appellee agreed to erect upon a platform 50 feet high a stand-pipe, 22 feet in diameter, and 175 feet high, with which was to be connected the conducting pipes and hydrants mentioned, and also two pumping engines, each having capacity to force into the

stand-pipe 2,000,000 gallons of water every 24 hours, and to keep a head of water sufficient to throw from any eight of the hydrants simultaneously, and for five consecutive hours at any one period of time, streams through 50 feet of hose 100 feet high, all which works were completed and put in operation in 1885; that appellee also agreed to have in the stand-pipe and conducting pipes at all times a supply of water sufficient to afford a head or pressure requisite for all domestic, manufacturing, and fire-protection purposes, for all the inhabitants and property of the city, and to increase the number and length of hydrants and pipes when necessary to meet demands of the city and citizens; that said contract was made with appellee by the city of Paducah for the use and benefit of all its property owners and inhabitants, and appellant's property was, from 1885 until destroyed by fire, in common with that of others, taxed at its full value to raise money with which to pay said hydrant rents.

It is further stated that, under a contract directly between them, there had been erected, previous to the fire, on the same lot where the burned property was situated, two hydrants, one within 30, and the other 70, feet of the place where the fire originated, and connected by pipes with the water-main, to be used by appellant to extinguish fires, and for steam purpose, for which it had been paying rent to appellee, and that in consideration thereof appellee had agreed to furnish and have ready at all times water sufficient to throw streams through hose kept by appellant in proper condition, to be connected with the two hydrants, the height provided for in said contract between appellee and the city of Paducah; that the fire originated in a wood building situated on the lot of appellant, and connected with its other property, though occupied at the time by another, but said fire occurred without any fault or negligence of appellant or its servants, and it could and would have been extinguished before doing damage to the property of appellant if there had been the stipulated quantity of water in the stand-pipe and conducting pipes, or the pumping machinery had been in readiness to operate, and the engineer and servants of appellee had been present to set it in motion; for immediately after the fire commenced, and before it had done any damage, or extended to the premises then occupied by appellant, hose pipes in good order were attached to the two private hydrants, and carried to within five or six feet of the fire, for the purpose of applying water to it. There were besides four or five double nozzle fire hydrants, one within 12 and two within 60 feet of the property burned, and all near enough to extinguish fire on any part of said lot; and experienced firemen employed by the city of Paducah were present on the ground within 10 minutes or less after the fire started, and had hose, suitable and in good condition, attached to the hydrants. But that, notwithstanding it had since 1885 been receiving

from the city of Paducah the agreed hydrant rent, and from numerous inhabitants thereof, appellant included, large sums of money for water furnished to them, appellee, in violation of said contract, and without excuse, refused and neglected to have, when said fire commenced, the stipulated quantity of water in the stand-pipe, and for more than one hour after the alarm was given, and the city firemen had arrived and attached hose to the hydrants, neglected to start the pumping machinery, or to have its engineer or other servant present for the purpose, so that, although when water was in the stand-pipe at the height of 75 feet streams could be forced through hose attached to the two private hydrants 75 feet high, and higher when pressure was applied by the pumping machinery, the streams passing through the hose when applied at the incipency of the fire did not reach 10 feet, and were so weak as to be utterly useless, nor was there sufficient head of water to force a stream through any kind or length of hose as much as 25 feet, by reason of which refusal and neglect appellant's property was burned and destroyed.

The grounds of demurrer are, in substance, that the facts stated in the petition and amendments do not constitute a cause of action in favor of the plaintiff against the defendant, which we will treat as involving two questions: (1) Whether there is vested in the plaintiff (appellant) such legal interest in the contract between the city of Paducah and the defendant (appellee) as to authorize it in any event to prosecute an action in its own name, and for its own benefit. (2) Whether appellee can be legally made liable in damages for the alleged breach of contract.

Clearly appellant had a right to sue for a breach of the distinct contract set out in the petition, by which, in consideration of rent paid for use of the two hydrants on its own lot, water was agreed to be furnished directly to it by appellee. But we will consider the two questions first stated as they arise on the contract between appellee and the city of Paducah. Authorities in some of the states hold the general rule to be that the plaintiff in an action on contract must be a person from whom the consideration actually moved, and that a stranger to the consideration cannot sue on a contract. But, we think, if there be in fact consideration for a promise or engagement made for the benefit of the person who sues, it is not essential for it to have passed directly from him to the person sued. It is not, however, important whether this case either comes within what is elsewhere laid down as a general rule, or is an allowable exception to it; for this court has held the doctrine well settled that a party for whose benefit a contract is evidently made may sue thereon in his own name, though the engagement be not directly to or with him, (*Smith v. Lewis*, 3 B. Mon. 229; *Allen v. Thomas*, 3 Metc. (Ky.) 198;) which practice is not only in accordance with the rule found

in Chitty on Pleading, but seems to be required by section 18, Civil Code, that in express terms provides every action must be prosecuted in the name of the real party in interest, except that under section 21 a fiduciary or trustee may bring an action without joining with him the person for whose benefit it is prosecuted. It thus follows that if the city of Paducah had power to make the contract as well for the personal benefit of its several inhabitants as for purely municipal purposes, and did so make it, appellant, being the real party in interest because owner of the property destroyed, has the right to prosecute the action in its own name, if maintainable at all, and the city of Paducah, though made so, is not even a necessary party, because whatever interest it may have, or injury it may have sustained, is entirely distinct, if not remote. Conceding, as must be done, existence of the alleged power of the city of Paducah under its charter to enter into a contract with another for construction and operation of water-works, the right and also duty attached to make it for the personal benefit of inhabitants within its corporate limits; for supply of water in a city for domestic and manufacturing purposes, and as safeguard against injury to or destruction of private property by fire, is always in such cases the main inducement, the need of the municipal corporation itself for water supply being comparatively little. Besides, it is manifest the principal source of expected profit to appellee was the money to be collected by imposition of the special taxation, and for private use of water with which to pay for service in supplying water for use of the inhabitants, and protection of their property from effects of fire; and it being alleged in the petition, and also, in effect, provided in the ordinance of the city council that contains the terms and conditions of the contract, that it was made for the benefit of the inhabitants, it seems to us that, if appellee can be made answerable in damages at all, it is liable to appellant upon the facts stated in the petition.

It is a rule co-existent with contracts that a party who has performed his part is entitled to reparation in some form for breach to his injury by the other. In equity he may sue for specific performance or rescission, neither of which is an appropriate or adequate remedy when the subject-matter of a contract is destroyed, and no longer exists; but at the common law, when an actual injury to one of the parties has been caused by refusal or neglect of the other to do what he agreed to do, and received consideration for doing, damages commensurate with the loss thereby sustained may be recovered, and such right of recovery cannot be regarded waived or relinquished unless clearly so provided in the contract.

It is not provided in the ordinance referred to, nor can it be fairly inferred, that appellee was not to answer in damages for its failure or refusal to perform its contract. The provision on that subject is that appellee shall

have the right to shut off water temporarily for the purpose of making repairs or extension of the works, and shall not be liable for any damages occasioned by such temporary suspension, provided notice is given of the intention to shut off the water, and such repairs or extension are made with due diligence and without delay; but that, if at any time the supply is shut off from any cause for more than five days, rent for the fire hydrants shall cease during the period of such suspension. It is further provided that, if appellee fail for five months to furnish an adequate supply of water for fire or other public or private purposes, the contract is to be void, and the franchise forfeited. As, under the contract, exemption from liability in damages for shutting off or suspending the water supply exists only when done for the special and temporary purpose of making repairs or extension of the works, and not then unless notice is given, and such repairs and extension are made with due diligence, and without delay, the necessary inference is that appellee was intended to be, and, according to a fair interpretation must be, regarded liable in the absence of such excuse. For, manifestly, neither the provision for rent of the fire hydrants to cease in case of a longer than five days' suspension of the water supply for the particular purpose mentioned, nor the reserved right of the city of Paducah to rescind the contract for the cause stated, was intended by the parties, or can be properly construed, to release appellee from liability, or deprive the city of Paducah or its inhabitants of the remedy for non-performance of the contract while it is in force.

The rule laid down in the leading case of *Hadley v. Baxendale*, 9 Exch. 353, is that, "where two parties have made a contract which one of them has broken, the damages which the other ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." This rule, which has been generally adopted and approved in the United States, is applicable and useful in determining the question of legal liability, as well as in fixing the measure of damages in case of breach of contract; for "parties, when they enter into contracts, may well be presumed to contemplate the ordinary and natural incidents and consequences of performance or non-performance." 1 Suth. Dam. 77.

It is, however, argued that the damages sustained by appellant were not the natural and proximate consequences of the neglect complained of, and therefore no recovery can be had; and the case of *Patch v. City of Covington*, 17 B. Mon. 722, is cited to sustain the position. There the action was to recover in damages the value of a house destroyed by

fire in consequence of failure on the part of the city of Covington to keep its public cisterns in repair, and to provide the fire company with hooks, ladders, and other necessary apparatus. The fire originated in a building adjacent to that of the plaintiff. The firemen had reached the house before the flames were communicated to it, and, as alleged, would have been able to save it but for neglect of the city to keep sufficient water in the cistern. But the judgment dismissing the action was affirmed, on the ground that the cause of plaintiff's loss "was wholly disconnected from, and independent of, the city, or its acts or omissions." That, unlike this, was an action against a municipal corporation for failure to perform what at most was an implied public duty, which, upon other than the ground just mentioned, courts in several states have held cannot be maintained. But whether the conclusion there reached was or not proper, the reason for it was not entirely pertinent; for while, in one sense, the fire, which in that as in this case originated in an adjacent building, was the proximate cause of the house being destroyed, the complaint was not that the defendant was in any way responsible for the occurrence of it, but failed to perform what was assumed to be its contract duty to furnish water in cisterns with which to extinguish it, the immediate consequence of which failure was, as alleged, loss of the building. There is a clear distinction between the occurrence of a fire, the origin of which is often unknown, and for which generally there attaches no legal liability to any person, and the extinguishment of it, which generally can be accomplished by application of water, that a party may, by contract, undertake and bind himself to supply in the proper manner and time. It does not, therefore, make any difference in this case how nor where the fire originated, provided appellant did not cause it; because the duty of appellee was not to prevent occurrence of it, but to keep the stipulated quantity of water in readiness to be applied to put it out. Water-works, however costly and skillfully constructed and operated, are not potent enough to extinguish, with absolute certainty, and at all events, every fire occurring in a city before destruction of, or serious injury to, the property ignited, nor are they ever made with such end in view. But it is entirely practicable by that means to supply water in such quantity, and having such head or pressure, as to usually extinguish a fire before serious damage is done, when promptly and efficiently used; and parties to a contract like this must be presumed to have contemplated and agreed that such, in the natural order of things, would be the probable effect of a performance of it, else there would have been no rational motive nor adequate consideration for entering into it. But the degree of probability in every such case as this must, of course, depend upon the stage of the fire when water is applied, upon the efficiency of the firemen, and all other attendant circumstances and

agencies favorable or adverse to arresting or extinguishing fires.

It seems, if the contract before us is not to be treated as meaningless and totally ineffectual for every purpose, the parties to it must be regarded as having contemplated and assented to the consequences of non-performance, as well as the profit and advantage of performance, and consequently appellee is liable in this case for such damages as its failure or refusal to perform may have caused to appellant. The inquiry therefore is, whether, considering the purpose, character, and capacity of the water-works, and all the attending circumstances and agencies, the fire which destroyed appellant's property could and would have been prevented or extinguished before doing damage if appellee had performed its contract; and as the facts alleged in the petition, and amended petition, constitute a *prima facie* cause of action, the lower court erred in sustaining the demurrer. Wherefore the judgment is reversed and remanded, with directions to overrule the demurrer, and for further proceedings consistent with this opinion.

DUNCAN *et al.* v. OWENSBORO WATER CO.

(Court of Appeals of Kentucky. Dec. 10, 1889.)

Appeal from circuit court, Daviess county.

"Not to be officially reported."

G. W. Williams & Son, for appellants. Sweeney, Ellis & Sweeney, for appellee.

BENNETT, J. The appellee, as an incorporated company, in consideration of the city of Owensboro giving the appellee the use of its streets, etc., for the purpose of laying its pipes, etc., and paying to the appellee so much each in the way of rent for the use of the hydrants to be thereafter erected by the appellee, and the exemption of the appellee's property from taxation for the space of two years, etc., agreed "to operate in the city of Owensboro water-works for the supply of said city and the inhabitants thereof with water for public and private purposes," and for these purposes pipes and hydrants were to be established at proper and convenient distances, and with certain capacities, and "at all times be ready (unavoidable accidents excepted) to supply a sufficient quantity of water for public and private uses, to keep all hydrants rented of it by the city in good repair, and ready for instant use in extinguishing fire by the fire department of said city, and to furnish water direct from the pumps when an alarm is given to the party in charge of the pumping machinery." The petition alleges that the appellant's merchandise, etc., were destroyed by fire in the city of Owensboro by reason of the appellee's negligent failure to furnish water for instant use by the fire department when the fire-alarm was given to the party in charge of the appellee's pumping machinery. The petition also sets out the ability of the fire department, and its readiness and willingness, to extinguish said fire, had the appellee furnished the water according to its undertaking. The petition also sets out the fact that the reliance on the undertaking of the appellee caused the making of no other arrangement for the extinguishment of fires. A demurrer to the petition was sustained, and, the appellant declining to amend, the petition was dismissed, and he has appealed to this court.

The appellee insists—*First*. That there is no such privity of contract between the appellant Duncan and the appellee as to enable the appellant to maintain this action against the appellee. *Second*. The contract, by its terms, did not contemplate appellee's liability for the loss of individual property by

fire. *Third*. The loss of the appellant's property by fire was not the proximate cause of the failure of the appellee to furnish water, etc. The well-considered case of Lumber Co. v. Water-Supply Co., ante, 554, (decided last week; Chief Justice Lewis delivering the opinion,) settles the foregoing questions against the appellee. It is therein settled—*First*. That the agreement of the water company in that case was for the benefit of the property owner in the city, as well as for the benefit of the city proper; and, as the consideration for the contract was paid by the property owner in the way of taxes, he had the right of action against the water company for the injury sustained by him by reason of the neglect of the company to furnish water for the extinguishment of the fire, by which the owner's property was destroyed. *Second*. That by the terms of the agreement the water company agreed to furnish the fire department a sufficient quantity of water, and of certain pressure, with which to extinguish fires occurring in the city; the calculation being that the water thus to be furnished would be sufficient, if used in time, to extinguish any fire that might occur; and, this being the purpose of the agreement, it was certainly contemplated that the water company should be responsible to the injured party by reason of any neglect of duty in this behalf, to the extent that he might be injured thereby. *Third*. That the burning of the owner's property by reason of the water company's neglect to furnish the water, as agreed, was the proximate cause of the fire, and entitled the owner to recover its value from the water company. *Fourth*. The fact as to whether such negligence existed, and the owner's property was consumed by reason thereof, should be determined by jury. *Fifth*. The fact that the water company would be subjected to fine by indictment for a willful or simple neglect of duty did not exonerate it from civil liability to the injured party. The case supra, in its essential features, is similar to this, consequently the principles therein announced will control this case.

The judgment is reversed, with directions for further proceedings consistent with this opinion.

VAUGHAN v. MCGANNON *et al.*

(Supreme Court of Arkansas. Nov. 16, 1889.)

PARTNERSHIP—PLEADING AND PROOF.

Plaintiff, to commence his action, filed a due-bill signed by defendants. One of defendants made default, and the other, in his own behalf, answered, denying the execution of the due-bill by him, and denying that any one had authority to sign it for him. Plaintiff replied that defendants were partners, and the due-bill was given by one of them for a partnership debt. Defendant by amendment struck out all of his answer except the denial. Held, that plaintiff could introduce evidence of the partnership without amending his pleadings.

Appeal from circuit court, Washington county; J. W. PITTMAN, Judge.

This is an action by George W. Vaughan to recover the amount of a due-bill from P. McGannon and W. J. Sanders. The plaintiff, to commence the action, filed the due-bill signed by defendants. Sanders made default. McGannon denied executing the due-bill, and in writing answered further that it was given for cattle; setting out the due-bill in full, and averring that "he did not buy the cattle of the value of \$131.65 from plaintiff, or authorize any one to buy them for him," etc.; that "he did not negotiate with plaintiff for the cattle." Plaintiff replied to this answer, and averred that defendants were partners in buying and shipping live-stock; that these cattle were bought by Sanders as a member of the firm, in the course of their



business; and that defendant McGannon ratified the course of the firm's dealings by Sanders, by making payment of such due-bills, etc. The court afterwards allowed defendant McGannon, over plaintiff's objections, to amend his answer by striking out all that related to the purchasing of the cattle from the plaintiff, and to the copartnership between defendants, etc. There was judgment for defendants, from which plaintiff appeals.

*L. Gregg*, for appellant.

PER CURIAM. If Sanders and McGannon were partners, and the due-bill in question was executed by one of them in the name of the partnership business, as evidence of a partnership debt, it was the liability of both. No amendment of the plaintiff's pleadings was necessary to authorize proof of the partnership. The court erred in excluding the testimony relating to that fact. Reverse and remand.

**DAVIS et al. v. READ et al.**

(Supreme Court of Arkansas. Nov. 16, 1889.)

CONTINUANCE—BURDEN OF PROOF.

1. The refusal of a court to postpone the trial of a cause is a matter in its discretion, and the appellate court will not interfere, except where abuse is shown.

2. Where defendants admit the execution of the notes sued on, and set up affirmative matters to defeat a recovery, the burden of proof as to these matters is on them.

Appeal from Crittenden chancery court; J. E. RIDDICK, Chancellor.

This suit was brought at law in the Crittenden county circuit court, on December 21, 1885, by S. P. Read and others, as executors of H. B. Howell, deceased, against Reese Davis and S. K. Davis, on a promissory note for \$923.29, with 6 per cent. interest thereon from the 1st day of November, 1885, which was given as collateral security to a note made by Reese Davis individually on the 3d day of April, 1882, and payable on the 1st day of November, 1885, for \$759.91, all of which appears in the complaint. Plaintiffs filed copies of the original note for \$759.91, and the collateral note for \$923.29, and a copy of the letters testamentary issued to S. P. Read and others, as executors of H. B. Howell, by the probate court of Shelby county, Tenn. The defendants answered the complaint, admitting the execution of the notes, and setting up affirmative matters to defeat plaintiffs' recovery. Defendants also demurred to the complaint, and moved that the cause be transferred to the equity docket. The answer, demurrer, and motion to transfer to the equity docket appear, by indorsement thereon, to have been filed January 19, 1886. The record entry recited the filing of the answer July 27, 1887. The court sustained the motion of defendants, and transferred the cause to the equity docket on July 20, 1887; and on July 27, 1887, one of the days of the same term, the cause was heard

against the protest of defendants. There was judgment for plaintiffs, and defendants appeal.

*E. F. Adams*, for appellants. *W. G. Weatherford*, for appellees.

PER CURIAM. The complaint was filed December 21, 1885. The answer, demurrer, and motion to transfer to equity docket appear by indorsement thereon to have been filed January 19, 1886. The record entry recited the filing of the answer only, July 27, 1887. The trial was had July 27, 1887. The refusal of the court to postpone the trial was the exercise of a discretion with which this court will not interfere, except where abuse is shown. The answer admitted the execution of the notes sued on, and set up affirmative matter to defeat a recovery. The burden of proof was on defendants as to these. The right of plaintiffs to bring the action as executors of Howell is not denied by the answer. Affirm.

**DAVIE et al. v. DAVIE.**

(Supreme Court of Arkansas. Nov. 23, 1889.)

APPEALABLE DECREES.

1. A decree adjudicating the parties' proportionate interests in land, and directing a reference to a master, who shall report at a subsequent term, when the court will determine what amount shall be charged as a lien on the several interests, and whether there shall be a sale to satisfy the liens, is not a final decree from which an appeal can be taken.<sup>1</sup>

2. *Manst. Dig. Ark. § 1265*, granting an appeal from a final order, and giving the appellate court authority "upon such appeal to review any intermediate order," does not give a direct appeal from an interlocutory order.

Appeal from circuit court, White county; M. T. SANDERS, Judge.

Ejectment by E. M. Davie and others against J. M. Davie. The case was transferred to equity, and plaintiffs appeal from the decree.

*W. R. Coody*, for appellant.

COCKRILL, C. J. The right of appeal is limited in general to final judgments, and does not extend to interlocutory orders. *Ex parte Railway Co.*, 39 Ark. 82. The object of the limitation is to present the whole cause here for determination in a single appeal, and thus prevent the unnecessary expense and delay of repeated appeals. A judgment in equity is understood ordinarily to be interlocutory when inquiry as to matter of law or fact is directed preparatory to a final adjudication of the rights of the parties. *Beebe v. Russell*, 19 How. 283. But "where the decree decides the right to the property in contest, and directs it to be delivered up, or directs it to be sold, and the complainant is entitled to have it carried into immediate execution, the decree must be regarded as final

<sup>1</sup> On the general subject of what orders and decrees are appealable, see *Jones v. Trumbo*, (S. C.) 6 S. E. Rep. 887, and note; *Mitchell v. Powers*, (Or.) 19 Pac. Rep. 647, and note.

to that extent, although it may be necessary, by a further decree, to adjust the account between the parties." *Forgay v. Conrad*, 6 How. 206; *Thomson v. Dean*, 7 Wall. 342. The appeal is allowed in such cases to prevent irreparable injury pending the suit. It is allowed, also, where a distinct and severable branch of the cause is finally determined, although the suit is not ended. *State v. Shall*, 23 Ark. 601; *Nichol v. Dunn*, 25 Ark. 129. But the unnecessary splitting of causes by courts of chancery creates confusion and difficulty in practice, and is condemned. *Tucker v. Yell*, 25 Ark. 431; *Hicks v. Hogan*, 36 Ark. 298; *Drake v. Thyng*, 37 Ark. 228; *Forgay v. Conrad*, supra. In this case, while the decree takes the form of a final order in adjudicating the parties' proportionate interests in the land, it is apparent that the court has not fully adjudicated that branch of the cause. The relative interests of the parties in the land has been ascertained and determined, but the cause is retained, with a reference to a master, who is directed to report at a subsequent term, and the court is yet to determine, upon the coming in of the report, what amount shall be charged as a lien upon the several interests, and whether there shall be a sale of some of the interests to satisfy the same. The decree does not direct its execution, but looks to further judicial action before that event. The plaintiffs can suffer no injury by awaiting the termination of the litigation. The first subdivision of section 1265,<sup>1</sup> Mansf. Dig., does not undertake to grant an appeal from an interlocutory order, but provides only, what was the law without it, that such an order can be reviewed on appeal from the final judgment. The appeal is premature. Cases supra; *Cohn v. Hamlet*, 44 Ark. 344; *Railway Co. v. Simmons*, 123 U. S. 52, 8 Sup. Ct. Rep. 58; *Gray v. Palmer*, 9 Cal. 632. Appeal dismissed.

#### BING v. STATE.

(Supreme Court of Arkansas. Nov. 30, 1889.)

INSTRUCTIONS—CREDIBILITY OF WITNESS—PROVINCE OF JURY.

On a trial for selling liquor to a minor, where the latter is a witness, it is error to charge that, if the jury believe that he "has any bias or leaning to one side or the other, the law is that they should find that leaning or bias against the party in whose favor the witness leant," as this invades the province of the jury.

Appeal from circuit court, Crawford county; H. F. THOMSON, Judge.

Indictment of L. A. Bing, for selling liquor to a minor. The latter was introduced as a witness, and testified that he bought liquor several times at defendant's dramshop, but that he could not say whether it was within a year before the finding of the indictment or not. The court charged "that, if the jury believe that the witness has any

bias or leaning to one side or the other, the law is that they should find that leaning or bias against the party in whose favor the witness leant; that is, if the witness has any leaning or bias in favor of the state, his testimony is to be taken most strongly against the state, or, if the leaning or bias be for the defendant, his testimony is to be taken most strongly against the defendant." Defendant was convicted, and appeals.

*Frederick & Frederick*, (C. J. Frederick, of counsel,) for appellant. *W. E. Atkinson*, Atty. Gen., and *T. D. Crawford*, for the State.

PER CURIAM. The instruction complained of invaded the province of the jury, and is erroneous. Reverse, and remand for a new trial.

#### BURGETT v. APPERSON.

(Supreme Court of Arkansas. Nov. 23, 1889.)

CERTIORARI—SALE OF DECEDENT'S LANDS.

1. Under Mansf. Dig. Ark. § 1368, authorizing *certiorari* to correct erroneous proceedings, it is the proper remedy to set aside, at the instance of an heir, a sale of decedent's land to satisfy a debt, where it appears that the proceedings were entirely irregular; that petitioner was a young child at the time of sale; that the administrator, who was also petitioner's guardian, was an imbecile; that petitioner was not apprised by the record that a time had been fixed for the sale, and so could not take the proper steps for appeal; that the land was partly deceased's homestead, and was worth far more than was paid; and that the purchaser would not suffer by a revocation of the sale, as he had paid no money, and had not yet received a deed.

2. Though the probate court has no jurisdiction to sell the homestead during the minority of any of decedent's children, such fact will not avoid a sale of land which the court had jurisdiction to sell, and it is proper for the circuit court, having no guide by which to separate the homestead from the residue of the land, to refuse to interfere with the sale on the ground of the want of jurisdiction.

3. Though it is error for the probate court to approve an administrator's execution of an order of sale, without learning from the record the disposition made of the case on appeal, yet, if the order of sale was affirmed, the jurisdiction to execute it, which was suspended by the appeal, was restored.

4. Mansf. Dig. § 184, requiring that lands offered by an administrator, and not sold for want of a bid equal to two-thirds of their appraised value, shall not be reoffered within 12 months, does not require a new order of sale, as judgment has already been entered as required by section 173, and the court need only provide anew for execution as prescribed by section 174 et seq.

Appeal from circuit court, Crittenden county; J. E. RIDDICK, Judge.

*W. G. Weatherford*, for appellant. *O. P. Styles*, for appellee.

COCKRILL, C. J. The appellant, who is the daughter and sole heir of Isaac Burgett, deceased, presented her petition to the circuit court for a writ of *certiorari* to quash an order of the probate court confirming a sale of her father's lands made by the administrator to pay debts. The court caused the writ to issue, but quashed it upon an inspec-

<sup>1</sup> This section gives an appeal from "a final order affecting a substantial right," and authorizes the appellate court, "upon such appeal, to review any intermediate order involving the merits," etc.

tion of the record. It appears from the clerk's return to the writ that the probate court refused to order a sale of the lands upon the petition of Apperson, who was a creditor of the estate. Apperson appealed to the circuit court, and there obtained an order of sale. The administrator prosecuted an appeal from the judgment of the circuit court, but it was affirmed here. The cause was remanded to the circuit court, and an order was entered there, directing the administrator to make the sale at a time and upon terms named in the order. The original order of sale made by the circuit court had been certified to the probate court for execution, but no action was taken under it pending the appeal. The latter order was never certified to the probate court, but the administrator offered the lands for sale in pursuance of the new direction of the circuit court, and reported to the probate court that it had not been sold, because no one had bid two-thirds of its appraised value. The report was received and approved, but no other order was made. Something more than a year thereafter, without further authority from the court, the administrator offered the lands for sale without regard to their appraised value; and Apperson, the creditor upon whose petition the order of sale had been made, became the purchaser at the sum of \$17,000. No money was paid on the purchase, but Apperson executed his notes for the purchase money, and received from the administrator what is termed in the record a "certificate of purchase." These proceedings were reported to the probate court, and were there approved, when the administrator immediately resigned. No deed has been made.

The petitioner alleges that she was an infant during these transactions, and had no information of them; that the administrator was her guardian; that, at the time the sale was confirmed by the probate court, his condition, both of body and mind, was such that he was incapable of protecting her interest; that a part of the land which was sold was her father's homestead at the time of his death; that it was described in the petition for and in the advertisement of sale, and in the administrator's report of sale, as the "Burgett Home Place." It also appears that Apperson was the only creditor of the estate at the date of sale; that his debt amounted to about \$10,000 principal, and interest; and that a body of land comprising 1,634 acres, and appraised at \$79,340, was offered in bulk to pay his debt. These facts are substantiated by the probate court record, except as to the petitioner's age and want of information, and the condition of her guardian, which appear from the petition and by affidavit adduced at the hearing. This proceeding was begun a short time after the petitioner was apprised of the facts, and within less than a year after she had reached the age of 18, which is the age of majority for females. The suit was begun three years and eight months after the order of confirmation.

The circuit court declared that the errors complained of did not render the sale a nullity, and for that reason declined to interfere. That the probate court has no jurisdiction to sell the homestead during the minority of any of the decedent's children is the settled law of this state. *McCloy v. Arnett*, 47 Ark. 445, 2 S. W. Rep. 71; *Nichols v. Shearon*, 49 Ark. 75, 4 S. W. Rep. 167; *Stayton v. Halpern*, 50 Ark. 329, 7 S. W. Rep. 304. But as that fact did not avoid the sale of the lands, which the court had jurisdiction to sell, and as the circuit court had no guide in this proceeding by which to separate the one from the other, it was not error to decline to interfere upon that ground, and leave the petitioner to her action at law for the possession of the homestead tract. It must be conceded that the probate court proceeded irregularly in every step taken in that tribunal after entering the circuit court's order of sale upon its records; but none of the errors go to the jurisdiction of the court, and consequently its action is not void. It approved the administrator's execution of the order of sale without learning from the record what disposition this court had made of the matter. The character of judgment it is to execute, when an appeal has been prosecuted to the circuit court, should be ascertained from a certified copy of the record of that court; and, if the matter is brought to this court for review, it should receive the certificate after the mandate of this tribunal has reached the circuit court. But in this instance the order of sale which had previously become the probate court's judgment by entry there (presumably before the appeal here was sued out) was affirmed, and the jurisdiction of that court to execute it, which had been suspended by the appeal, was restored, at least from the time when the circuit court entered its order in accordance with the mandate, and it was not without power to proceed. *Green v. Clark*, 24 Vt. 136; *Dunham v. Dunham*, 16 Gray, 577; *Curtiss v. Beardsley*, 15 Conn. 518. The court also erroneously approved the offering of the lands for sale by the administrator when no time had been previously fixed by it for a sale, and subsequently approved the report of the sale to Apperson, made more than a year afterwards, under like circumstances. But a sale upon a day other than that fixed by the order, if made in pursuance of a subsisting judgment of a superior court, is not a nullity after confirmation. It is an irregularity only, and like selling without notice of sale, or without notice of the application to sell, which the statute requires, does not render the sale void, according to a long line of decisions, beginning with *Borden v. State*, 11 Ark. 519. The statute which requires that lands which have been offered by an administrator, and not sold for want of a bid equal to two-thirds of their appraised value, shall not be reoffered within 12 months, (*Mansf. Dig.* § 184,) does not require a new order condemning the lands to sale. That judgment has already been entered in accordance

with another provision of the statute, (section 173,) and, the day fixed for its execution having passed, it only remains for the court to provide anew for its execution, (section 174 et seq.) The sale and confirmation after the expiration of the year were not, therefore, made without a valid judgment to support them, and are not nullities.

But a want of jurisdiction is not the only defect that the writ of *certiorari* is capable of reaching. The statute prescribes that it may be used to correct erroneous proceedings as well as want of jurisdiction. Mansf. Dig. § 1368. The writ is granted in two classes of cases—*First*, where it is shown that the inferior tribunal has exceeded its jurisdiction; and, *second*, where it appears that it has proceeded illegally, and no appeal will lie, or that the right has been unavoidably lost. *Roberts v. Williams*, 15 Ark. 43; *Randle v. Williams*, 18 Ark. 383; *Ex parte Allston*, 17 Ark. 580; *Lindsay v. Lindley*, 20 Ark. 581; *Derton v. Boyd*, 21 Ark. 264; *Vance v. Gaylor*, 25 Ark. 32; *Tucker v. Yell*, Id. 420; *Wyatt v. Burr*, Id. 476; *Payne v. McCabe*, 37 Ark. 321; *Ex parte Pearce*, 44 Ark. 514; *Howard v. State*, 47 Ark. 439, 440, 2 S. W. Rep. 331.

The cases in our Reports in which it is said the writ cannot be used for the correction of erroneous proceedings in the exercise of jurisdiction are cases in which laches in not appealing were imputable to the petitioner, and the question of jurisdiction alone, therefore, was presented, as in *Carolan v. Carolan*, 47 Ark. 511, 2 S. W. Rep. 105; *Phelps v. Buck*, 40 Ark. 219, and *Railway Co. v. Barnes*, 35 Ark. 95; or as in the case of *Haynes v. Semmes*, 39 Ark. 399, where the circumstance which prevented the appeal was probably (it was said) a valid excuse for not appealing; but the inferior court which had jurisdiction had proceeded regularly, and there was a legal remedy which would prevent injustice if the party was really aggrieved. Mere errors are never reviewable on *certiorari* at the instance of one who has lost the right of appeal by his own fault, or who neglects to apply for the writ as soon as possible after the circumstance which renders it necessary to resort to it, and the aid of the writ is never granted except to do substantial justice. It may be refused even when there is no laches on the part of the petitioner, and errors are apparent upon the record, if the judgment appears upon the whole to be right; and, even where prejudicial errors are apparent, it will be refused if great public inconvenience will result from its issue. *Moore v. Turner*, 43 Ark. 243. It is upon these considerations that it is denominated a "writ of discretion," and not a "writ of right;" and it is in part, at least, for the purpose of informing the conscience of the court for the intelligent exercise of this discretion, that the statute provides that testimony may be heard on the return to the writ. *Rutland v. Commissioners*, 20 Pick. 77; *Hyslop v. Finch*, 99 Ill. 179. It cannot be used as a substitute for appeal to correct errors, where an appeal

is provided, except by a party who could have appealed; and as the heir is not made a party to the record in our probate proceedings to sell land of a decedent, and cannot ordinarily prosecute an appeal, (*Arnett v. McCain*, 47 Ark. 411, 1 S. W. Rep. 873,) he cannot use the writ as a substitute for appeal. But as the application to sell lands in such cases is in the nature of a proceeding *in rem*, (*Adams v. Thomas*, 44 Ark. 267, Wap. Proc. in Rem, §§ 566, 578, 579,) and the heir is a party in interest, the court may upon his petition cause him to become a party to the record, and so clothe him with the right of appeal. If he neglects to become a party, he cannot use the writ of *certiorari* as a substitute for appeal. But if he has lost the opportunity of becoming a party, and thereby of acquiring the right of appeal without his fault, he has lost his appeal without fault, and may, within proper time, resort to the writ of *certiorari*. *Derton v. Boyd*, 21 Ark. 264. There is no statute limiting the period within which the court may grant the writ, but, when the effort is to use it as a substitute for appeal, the time within which the appeal might have been prosecuted is adopted by analogy. But as this is not a binding rule, like the statute, the courts have not strictly adhered to it, but exercise the right where the ends of justice demand it. The question now is, ought the writ to be used for the petitioner's benefit? The statement of the case shows that no hardships will be entailed upon the purchaser. He has paid no money, and has received no deed, so that no one claiming under him could have been led to believe that he was the true owner. He was instrumental in procuring the sale in bulk of more lands than appear to have been required for the payment of his debt. He was a party to the record, and is presumed to have known that irregularities existed, the natural tendency of which was to redound to his benefit by preventing others from bidding at the sale which he brought about. Upon the other hand, does the petitioner show a valid excuse for not becoming a party to the proceeding, and prosecuting her appeal? She was not apprised by the record that any time had been fixed for the sale of the land, and so lost her right to take the necessary steps to prosecute an appeal from the judgment of confirmation by the erroneous act of the court. But the defeat of an appeal by the erroneous act of the court is one of the established grounds justifying a resort to *certiorari*. *McMurry v. Milan*, 2 Swan, 176. Her guardian may be said to have had knowledge of the sale because he was the administrator in whose name it was conducted, but the uncontradicted proof adduced at the hearing was to the effect that he was an imbecile at his house when the sale was made, incapable of attending to any business, and his resignation as administrator appears to have been prepared and held in abeyance only until the order of confirmation could be made. The petitioner was herself an infant of ten-

der years, and appears to have acted without delay after arriving at years of discretion. The court erred in refusing to quash the proceeding. The judgment will be reversed, and the cause remanded, with instructions to quash the probate court's order confirming the sale.

**MOORE v. STATE. GILES v. SAME. FRAZIER v. SAME.**

(*Supreme Court of Arkansas*. Nov. 30, 1889.)

**HIGHWAYS—WORKING THE ROAD—NOTICE.**

Under Mansf. Dig. Ark. § 5905, requiring notice to work the road to be given three days before the time appointed, notice on Saturday to work on the following Tuesday, Wednesday, and Thursday is bad as to Tuesday, but good as to the other days.

Appeals from circuit court, Desha county; B. F. GRAOE, Special Judge.

Indictments of Tom Moore, Charles Jiles, and ——— Frazier, for refusing to work the roads. Mansf. Dig. Ark. § 5905, requires notice to work the roads to be given three days before the time appointed for such work. Defendants were convicted, and appeal.

David A. Gates, for appellants. W. E. Atkinson, Atty. Gen., for the State.

PER CURIAM. Notice on Saturday to one liable to road duty, to work a road on the following Tuesday, Wednesday, and Thursday, was not sufficient notice to work on Tuesday, because three full days did not intervene, (*Jones v. State*, 42 Ark. 93,) but was good as to the other days. Affirm.

**WELLINGTON et al. v. STATE.**

(*Supreme Court of Arkansas*. Nov. 30, 1889.)

**TRESPASS—HUNTING WITHOUT PERMISSION.**

1. In a prosecution under Mansf. Dig. Ark. § 1669, for hunting in the inclosed grounds of another without the consent of the owner previously obtained, where it appears that defendants had permission to hunt on land adjoining that on which the alleged offense was committed, an instruction that it was defendants' duty to ascertain, "by all means in their power," the boundaries of the inclosure they had permission to hunt upon is not prejudicial error, as requiring a greater degree of diligence than the law sanctions, in the absence of evidence showing that they used any diligence whatever.

2. One who has paid the consideration for the land, and has exclusive control and possession, is the "owner," within the meaning of the statute, though his deed for it has not been executed.

Appeal from circuit court, Washington county; J. M. PITTMAN, Judge.

Prosecution instituted against E. R. Wellington and another for hunting on the land of William Braithwaite without his consent. Mansf. Dig. Ark. § 1669, provides: "If any person shall \* \* \* hunt in the inclosed ground of another, without the consent of the owner previously obtained, \* \* \* the party so offending shall be guilty of a misdemeanor." Defendants had permission to hunt on the land of Charles Craig, which adjoined that belonging to Braithwaite. Both

tracts were uncultivated, but they were separated by a fence. At the state's request, the court gave the jury the following instruction: "It is the duty of the person who hunts upon the inclosed grounds of another to first procure permission of the owner of such lands, and to ascertain by all means in his power the boundaries of the inclosure that he has permission to hunt upon; and if, after using all these means and ascertaining such boundaries, he, honestly believing that he is in such boundaries, trespass upon the lands of another without intending to do so, he will not be guilty." It was proved that Braithwaite bought the land from one Wright, having paid the consideration, but the deed had not been executed. Braithwaite was in exclusive control and possession of the land, which was inclosed. There was a conviction, and defendants appeal.

E. P. Watson, for appellants. W. E. Atkinson, Atty. Gen., and T. D. Crawford, for the State.

PER CURIAM. If the charge of the court demanded of the appellants a greater degree of diligence than the law sanctions, in ascertaining the boundaries of the land upon which they had permission to hunt, it did not prejudice them, because there is no evidence in the abstract tending to show that they used any diligence at all. *Clark v. State*, 50 Ark. 570, 9 S. W. Rep. 431. Braithwaite was the owner of the land, within the meaning of the act. Affirm.

**MARQUARDT v. STATE.**

(*Supreme Court of Arkansas*. Nov. 30, 1889.)

**INTOXICATING LIQUORS—SUNDAY SALES—INDICTMENT.**

An indictment which charges that defendant, "on the 1st day of May, 1889, \* \* \* unlawfully did keep open his dram shops on Sunday," is good, though the 1st day of May, 1889, came on Wednesday; the gist of the offense being that defendant sold spirituous liquor on Sunday.

Appeal from circuit court, Sebastian county; JOHN S. LITTLE, Judge.

Indictment of P. Marquardt for keeping open a dram-shop on Sunday. The indictment is as follows: "The grand jury \* \* \* accuses P. Marquardt of the crime of keeping open dram-shops on Sunday, committed as follows, to-wit: The said P. Marquardt, on the 1st day of May, 1889, \* \* \* unlawfully did keep open his dram-shops on Sunday." The 1st day of May, 1889, did not come on a Sunday, but on Wednesday. The court overruled defendant's demurrer to the indictment. There was a conviction, and defendant appeals, assigning as error the overruling of his demurrer.

C. A. Lewers, for appellant. W. E. Atkinson, Atty. Gen., and T. D. Crawford, for the State.

PER CURIAM. The allegation of time in the indictment is immaterial. The gist of the offense is that spirituous liquor was sold

on Sunday, and whether the day of the month is correctly stated is no more important in this than in other cases. *Whart. Crim. Pl. § 121; People v. Ball, 42 Barb, 324; State v. Drake, 64 N. C. 591; State v. Eskridge, 1 Swan, 416. In Robinson v. State, 38 Ark. 548, it was not charged that the offense was committed on Sunday, but only on a day of the month which the court judicially knew was not Sunday. That case does not conflict with the view now expressed. Affirmed.*

#### LOWERY v. STATE.

(*Supreme Court of Arkansas. Nov. 30, 1889.*)

##### HIGHWAYS—WARNING TO WORK ROAD.

1. Under Mansf. Dig. Ark. § 5905, providing that the warning required to be given by the road overseer to every person in the district of his appointment to work on the public highways "may be given personally, or by leaving a written notice at the usual place of abode of the person warned, in some conspicuous place, \* \* \* at least three days previous to the time appointed to work by such overseer," service cannot be had by leaving the notice with the wife of the person to be warned.

2. That a conversation regarding the question whether defendant was subject to road duty, had between him and the road overseer, may constitute notice, it must appear to have occurred more than three days before the time fixed for the work.

Appeal from circuit court, Garland county; J. B. WOOD, Judge.

Indictment of Mart Lowery for failure to work on a public highway. Notice was left at defendant's usual place of abode, with his wife, eight days before March 20, 1889, that he was to do work on a public road, March 20, 21, and 22, 1889. He afterwards hunted up the road overseer, and claimed he was not subject to road duty, when they agreed to submit the matter to arbitration. Mansf. Dig. Ark. § 5905, provides that the warning required to be given by the road overseer to every person in the district of his appointment to work on the public highways "may be given personally, or by leaving a written notice at the usual place of abode of the person warned, in some conspicuous place, \* \* \* at least three days previous to the time appointed to work by such overseer." The court gave the jury the following instruction: "If you find from the evidence that the road overseer left a written notice, in proper form, at the usual place of abode of defendant, and with defendant's wife, a member of his family, at least three days previous to the time appointed to work by said overseer, you will find that the defendant was legally warned." There was a conviction; and from an order overruling his motion for a new trial, defendant appeals.

C. V. Teagus, for appellant. W. E. Atkinson, Atty. Gen., and T. D. Crawford, for the State.

PER CURIAM. The legislature has prescribed the manner of warning hands to work upon the public highways. The warning may be given personally, or by leaving a

written notice at the usual place of abode of the person warned, in some conspicuous place. Service cannot be had by leaving the notice with the wife of the person to be warned, because this manner of giving notice is not within the provisions of the statute. *Barnett v. State, 35 Ark. 501; Bruce v. Arrington, 22 Ark. 362.* If the conversation of the overseer with the defendant is relied upon as notice, it must appear to have occurred more than three days before the time fixed for the work. There was evidence upon which a jury might find that the defendant was liable to road duty. The instruction given by the court, of its own motion, as to the sufficiency of the notice, was error; and for that the judgment is reversed, and cause remanded for a new trial.

#### CRUMPTON v. STATE.

(*Supreme Court of Arkansas. Nov. 30, 1889.*)

##### WITNESS—CREDIBILITY—BIAS.

The bias of one called to testify in a case not being a collateral matter, testimony as to statements made by him which tend to show such bias is competent.

Appeal from circuit court, Craighead county; J. E. RIDDICK, Judge.

This was an indictment against P. C. Crumpton, for murder. He was convicted of voluntary manslaughter, and appeals.

N. W. Norton, for appellant. W. E. Atkinson, Atty. Gen., for the State.

PER CURIAM. During the trial of the appellant a witness introduced by him was asked if he had not made certain statements which, if made, tended to show that he felt an interest in the defendant's behalf. He denied that he had made the statements, and the state was permitted, against his objection, to prove that he had made them. The bias of one called to testify in a case is not a collateral matter. The testimony was competent. *Butler v. State, 34 Ark. 480; Whart. Crim. Ev. § 485.*

It is urged that the court erred in instructing the jury as to the law of manslaughter, against the appellant's objection. We cannot say that there was no testimony to justify a conviction of manslaughter. Affirm.

#### STATE v. AGNEW.

(*Supreme Court of Arkansas. Nov. 30, 1889.*)

##### INDICTMENT—FINDING AND FILING—SIGNING BY FOREMAN OF GRAND JURY.

Mansf. Dig. Ark. § 2102, requiring the foreman of the grand jury to sign the indorsement "A true bill," is directory, and where he does not sign it the objection to the irregularity is waived, unless made before pleading.

Appeal from circuit court, Logan county; H. F. THOMASON, Judge.

The appellee, J. M. Agnew, was indicted and on trial in the Logan circuit court for selling liquor without license, and the jury had been impaneled, the state had closed

her evidence, and that for the defense was being introduced, when the circuit judge discovered that the indorsement, "A true bill," had not been signed by the foreman, as provided by Mansf. Dig. Ark. § 2102. He at once stopped the trial, discharged the jury, dismissed the indictment, and acquitted the defendant. The prosecuting attorney filed a motion for a new trial, which was overruled, and the state excepted and appealed.

*W. E. Atkinson, Atty. Gen., for the State.*

**PER CURIAM.** The provision that the foreman of the grand jury shall sign the indorsement, "A true bill," upon indictment is directory, and the objection to the irregularity is waived, unless made before pleading. *People v. Lawrence*, 21 Cal. 372; *State v. Mertens*, 14 Mo. 94; *State v. Creighton*, 1 Nott & McC. 256; *Wau-Kon-Chaw-Nee-Kaw v. U. S., Morris*, (Iowa,) 332; *State v. Cox*, 6 Ired. 440; *State v. Powell*, 24 Tex. 135; *State v. Murphy*, 47 Mo. 274; *State v. Shippey*, 10 Minn. 223, (Gil. 178; ) *State v. Brandon*, 28 Ark. 411; *State v. Johnson*, 33 Ark. 174. Reverse and remand, with directions to put defendant upon his trial.

#### **RUSSELL v. STATE.**

(*Supreme Court of Arkansas. Nov. 30, 1889.*)

**INDICTMENT—DESCRIPTION OF OFFENSE—ASSAULT WITH INTENT TO KILL.**

Mansf. Dig. Ark. § 1562, defines an "assault" as an unlawful attempt coupled with present ability to commit a violent injury on the person of another. Held that, in an indictment for assault with intent to kill, it is sufficient to allege that the assault was committed in the manner and with the intent necessary to constitute the offense, without expressly alleging "present ability," the word "assault" in such connection meaning all that the statute defines an assault to be.

Appeal from circuit court, Washington county; *J. M. PITTMAN*, Judge.

This was an indictment against *J. M. Russell* for assault with intent to kill. He was convicted of a simple assault, and appeals. Mansf. Dig. Ark. § 1562, declares that an assault is an unlawful attempt coupled with present ability to commit a violent injury on the person of another.

*J. M. Russell, pro ss. W. E. Atkinson, Atty. Gen., for the State.*

**PER CURIAM.** In an indictment for an assault with intent to kill and murder, it is not necessary to "pursue the terms" of the statutory definition of an "assault." It is sufficient to allege that the assault was committed in the manner and with the intent necessary to constitute the offense, without expressly averring "the present ability" necessary to constitute the assault. The word "assault" or "assaulted," used in such a connection, means all the statute defines an assault to be. *Bish. St. Crimes*, (2d Ed.) § 514; *Butler v. State*, 34 Ark. 480; *Lacefield v. State*, Id. 275; *Robinson v. State*, 5 Ark. 660; *McCoy v. State*, 8 Ark. 451. Judgment affirmed.

#### **LIGHTLE v. CASTLEMAN.**

(*Supreme Court of Arkansas. Nov. 30, 1889.*)

**CHATTEL MORTGAGES—LIVE-STOCK—DESCRIPTION.**

A description in a chattel mortgage of the property mortgaged as "one black mare mule, six years old," in the mortgagor's possession, in a certain county and state, is sufficient.<sup>1</sup>

Appeal from circuit court, Hempstead county; *C. E. MITCHELL*, Judge.

Replevin by *John E. Lightle* against *Andrew Castleman*, brought before a justice of the peace, who rendered judgment for plaintiff, and defendant appealed to the circuit court. Plaintiff claimed a mule under a trust-deed, which described the mule as "one black mare mule, six years old," and recited that all of the property described in it was in the mortgagor's possession, in White county, Ark. Judgment for defendant, and plaintiff appeals.

*J. W. House*, for appellant. *E. B. Williams*, for appellee.

**PER CURIAM.** A mortgage which describes the property as "one black mare mule, six years old, in the mortgagor's possession, in White county, Ark.," states facts by the aid of which third persons could identify the mortgaged property, and is a good description. *Johnson v. Grissard*, 51 Ark. —, 11 S. W. Rep. 535; *Jones, Chat. Mortg.* §§ 54, 54a. Reverse the judgment, and remand the cause.

#### **GORE v. STATE.**

(*Supreme Court of Arkansas. Nov. 30, 1889.*)

**CRIMINAL LAW—TRIAL—PRESENCE OF DEFENDANT CONSTITUTIONAL LAW.**

Mansf. Dig. Ark. § 2313, providing that a defendant on trial for a felony must be present at the trial, but that if he escapes from custody after commencement of trial, or, "if on bail, shall absent himself during the trial," the trial may progress to a verdict, does not violate the constitutional guaranty (Const. Ark. art. 2, § 10) that the accused shall have the right to be confronted with the witnesses against him, as this does not give him the right to abscond, and then complain of his own absence.

Appeal from circuit court, Montgomery county; *L. LEATHERMAN*, Special Judge.

*T. D. Crawford*, for appellant. *W. E. Atkinson, Atty. Gen., for the State.*

**SANDELS, J.** Appellant, *E. N. Gore*, was indicted in Montgomery circuit court for grand larceny, and gave bail for his appearance. He was present at the commencement of the trial, on the 17th day of February, 1880. On the next day, and during the progress of the trial, he absented himself. Thereupon, the prosecuting attorney having elected to proceed, the court allowed the cause to progress to a verdict. The jury found appellant guilty. Subsequently, on the 21st day

<sup>1</sup>As to what is a sufficient description of live-stock in a chattel mortgage, see *Warner v. Wilson*, (Iowa,) 36 N. W. Rep. 720, and note; *Barrett v. Fisch*, (Iowa,) 41 N. W. Rep. 810, and note; *Rawlins v. Kennard*, (Neb.) Id. 1004.



of August, 1889, appellant was brought into court, in custody of the sheriff, and judgment was rendered upon the verdict. The motion for a new trial states three grounds, viz.: (1) Defendant was tried for a felony, in his absence; (2) defendant was absent when the verdict was rendered or returned into court; (3) the jury were charged by the court that if the value of the goods taken by defendant amounted to two dollars they should find him guilty, and assess his punishment at not less than one year in the penitentiary. There is no bill of exceptions, and we do not know what instructions were given by the court.

The only question arising upon the record is, does section 2213, Mansf. Dig., violate the constitution? That section is as follows: "If the indictment be for a felony, the defendant must be present during the trial. If he escapes from custody after the trial has commenced, or, if on bail, shall absent himself during the trial, the trial may either be stopped or progress to a verdict, at the discretion of the prosecuting attorney; but judgment shall not be rendered until the presence of the defendant is obtained." It has been uniformly held by this court that a defendant charged with felony has a right to be present at every stage of his trial. Sections 8, 10, art. 2, Const., have been construed to guaranty him that right; and it has been often held that a defendant cannot waive his constitutional right by agreement. It is now to be determined whether the constitutional guaranty that the defendant shall be confronted with the witnesses against him (article 2, § 10), remains, where he, pending a trial, absconds, and refuses to be confronted. Neither direct authority nor analogy are lacking in the construction of this guaranty. For 200 years it has been ruled in England that where a witness is absent by the fraudulent procurement of a defendant the deposition of the witness taken on a preliminary hearing may be read in evidence, (Lord Morley's Case, 6 State Tr. 770; Harrison's Case, 12 State Tr. 851; Reg. v. Scaife, 17 Adol. & E. (N. S.) 242;) and the same doctrine prevails in this country, (Drayton v. Wells, 1 Nott & McC. 409; Williams v. State, 19 Ga. 403; Reynolds v. U. S., 98 U. S. 145-158; 1 Greenl. Ev. § 163; 1 Taylor, Ev. § 446; 1 Whart. Ev. § 178.) In the last-mentioned case, Chief Justice WAITE, delivering the opinion of the court, says: "The constitution gives the accused the right to a trial at which he shall be confronted with the witnesses against him; but, if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The constitution does not guaranty an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but, if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement,

their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated." And, after reviewing the English and American authorities upon the point, he adds: "We are content with this long-established usage, which, so far as we have been able to discover, has rarely been departed from. It is the outgrowth of a maxim based on the principles of common honesty, and, if properly administered, can harm no one." In *U. S. v. Davis*, 6 Blatchf. 464, it was ruled that where a defendant was so violent and obstreperous as to prevent the orderly progress of his trial it was proper to remove him from the court and proceed with the trial. In *Price v. State*, 36 Miss. 531, and in *Fight v. State*, 7 Ohio, 180, it is held that where a defendant, pending his trial, absconds, it is proper to proceed to verdict. The constitution guaranties him the right to be present, but this guaranty was never intended to include the right to abscond, and then complain of his own absence. We hold the statute constitutional, and affirm the judgment.

#### OPP v. WACK.

(*Supreme Court of Arkansas*. Nov. 30, 1889.)

##### LIMITATION OF ACTIONS—NEW PROMISE.

Where defendant owes plaintiff on several distinct obligations, a letter from him to plaintiff saying, "Don't push us, as yours is the only claim for goods on the shop, and I shall work it off as soon as possible," without designating which obligation he promises to "work off," is not a sufficient new promise to remove the bar of the statute of limitations.<sup>1</sup>

Appeal from circuit court, Phillips county; M. T. SANDERS, Judge.

J. C. Tappan and J. J. Hornor, for appellant. P. O. Theveatt, for appellee.

SANDELS, J. Action brought June 4, 1887, by appellee, upon six bills of exchange,—one dated October 8, 1881, due at 90 days, for \$212.80; one dated October 25, 1881, due at 90 days, for \$311.05; and four dated November 14, 1881, for \$82.12 each, and due at 15, 30, 40, and 60 days, respectively. The complaint also alleges that on October 3, 1882, appellant in writing acknowledged said several debts, and promised to pay the same. Answer, statute of limitations, and denial of promise to pay within five years. The letter written by R. A. Opp, appellant, dated October 3, 1882, upon which appellee relied to take his claims out of the statute of limitations, is in words and figures as follows: "Helena, Ark., Oct. 3rd, 82. Wack & Miller—Gents: Yours to hand a few days ago. I have been sick, and am just up. My dear sir, it is impossible for me to give drafts to pay at any particular time, at present. As yet, business is as dull as it could be. But

<sup>1</sup>As to what is a sufficient acknowledgment of a debt, or new promise to pay the same, to remove the bar of the statute of limitations, see *Holberg v. Jafray*, (Miss.) 5 South. Rep. 94, and note; *Gathright v. Wheat*, (Tex.) 9 S. W. Rep. 76, and note.

our prospect is good for a lively trade this fall. The extreme hard times has reduced my stock. But we are at work like Turks to get up work for the fall trade, and rest assured that I will do all I can for you. But it is no use to give drafts, and have them go to protest. Don't push us, as yours is the only claim for goods on the shop, and I shall work it off as soon as possible. [Signed] Truly yours, R. A. Opp." Wack and Wurth testified that the letter could have referred only to the acceptances in suit; that defendant owed plaintiff only these six bills at the time it was written.

Construed most strongly against the writer, the letter of Opp is, at most, a conditional promise; in which event it is always necessary to prove the happening of the contingency or accrual of the subject-matter of the condition. But a fatal insufficiency exists in the failure of the letter to designate which one or ones of the drafts he promised to "work off." Where a promise to pay a debt barred by limitation or an acknowledgment within the period of limitation is relied upon, and is otherwise sufficiently specific, parol proof may be admitted to show that there was but one obligation due from defendant to plaintiff, and thus identify the debt to which the promise refers. But, where there are two or more distinct obligations due the plaintiff, the written acknowledgment must itself identify the one or ones to which the promise to pay attaches. *Ringo v. Brooks*, 26 Ark. 540; *Armistead v. Brooke*, 18 Ark. 521. Reverse, and remand for new trial.

#### HELT v. STATE.

(*Supreme Court of Arkansas*. Dec. 7, 1889.)

##### INDICTMENT—PLACE OF RETURN—PRESUMPTION

An indictment which recites that it was found by the grand jury of Lincoln county at the August term, 1888, of the Lincoln circuit court, without specifying in which of the two districts it was found, will be presumed to have been returned by a grand jury legally impaneled in the Star City district, where it appears from the term at which it was found, and from the clerk's indorsement thereon, that it was returned at a time when that district of the court could alone have been legally in session, and where the proof shows that the offense was committed, and the defendant tried and convicted, there.

Appeal from circuit court, Lincoln county; J. M. ELLIOTT, Judge.

The following indictment was found against J. S. Helt: "State of Arkansas v J. S. Helt. In the Lincoln circuit court, August term, 1888. The grand jury of Lincoln county, in the name and by the authority of the state of Arkansas, accuse J. S. Helt of the crime of carrying a weapon, committed as follows, to-wit: The said J. S. Helt, in the county and state aforesaid, on the 20th day of April, 1888, did carry a pistol as a weapon, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Arkansas." Defendant demurred, on the ground that the indictment did not state that the offense was committed within

the jurisdiction of the circuit court, and by a grand jury of Lincoln county, for the Star City district. The demurrer was overruled, and defendant, having waived a jury trial, was found guilty by the court. From an order denying his motion for a new trial, defendant now appeals.

J. M. Cunningham, for appellant. W. E. Atkinson, Atty. Gen., and T. D. Crawford, for the State.

PER CURIAM. The indictment recites simply that it was found in the Lincoln circuit court, at the August term, 1888, by the grand jury of Lincoln county, without specifying in which of the two districts of the county it was found. Without referring to the record entries, to ascertain where the court sat which impaneled the grand jury, it appears from the term at which the indictment was found, and date of the clerk's indorsement upon it when it was received from the grand jury, that it was returned at a time when the Star City district of the court alone could legally be in session. It will therefore be presumed from the indictment itself that it was returned by a grand jury legally impaneled in that district. See *Cornelius v. State*, 12 Ark. 799. The proof shows that the offense was committed in that district. The defendant was tried and convicted there. There is no other point made in the case, and the judgment will be affirmed.

#### BAIRD v. STATE.

(*Supreme Court of Arkansas*. Dec. 7, 1889.)

##### INTOXICATING LIQUORS—LOCAL OPTION—LICENSE.

1. Revenue Act Ark. 1883, imposing a license on the business of a liquor seller, amended by implication the general license law and became a part thereof; and one carrying on such business in a prohibition district is liable to the penalty of the revenue act, by virtue of the "Drag-Net Proviso" of Act Ark. March 26, 1883, which authorizes a conviction for violation of the license law in prohibition districts. Following *Mazzia v. State*, 10 S. W. Rep. 257.

2. The "Drag-Net Proviso" of Act Ark. March 26, 1883, which, after re-enacting the prohibitory part of the license act of 1879 so as to include alcohol within its provisions, declares that the act shall have operation in every part of the state, irrespective of other prohibitory acts, is not in contravention of Const. Ark. 1874, art. 5, § 23, which prohibits the extension of the provisions of a prior law by reference to its title.

3. Independent of such proviso, a conviction for selling liquor without a license in a prohibition district is warranted under the license provision of the revenue act of 1883, which prevails in all parts of Arkansas, irrespective of local option laws.

4. A conviction is warranted for selling liquor as the agent of one who has no license.

Appeal from circuit court, Saline county; J. B. WOOD, Judge.

Indictment of William Baird for the alleged selling of intoxicating liquors without a license, in a district in which a local prohibitory law prevailed. The court found defendant guilty, and from the denial of a motion for a new trial, defendant appeals.

L. Leatherman and G. W. Murphy, for ap-

pellant. *W. E. Atkinson*, Atty. Gen., for the State.

COCKRILL, C. J. The latter half of the third section of the act of March 26, 1883, amending the liquor license law, though introduced by the word "provided," does not limit any provision of the act, or except anything from its operation. It contains, besides, a positive enactment to the effect that the provisions of that act shall be enforced in every part of the state, including localities where the local option and special laws prohibiting the sale of liquor are in force. This is apparent from the latter part of the section. The technical canon of construction which applies to provisos proper has therefore no place in the interpretation of the act and its amendments. The license provision of the revenue act of 1883, subsequently passed, made it a crime to carry on the business of a liquor seller without license, and fixed the penalty at a higher fine than was previously imposed for unlicensed sales. The offense thus created was a new one. By the terms of the act creating it, it became an offense against the license law; but there is only one license law, (*Drew Co. v. Bennett*, 43 Ark. 364,) and the "Drag-Net Proviso," as the above-mentioned provision from the act of March 26, 1883, is called, is a part of it. It follows that there is no suspension of the enforcement of the act on account of the operation of the local option law in the locality where the sale took place; and the decisions of *De Bois v. State*, 34 Ark. 381, and the cases following it, have for that reason no application. That is the effect of the decision of *Mazzia v. State*, 51 Ark. 177, 10 S. W. Rep. 257.

It is argued that the so-called proviso of the act of March 26, 1883, is repugnant to that clause of the constitution which forbids the extension of the provisions of a prior law by reference to its title. Section 23, art. 5, Const. 1874. The section does not extend the provisions of the license law by reference merely, but, after re-enacting the prohibitory part of the license act of 1879 so as to include alcohol within its prohibition, along with other spirituous liquors, declares that the act shall have operation in every part of the state, irrespective of other prohibitory acts. That is not within the evil inhibited by the constitution. *Scales v. State*, 47 Ark. 476, 1 S. W. Rep. 769. The validity of the proviso is asserted by a long line of affirmances of convictions under it by this court without question.

But, aside from the influence of the proviso, the act which makes it a crime to be a common seller of liquor without license does not indicate the intention to limit prosecutions for its breach to territory not covered by special or other acts. Like the act for the punishment of clandestine sales of liquor, passed about the same time, (see *Blackwell v. State*, 45 Ark. 92,) it is designed to cover all territory. The point as to clandestine sales was

so ruled in *Glass v. State*, Id. 173. The conclusion that such was the intention of this act is made more manifest by the fact that the proof which would warrant a conviction under the local option law, which is aimed at single instances of selling only, would not answer the demand upon a charge of the new offense. The two offenses have not the same constituent element. *State v. Coombs*, 32 Me. 529. See *Ruble v. State*, 51 Ark. 170, 10 S. W. Rep. 262. The reason given for the *De Bois* decision does not, therefore, apply, and the conviction is right, independent of the "Drag-Net Proviso." *Mazzia v. State*, supra; *State v. Smiley*, 7 S. E. Rep. 904; *Robinson v. State*, 9 S. W. Rep. 61.

The agreed statement of facts on which the appellant was tried, shows that he sold liquor as the agent of one who had no license. That was sufficient to warrant the conviction. *Rand v. State*, 51 Ark. 481, 11 S. W. Rep. 692; *Berning v. State*, 51 Ark. 550, 11 S. W. Rep. 882; *State v. Keith*, 37 Ark. 96; *State v. Devers*, 38 Ark. 517; *Cloud v. State*, 36 Ark. 151. The judgment must be affirmed.

#### BEARD et al. v. WILSON.

(Supreme Court of Arkansas. Nov. 30, 1889.)

CONSTITUTIONAL LAW—AMENDMENTS OF LAWS—EQUITY—ATTACHMENT SALE—REDEMPTION—EJECTMENT—PLEADING.

1. Act Gen. Assem. Ark. March 4, 1874, relating to the right of redemption from sales under decrees in equity, which declares: "Section 1. Be it enacted by the general assembly of the state of Arkansas that it was and is the true intent and meaning of sections 2696, 2698, 2699, and 2700 should and does apply to all sales of real estate made and had under and by virtue of decrees of chancery courts, in the same manner as they did to sales under executions at law,"—is unconstitutional, under Const. Ark. 1868, art. 5, § 23, which declares that no act shall be revised, amended, or the provisions thereof extended or conferred, by reference to its title only.

2. A sale under attachment is within the purview of Mansf. Dig. Ark. § 3067, which provides that when real estate, or any interest therein, is sold under execution, the same may be redeemed by the debtor within 12 months thereafter. *SANDERS, J.*, dissenting.

3. Mansf. Dig. Ark. § 2632, provides that plaintiff in ejectment shall set forth in his complaint all deeds and other written evidences of title on which he relies, and shall file copies as exhibits therewith, and shall state such facts as show a *prima facie* title in himself to the land in controversy, and that "defendant in his answer shall plead in the same manner as above required from the plaintiff;" and section 2633 provides that, when exceptions are sustained to any such documentary evidence, it cannot be used on trial, unless cured by amendment. *Held*, that an answer in ejectment was demurrable where exceptions were sustained to the documentary evidence of title exhibited therewith, so that nothing remained except the general denial. *SANDERS, J.*, dissenting.

Appeal from circuit court, Lee county; *M. T. SANDERS*, Judge.

*U. M. & G. B. Ross* and *McCulloch & McCulloch*, for appellants. *W. G. Whipple*, for appellee.

*HUGHES, J.* The appellee filed her complaint, claiming title to and right to possess-

sion of land described therein, and alleging that appellant Beard was in unlawful possession thereof. As evidence of title she exhibited with her complaint a deed for the land, executed to her on the 29th day of April, 1886, by a commissioner in chancery, who had sold the same under a decree in chancery in the United States circuit court for the eastern district of Arkansas, against said Beard, in favor of the Wilson Sewing-Machine Company, of Chicago, Ill., which company had purchased the land at the sale by said commissioner, and received a certificate of purchase from him, which it had transferred to the appellee, Henrietta Wilson, and upon which her deed was made. The deed had been approved by the court, and recorded. Appellee in her answer denied the ownership and right of possession of the plaintiffs, averred ownership and possession in appellant Roots, and admitted that Beard was in possession as his tenant. As evidence of his title, Roots exhibited with the answer a deed executed to him for the land by the sheriff of Lee county, on the 24th day of September, 1887, based upon a purchase of said land by Roots on the 6th day of December, 1886, which had been made by said sheriff pursuant to the judgment and order of said circuit court rendered and made, respectively, on the 8th day of May, 1886, and the 26th day of October, 1886, in a cause then pending in said court, wherein G. W. Hull, as receiver of the Wilson Sewing-Machine Company, of Wallingford, Conn., was plaintiff, and said Wilson-Sewing Machine Company, of Chicago, Ill., was defendant, in which cause a general attachment was issued on the 25th day of March, 1885, and levied upon the land in controversy on the 25th day of the same month. Exceptions to the documentary evidence exhibited with the answer of defendants were sustained by the court, upon the ground that the sheriff's deed filed therewith was executed within one year from the sheriff's sale at which appellant Roots became the purchaser of the land. Defendant excepted, and, declining to plead further, a demurrer to the answer was interposed, in short, upon the record, upon the ground that (since exceptions were sustained to the documentary evidence exhibited with said answer) it did not state facts sufficient to constitute a defense to the action. The demurrer was sustained, and defendants excepted, and declined to plead further. The court found for the plaintiff, impaneled a jury to assess damages, and upon the return of their verdict rendered judgment for the plaintiff for recovery of the land and for damages, to which defendants excepted and appealed.

Did the right of redemption from the chancery sale, above referred to, exist? The act of the general assembly of the 4th of March, 1874, in reference to the right of redemption from sales under decrees in equity, is as follows: "Section 1. Be it enacted by the general assembly of the state of Arkansas that it was and is the true intent and meaning of sec-

tions 2696, 2698, 2699, and 2700 should and does apply to all sales of real estate made and had under and by virtue of decrees of chancery courts, in the same manner as they did to sales under executions at law." This act evidently refers to the sections above named of Gantt's Digest, in reference to the right of redemption from execution sales; otherwise it can have no intelligible meaning or application. The language is ungrammatical, but bad grammar does not vitiate. Is this act constitutional? Section 23, art. 5, of the constitution of 1868, which is substantially the same as section 23, art. 5, of the constitution of 1874, declares: "No act shall be revised, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revised, amended, extended, or conferred, shall be enacted and published at length." The same provision is a part of the constitution of the state of Pennsylvania. In considering the constitutionality of an act of the legislature of that state, relating to the lien of mechanics and others upon buildings, passed June 17, 1887, the supreme court of Pennsylvania held the act unconstitutional, upon the ground that it undertook to extend and confer the benefits of the acts of 1836 and 1845 to a large class of claimants which the courts had held not to be within their provisions, by reference to their titles only, without the reenactment of a single one of the provisions so extended. The court said: "It would be difficult to imagine a plainer violation of the constitutional provision." *Iron-Works v. Oil Co.*, 122 Pa. St. 627, 15 Atl. Rep. 917. See *Wells v. City of Buffalo*, 14 Hun, 438; *Watkins v. Eureka Springs*, 49 Ark. 131, 4 S. W. Rep. 384. This is exactly the character of our act of March 4, 1874, which comes within the inhibition contained in the above-named section 23, art. 5, of the constitution, and is void on that account.

Does the right of redemption from a sale under a judgment in an attachment suit exist for one year after the sale, as in case of a technical execution sale? Section 3067, *Mansf. Dig.*, provides that "when any real estate, or any interest therein, is sold under execution, the same may be redeemed by the debtor from the purchaser or his vendee, or the personal representatives of either, within twelve months thereafter." It was doubtless the intention of the general assembly in passing this act to give the right of redemption from sales of real estate under any final process from courts of law. The justice or sound policy of a distinction between technical execution sales, and sales made in execution of judgments in cases where attachments have issued, is not very apparent. It is true that sales under attachments must be reported to and confirmed by the court ordering the same, and in this particular they partake of one of the characteristics of judicial sales. While it is generally proper to observe even the technical distinctions of the law, yet, when to do so would tend to defeat the benef-

icent purposes of a remedial statute, they ought not to be entertained. In *Grubbs v. Ellyson*, 23 Ark. 287, Judge FAIRCHILD said: "An attachment is but a preliminary execution, so that a homestead is not subject to attachment any more than it is to an execution that is final process." In *Ex parte Duignan*, *In re Bissell*, L. R. 11 Eq. 608, 34 Vict., it is said that "an execution is the result of a judgment which has been recovered in some court of law." "An execution is the end and fruit of the law." Co. Litt. 289. "An execution is the execution of the law according to the judgment." 3 Co. Inst. 212. "Execution is defined to be the act of carrying into effect the final judgment of a court. The writ which authorizes the officer so to carry into effect such judgment is also called an 'execution.'" *Lockridge v. Baldwin*, 20 Tex. 306. "A writ of execution is the embodied power of the court, in the shape of a command to a ministerial officer, respecting the rights of the parties to the judgment, and imposing upon the officer certain duties and liabilities prescribed by law." Id. 307; *Bouv. Law Dict. in loco*. We hold that a sale under judgment and order of a court of law, in a suit in which an attachment issues, is not a judicial sale from which there can be no redemption under our statute, but that the statute gives the right of redemption from such sales, and that, therefore, the exceptions to the deed of appellant Roots exhibited with his answer were properly sustained.

Was the demurrer to the answer (interposed after the exceptions to the documentary evidence exhibited therewith had been sustained) well taken? Our statute governing the pleadings in ejectment is peculiar. It requires that "the plaintiff shall set forth in his complaint all deeds and other written evidences of title on which he relies for the maintenance of his suit, and shall file copies of the same, as far as they can be obtained, as exhibits therewith, and shall state such facts as shall show a *prima facie* title in himself to the land in controversy, and the defendant in his answer shall plead in the same manner as above required from the plaintiff." Mansf. Dig. § 2632. When exceptions are sustained to any of this documentary evidence, it cannot be used on the trial, unless the defect for which the exceptions are sustained is covered by amendment. Id. § 2633. Plaintiff and defendant having each derived title from a common source, and having specially pleaded and set out fully the evidences of title relied upon, when exceptions were sustained to the documentary evidence of the defendant exhibited with his answer, it is clear that there was nothing left in the answer, except the general denial of the plaintiff's ownership and right to possession, which was a statement of a conclusion of law, and not of fact, sufficient to constitute a defense to the action. *Keith v. Freeman*, 43 Ark. 296. The defendant claiming title from the same source as the plaintiff, it is appar-

ent from the pleadings in this case that the demurrer was properly sustained, and to hold this does not necessarily determine that there may not be cases in which an answer to an action to recover possession of real property would be good, only denying that the plaintiff was seized in fee-simple of the land, or entitled to the possession thereof, as alleged in the complaint. If it were sufficient in ejectment under our statute for the plaintiff to allege, in general terms, his ownership or right to possession, without stating facts sufficient to show a *prima facie* title in himself or right to possession, a specific denial of title in the plaintiff or his right to possession would be sufficient. In *Newman on Pleadings and Practice*, 533, it is said: "It would seem that in any case, where the plaintiff sets forth in his petition a *prima facie* title, the defendant cannot, perhaps, by a mere denial of title in the plaintiff, be allowed to introduce proof to defeat that title, without having set out the facts in his answer showing the defects in the plaintiff's title, or a superior title in himself or some third person." Certainly it would seem that our statute does not allow him to do so. Affirmed.

SANDELS, J., (*dissenting*.) I concur in holding the statute under consideration null and void, both for the reason stated by the court, and because it is an assumption of power by the legislature to construe and determine the effect of statutes,—a power which belongs alone to the judiciary. But I cannot assent to the two remaining propositions decided by the court.

There is no ground upon which to place the claim that a sale under the judgment of the court sustaining an attachment is not a judicial sale. The sale is of specific property, condemned by order of the court. There is no writ, but the judgment of condemnation is the officer's authority to sell. The purchaser acquires no title until the sale is reported to and confirmed by the court. There is not a single element of the definition of a "judicial sale" which does not inhere in an attachment sale. The fact that every section of our statute on this subject commits the disposition of attached property to the court from the time it is seized by the sheriff to the sale of it under the final judgment, and the report to and confirmation by the court, would seem to be conclusive of the contention that it is a judicial sale. The supreme court of Kentucky (whence our statute comes) has decided that an attachment sale is a judicial sale. *Greer v. Powell*, 3 Metc. (Ky.) 125. Redemption is a statutory privilege. The court decides that there is no redemption from sales under decrees, because no statute gives it. There is not a pretense that any statute, in terms, gives the right of redemption from attachment sales. The logic which extends the benefits of the statute relative to execution sales to the latter, and denies them to the former, is inscrutable. The reason stated is that as to attachments

it is but a proper extension of a remedial statute. If so, why not extend it to sales under decrees? Or why extend the statute at all, on account of its beneficial provisions, to subjects which the legislature, having full power in the premises, did not include in it? I conceive that the wisdom and expediency of giving the right of redemption are questions for the legislature alone, and that the courts have no right to extend the privilege to those whom that body has seen fit to ignore.

Upon the last question decided I am also unable to agree with the court. The record shows that exceptions were filed to the exhibits to defendant's answer, and were sustained, and that upon the exceptions being sustained a demurrer to the answer was filed and sustained. Sustaining exceptions to exhibits simply precludes the use of such documents as evidence on the trial. The fact that a party may not be able to prove an allegation in his pleading does not affect the sufficiency of the allegation, when tested by demurrer. A complaint in ejectment alleges the plaintiff's ownership of the premises and the defendant's wrongful possession. In addition to this, the plaintiff is by statute required to state the evidence of his title, and file copies of deeds under which he claims. This is to prevent surprise on the trial, as objections to the admissibility of documentary evidence must be raised by exceptions in advance. Now, the statement that plaintiff claims title under and by virtue of certain conveyances is not issuable matter. The defendant need not traverse the evidence by which plaintiff claims that he can establish his ownership. He is not compelled to set up title in himself in order to defend. He may rest upon a denial of plaintiff's title. This he may do at all times, for the plaintiff must recover upon the strength of his own title. But suppose he adds a claim of title in himself, and states such facts as are insufficient to give him title, the invalidity of his own claim does not deprive him of the right to be heard in denial of plaintiff's right. In this cause defendant denied plaintiff's title, and also set up title in himself. The court, upon exceptions, adjudged defendant's evidences of his own title insufficient, and then sustained a demurrer to the whole answer. I think that, in any view, the demurrer should have been overruled.

#### *Ex parte* REYNOLDS.

(Supreme Court of Arkansas. Dec. 7, 1889.)

#### CONSTITUTIONAL LAW—CONSTRUCTION—EMINENT DOMAIN—COMPENSATION.

1. Const. Ark. 1874, art. 12, § 9, provides that "no property nor right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner in money, or first secured to him by a deposit of money; which compensation \* \* \* shall be ascertained by a jury of twelve men." *Held*, that the clause prescribing trial by jury has reference only to the final assessment of the compensation.

2. Act Ark. April 28, 1873, § 7, (Mansf. Dig. §§

5464-5466,) providing that when the determination of questions arising in condemnation proceedings is likely to retard the progress of work on a railroad the court, or judge in vacation, shall designate an amount of money to be deposited by the railroad company, subject to the order of the court, and for the purpose of making compensation when the amount thereof shall have been assessed, whereupon the company may enter and proceed with the work upon the land prior to such assessment, is not in contravention of such section of the constitution.

3. The making of an order in vacation for such a deposit of money is a step taken in the suit to condemn, of the time and place of which proceeding the land-owner is entitled to notice, but notice is waived by his appearance when such order is made.

*Certiorari* to circuit court, Chicot county; C. D. Wood, Judge.

Proceeding by the Louisiana, Arkansas, & Missouri Railway, to condemn right of way through petitioner's lands, under Act April 28, 1873, (Mansf. Dig. §§ 5464-5466.) The judge in vacation fixed the amount of the deposit to be made, as is contended by petitioner, without due notice. Petitioner resisted the proceedings on the ground, among others, that the act was unconstitutional, as being in violation of section 9, art. 12, Const. 1874, and brought *certiorari* to this court, to quash proceedings.

D. H. Reynolds, for petitioner. John McClure, for respondent.

COCKRILL, C. J. The question which controls this proceeding is the constitutionality of the seventh section of the act of April 28, 1873, which reads as follows: "Where the determination of questions in controversy in such proceedings is likely to retard the progress of work on, or the business of, such railroad company, the court, or judge in vacation, shall designate an amount of money to be deposited by such company, subject to the order of the court, and for the purpose of making such compensation, when the amount thereof shall have been assessed as aforesaid, and said judge shall designate the place of such deposit. Whenever such deposit shall have been made in compliance with the order of the court or judge, it shall be lawful for such company to enter upon such land and proceed with their work through and over the lands in controversy prior to the assessment and payment of damages for the use and right, to be determined as aforesaid. In all cases where such company shall not pay or deposit the amount of damages assessed as aforesaid within thirty days after such assessment, they shall forfeit all rights in the premises." Mansf. Dig. §§ 5464-5466. It is argued that this section attempts to authorize a proceeding which is prohibited by section 9, art. 12, of the constitution of 1874. That section is as follows: "No property, nor right of way, shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner, in money, or first secured to him by a deposit of money, which compensation, irrespective of any benefit from any improve-

ment proposed by such corporation, shall be ascertained by a jury of 12 men, in a court of competent jurisdiction, as shall be prescribed by law."

Prior to the adoption of the constitution of 1868, the forty-eighth section of the fifth article of which was similar to the section above quoted, there was no provision in the organic law of this state requiring compensation to precede the appropriation of private property for public use. In the case of *Railway Co. v. Turner*, 31 Ark. 494, Chief Justice ENGLISH, in treating of the power of the legislature under the constitution of 1836, said there were expressions in the case of *Ex parte Martin*, 13 Ark. 198, which indicated that the learned judge who delivered the judgment was of opinion that it was incompetent, even in the absence of such a provision, for the legislature to stop short of providing for actual payment of compensation to the owner before his property could be appropriated. He states, however, that that view is opposed to the clear weight of authority. In jurisdictions where it was settled that all that could be demanded by the owner of the property to be condemned was provision for a remedy whereby he could certainly obtain compensation, a difference of opinion existed as to what remedy or provision was adequate, to a legal certainty.

In the case of *Railway Co. v. Turner*, *supra*, a bond, with sureties, which was all that was demanded by the statute in force prior to the constitution of 1868, was held to be adequate. In California, it was at one time held that, as the payment of compensation need not precede the company's entry upon the land to be condemned, an act of the legislature was valid which gave the right of entry, for the purpose of constructing the road, upon paying into court a sum of money sufficient to pay the damages when assessed, or upon giving security to be approved by the court or judge, (*Fox v. Railway Co.*, 31 Cal. 538); but in the subsequent case of *Sanborn v. Belden*, 51 Cal. 266, it was ruled that the bond with sureties which the act provided for did not afford an adequate means of compensation, because the judgment against the sureties might not be efficient. See, too, *Davis v. Railway Co.*, 47 Cal. 519-521. These are instances of the conflict of opinion on the subject. In addition to these perplexities, one of the inevitable results of making compensation in advance an unconditional prerequisite to the right of entry put it in the power of a single individual upon any proposed line of railway to check its construction, if not to thwart the enterprise, where time became material in the undertaking, by resorting to continuances, changes of venue, new trials, and appeals. The provision of the constitution above quoted treats of all these difficulties, and avoids the extremes of each. It affords protection to the land-owner, while taking from him the power to check unnecessarily the progress of public enterprise, by requiring in advance of any

appropriation of his land actual payment of compensation, or what was deemed the most certain security therefor,—that is, a deposit of money, instead of a bond with sureties, as the statute formerly required. But when the land-owner is secured in the manner required by the constitution, the conditions of that instrument are fulfilled, and the company is authorized to enter upon the land, to construct its road, without further delay. See *Railway Co. v. Fire Brick Co.*, 85 Mo. 307; *Railroad Co. v. Railway Co.*, 28 Kan. 453; *Wagner v. Railway Co.*, 38 Ohio St. 32; *Railway Co. v. Dyer*, 35 Ark. 363.

But a question of more difficulty is, how shall the amount of the security be fixed? Must it be "ascertained by a jury of 12 men, in a court of competent jurisdiction," or does that clause of the section refer only to the final assessment of the compensation, leaving the legislature free to provide another method for ascertaining the amount of security to be demanded? A literal construction of the language might lead to a negative answer to the latter question, but is that the meaning of the terms used? The probable design in inserting the clause as to jury trial in its connection, and its proper limitation as here used, may in some measure be elucidated by recalling the restrictions the legislature could impose upon that privilege in a statutory proceeding unknown to the common law; and also by referring to the established practice of the courts in taking security, where the law required it, as preliminary to the provisional possession of property taken from the owner, or one claiming to be the owner, under process of law, in other proceedings as well as those to enforce the right of eminent domain. In the absence of an express provision on the subject, trial by jury in a proceeding to assess damages for appropriating a right of way is not a constitutional right. It was not guaranteed in such cases by the constitution of 1836. *Railroad Co. v. Trout*, 32 Ark. 17. The purpose, we must suppose, of introducing this provision into the constitutions of 1868 and 1874, was, as is said by the supreme court of Ohio of a like provision in the constitution of that state, "to enlarge the rights of the citizens by extending the right of trial by jury to a class of cases wherein it did not before exist. But," continues the court, "we can find no evidence of an intention on the part of the framers of the constitution to fortify this extension of the right with immunities and privileges unknown in the history of the law relating to juries, and not enjoyable in other cases wherein the right of such trial previously existed." *Reckner v. Warner*, 22 Ohio St. 275. Now the right to have the jury fix the amount of security to be taken as indemnity against an act thereafter to be done is an anomaly in other proceedings; and, while that is not a sufficient reason for holding that the framers of the constitution may not have desired to confer the right in this class of cases, the known practice of taking security in advance of the



assessment of damages (Gould, Dig. c. 140) in these and other somewhat analogous cases, and the absence of an evil to be corrected, growing out of an abuse of the practice, furnish strong reasons for supposing that the word "secured," when used in the constitution, was intended to be restricted to the sense in which it was commonly understood, unless a different intention is indicated. "Every word employed in the constitution is to be expounded in its plain, obvious, and common-sense unless the context furnishes some ground to control, qualify, or enlarge it." Story, Const. § 451. Now, the framers of the constitution and the people were familiar with the analogies of the law which permit a citizen to be deprived of the possession of his property, pending litigation, upon the execution by the adverse claimant of a bond, with sureties, in a sum sufficient to secure him against loss. The actions of replevin and unlawful detainer, and suits in which one is ousted by a receiver appointed for the purpose, are familiar instances. In either case the owner is deprived of the use of his property, and may lose the property itself, or a part of it, by conversion, spoliation, or destruction; and his protection is the security which the law demands in advance for his benefit. Security in such cases has but its common meaning, of something given or deposited to make certain the fulfillment of an obligation, and it necessarily precedes the ripening of the obligation. The practice designed by the constitution seems to have been framed in analogy to such proceedings, and to depart from the former practice in condemnation proceedings only in requiring a deposit of money in lieu of a bond with sureties. The requirement that a deposit of money shall be made to secure the payment of compensation to the land-owner presupposes that the time is not ripe for payment, else no provision for security would be needed. It has been suggested that the clause means only a deposit of the assessment made by a jury in a condemnation proceeding as a provision for cases where the owner may refuse to accept the amount awarded as payment, or may be unknown, or not *sui juris*. It certainly covers these contingencies, and might easily have been restricted to them, if it had been so intended. But the language employed does not restrict the meaning to such cases. It is general. Compensation must be paid or secured in every case; and, pending proceedings to condemn, it is for the legislature to determine when the deposit by way of security may be made. It is also suggested that the judge may fix the amount of the security at a sum not sufficient to make "full compensation." The same objection may be urged to the assessment of a jury. On a second trial the award may be increased. The expediency of submitting the question to the one or the other is remitted to the legislature. In either case the land-owner has the further protection that his title is not divested, nor does the right to the easement

rest in the corporation, until the damages awarded are paid, (Railway Co. v. Turner, supra; Manuf. Dig. § 5466, supra;) and the deposit is a security for compensation for any damages done in the attempted appropriation of the right of way. The Ohio constitution contains a provision almost identical with the one in question. The supreme court of that state, in *Wagner v. Railway Co.*, supra, construed it as meaning that the right of entry by the company, and the right to receive compensation by the land-owner, are coexistent; and that when entry is made the land-owner is *eo instante* entitled to receive compensation; but that conclusion seems to us to lay stress upon the first part of the provision, in relation to payment of the compensation at the expense or in disregard of the subsequent provision as to the security to be given for payment. The latter is of equal dignity with the former, and entitled to the same consideration in construing the provisions. The supreme court of Missouri, on the other hand, under a more restrictive constitutional provision, declaring that until compensation "shall be paid to the owner, or into court for the owner, the property shall not be disturbed," hold that the company may enter pending an appeal, after paying into court, as security for the owner, the amount assessed by the jury.

The act assailed in this case was passed, as was said in *Railway Co. v. Turner*, supra, to conform to the provisions of the constitution of 1868, and has been steadily acquiesced in since the adoption of the present instrument. Many miles of railway have been constructed under it, and many condemnation proceedings had, where the entry was made before the judgment of condemnation, not a few of which have passed through this court, without an intimation of the invalidity of any provisions of the act. The circuit judges, from the passage of the act, have conformed their practice to the requirements of the provision that is now attacked; and, finally, we have an affirmance of its validity by this court in the case of *Niemeyer v. Railway Co.*, 43 Ark. 111, in an opinion by Judge EAKIN, prior to the death of Chief Justice ENGLISH. The state of case was exactly that now presented, except that the land-owner resorted to equity for an injunction, instead of seeking his remedy through *certiorari*, as the petitioner here does. The court say that "if the proposed action of the railway be authorized there can be no doubt of the power to arrest it by injunction;" and, after discussing other questions, and mentioning the fact that the only authority of the company in appropriating the right of way at that time was by virtue of a deposit of money made under the order of the court where the proceedings to condemn were pending, denied relief to the complainants. The question now presented is not argued by the court in that case, and we are asked to overrule the decision. It is essential in any case that a prohibition upon the power of the legislature should be cer-

tainly found in the constitution, to warrant the court in declaring a legislative act void; but, where the act has been long acquiesced, in by the legislative and judicial branches of the government, the courts should be satisfied that it is repugnant, not only to the express and unequivocal terms of the instrument, but to its intent and reason, before resorting to their extraordinary power of nullification. "Where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention." *Cookey, Const. Lim. 67; State v. Sorrells, 15 Ark. 664.* Such matters are not entitled to controlling weight, for acquiescence for no length of time can legalize a clear usurpation of power; but, when an examination of the constitution leaves a doubt, the judges are warranted in looking to these extraneous matters for aid. We cannot draw from the language of the constitution the plain and unmistakable meaning that the act in question is a usurpation, and therefore declare it to be a legitimate exercise of the legislative prerogative.

The act of the circuit judge in fixing the amount of deposit is a step taken pending the suit to condemn; the land-owner is interested in ascertaining the amount to be deposited, and is entitled to notice of the time and place of the proceeding, as of any other step taken in the cause in vacation. See *Mansf. Dig. § 5212.* But the appearance of the petitioner was a waiver of notice in this case.

Other questions have been argued by counsel, but the power of the judge to act is the only one presented by this proceeding. So far as the plaintiff can litigate the other questions at all, it must be by independent action in the appropriate tribunal, or by appeal from the judgment of condemnation. The writ will be quashed.

#### CITY OF FAYETTEVILLE v. CARTER.

(*Supreme Court of Arkansas. Dec. 7, 1880.*)

#### MUNICIPAL CORPORATIONS—ORDINANCES—LICENSES—FEES.

*Mansf. Dig. Ark. § 751,* authorizes municipal corporations to regulate drumming or soliciting persons, who arrive on trains or otherwise, for hotels, boarding-houses, bath-houses, or doctors, and to license such drummers, and to punish by fine any violation of such provision. *Held,* that the amount of the fee charged for such license must depend upon the expense of the municipal supervision made necessary by the business licensed, and the discretion of the council in fixing it is not to be interfered with, unless such amount is plainly unreasonable; a fee of \$12.50 not being so, in the absence of any evidence upon the subject.

Appeal from circuit court, Washington county; J. M. PITTMAN, Judge.

C. R. Buckner, for appellant. T. M. Gunter, for appellee.

*BATTLE, J.* Section 751, *Mansf. Dig.*, provides that all municipal corporations shall have power "to regulate drumming or soliciting persons, who arrive on trains or otherwise, for hotels, boarding-houses, bath-houses, or doctors, and to license such drummers, and to provide that each drummer shall wear a badge, plainly exposed to view, showing for whom and for what he is drumming or soliciting patronage, and to punish by fine any violation" of such provision. In pursuance of this section, the council of the city of Fayetteville passed an ordinance forbidding all persons to drum or solicit patronage from persons, who arrive on trains or otherwise, for any hotel or boarding-house, without having first obtained a license to do so, and paid therefor the sum of \$12.50, and making a violation thereof an offense punishable by fine. In a prosecution against appellee, this ordinance, without any evidence of its invalidity except the ordinance itself, was held void, because the \$12.50 was an unreasonable fee for the license.

The authority of a municipal corporation to pass an ordinance requiring solicitors of patronage for hotels and boarding-houses to take out a license, and pay a reasonable fee therefor, is conceded by both parties. The only question presented for our consideration is, is the fee fixed by the ordinance in question reasonable?

The power to license and regulate granted by the statute was conferred solely for police purposes; and municipal corporations have no right to use it as a means of increasing their revenues. They can require a reasonable fee to be paid for a license. The amount they have a right to demand for such fee depends upon the extent and expense of the municipal supervision made necessary by the business in the city or town where it is licensed. A fee sufficient to cover the expense of issuing the license, and to pay the expenses which may be incurred in the enforcement of such police inspections or superintendence as may be lawfully exercised over the business, may be required. It is obvious that the actual amount necessary to meet such expenses cannot, in all cases, be ascertained in advance, and that "it would be futile to require anything of the kind." The result is, if the fee required is not plainly unreasonable, the courts ought not to interfere with the discretion exercised by the council in fixing it; and, unless the contrary appears on the face of the ordinance requiring it, or is established by proper evidence, they should presume it to be reasonable. *City of Burlington v. Insurance Co., 31 Iowa, 105, 106; Van Hook v. Selma, 70 Ala. 361; Van Baalen v. People, 40 Mich. 258; In re Wan Yin, 22 Fed. Rep. 701; Johnson v. Philadelphia, 60 Pa. St. 445; Ex parte Chin Yan, 60 Cal. 78; Ex parte Gregory, 20 Tex. App. 210; Town of State Center v. Barenstein, 66 Iowa, 249, 28 N. W. Rep. 652; Fisher v. Harrisburg, 2 Grant, Cas. 291; St. Louis v. Weber, 44 Mo. 547; Corrigan v. Gage, 68 Mo. 541; State v.*

Gas Co., 37 Ohio St. 45; *Clason v. Milwaukee*, 30 Wis. 316. According to this rule we cannot say, and it does not appear, that the fee required in this case is unreasonable. The contrary is presumed.

Reversed, and remanded for a new trial.

### HODGENS v. POWELL.

(Supreme Court of Arkansas. Dec. 14, 1889.)

#### WIDOW'S CURTILAGE—DEEDS.

Under a conveyance by the widow of "all her right and title to the house and lot in the town of G., occupied during the life-time of her husband by his family as a residence, and vested in her by an order of the probate court, more particularly known as 'lot number one,' the grantee cannot take, as a curtilage to said lot, another lot, which, though inclosed with the lot on which the residence stood, was conveyed to the widow by a deed executed before she was invested with title to the residence lot.

Appeal from circuit court, Sebastian county; J. S. LITTLE, Judge.

Action by William Hodges against R. T. Powell. Plaintiff claims that he is owner in fee of lot 1, and the east half of lot 2, in block 4, in the town of Greenwood, by reason of a deed from Mrs. M. E. Spradling, conveying to him "all her right and title to the house and lot in the town of Greenwood, occupied during the life-time of her husband by his family as a residence, and vested in her by an order of the probate court, more particularly known as 'lot number one, (1), in block four, (4,) original donation to said town,' to have and to hold the same, with all and singular the hereditaments and appurtenances thereto belonging," and alleges title to the east half of lot 2 in said block, as appurtenant and a curtilage to lot 1. Defendant claims title to lot 2 by deed from Mrs. M. E. Spradling, executed after the conveyance of lot 1 to plaintiff. Mrs. Spradling derived title to lot 2 by a deed which was executed before the vesting order of the probate court, which invested her with title to lot 1. The residence was located only on lot 1, though that lot was inclosed with lot 2. There was judgment for defendant. Plaintiff appeals.

B. J. H. Gaines, for appellant. Clayton, Brizzalara & Forrester and Clendening & Read, for appellee.

PER CURIAM. The decree is right, and should be affirmed.

### BILLINGS v. STATE.

(Supreme Court of Arkansas. Dec. 7, 1889.)

#### WITNESS—CREDIBILITY—CONTRADICTORY STATEMENTS—CRIMINAL LAW—MURDER—EVIDENCE.

1. Mansf. Dig. Ark. §§ 2902, 2903, provide that a witness may be impeached by the party against whom he is produced by showing that he has made statements different from his testimony, but, in order to so impeach him, he must be asked if he has made the statement assumed, and the examination must indicate the time when and the person to whom it was made. *Held*, that proof of such contradictory statements may be made as well where he testifies that he does not remember them as where he denies them.

2. On a trial for murder, where it was shown that the conduct of the accused and the deceased towards each other had been rough and irritating during the day in the afternoon of which the homicide was committed, evidence of bruises found on the body of deceased shortly after his burial is admissible, as tending to show who had been the aggressor during the day.

3. Evidence concerning a difficulty between defendant and deceased, which occurred two and a half years before the homicide, is irrelevant, where no connection is shown between the two events, and, being prejudicial to defendant, its admission is reversible error.

Appeal from circuit court, Perry county; J. B. WOOD, Judge.

J. F. Sellers, for appellant. W E Atkinson, Atty. Gen., and T. D. Crawford, for the State.

HEMINGWAY, J. The defendant was indicted for murder in the second degree. He testified that he killed the deceased, and sought to excuse it because it was done, as he claimed, in self-defense. He was convicted of manslaughter. It is assigned for error here that the court erred—*First*, in admitting improper evidence; *second*, in declaring the law applicable to the right of self-defense. During the morning of the homicide the deceased, Wallace, the defendant, Dave Billings, William Billings, and Ike Brown met at the residence of William Billings, where they all remained until the homicide occurred, in the afternoon. The witness Handright visited the place during the day, but left before the homicide occurred. It appears that the conduct of the deceased and defendant towards each other during the day was rough and irritating, attended with violent and abusive language. The evidence of those who were present shows the deceased to have been the aggressor. This the state denied. The appellant was in the house of his friends, and it may be that the witnesses were subject to a bias in his favor. The attitude of the parties towards each other during the day was material in determining the merits of the defense.

William Billings, who is a brother of the appellant, and saw the homicide committed, was produced as a witness in his behalf. He professes to detail the entire transaction, from the meeting in the morning until the culmination in the afternoon. If his narrative be true, the conduct of the deceased was violent, abusive, and aggressive. To discredit him, the state asked him, upon cross-examination, if he did not tell Handright, during his visit that day, while the defendant and the deceased were out of the house, "that Dave Billings and Ike Brown had been running over Wallace [the deceased] all day, and that he [the witness] did not intend to stand it." He answered that he might have said something like that, but that he did not remember. The state then proved by Handright that the witness had so told him. This evidence was introduced against the appellant's objection, and its admission is now assigned as reversible error. The state proved that a very short time after the burial of the

deceased his body was exhumed, and certain bruises found upon it, which were explained to the jury. It produced, as a witness, the widow of the deceased, and she was permitted to detail the particulars of a difficulty between the parties about two and a half years prior to the killing, and a conversation of the appellant with her about two years before the killing. Her testimony was substantially that at a picnic her husband and one Wilson had a fight; that a few moments after the fight her husband said to one Bostic that he had knocked his brother-in-law, meaning Bostic, down; that appellant, who heard the remark, ran up with a drawn knife, and said, "If it's brothers-in-law you are after, I am here," coupled with curses and oaths, at the same time striking at him with the knife. As to the conversation of the appellant with her, she testified that he wanted to buy her interest in their father's estate; that she offered to sell for cash, which he could not pay; that she refused to sell on credit; that he then said he would have the land or some man's hide. There is no proof of any other altercation between the parties during the interval of over two years, nor does it appear that their relations were unfriendly. The deceased went to the house where appellant was staying on the morning of the homicide, found him there, and remained until he was killed. The defendant had whisky, and the deceased brought more. They drank together during the day, and it is probable that all were somewhat under its influence. This is a sufficient outline of the evidence to an understanding of the questions we are called to consider.

Was it competent to prove by Handright what William Billings had told him? The statute provides that a witness may be impeached by the party against whom he is produced by showing that he has made statements different from his testimony. But, in order to so impeach a witness, he must be asked if he has made the statement assumed, and the examination should indicate the time when and the person to whom it was made. Mansf. Dig. §§ 2902, 2903. This is but a re-enactment of the common law. It has been proper at all times to discredit a witness by proof of contradictory statements as to a material matter; but it could not be done until he had been cross-examined as to the supposed contradiction in such a manner as to direct his attention to the matter assumed. The rule which prescribes this condition rests on the principle of justice to the witness. The tendency of the evidence is to impeach his veracity, and common justice demands that, before his credit is attacked, he should have an opportunity to declare whether he made such statements to the person indicated, and to explain what he said, and what he intended and meant in saying it. When this opportunity has been afforded him, justice can demand in his behalf nothing more, and the reason of the rule is satisfied. If he neither admits nor denies the statement, can it be proven? The decisions

of the English courts upon this question are conflicting. If the matter is irrelevant, the proof of contradictory statements is certainly inadmissible; but if it is relevant, the weight of the English authorities favor their admission. 2 Phil. Ev. 960. This rule is sustained by American cases. *Payne v. State*, 60 Ala. 80; *Dufresne v. Weise*, 46 Wis. 290, 1 N. W. Rep. 59. The question has never been ruled by this court. The statute does not rest the right to impeach a witness by proof of contradictory statements upon the condition of his denial. It requires his cross-examination upon the matter; nothing more. This is exacted in order that he may explain apparent contradictions, and reconcile seeming conflicts and inconsistencies. If he cannot remember the fact, he is unable to do what the law affords him the opportunity to do. If he cannot remember the statement made, it is quite as probable that his recollection of the occurrence about which he testifies is inaccurate or incorrect. If contradiction properly affects the value of his testimony when he denies, it is difficult to see why it should not when he ignores, the contradictory or inconsistent statements. The testimony is discredited because he affirms to-day what he denied yesterday. The legitimate effect of such contradiction cannot depend upon his power to remember it. If the defect in the memory is real, the proof of the contradiction apprises the jury of this infirmity of the witness. If he has made a false statement, under the pretense of not remembering, he should not escape contradiction and exposure. We think the evidence was properly admitted.

Proof of the bruises on the body of the deceased tended to elucidate the disputed question as to who had been the aggressor in the difficulty during the day. It was competent.

Did the court err in admitting that part of the testimony of Mrs. Wallace above stated? The conversation of appellant with her is ambiguous. It does not appear to whom he intended his threat to apply. It was too remote from the matter charged, both in circumstance and time, to afford any reasonable presumption or inference of connection between the two affairs. The general rule is well established, in civil as well as in criminal cases, that evidence shall be confined to the issue. It seems that the necessity for the enforcement of the rule is stronger in criminal cases. The facts laid before the jury should consist exclusively of the transaction that forms the subject of the indictment and matters relating thereto. To enlarge the scope of the investigation beyond this would subject the defendant to the dangers of surprise against which no foresight might prepare and no innocence defend. Under this rule, it is generally improper to introduce evidence of other offenses; but if facts bear upon the offense charged, they may be proven, although they disclose some other offense. The test of admissibility is the connection of the facts offered with the

subject charged. Such connection exists in a variety of cases, and in them it is often proper to prove one offense in a trial for another. The supreme court of Alabama has indicated several classes of cases in which this may be done, as follows—*First*, when necessary to prove the *scienter* or guilty knowledge which is an element of the offense charged; *second*, when the offense charged and the offense proved are so connected that they form part of one transaction; *third*, when the act proved and the offense charged are similar, and the one tends to fix the intent in the other; *fourth*, when it is necessary to prove a motive for the offense charged, and there is an apparent relation or connection between it and the other acts proved, and, again, when it tends to prove the identity of the offender or of an instrument used. In the case of *Dunn v. State*, 2 Ark. 229, this court approved the exception to the general rule; but it was there held that proof of a distinct crime could not be introduced until there was evidence showing some connection between the different transactions, or such circumstances as will warrant a presumption that the latter grew out of the former. In that event it was held that the circumstances of the former were admissible as tending to discover the *quo animo* of the latter occurrence. In a later case it was held that antecedent facts could be proven when they were capable of forming any reasonable presumption or inference in elucidation of the matters involved in the issue. There are many cases in the Reports of this court in which this question has been considered, and evidence of other crimes admitted, but an examination will disclose that in each case the crime proven and that charged were connected in some way clearly manifest. We think there is no case in which the interval of time was nearly so great as in this. *Dunn v. State*, 2 Ark. 229; *Austin v. State*, 14 Ark. 555; *Eduionds v. State*, 34 Ark. 732; *Glory v. State*, 13 Ark. 236; *Melton v. State*, 43 Ark. 367; *Ford v. State*, 84 Ark. 650. On the other hand, cases are to be found in our Reports in which evidence of other crimes was held incompetent. *Endaily v. State*, 39 Ark. 278; *Dove v. State*, 37 Ark. 261. It is impossible to say how far back, as respects time, other crimes may be so connected as to be admissible. When, in view of all the facts in the cause, including lapse of time and no recurring trouble, it does not appear that there is a connection between the crime charged and the other affairs, or that they tend to prove some fact included in it, they cannot be proved. The altercation proven in this case seems to have arisen suddenly. There is no proof that it did not as quickly pass away. There is nothing in the circumstances attending it to show that it made any lasting impression on the defendant, or that he thereafter cherished any malice or resentment on account of it. If the evidence was competent, it was as tending to prove malice. There is no reason-

able presumption or inference that the two affairs were connected, or that the latter resulted from the former, or from the motive prompting the former. As the parties had lived as neighbors for two and a half years, and no recurring evidences of ill feeling were proven, it is more reasonable to say that they had their origin in independent causes. Regardless of relevancy, this evidence was of a nature damaging to the appellant. It tended to show that he was a violent, turbulent, and lawless man, from which the jury might unconsciously conclude the man who committed one would commit another crime. However natural this conclusion, evidence is not proper to establish it. It was competent, if at all, only to show malice. It cannot be said that there was a fair or reasonable inference that it had such tendency. If it were of a character harmless, though irrelevant, we should not reverse for it; but, as it is obviously harmful, we cannot so treat it. The instructions declared the law of self-defense as it has been construed by this court. *Fitzpatrick v. State*, 37 Ark. 254, 255. For the error indicated the judgment will be reversed, and the cause remanded.

#### CROSS v. WILSON.

(Supreme Court of Arkansas. Dec. 14, 1889.)

#### SERVICE BY PUBLICATION.

1. *Manuf. Dig. Ark. §§ 4339-4342*, provide that in actions by the prosecuting attorney to collect bonds given in payment of lands sold by the state, in case the return of the officer shows that defendant is dead, or on other proof thereof, the clerk shall make and enter an order which shall contain the date and amount of the bond proceeded upon, and a description of the land, etc., and warn generally "the heirs and personal representatives" of the defendant to appear and make defense thereto on the first day of the next term of the court that commences more than 60 days from the date of such order; and the publication of such order, as provided by law, provided it states the month, and day of the month, upon which such term shall commence, shall be equivalent to personal service; provided that upon return of the officer, showing that defendant is not found in the county, the prosecuting attorney shall file an affidavit that he has used due diligence, and has not been able to ascertain whether defendant is dead or alive. *Held*, that a warning order is insufficient which gives the title of the cause and warns "the defendants, the legal representatives of [certain named persons who were named as defendants in the title] to appear in this court within thirty days, and answer the complaint of" plaintiff.

2. *Manuf. Dig. Ark. § 4359*, provides that the affidavit of any editor, publisher, or proprietor of any newspaper authorized to publish legal advertisements, to the effect that an advertisement has been published in his paper for the length of time, etc., shall be evidence of the publication thereof. *Held*, that an affidavit of a person that the advertisement was published in a certain paper, without showing his connection with the paper, or his right to make the affidavit, is not proof of legal publication.

Appeal from circuit court, Clark county; R. D. HEARN, Judge.

Ejectment by Mary E. Cross against Joseph S. Wilson. Plaintiff relied on a commissioner's deed, executed under a decree of the Pulaski chancery court against James E. M.

Barkman and James R. N. Candler, foreclosing the state's lien for purchase money, under Manf. Dig. Ark. §§ 4332-4352. Section 4332 provides that in actions by the prosecuting attorney to collect bonds given for lands sold by the state, in case "the return upon a process shows that the defendant is not found in the county, \* \* \* the clerk \* \* \* shall make and enter on the record an order which shall contain the title of the suit, the date and amount of the note or bond proceeded upon, and a description of the land upon which the lien is sought to be enforced, and warn the defendant to appear and make defense thereto on the first day of the next term of such court that commences more than sixty days from the date of such order." Section 4340 provides that "the publication of such order \* \* \* as provided by law shall be equivalent to a personal service; provided, that such order shall designate the month, and day of the month, on which such term of said court will commence." Section 4341 provides that, "if the return \* \* \* shows that defendant is dead, \* \* \* said clerk shall make and enter the order mentioned in the preceding sections, except that it shall warn generally 'the heirs and personal representatives' of the defendant to appear. \* \* \*". Section 4342 provides that "the publication of such order, as provided in the preceding section, shall be equivalent to a personal service; provided, that upon a return \* \* \* the prosecuting attorney shall file \* \* \* an affidavit \* \* \* that he has used due diligence, and has not been able to ascertain whether the defendant is dead or alive. \* \* \*". Manf. Dig. Ark. § 4352, provides that "the affidavit of any editor, publisher, or proprietor, or the principal proprietor, of any newspaper authorized to publish legal advertisements, to the effect that a legal advertisement has been published in his paper for the length of time and number of insertions it has been published, \* \* \* shall be evidence of the publication. \* \* \*". The record in the suit in which the decree was rendered, upon which plaintiff relies in this action, shows many defects in the manner of obtaining service on defendants. A summons was issued to which the sheriff made return that one of the defendants was dead, and the other did not live in his county, and from what he could learn was also dead. Thereupon the following warning order was published: "State of Arkansas, for Use of School Fund, Plaintiff, v. James E. M. Barkman and James R. N. Candler, Defendants. Pulaski chancery court—In chancery. The defendants, the legal representatives of James E. M. Barkman and of James R. N. Candler, are warned to appear in this court within thirty days, and answer the complaint of the plaintiff, the state of Arkansas, for use of school fund. D. P. UPHAM, Clerk,"—and the proof of its publication read as follows:

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"State of Arkansas, county of Pulaski. I hereby certify that the inclosed advertisement was published four times in the Arkansas Republican, the first of which was on the 5th day of March and the last on the 26th day of March, 1878. JOHN G. PRION. Sworn to, etc.,—and was indorsed, 'Filed June 9, 1873.' There was judgment for defendant. Plaintiff appeals.

J. E. Witherspoon, for appellant. Crawford & Crawford, for appellee.

PER CURIAM. The record of the cause in which the decree relied upon as the foundation of the appellant's title was rendered, shows that it was based upon a warning order which does not state material facts required by the statute, and that proof of its publication is fatally defective. The decree was therefore void. Affirm.

DOW vs. KING.

(Supreme Court of Arkansas. Dec. 14, 1889.)  
INJURY TO ANIMALS—TITLE TO PROPERTY AFTER JUDGMENT PAID.

1. In an action of replevin by the owner to recover possession of property, for the injury of which he has recovered damages from a railroad company as for a total loss, an interplea by the railroad company, on the theory that the original action was for the conversion of the property, is bad, if it does not allege satisfaction of the judgment recovered for the conversion.

2. The recovery of a judgment against a railroad company for negligent injury to property gives the company no claim in the property.

Appeal from circuit court, Lonoke county; J. W. MARTIN, Judge.

R. R. King sued the Memphis & Little Rock Railroad Company for the negligent injury of his mule, and recovered damages. He afterwards brought an action of replevin against one Sessums, who, at his request, had taken charge of the mule after it was injured, giving it the necessary attention, and holding it for a lien of \$40. R. K. Dow and others filed an interplea, setting up that they were the trustees of the railroad company, and while operating it had injured the mule, and that thereupon the plaintiff had brought suit for it as a total loss, and had recovered, and that the mule had thereby become their property. A demurrer to the interplea was sustained. R. K. Dow and others appeal.

U. M. & G. B. Ross, for appellants. T. C. Trimble and John C. & C. W. England, for appellee.

PER CURIAM. The interplea is bad, whether the original action against the railway was for the conversion of the mule, or for damages for injury done it. In the former case it should have alleged a satisfaction of the judgment recovered for the conversion, (Cooley, Torts, 458,) and in the latter event the interpleaders had no claim to the property at all. Affirm.

**HILLIARD v. HILLIARD.**

(Supreme Court of Arkansas. Dec. 14, 1889.)

**ALLOTMENT OF DOWER—APPEAL.**

In a proceeding for the allotment of dower in the probate court, an order confirming the report of the commissioners appointed to allot the same is final, and an appeal therefrom to the circuit court carries with it the whole case for trial *de novo*.

Appeal from circuit court, Chicot county; C. D. WOOD, Judge.

Petition of Caroline Hilliard against Edwin S. Hilliard for the allotment of dower in the lands of her deceased husband, Isaac H. Hilliard. Commissioners were appointed, whose report was subsequently approved and confirmed by the probate court. Petitioner appealed to the circuit court, and filed exceptions to the report, which, with one exception, were overruled as irrelevant. Appellant then moved to take up the whole case for trial *de novo*, and to make such orders as the probate court should have made, which motion was also overruled. The court then proceeded to hear the case upon the remaining exception, holding that the case, as appealed, was on the regularity of the commissioners' report, and not the whole case. Petitioner appeals, contending that the approval of the commissioner's report was a final order; that the appeal therefrom brought up, for consideration, the whole case; and that the court erred in its rulings.

William B. Street, for appellant. D. H. Reynolds, for appellee.

**PER CURIAM.** The order confirming the report of the commissioners appointed to allot dower was the final judgment of the probate court in the case, and the appeal from that judgment carried the whole cause to the circuit court for trial *de novo*. It was error, therefore, in the circuit court, to confine the appellant to her exceptions to the manner of allotting dower. The judgment will be reversed, and the cause remanded for a rehearing.

**JOHNSON v. CAMPBELL.**

(Supreme Court of Arkansas. Dec. 14, 1889.)

**VACATION OF JUDGMENT—JUDICIAL SALE.**

1. Under Mansf. Dig. Ark. §§ 3909, 3911, providing that after the expiration of the term the proceedings in the circuit court to vacate or modify a judgment shall be by complaint, verified by affidavit, setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party was defendant, a petition to vacate a judgment, when presented by way of objection to the confirmation of a report of sale, will be rejected.

2. The confirmation of a sale under a decree will not be disturbed, where it appears that there has been due and legal notice of time, terms, and place of sale, though it was made on a credit of three months, instead of four, as the decree directed; the defendant showing no injury resulting from the departure from the direction, and the trial court being satisfied that none had resulted therefrom.

Appeal from circuit court, Franklin county; G. S. CUNNINGHAM, Judge.

Petition by defendant, Johnson, to vacate a judgment obtained by plaintiff, Clark, and objection by defendant to the confirmation of a report of sale made thereunder. From an order rejecting his petition, and confirming the sale, defendant appeals. Mansf. Dig. Ark. § 3909, provides: "The court in which a judgment or final order has been rendered or made shall have power, after the expiration of the term, to vacate or modify such judgment or order: \* \* \* *fourth*, for fraud practiced by the successful party in the obtaining of the judgment or order; *fifth*, for erroneous proceedings against an infant, married woman, or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings; *sixth*, for the death of one of the parties before the judgment in the action; *seventh*, for unavoidable casualty or misfortune preventing the party from appearing or defending; *eighth*, for errors in a judgment shown by an infant in twelve months after arriving at full age." Section 3911 provides: "The proceedings to vacate or modify the judgment or order on the grounds" above mentioned "shall be by complaint, verified by affidavit setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action if the party applying was defendant."

J. V. Bourland, for appellant.

**PER CURIAM.** The court, after the lapse of the term, had no power to vacate the judgment, except upon complaint filed in accordance with the provisions of section 3909, Mansf. Dig. There was no error in rejecting the petition to vacate the judgment, when presented by way of objection to the confirmation of the report of sale. There appears to have been due and legal notice of time, terms, and place of sale. It was made upon a credit of three months, however, instead of four, as the decree directed. The defendant showed no injury resulting from the departure from the direction, and the court, being satisfied that none had resulted therefrom, did not abuse its discretion in confirming the sale. Affirm.

**CRENSHAW v. BRADLEY.**

(Supreme Court of Arkansas. Dec. 14, 1889.)

**APPEAL—OBJECTION NOT RAISED BELOW—BURDEN OF PROOF.**

1. Where defendant, on an appeal by plaintiff from a judgment of a justice of the peace, fails to move the circuit court to dismiss the appeal for want of an affidavit for appeal, he cannot raise the objection in the supreme court.

2. In replevin, where defendant does not deny plaintiff's title to the property in dispute, but alleges that he entered into an agreement with plaintiff that defendant should sell it, and out of the proceeds pay the balance of an account which plaintiff owed him, the burden is on defendant to prove the agreement.

Appeal from circuit court, Desha county; J. A. WILLIAMS, Judge.

Replevin by Sam Bradley against R. D.



Crenshaw for three bales of cotton, hauled by plaintiff to defendant's gin, which defendant refused to surrender. The action was originally brought before a justice of the peace, and defendant had judgment. Plaintiff prayed an appeal, which was granted, but no affidavit for the appeal was ever filed. A trial *de novo* was had in the circuit court. Defendant claimed the cotton under an express agreement between him and plaintiff that defendant was to hold it for a balance due him on an account. Plaintiff denied the agreement. The court, against defendant's objections, gave this instruction: "The burden of proof was upon defendant to prove the delivery of the cotton in controversy by the plaintiff to the defendant." There was a verdict for plaintiff, and from an order overruling defendant's motion for a new trial he appeals.

*W. S. McCain*, for appellant.

**PER CURIAM.** The appellant, having failed to move the circuit court to dismiss the appeal for want of an affidavit for appeal, cannot be heard to raise the objection here. *Wilson v. Dean*, 10 Ark. 308; *James v. Dyer*, 31 Ark. 489. There was no proof that the defendant held the cotton as security for payment of a lien upon it, as counsel argues. Without denying the plaintiff's title, he undertook to prove that he held the cotton by virtue of an agreement made with the plaintiff to the effect that he should sell it, and out of the proceeds pay the residue of an account which he claimed the plaintiff owed him. The court properly instructed the jury that the burden was on the defendant to prove the defense thus alleged. Nothing else is complained of. **Affirm.**

#### MAYS v. ROGERS.

(Supreme Court of Arkansas. Dec. 14, 1889.)

#### ADMINISTRATORS—SALE OF LANDS—COST OF ADMINISTRATION.

Under Mansf. Dig. Ark. §§ 170, 171, providing that "lands and tenements shall be assets in the hands of every executor or administrator for the payment of the debts of the testator or intestate," and that if any person die intestate as to any lands or tenements, who "shall not have sufficient personal estate to pay his debts, it shall be the duty of the \* \* \* administrator to apply to the court of probate by petition, \* \* \* containing a true and just account of all the debts of the \* \* \* intestate which shall have come to his knowledge," where an application is made to sell lands to pay the expenses of administering the estate only, it must be made to appear that the expenses were incurred in the course of administering the estate to pay debts due personally by the decedent, and if no debts are due by him there can be no sale of his lands.

Appeal from circuit court, White county;  
*M. T. SANDERS*, Judge.

Petition by an administrator for leave to sell lands belonging to his decedent's estate. Mansf. Dig. Ark. § 170, provides: "Lands and tenements shall be assets in the hands of every executor or administrator for the payment of the debts of the testator or intestate." Section 171 provides: "If any per-

son, being the owner of lands and tenements, die intestate, and such \* \* \* intestate shall not have sufficient personal estate to pay his debts, it shall be the duty of the \* \* \* administrator to apply to the court of probate by petition, \* \* \* containing a true and just account of all the debts of the \* \* \* intestate which shall have come to his knowledge."

The appellant, *pro se*. *W. R. Coody*, for appellee.

**PER CURIAM.** Where there are no debts due by a decedent, there can be no sale of lands of his estate to pay the expenses of an administration had thereon. If the administration is continued after the debts are paid, as in the case of *Stewart v. Smiley*, 46 Ark. 373, it would be error to order a sale of the lands to pay the costs of the subsequent administration. To what extent the right to resort to the lands for the sole purpose of paying the expenses of administering the estate is limited, has not been fully argued by counsel, and is not now determined. In every case, however, where an application is made to sell lands for the expense of administering the estate only, it must be made to appear that the expenses were incurred in the course of administering the estate to pay debts due personally by the decedent. Mansf. Dig. §§ 170, 171. See cases cited at section 468, 2 Woerner, Adm'n; 3 Williams, Ex'rs, \*2041, note a. The cause was heard by the circuit court upon the administrator's petition to sell, and one exhibit thereto, and the remonstrance of the heir, without proof, and the essential fact referred to does not appear therefrom. The other questions argued by the appellant are not presented by the facts as set forth in the record. For the error pointed out the judgment is reversed, and the cause remanded for further proceedings.

#### SLATE CREEK IRON CO. v. HALL.

(Court of Appeals of Kentucky. Dec. 7, 1889.)

#### NEGLIGENCE OF MASTER.

In an action by an engineer of a train engaged in hauling coal from defendant's mine for personal injuries sustained by reason of his engine striking an ore chute, arranged to be raised or lowered to allow trains to pass, where it appears that the conductor of plaintiff's train had told the agent in charge of the chute that the train was not going to be run that far, and signaled the engineer to stop, but the engineer did not see the signal because of the smoke from his engine, and ran into the chute before it was moved out of the way, there is not sufficient evidence of negligence on the part of defendant to support a verdict for plaintiff.

Appeal from circuit court, Bath county.  
"Not to be officially reported."

Action by *W. L. Hall* against the Slate Creek Iron Company. Judgment for plaintiff. Defendant appeals.

*Wm. Lindsay*, *R. Gudgell*, *J. J. Nesbitt*, and *C. W. Goodpaster*, for appellant. *Thos. H. Hines*, *W. S. Gudgell*, and *C. W. Nesbitt*, for appellee.

**PRYOR, J.** The appellee was an engineer of a freight train owned by the Newport News & Mississippi Valley Company that was engaged in bringing iron ore from the mines of the appellant to the track of the Elizabethtown, Lexington & Big Sandy Railroad Company. The ore was dumped into the cars by means of chutes, with aprons or spouts attached, that when in a certain position obstructed the passage of cars on the track; the apron having to be raised or lowered in order that trains might pass. The appellee, on the day of the accident causing the injury complained of, had to pass by the chute, and then back up to it with his train, that it might be loaded, as was the usual manner of loading. It is alleged by the appellee that the appellant or its employes had negligently and intentionally permitted and suffered this chute, or the apron from it, to be so lowered and raised out and over the track of the road as that it was struck by the train, and he, the engineer, seriously injured.

It may be questionable whether the petition presents a cause of action, as the facts are not sufficiently alleged to show negligence on the part of the defendant; but the evident purpose of the pleader was to allege that this spout was where it ought not to have been when trains were passing, and the appellant, knowing this fact, and it being the duty of appellant to remove it, was guilty of negligence. This case, however, must be reversed on the testimony. The judgment is for \$3,400, in the absence of any proof upon which to charge the company or its agents with neglect. As we understand from the testimony, one Herman was the conductor of the train on which the appellee was at the time acting as engineer; and all the parties cognizant of the facts, and the location of this branch road, and the chutes at the mines, knew that the spout or apron would interfere with the passage of the train,—this is conceded as well as proven; and, it being the duty of the company to raise or lower the spout that trains might pass, in the absence of some valid excuse, the company was guilty of neglect. The undisputed testimony, however, shows that the conductor of appellee's train occupied a position at the time of the accident near the track of the road, and informed the agent of the company that he would not pass this chute on account of some defect in the road, and he was then told by the company's agent that no necessity existed for lowering the spout. That this conversation took place is a fact sworn to by several witnesses, and the conductor, in order to carry out his purpose and stop the train, gave what is called several stop signals, that were unheeded by the engineer and brakeman. That these signals were given in ample time to have enabled the train to stop before reaching the chute is proven by the appellee's own witnesses. It was a clear, bright day, but the engineer says the smoke from the stack of his train prevented him from seeing the signal, and hence the accident. The conductor

himself is sworn, and testifies that he told the agent he did not intend to pass the chute; and, to show that this was his purpose, it further appears that signal after signal was given to stop the train. Assuming, therefore, that the smoke from the smoke-stack obscured the vision of the appellee, and prevented him seeing the signal, why should the appellant be held responsible for the injury? The conductor's orders had to be obeyed. He had the right to say when and where the train should stop. This was a branch track, and used alone by this company in carrying and transporting ore from the mines to the principal railroad. The spout was where it ought to have been when no trains were about to pass it. The agent of the appellee was informed by the conductor that the train would not pass the chute. This entire testimony is uncontradicted. There is no collusion shown between the conductor and the agents of the appellee. The witnesses have not been impeached, and no reason appears from the facts before us for assuming that these witnesses, several in number, have sworn falsely; and the fact that stop signals were given would negative the conclusion that this was a defense concocted for the purpose of defeating the recovery.

It is seldom that this court is called on to disturb the verdict of a jury on the facts, but in this case, the verdict, being palpably against the evidence, we feel compelled to reverse the judgment, and the case is now remanded for further proceedings consistent with this opinion.

**ESKRIDGE'S EX'R v. CINCINNATI, N. O. & T. P. Ry. Co.**

(Court of Appeals of Kentucky, Dec. 10, 1889.)

**RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—EVIDENCE—PLEADING.**

1. Deceased, who was driving four unhitched horses, riding one of them, approached a railway crossing along a road where the view of the railway was at different points more or less obstructed, and about 115 feet from the crossing stopped to talk with some men, when a passing train frightened the horses, and caused them to run away, whereby deceased was killed. The men with whom he was talking testified that they heard no whistle, but one saw the smoke of an approaching train, and gave a warning, too late. Other witnesses within hearing distance heard no whistle, or were not positive that it was at the crossing. *Held*, in an action against the railway company for causing deceased's death, that contributory negligence was not to be presumed, so as to justify the case being taken from the jury.

2. The question as to whether a witness, who heard no signal of an approaching train, could have heard it had it been given, calls for an opinion merely, and is properly ruled out.

3. Testimony of a witness that she watched the trains after the accident, and only a few out of a large number whistled, and that trains did not usually whistle there, is inadmissible.

4. The petition stated that the injury was caused by defendant's accommodation train, but, before answer, was amended by changing the allegation to the express train, which passed before the accommodation. *Held*, that it was proper to refuse to allow the petition to be amended, after

the jury had been sworn and witnesses had testified, so as to state as at first that the accommodation train caused the injury.

Appeal from circuit court, Grant county.  
"To be officially reported."

Action by the executor of William K. Eskridge against the Cincinnati, New Orleans & Texas Pacific Railway Company for damages for personal injuries resulting in death. Judgment for defendant. Plaintiff appeals.

*H. Clay White and Collins & Penley*, for appellant. *O. B. Simrall and De Jarnette & Dickerson*, for appellee.

**Lewis, C. J.** The life of W. K. Eskridge was destroyed in Grant county, under the following circumstances: He was, in February, 1887, returning from Dry Ridge, on the east side, to his residence, about one and a half miles west of the railroad of appellee, driving a team of four horses, harnessed, but not hitched to a vehicle, he being astride the saddle horse; and, about the time the leaders had reached, or were very near to, the track, at what is called "Conrad's Crossing" of a county road, a train of cars passed rapidly southward, frightening them so much he lost control of the team, and fell or was thrown to the ground, and, from injuries thereby received, died in a few days. Whereupon this action was instituted, by his executor, to recover damages therefor; but, upon conclusion of the plaintiff's evidence on the trial in the lower court, a peremptory instruction was given, and verdict was rendered for the defendant.

In the original petition, it was stated the injury was caused by negligence of those in charge of the south-bound accommodation train, but in an amended petition, filed before answer, it was stated to have been caused by wilful negligence of servants of appellee in charge of the south-bound express train, which passed before the other; and one of the alleged errors is refusal of the court to permit the plaintiff to file a second amended petition, in which it was stated, as in the original, the south-bound accommodation train caused the injury. As motion to file the last-named pleading was made after the jury was sworn and some of the witnesses had testified, we think the court properly overruled it, and also properly sustained objection to testimony of the passengers on the accommodation train, who, it was averred, would state they heard no whistle or bell when it approached Conrad's Crossing; for, the issue having been made up and partly tried as to negligence of those in charge of the express train, it would have been obviously prejudicial to the defendant to allow it to be then changed.

Certain witnesses having stated they did not hear any signal of the approaching train, it was the province of the jury to judge from the facts before them whether such witnesses could have heard the signal if it had been given; and the court properly refused to permit the witnesses to give their opinion on

the subject, for it was no more than an expression of opinion.

The plaintiff offered to prove by a witness that she (the witness) noticed the trains very closely that passed the crossing the day after the testator was injured, for this purpose of ascertaining whether they gave the signal as they approached that place, and, of the large number passing, only three whistled; and also that the trains did not usually do so. It was held by this court, in an action to recover damages of a railroad company for destruction of fences, grass, and other property along the line of the road, alleged to have been ignited by sparks of fire escaping from the chimney of a particular locomotive, that it was competent, in the absence of direct evidence as to origin of the fire, and in order to thus show it, to prove the usual condition of the defendant's engines. *Railroad Co. v. Barron*, 6 Ky. Law Rep. 240. The theory upon which such testimony is admissible is that "the business of running trains on a railroad supposes a unity of management, and a general similarity in the fashion of the engines and character of the operation," (*Sheldon v. Railroad Co.*, 14 N. Y. 218;) for every railroad company is bound to have and use, in operating its trains, machinery scientifically constructed, and best adapted to prevent injury to persons and property. Besides, there is a statute of this state which requires all railroad companies to place on top of each locomotive chimney a screen or fender, for the special purpose of preventing escape of sparks of fire while the train is in motion. As the duty is thus imposed directly upon each company, and its chief officers are required to uniformly construct and adjust locomotives so as to prevent escape of sparks of fire, it was held competent in that case, where the question was made as to the condition in that respect of the particular locomotive alleged to have caused the injury, to show a failure generally to comply with the law. But whether a signal was given at approach of a train to a station or crossing on any particular occasion is a question of fact that cannot be affected, one way or another, by showing the conduct of subordinate officers or servants in charge of some other train or trains, who may or may not be mindful of their duty.

The well-established rule in this state, in determining whether the court ought or not to give a peremptory instruction, is that it is not enough that the evidence be, in the opinion of the court, such that possibly a new trial should be awarded in case of verdict in favor of the plaintiff, on the ground it would be against the weight of evidence; but, if there be evidence conducing to show a right of recovery, however contradictory it may seem to the court to be, or wherever the preponderance, in the court's opinion, may be, the plaintiff may insist on a verdict of the jury. It appears that the testator stopped on his way at the point the county road intersects the Lexington & Cincinnati turnpike,

about 115 feet from the railroad track at Conrad's Crossing, and, with one of two persons at work in a field adjacent to the turnpike, conversed for a short time; and he was in full view of both of them when his team became frightened at the passing train, and he was injured. Both of these persons testified, as witnesses, that they did not hear any signal of the approach of the train given, though one of them stated he discovered the train by the smoke arising from the locomotive, and warned the deceased it was coming,—to look out,—though too late. It is not necessary to refer in detail to the evidence of the other five witnesses who testified on the subject, three of whom, though within the limit of distance at which a locomotive whistle may be heard, testified they did not hear any signal given upon approach of the train to Conrad's Crossing. The other two testified they heard a whistle, but were not positive it was at the crossing. It appears, from the testimony of a witness who took some pains to ascertain the distance and topographical features of the ground between the turnpike and railroad, that a person passing on horseback along the county road, which is called the "Baton Rouge Road," towards the crossing, from the point of intersection to within 90 feet of the railroad, the train was in full view for a distance of 3,500 feet northward. Between 90 and 50 feet from the track, it could not be seen; at 50 feet, it could be seen for the distance of 350 feet; and at 37 feet, it could be seen 1,500 feet; but between that point and the track it could not be seen. Though it may be that the deceased might, by using his eyes, have seen the approaching train, or that, adopting the theory of appellee's counsel, he did see it, but trusted to the docility of his horses, still, whether, if at all, he so far contributed to the injury by his own negligence that but for it the injury would not have happened, was exclusively within the province of the jury to determine; for the court had no right to "presume that the deceased recklessly or carelessly imperiled his own life, or entered upon the track knowing of the train's approach." *Railroad Co. v. Goetz*, 79 Ky. 442. And, without such presumption, conclusive contributory neglect, to the degree necessary to acquit the defendant of all liability for its failure to give the signal, if it did so fail, cannot be arrived at, under the circumstances of this case, with such certainty as to justify the court in giving a peremptory instruction. Moreover, it is settled by this court that where willful negligence is established the defendant is liable, no matter how negligently the person killed may have acted, (*Claxton v. Railroad Co.*, 13 Bush, 636;) and whether appellee's servants in charge of the train that caused the death of appellant's testator were guilty of such negligence is a question for the jury, in a case like this, to determine under the proof, (*Id.*, and 79 Ky. 442.) Willful negligence, in the meaning of the statute as heretofore defined, is where the "conduct of a party in

fault was such as to evidence reckless indifference to the safety of the public, or an intentional failure to perform a plain and manifest duty, in the performance of which the public and the party injured had an interest." 13 Bush, 637. To run a train at a rapid rate of speed across a public street in a city or town, without a signal to warn persons of its approach, is *prima facie* willful negligence, because the probability of destroying life or doing serious personal injury is very great. There is less probability of fatal results from crossing a county road, not much traveled. But it is the policy of the law, as has been often held by this court, to treat the duty of those in charge of a railroad train to give timely and sufficient warning of its approach to the crossing of a public road as imperative; and a failure to perform it is, in legal contemplation, negligence, the degree of which depends upon the facts and circumstances of each case, to be determined by the jury. And, if they find it to be willful negligence, then contributory negligence, by a person whose life is destroyed, affords no defense or excuse in law. Wherefore the judgment is reversed, and cause remanded for a new trial, in accordance with this opinion.

#### ALLEN v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 10, 1889.)

HOMICIDE—CONSPIRACY—EVIDENCE—ELISORS.

1. On a trial of defendant for aiding and abetting a husband in the murder of his wife, where it appeared that they armed themselves, and together went to the home where the wife lived after separation from her husband, with the purpose of capturing her and carrying her away for an unlawful purpose, evidence that the husband, during such pursuit, offered to surrender the virtue of his wife to others, if they would give him information as to where she was, is admissible, whether or not defendant heard such offer.

2. Where defendant, on cross-examination, denies that he surrendered himself for the purpose of obtaining the reward offered, testimony of other witnesses that he admitted that his surrender was made in order to obtain the reward, if incompetent, is no ground for reversal.

3. It is no ground for a new trial that the jury convicted defendant of manslaughter instead of murder.

4. Where, during the impaneling of the jury, the judge ascertains that the sheriff is related to the accused, it is proper, without motion or affidavit, to appoint an elisor to act in the sheriff's stead.

Appeal from criminal court, Floyd county.

"Not to be officially reported."

Walter S. Harkins, for appellant. P. W. Hardin, Atty. Gen., for the Commonwealth.

PRYOR, J. The appellant, Linden Allen, was indicted for aiding and abetting one Benjamin Howard in the murder of Howard's wife, and convicted of manslaughter, his punishment being confinement in the state-prison for two years. A reversal is asked, on several grounds—*First*, that under the testimony, if not guilty of murder, he was entitled to an acquittal; *second*, the admission of incompetent testimony; and, *lastly*, an error in impaneling the jury.

It seems from the testimony that Howard, who is charged with the murder, married the deceased, a girl about 16 years of age, and lived with her but a brief period. The cause of the separation is not made to appear from the testimony. He left his home in Magoffin county, and went west, returning in a few months, when his desire to have an interview with his wife induced him to seek the aid of his friend, the appellant; and the two, after arming themselves with a pistol each, and imbibing a quantity of brandy, started on the hunt of the girl, who was supposed to be at the residence of Judge Harris, in the county of Floyd. On Monday morning, they reached the little village of Goodloe, where Judge Harris lived, and, going to his house, inquired for the girl by her maiden name; said they were her cousins, desiring to see her, and had been, or were then, in pursuit of a man who had killed some one in the state of Virginia. Howard, the husband, assumed the name of Higgins, and thus imposed on the wife of Harris. They were told that the young lady was not in, or at home, but would return in the evening. Prior to their going to the house of Harris, they purchased a dozen cartridges at a store in the village; and the appellant loaded both pistols, that they might be prepared for the assault on their young victim. The husband, Howard, made inquiry of some two or more persons he knew as to his wife's place of abode, promising, if they would find out, she would be made to submit to the gratification of their beastly passions; and such a motive, no doubt, caused the extraordinary exertions used to obtain the custody of her person. It was neither love nor affection for the wife that caused this hasty ride from the one county to the other, but the desire to gratify a brutal passion that would have been consummated by more than one, if they had obtained possession of her person. It is objected by the appellant that this offer by the husband to surrender the virtue of his wife to those who would give the information as to her home was incompetent as to him, because he was not present at the time, or near enough to have heard what passed between Howard (the husband) and the witness. He was as near as 15 or 20 feet of the witness when Howard addressed him, and, no doubt, heard what passed between them; and, whether he did or not, the pursuit of the girl, evidently for an unlawful purpose, was undertaken by both the appellant and the husband, and what either said, during this effort to capture the girl, in regard to the object in view, and its results if successful, was competent, and therefore properly admitted as testimony.

On the evening of the same day, Monday, the two, appellant and Howard, returned to the home of Judge Harris, and the appellant alighted from his horse and went into the house, where he saw the girl attempting to conceal herself by wrapping her body in the curtains that hung from the window. She requested the appellant not to inform her

husband that she was in the house. He returned at once to the fence where he had left Howard and the horses, and Howard dismounted, going into the house, saying at the same time that he had seen his wife through the window. This is what the appellant states; but the fact that the appellant first entered the house, with a view of ascertaining whether the girl was in or not, connected with his agency in the capture and his hasty return to Howard, indicates clearly that he had given the information desired, resulting in the tragedy that took place in less than five minutes after Howard left him in charge of the horses. Howard, when entering the room and seeing his wife, desired a private interview with her. This she declined, and requested him to take a chair, and speak to her, if he wished. Mrs. Harris, discovering that Howard was the girl's husband, instead of cousin, and believing that he desired to have a private talk with his wife, left the room, and stepped into the yard, where, after a few seconds, she heard the report of a pistol, and, rushing at once into the house, found the unfortunate girl with a bullet hole through her body. The wife had refused to surrender her person to the husband, when the latter deliberately took her life. The appellant and Howard then remounted their horses and made haste to escape; the appellant halting Howard for a moment, as they passed some man's house, and proposing that they return and "clean out the whole damned set." They slept together in the woods that night, and then made their way to the state of Virginia, having been pursued and shot at by the friends of the unfortunate girl, and were finally captured on their return, as the appellant says, to surrender to the civil authorities. What has become of the husband, does not appear from this record. On the trial, when the appellant was being examined as a witness, he was asked if he had not said that his purpose in returning was to obtain the reward that had been offered for his capture. This he denied; and then the prosecution, by way of contradiction, and to rebut the idea of his voluntary surrender for the purpose of having a fair investigation of the case, proved by one or more witnesses that he said his surrender was made that he might obtain the reward. This immaterial issue could not have affected the case the one way or the other, and, if incompetent, affords no ground whatever for a reversal.

It is further argued that during the impaneling of the jury the judge presiding ascertained that the sheriff was related to the accused; and that, without any motion having been made by the commonwealth, or an affidavit filed showing this relationship on the part of the sheriff, the judge had an elisor appointed, who was sworn, as the law requires, with his deputies, and took charge of the accused, and also summoned other jurors. This action on the part of the judge is complained of, and the entire panel objected to, for that reason, with the proper motion made by the

accused in the court below. The judge below acted properly in appointing the assessor. It was his duty, as well as that of the attorney for the state, when information was given him that the sheriff was related to the accused, to appoint some one to act in his stead; and, while there is nothing showing any improper conduct on the part of the sheriff in summoning the jury, it relieved him from an embarrassing position, and conducted to a pure administration of justice, as between the state and accused.

It seems to us that the only complaint the appellant has in effect made is that the jury convicted him of manslaughter instead of murder; and we attribute the light punishment inflicted on the accused solely to his previous untarnished character as a peaceable, law-abiding young man. That he was convicted of a lesser offense when guilty of a higher degree of crime is no argument for sending this case back for another trial. If the commonwealth could appeal, and the life of the accused be placed in jeopardy more than once, under our constitution and laws, a reversal of this case would necessarily follow, as the pages of this record furnish evidence of the commission of a crime so heinous in its character as that no punishment imposed by law would be held too severe on the offender. Judgment affirmed.

**FRYSE et al. v. THUM et al.**

(Court of Appeals of Kentucky, Dec. 18, 1890.)

COUNTY SCHOOL COMMISSIONER—BOND.

Gen. St. Ky. c. 18, art. 5, § 8, requires the superintendent of public instruction, upon the report of the county school commissioner, to certify the amount due for schools in that county to the auditor, who is to draw his warrant on the treasury in favor of the commissioner, who is required to collect the same as soon as possible, and pay over to the teachers the amount due them respectively. A commissioner who was also sheriff, having failed as sheriff to turn over to the treasurer the full amount due from him, adjusted the deficit by an arrangement with the auditor whereby the amount due him as commissioner was applied on this account. Held, that it was no defense to an action on his bond for the amount due the teachers, that the money was never in fact drawn from the treasury.

Appeal from circuit court, Lee county.

"Not to be officially reported."

Several actions by A. W. Titus and others against David Fryse and others. Judgment for plaintiffs. Defendants appeal.

J. B. White, for appellants. *Harple & Rustin*, for appellees.

Lewis, G. J. These actions, tried together, were instituted by appellees to recover the several amounts alleged due them, respectively, as teachers, from appellants, sureties on the bond of McGuire, commissioner of common schools of the county of Lee. There is no controversy about the amounts claimed by the plaintiffs being due, nor as to the liabilities of the principal in the bond therefor. But the sureties resist recovery against them upon the ground that the amount due for the

year appellees rendered services as teachers, or the balance sued for, never was in fact drawn from the state treasury by McGuire as commissioner. By section 8, art. 5, c. 18, Gen. St., (former edition,) it was made the duty of the superintendent of public instruction, upon the report of a commissioner of common schools for any county being placed in his hands and approved by him, to certify the amount due for schools therein to the auditor, who was to draw his warrant on the treasury in favor of the commissioner in payment of the same, which he was required to collect as soon thereafter as possible, and when collected pay over to the teachers of the districts in proportion to the amounts they were respectively entitled, for the use and benefit of teachers thereof. It appears that McGuire held at the same time the office of sheriff as well as commissioner of common schools of Lee county, and, having failed to pay into the state treasury the full amount of revenue due from that county, judgment was recovered against him and his sureties on the revenue bond for \$—, the deficit, and execution issued therefor. But by an arrangement between him and the auditor of public accounts the amount due and payable to him as commissioner of common schools, except about \$140 which he received, was applied in paying the amount due as collector of revenue, and thus cessation of proceedings on the judgment, and a *quodammodo* was obtained by him. The auditor, who testified as a witness in these cases, stated that it has been common for him to make arrangement with sheriffs to pay revenue collected directly to commissioners of common schools, and in return have the amounts then paid, repaid out of duty due to the commissioners at Frankfort, the proper warrants being drawn for the purpose, whereby the risk and trouble of transmitting money to and fro can be avoided. But, whether the transaction intimated be entirely regular or not, we are unable to see how appellees can be made to lose by it. The statute required McGuire, as commissioner, to execute a bond, with sufficient security, for the faithful discharge of his duties, which is broad enough to cover every official duty and undertaking; but appellees, by the terms of the bond actually executed, covenanted, in addition, that he would pay over in due time to such persons as might be entitled all means coming to his hands as school commissioner of Lee county. But before he could collect, or was legally entitled to receive, any money as commissioner, the amount due to Lee county had to be ascertained by the superintendent of public instruction, which could not be done without a report from the commissioner, which the law required him to make, showing the number of children of the required age, the number of schools taught, and the length of time they were taught. Beyond question, his failure to discharge that duty would have rendered him and his sureties liable to the teachers of Lee county, who would have

thereby been kept out of the money it was his duty to collect and pay to them. It does not, therefore, seem to us to make any difference what person or motive may have influenced or controlled the conduct of McGuire in failing to collect and pay over, as it is plain he has broken his covenant without any excuse on his part, or fault on the part of the teachers, and to the extent they have been damaged thereby they ought to recover. If he had consented to transfer the school money to make up the deficit of some other negligent or defaulting sheriff than himself, it would hardly be contended that the teachers should, without fault, be made to suffer, that his sureties might go free. It is not easy to see how the fact that he is the defaulting sheriff should make the case any worse for the teachers or better for appellants. Judgment affirmed.

#### CHENOWITH v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 12, 1899.)

##### CRIMINAL LAW—PUNISHMENT—SECOND OFFENSE.

1. Gen. St. Ky. c. 89, art. 1, § 12, which provides that "every person convicted a second time of felony . . . shall be confined in the penitentiary not less than double the time of the first conviction," simply fixes the minimum punishment for the second offense. Where the punishment awarded by the jury for the second offense equals or exceeds double the time of the former, judgment is to be entered for the amount thus awarded. Where it is less, it must be increased to double the time of the former.

2. It is the office of the jury, in such cases, to merely find whether there has been a former conviction; and the addition by them of double the former time to the amount awarded for the second offense must be regarded as mere surplusage.

3. This statute is not in violation of the constitutional provision that no one, for the same offense, shall be twice put in jeopardy. Following *Boggs v. Com.*, 5 S. W. Rep. 307.

Appeal from circuit court, Jefferson county.  
"Not to be officially reported."

*A. A. Haggan*, for appellant. *P. W. Hardin*, Atty. Gen., for the Commonwealth.

**HOLM, J.** The indictment against the appellant, *W. B. Chenowith*, contains three counts. The first charges him with forgery; the second and third, with previous convictions for felony. The second count was sustained by testimony. The jury returned this verdict: "We, the jury, find the defendant guilty on the first count of the within indictment, and fix his punishment at five years in the penitentiary; and also find him guilty on the third count of the within indictment, and fix his punishment at six years in the penitentiary; making, in all, eleven years' confinement in the state penitentiary." The judgment is for the 11 years. The evidence supported the finding of the jury, and no error is shown by the record during the progress of the trial.

But one material question is presented: Is the judgment correct? The statute provides: "Every person convicted a second time of felony, the punishment of which is confine-

ment in the penitentiary, shall be confined in the penitentiary not less than double the time of the first conviction; and, if convicted a third time of felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty, unless the jury shall find from record and other competent evidence the fact of former convictions for felony committed by the prisoner, in or out of the state." Gen. St. c. 89, art. 1, § 12. It has been held that this statute is not in violation of the constitutional provision that no one, for the same offense, shall be twice put in jeopardy. The increased punishment is not for the former offenses, but the previous convictions merely aggravate the last offense, and add to its punishment. The accused is not required to answer to the former charges, and defend against them. Nothing is heard in reference to the former trials, save the fact of conviction. *Mount v. Com.*, 2 Duv. 93; *Taylor v. Com.*, 8 Ky. Law Rep. 783; *Boggs v. Com.*, 5 S. W. Rep. 307.

A construction of the statute has never been had, however, upon the state of case now presented. In case of a third conviction there is no trouble. It arises where there is a second conviction, and the punishment awarded for the last offense exceeds double the punishment of the former one, or where, as in this instance, the question is presented whether double the time of the former conviction is to be added to that fixed by the jury for the present offense; thus increasing the punishment both beyond that fixed by the jury for the present offense and double that of the former conviction. The language of the statute is that in such a case the party convicted "shall be confined in the penitentiary not less than double the time of the first conviction." Not without some doubt, we incline to the opinion that the legislative intention was that in case of a second conviction the offender should be punished to the extent of at least double the time of the former conviction. It is true the statute looks to an increased punishment for a repetition of crime, but it seems to us, only to this extent, in case of a second conviction. The legislature has said that if the party offends twice he shall at least suffer to the extent of double the former penalty. If, therefore, the punishment awarded for the second offense be equal to or exceeds double the time of the former one, judgment is to be rendered only for the punishment fixed for the present offense. If, however, it be less, then the punishment is to be increased to double the time of the former conviction. It is to be this much, at least. The law-maker has said that it shall not be less; and, if it had been intended it might not only exceed the punishment awarded for the present offense, but more than double that of the former conviction, it seems to us the legislature would have said so in unmistakable terms. This it has certainly not done; and, were it even more doubtful than it is, we should feel in-



clined to favor a merciful construction of the statute.

It is the office of the jury, in such a case, to find whether there has been a former conviction. The addition by the jury in this instance of the years of punishment awarded by them for the present offense to double the time of the former punishment, making an aggregate of 11 years, must be regarded merely as surplusage. As the punishment awarded by them for the present offense was but five years' confinement in the penitentiary, or less than double the time of the former conviction, the court should have increased it to six years, thus rendering judgment for "not less" than double the time of the former conviction. A new trial is not to be had upon the return of the case, but the judgment is reversed, with directions to render one upon the verdict in conformity to this opinion.

#### HOUSTON & T. C. R. Co. v. TIERNEY.

(*Supreme Court of Texas*. Dec. 18, 1888.)<sup>1</sup>

##### TRIAL—INSTRUCTION.

In an action against a railroad company for personal injuries, defendant pleaded a release of damages. The replication denied the execution of the release, and a special answer averred that if plaintiff signed it he did so when under the influence of liquor furnished by defendant's agents. The testimony of the subscribing witness to the release, and others, was to the effect that plaintiff signed it after having been told to read it, and after having looked over it with the appearance of reading it; that he acknowledged having "signed it for the purpose therein stated;" and that he was not intoxicated when he signed it. Plaintiff testified that the signature looked like his, but that he had no recollection of having signed the instrument, or of having seen it until it was filed with the papers in the case. *Held*, that the evidence did not authorize an instruction that if plaintiff signed the release when he was so drunk that he did not know what he was doing, or without an opportunity to understand its terms, it would not bind him.

Commissioners' decision. Appeal from district court, Dallas county; GEORGE N. ALDRIDGE, Judge.

Action by Michael Tierney against the Houston & Texas Central Railroad Company, to recover for personal injuries to plaintiff while in defendant's employ. There was a judgment for plaintiff, and defendant appeals.

*R. De Armond*, for appellant. *R. B. Cowart*, for appellee.

HOBBY, J. The verdict in this case for the sum of \$5,000 in favor of plaintiff, who was a "section boss" of defendant, is based upon his testimony. In going to the work in the line of his service, that of loading flat-cars with old iron, he was ordered by the conductor in charge of the construction train to climb over a box-car by means of a brake-rod attached thereto. In attempting to obey this order, the brake-rod, by reason of its defective attachment to the car, and because the

car also was rotten, gave way. The plaintiff was precipitated upon a pile of iron negligently laid near the track, and received from this fall serious personal injuries, which are conceded to be of such a character as would remove any complaint as to an excessive verdict. The plaintiff says he "did not know the defective condition of the brake-rod, its fastenings, or that of the car to which it was attached." He states that after the injury he heard the car-repairer of defendant say, in the presence of 30 persons, at Bremond, that the car had been condemned. His account of the manner in which his injuries occurred is contradicted by all the witnesses; so, also, is his evidence as to the condition of the brake-rod and car. It is in proof that these were in good condition, and in all respects sufficient for and adapted to the purposes for which they were intended and to which they were applied.

The defendant introduced in evidence a release executed by the plaintiff subsequent to his recovery from the injuries above referred to. This instrument recited the fact of plaintiff's injury in defendant's employ; his recovery therefrom; the institution of this suit in the district court of Dallas county; the denial by defendant of any negligence or liability for said injury; the acceptance by plaintiff of an offer to compromise to this effect: that if defendant would re-employ plaintiff in its service, pay him one dollar and costs of the suit, plaintiff would accept the same in full satisfaction and accord of all claims which he had or might have, or were in any manner incident to the accident and injury above set forth. It also recites the payment to plaintiff of the amount specified, and the promise to employ plaintiff, and the acceptance of the terms by plaintiff, and authorizes R. De Armond, an attorney of said court, to dismiss the suit. This release is signed by the plaintiff on the 11th day of September, 1884, and subscribed by three witnesses, (White, Fanning, and Kelly,) employes of defendant. Fanning stated that he was "road-master of defendant. Had known plaintiff for six or seven years. Saw plaintiff sign the above-described instrument. He had told plaintiff he thought his suit was very foolish, and he would make nothing out of it. What he said to plaintiff was as a friend." Witness testified that "Quinlan, superintendent of defendant road, gave him the release to take to plaintiff for his signature. He did so, handed it to plaintiff, and told him to read it. Plaintiff was at work at the depot (Thornton) at the time. Plaintiff seemed to read it. Witness did not read it to him. Saw him sign it, and gave him a silver dollar. Plaintiff was not drunk when he signed it, nor did he see anything unusual in his appearance." Kelly "had known plaintiff for the same length of time. Saw plaintiff sign the instrument. White, Fanning, plaintiff, and witness and others were present. Tierney was called by Fanning or me to come to depot. Fanning told

<sup>1</sup>Publication delayed by failure to receive copy.

him to read it over, and what it was. He gave plaintiff a silver dollar. Plaintiff was not drunk. Was sober and rational as he is here to-day. During witness' acquaintance with him had seen him under the influence of liquor. Did not see plaintiff read the instrument." White testified that "the instrument was brought to him with plaintiff's name subscribed, and he was asked to sign it as a witness. Said he could not do so, as he had not seen it signed." He then "took it to plaintiff, who was at work, and gave it to him to read. He took it, and appeared to read it;" and witness "inquired if he had signed it for the purpose therein stated." He replied in the affirmative. He exhibited no more appearance of intoxication than he does now,—nothing unusual in his appearance." Hudson testified that he "saw the plaintiff sign the release. Heard Fanning say to plaintiff, before plaintiff signed it, 'Be certain you know what you are doing before you sign it.' Was not called upon to sign as a witness. Plaintiff had the instrument in his hands, and had full opportunity to examine it, and was cautioned about signing it, or words to that effect." Plaintiff was shown the instrument offered in evidence, and was asked if the signature was his. He replied: "It looks like my signature, as I used to make it on the company's pay-rolls. I can read and write. Can read this [the instrument] plain enough. I have no recollection of ever signing the instrument, or seeing it, until it was filed with the papers in this case, a short time before the trial of this case,—the first time,—when it was shown me by my attorneys."

This is the evidence with reference to the execution of the instrument by the plaintiff. It was pleaded as a defense by the defendant, and the replication to the plea was a denial of its execution, and a special answer, in substance, that, if the plaintiff signed it, "it was done under the influence of intoxicating liquors furnished by defendant's agents, and when by reason thereof he was incapable of understanding what he was doing;" and pleading that the manner and circumstances under which the release was obtained from him constituted a fraud, and made the same absolutely void.

It appears from the evidence that the plaintiff, after executing the release, worked in the employment of the defendant, but for what length of time is not shown. It seems that he was discharged by one of his superior officers because his work was not satisfactory, and by another for drinking. With this evidence before the jury in support of the plaintiff's plea denying the execution of the release, the court charged the jury in this language: "With reference to the release pleaded by defendant you are instructed that, if plaintiff signed it when he was so drunk that he did not know what he was doing, then the release is not binding upon him. If plaintiff signed it without having an opportunity

to understand its terms, then it would not be binding upon him, and would not defeat his claim for damages."

It is altogether unnecessary to enter into any discussion for the purpose of showing that the charge quoted has no application whatever to the case as made by the evidence of both parties. We think it useless, also, to make any inquiry as to the correctness of the instruction as a question of law, for, if it be conceded to be a faultless declaration of a well-established principle of law, it is manifestly inapplicable to the evidence in the case. It is not pretended that the "plaintiff signed it without having an opportunity to understand its terms." The plaintiff does not in his testimony deny signing it. He states nowhere in the lengthy and specific narrative he gives of the circumstances attending his injury and his service in defendant's employ that he did not understand it. He fails to mention that he was intoxicated, or under the influence of liquor furnished by any one. All the other witnesses expressly refer to the fact of an entire absence of such condition upon the part of the plaintiff at that time, and neither these witnesses nor plaintiff testify to any circumstances tending to establish this. The charge, we think, in this respect, submits an issue not made by the testimony. It was obviously a question affecting the rights of the parties, but it was not made so by the evidence. It is a fundamental principle that a charge presenting a controlling issue, and plainly decisive of the rights involved, must be predicated upon evidence in support of pleas setting forth these rights. The violation of this universally safe rule results, as illustrated in this case, in the submission to the jury of a vital issue through the medium of a charge which can only reach the jury through the channel of pleading and proof. Under plaintiff's plea, he had the right to show that the release and satisfaction of any claim he had to damages was fraudulently obtained from him, or that when he signed it "he was so drunk that he did not know what he was doing." And if this had been shown, or there had been evidence tending to establish this, unquestionably it would have been his right to have the jury instructed as to the legal effect of this state of facts upon his rights, if the jury believed them. But in view of the full proof of the execution of the release by plaintiff, and the absence of any evidence from him impeaching it, we do not think there was any basis for the instruction.

There are other errors, we think, contained in the record, but we are of opinion that the error mentioned disposes of the case. We think the judgment should be reversed, and the cause remanded.

PER CURIAM. Report of the commission of appeals examined, their opinion adopted, and the judgment reversed, and the cause remanded.

## LLENPO v. STATE.

(Court of Appeals of Texas. Nov. 6, 1889.)

HOMICIDE—CONFESSIONS—INTOXICATION—DEPOSITIONS.

1. The fact that one accused of murder, who makes voluntary statements to the justice of the peace, after due warning and caution by the justice that the statements could be used in evidence against him, was intoxicated at the time he made them, does not render them incompetent, where it is not shown that he was intoxicated to that extent that he did not comprehend the warning, and was not able to make an intelligible statement.

2. Under Rev. St. Tex. art. 2235, Code Crim. Proc. art. 768, depositions cannot be read in evidence in criminal cases unless filed at least one entire day before the beginning of the trial; and objections thereto, when so properly filed, must be made in writing, with notice to opposing counsel. The objection urged to depositions taken out of the state, offered by defendant, was to the form and taking of the same. The bill of exceptions did not show that the depositions were filed in time. Held, that the presumption was that they were not properly filed, and hence their exclusion because not taken and returned by an authorized officer was not error.

3. Code Crim. Proc. art. 760, designating the officers before whom depositions outside of the state are to be taken in criminal cases, does not authorize them to be taken before a notary public.

4. It appeared on a trial for murder that on the day previous to the homicide the deceased had twice assaulted, beat, and abused the defendant, and defendant testified that a moment before the killing the deceased again insulted and threatened him with violence. Held, that this evidence warranted an instruction upon the issue of manslaughter.

Appeal from district court, Wise county; PATTERSON, Judge.

J. M. Llenpo was convicted of murder in the second degree, and appeals.

Asst. Atty. Gen. Davidson, for the State.

WILSON, J. It appears from the testimony that defendant's statements made to the justice of the peace, as testified to by the witnesses Hill and Gilbert, were voluntarily made by him, after he had been fully warned and cautioned by said justice of the peace that any statements he might make about the killing might be used in evidence against him. We think said statements were admissible as evidence under Article 750 of the Code of Criminal Procedure. That he was at the time of making said statements in an intoxicated condition did not render his said statements incompetent evidence, as it did not appear that he was intoxicated to that degree that he was incapable of understanding the warning and caution administered to him, nor incapable of making an intelligible statement of the cause and circumstances of the homicide. His mental condition at the time of making said statements was a proper matter for the consideration of the jury in weighing the evidence, but was not a sufficient ground for excluding said statements from the jury.

We are unable to determine from defendant's bill of exception that an error was committed in excluding the depositions offered by him. It does not appear from the bill that said depositions had been filed in the cause at least one entire day before the com-

mencement of the trial. It is true that the objection made to the depositions was merely to the form of taking and returning the same, (Adams v. State, 19 Tex. App. 250;) and, if the depositions had been filed in the cause one entire day before the commencement of the trial, said objection should not have been entertained unless made in writing, and notice thereof given to defendants' counsel, (Rev. St. art. 2235; Code Crim. Proc. art. 768.) We must presume that said depositions had not been filed in the cause the requisite length of time, and that therefore the court did not err in excluding them because they were not taken and returned by an officer authorized by law to take them. A notary public is not an officer authorized by law to take depositions in criminal cases, when such depositions are taken out of this state. Id. art. 760.

As we view the evidence, it demanded instructions upon the issue of manslaughter. It appears from the evidence that the homicide was committed by the defendant voluntarily, and under the influence of passion. It also appears that on the day previous to the homicide the deceased had twice assaulted, beat, and abused the defendant, and the defendant testified that a moment before the killing the deceased again insulted and threatened him with violence. This testimony, we think, presented the issue of manslaughter. It should have been submitted to the jury to determine whether or not the homicide was committed under the immediate influence of sudden passion, arising from an adequate cause. Defendant requested a special charge upon this issue, which the court refused to give, and did not submit the issue to the jury; concluding, we presume, that the evidence did not fairly raise such issue. This omission in the charge is the only error in it, but, as this error is material, the judgment must be set aside. Therefore the judgment is reversed, and the cause remanded.

## HUFFMAN v. STATE.

(Court of Appeals of Texas. Nov. 6, 1889.)

THEFT—POSSESSION—CONFESSIONS—TRIAL.

1. On the trial for the theft of a mare branded H O F, the theory of the state being that defendant and M. acted together in the theft, it is proper to permit a witness to testify that defendant and M. told him that they were jointly interested in the H O F brand.

2. Defendant, being on the stand in his own behalf, was asked about certain material statements made by him on his preliminary examination. He qualifiedly denied that he made them. Held, that this was sufficient to authorize the admission in evidence of the record of his written testimony as given on said preliminary examination.

3. A horse on its accustomed range is, in contemplation of law, in the possession of its owner.

4. It is not error for the court to receive the verdict on Sunday, in the absence of defendant's counsel, defendant being present.

5. Newly-discovered evidence is not ground for new trial, in the absence of a showing that such evidence could not, by reasonable diligence, have been had on the trial.

6. It is not sufficient that a bill of exceptions recites that a particular objection was taken to a certain proceeding. It must further show that the ground of objection actually existed.

Appeal from district court, Wise county; J. W. PATTERSON, Judge.

E. B. Huffman was convicted of the larceny of a mare, and appeals.

*Graham & Holman*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. We are unable to say from the record that any error was committed in admitting as evidence the extracts from the written testimony of defendant, taken on his preliminary examination before a magistrate. It is not made to appear by the bill of exception or otherwise that said testimony was not taken and authenticated in accordance with law. True, the bill of exception states that an objection made to said testimony was that said extracts were not authenticated, but the mere statement in a bill of exception of an objection made to evidence does not establish that the ground of objection existed. It must be made to appear that the ground of objection in fact existed. *Heunessy's Case*, 28 Tex. App. 840, 5 S. W. Rep. 215.

Another objection made to this testimony was that a proper predicate was not laid for its introduction. This objection is not supported by the record. Defendant testified as a witness in his own behalf on the trial. His testimony was subject to the same tests as that of other witnesses. He was subject to be examined, cross-examined, and impeached in precisely the same mode as other witnesses. *Whart. Crim. Ev. § 430*. "He may be contradicted by proof of prior inconsistent statements, and this without previously questioning him as to such statements." *Id. § 433*; *Chambers v. People*, 105 Ill. 469; *Gibbs v. Linsbury*, 22 Mich. 479. It is usually requisite, however, to ask the witness whether he has not made such prior contradictory statement, specifying the person to whom the same was made; and as far as possible the circumstances; and it is only upon a denial, direct or qualified, by the witness that he made such contradictory statements, that proof of them can be made, and the contradictory statements must be as to matters material and relevant to the issue, and not as to mere collateral matters. *Whart. Crim. Ev. § 433*; *Wilson, Crim. St. § 2513*. In this case, the defendant was asked about statements made by him on his preliminary examination before a magistrate. The statements were material and relevant to the issue. He qualifiedly denied having made such statements; that is, he said he did not remember making them, and did not think he had made them. We think a sufficient predicate was laid for the admission of the statements, and the court properly instructed the jury that said statements were not to be considered for any other purpose than as affecting the credibility of defendant as a witness in his own behalf.

It was not error to admit the testimony of the witness Milligan as to the joint ownership of defendant and one Morris of the mare in question. It was in proof that the mare was in the H O F brand, and Milligan's testimony was that the defendant and Morris stated to him that they were jointly interested in that brand. There is other evidence in the case which tends strongly to show that Morris acted with defendant in the theft of the mare, and it is the theory of the prosecution that the theft was their joint act.

Several objections are urged by counsel for defendant to the charge of the court, none of which are in our opinion maintainable. It was proved that at the time the mare was taken by the defendant she was running in the range in Wise county, where she had been accustomed to run for some time prior to the taking. She was therefore taken from her accustomed range, and was at the time of taking in the possession of her owner, and upon this issue the charge is correct.

We see no error in the charge as to defendant's claim of right to take the mare. He claimed the right to take her under a power of attorney purporting to be executed by one E. Coker. The evidence tended strongly to show that said power of attorney was a sham or device, concocted by defendant and Morris with a view to covering up the fraudulent taking, and that Morris, under the fictitious name of Coker, executed the said power of attorney. Such being the evidence, the charge of the court was applicable to the facts, and correct in principle. *Shoefercater v. State*, 5 Tex. App. 207; *Prator v. State*, 15 Tex. App. 363; *Roberts v. State*, 17 Tex. App. 82.

The charge is not defective in failing to instruct as to the character of defendant's possession of the mare,—whether recent or remote. This issue was not in the case, because the defendant himself testified that he took the mare from the range in Wise county. Nor was it essential to charge as to circumstantial evidence, in view of defendant's admission that he took the mare. Having given fully and correctly the law applicable to the facts proved, it was not error to refuse the several special instructions requested by defendant.

It was not error to receive the verdict on Sunday, and in the absence of defendant's counsel, the defendant himself being present. *Willson, Crim. St. § 2399*.

A new trial was properly refused. There is sufficient evidence to warrant the conviction. It was the conclusion of the jury that the power of attorney relied upon by defendant was a mere sham, fabricated by himself and Morris to shield them in the commission of the theft; and this conclusion was, we think, justified by the evidence. As to the alleged newly-discovered evidence, it is not made to appear that it could not have been, by the use of reasonable diligence, found and produced on the trial. The judgment is affirmed.

**COLEMAN v. STATE.**

(Court of Appeals of Texas. Nov. 6, 1889.)

**CARRYING CONCEALED WEAPONS.**

Pen. Code Tex. art. 319, denouncing the offense of unlawfully carrying arms, exempts a person who has reasonable ground for fearing an unlawful attack upon his person, and the danger is so imminent and threatening as not to admit of the arrest of the party about to make such attack, upon legal process. On the trial for a violation of the statute, it appeared that defendant was arrested at night, carrying a pistol on his person. A few minutes before his arrest he was attacked by one D., a larger and more powerful man than himself. Defendant fled, and was pursued some distance by D., who was armed with a club; D. threatening to kill him. Defendant fled to the room of a friend, from whom he borrowed the pistol, and soon after leaving the room was arrested. *Held*, that the case was within the exemption of the statute.

Appeal from county court, Tarrant county; HARRIS, Judge.

Jack Coleman was convicted of unlawfully carrying arms, and appeals. On the trial the defense proved that a few minutes before defendant's arrest he was attacked by one Davis, a larger and more powerful man than himself. Defendant fled, and was pursued some distance by Davis, who was armed with a club; Davis threatening to kill defendant. Defendant fled to the room of a friend, from whom he borrowed a pistol. Soon after leaving his friend's room he was arrested with the pistol on his person. The Texas statute, (Pen. Code, art. 319,) denouncing the offense of unlawfully carrying arms, exempts a person who has reasonable grounds for fearing an unlawful attack upon his person, and the danger is so imminent and threatening as not to admit of the arrest of the party about to make such attack, upon legal process.

B. G. Johnson, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. We are of opinion that the conviction in this case is not warranted by the evidence. We think the evidence shows that at the time defendant carried the pistol he had reasonable ground for fearing an unlawful attack upon his person, and that the danger was so imminent and threatening as not to admit of the arrest of the party about to make the attack, upon legal process. Defendant had already been violently assaulted by such party, and a continuance of such assault was threatened and imminent. It was in the night-time, and the circumstances were such that the defendant could not obtain legal process for the arrest of the attacking party in time to protect himself from the threatened danger. Our conclusion being that the evidence does not show a violation of the law by defendant, the judgment is reversed, and the cause remanded.

**SWEET v. STATE.**

(Court of Appeals of Texas. Nov. 20, 1889.)

**FORGERY—CONTINUANCE.**

1. On a trial for forgery of an order for money, the evidence showed that defendant, who was an ignorant, illiterate fellow, applied to the drawee

of the order for the loan of money to buy a coffin, in which to bury his mother, which was refused. The alleged drawer of the order testified that defendant applied to him for the purchase money of the coffin, and he advised him to apply to the drawee. Defendant left, and shortly afterwards presented the alleged forged order to the drawee, who paid the same. The drawer testified that he did not sign the order, nor authorize the defendant to sign his name thereto. *Held*, that under the evidence the court should have given in charge to the jury article 441, Pen. Code Tex., which provides that, when the person making or altering an instrument in writing acts under an authority which he has good reason to believe, and actually does believe, to be sufficient, he is not guilty of forgery, though the authority be in fact insufficient, or void.

2. Defendant, in his application for a continuance, stated that he had been unable, by the use of reasonable diligence, to have a certain witness at the trial; that he expected to prove by said witness that he heard the supposed drawer of the order authorize defendant to obtain from the drawee the amount named in the order, on the credit of him, (the said drawer.) *Held*, that the application should have been granted.

Appeal from district court, Gregg county; CAMPBELL, Special Judge.

Wilson Sweet was convicted of forgery, and appeals. The alleged forged instrument was an order on A. A. Killingsworth for \$15, purporting to have been executed by Dick Fields. Killingsworth testified, in substance, that defendant applied to him for the loan of the money to buy a coffin in which to bury his mother, or to become his surety for the purchase of said coffin. Witness refused. At a later hour, on the same day, defendant handed witness a note, purporting to have been written by Dick Fields, which was a request to witness to lend defendant \$15, or get defendant a coffin, and charge same to him, (Fields.) Witness thereupon, believing the order to be genuine, paid the defendant \$15. Fields testified, in effect, that defendant applied to him to become surety for him for the purchase money of a coffin. The witness refused, upon the plea that he had already paid two surety debts, and would incur no more. He then advised defendant to appeal to Killingsworth for help. Defendant left, and afterwards returned, and told witness that he got the money from Killingsworth, and in a few days would send the amount to witness, to pay Killingsworth. Witness advised him to send it direct to Killingsworth. The witness did not sign an order on Killingsworth for any sum of money payable to defendant, nor did he authorize defendant to sign his name to such an order. A number of witnesses testified for the defense that the defendant was an ignorant and illiterate man, who could neither read nor write.

R. B. Levy, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. This conviction is for the forgery of an order in writing, purporting to be the act of one Fields. We think a new trial should have been awarded the defendant, because of the absence of the witness Bryant Thompson, whose testimony, we

think, was material, and probably true. Defendant made a first application for continuance to enable him to obtain said testimony, in which he showed that he had used reasonable diligence to have said witness present at the trial, which application the court overruled. It is stated in said application that defendant expected to prove by said witness that he heard Fields authorize defendant to obtain from Killingsworth, the drawee of the alleged forged order, \$15, the amount named in said order, on the credit of him, (the said Fields.) This testimony would be material in several aspects: (1) As tending to show that defendant had lawful authority to make said order, or had good reason to believe, and actually did believe, that in obtaining the money from Killingsworth he acted under sufficient authority. (2) As tending to show that in the transaction he acted without an intent to injure or defraud. (3) As tending to show, in connection with other evidence adduced on the trial, that the order was genuine; that the same had, in fact, been executed by the said Fields. It cannot be said, in view of the evidence on the trial, that said absent testimony is not probably true.

We are further of opinion that, under the peculiar facts of this case, the court should have instructed the jury, in accordance with article 441 of the Penal Code, to the effect that if the defendant, in making said order, if he did make it, acted under an authority which he had good reason to believe, and actually did believe, to be sufficient, he was not guilty of forgery, though the authority was in fact insufficient, and void. This, we think, was a part of the law of this case; there being some evidence tending to show that Fields had authorized the defendant to get the money from Killingsworth, on his (Fields') credit, and it being shown, also, that defendant was ignorant and illiterate, and may, therefore, have reasonably believed that such authority justified the making of the order. Upon the whole case, as presented in the record, we are impressed with the belief that the ends of justice will be best subserved by according to the defendant another trial. The judgment is reversed, and the cause remanded.

#### GIEBEL v. STATE.

(Court of Appeals of Texas. Nov. 2, 1889.)

#### HOMICIDE—INDICTMENT—STYLE OF COURT—SELF-DEFENSE—INSANITY.

1. Const. Tex. art. 5, § 1, provides that the criminal district court of Galveston and Harris counties shall continue until otherwise provided by law. Act July 23, 1870, creating the court, was entitled "An act to organize and define the powers of the criminal district court in and for the counties of Galveston and Harris, and to prescribe the duties thereof," and in section 8 it was provided that the court in each county should have a seal, with the words, "Criminal District Court of ——— county." Held, that an indictment presented in the court sitting in Galveston county was properly entitled "In the Criminal District Court of Galveston County."

2. An indictment sufficiently charges murder

that alleges the killing upon "malice aforethought;" it need not allege express malice.

3. Nor need it allege the particular part of the body where the mortal wound was inflicted.

4. Rev. St. Tex. art. 8033, requires that the district court shall, at each term, appoint jury commissioners, who shall select jurors to serve during the several weeks of the succeeding term, and that the said commissioners shall certify the several lists of names to be the lists drawn by them for the said several weeks, which lists shall be sealed in separate envelopes, indorsed, "Lists of Petit Jurors for the ——— Week of the ——— Term of the ——— Court of ——— County." Defendant's motion to quash the special venire was based upon the fact that the several lists were headed "Lists of Jurors for the April Term." Instead of properly, the May term. The bill of exceptions did not show, nor did it otherwise appear, that the envelopes inclosing said lists were not properly indorsed. Held that, as the statute does not require the "headings of the lists" to be indorsed in like manner as the envelopes, the presumption obtained in favor of the proper return of the lists.

5. Act April 4, 1889, permitting defendants to testify in their own behalf, contained an emergency clause, but, falling of the essential two-thirds vote on the passage of the act, the emergency clause did not become operative, and the act did not take effect until 90 days after the adjournment of the legislature. Held, that it was not error to refuse to permit the defendant to testify in his own behalf, on a trial occurring before the 90 days had expired.

6. Nor was it error to refuse to continue the case so as to give defendant the benefit of that act.

7. A proposed juror stated on his *voir dire* that he was prejudiced in favor of defendant, but that he could find a verdict upon the evidence alone. Held, that the court properly sustained the state's challenge for cause.

8. Statements made by defendant three hours before the homicide were not admissible in his behalf as part of the *res gestæ*.

9. The fact that irrelevant and immaterial evidence was admitted for the state without objection by the defense affords no reason why the same character of evidence should be admitted for the defense over the state's objection.

10. The defense proved that, shortly before the homicide, the deceased declared that he had sustained illicit relations with defendant's former wife, which was the reason for the hostility existing between him and the defendant. Held, that it was proper to permit the state, in rebuttal, to prove, by the defendant's divorced wife, that she had never had improper relations with deceased, and that defendant had never charged her with nor suspected her of such relations.

11. The charge with reference to the right of an officer to use a deadly weapon upon an arrested party in his custody, only when in the necessary defense of his own person from serious bodily injury then about to be inflicted upon him by such prisoner, is not obnoxious to the objection that it based the right of self-defense upon the actual existence of danger, and not upon its reasonable appearance.

12. The defense interposed the plea of general and not partial insanity. A witness for the defense having testified to facts upon which he based his opinion that the defendant was insane, the state, on cross-examination, asked him whether in his opinion the defendant knew right from wrong. The defense objection that the question was too general, and that it should have been restricted to the defendant's mental capacity and knowledge as to the right and wrong of the particular act charged, was overruled. Held, that while the restriction would be proper, whether general or partial insanity be the plea, the ruling of the court was not reversible error, as it was not shown that defendant was injured, or that he was not permitted to examine the witness with reference to the particular act charged.

13. It is proper to charge that to establish the defense of insanity it must be clearly proved that at the time of committing the act the defendant

was laboring under such defect of reason as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know it was wrong.

Appeal from criminal district court, Galveston county; CLEVELAND, Judge.

Edward Giebel was convicted of the murder of Robert Crawford in the second degree, and appeals.

Upon the issue of insanity the court charged the jury as follows: "Every man is presumed to be sane until the contrary appears to the jury trying him. He is presumed to entertain, until this appears, a sufficient degree of reason to be responsible for his acts; and, to establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, defendant was laboring under such defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, he did not know he was doing wrong; that is, that he did not know the difference between right and wrong as to the particular act charged against him. The insanity must have existed at the very commission of the offense, and the mind must have been so dethroned of reason as to deprive the defendant of the knowledge of the right and wrong as to the particular act done. \* \* \* As a part of the law of self-defense, the court also charged as follows: "An officer who has made such arrest has no right to use a deadly weapon upon the person so arrested; after his arrest, or at any time, except it be in the necessary defense of his own person from some serious bodily injury then about to be inflicted upon him by such prisoner. He has no right to take the life of the person arrested, or about to be arrested, even though such person resists such arrest, unless the life of the officer is endangered by the use, or attempted use, of such force by the person arrested or about to be arrested, as to create in him just ground to fear that his own life will be taken, or that he will suffer great bodily injury thereby."

*J. B. & C. I. Stubbs*, for appellant. *Atty. Gen. Davidson*, for the State.

**WHITE, P. J.** 1. In his motion to quash, the defendant excepted to the sufficiency of the indictment, both as to its form and substance. As to its form, "because it does not appear to have been presented in the proper court, to-wit, the criminal district court of Galveston and Harris counties." On its face it is stated that the same was presented "in the criminal district court of the county of Galveston, state of Texas." It is insisted that there is no such court. Section 1, art. 5, of the constitution, to which we are cited in support of this position, simply provides that the criminal district court of Galveston and Harris counties shall continue with the district jurisdiction and organization now existing by law, until otherwise provided by law." The act of the legislature creating

said court was adopted July 23, 1870, and was entitled "An act to organize and define the powers of the criminal district court in and for the counties of Galveston and Harris, and to prescribe the duties thereof." (Pasch. Dig. art. 6135 et seq.) It is said that it is nowhere declared that the name of the court should be the "Criminal District Court of Galveston and Harris Counties." That such was not intended to be the name of the court, and that it was intended that the name of the particular court should be determined by the county name of either of the counties in which the court proceeding was had or session held, as in the case in other districts composed of more than one county, is, we think, manifestly apparent from the third section of the act of July 23, 1870, which provides that "the said court in each county shall have a seal similar to those of the district court, with the words, 'Criminal District Court of \_\_\_\_\_ County,' etc." It certainly never could have been intended that said court, when sitting in either county, should have jurisdiction at and try cases from both counties indiscriminately. We are of opinion that the words, "The Criminal District Court of the County of Galveston," or "The Criminal District Court of Galveston County," would either be proper and sufficient as the name of said court when held in Galveston county. This objection, therefore, to the form and manner of the presentation of the indictment, was without merit, and was properly overruled.

Appellant's objections for substance were "because the indictment does not charge express malice; because it does not charge murder; and because it does not state where, upon the body of the deceased, the fatal wound was inflicted." (The indictment is good, both in form and substance. It was not necessary to allege that the act was committed with "express malice." It was sufficient that it was alleged to have been done with "malice aforethought." *Pen. Code*, art. 605; *Willson, Crim. Forms*, Nos. 388, 389; *Sharpe's Case*, 17 Tex. App. 502, and authorities cited; *Willson, Crim. St.* § 1035. It was not, and is not necessary, to allege in what particular portion of the body the mortal wound was inflicted. *Willkerson v. State*, 2 Tex. App. 255; *Williams v. State*, 3 Tex. App. 123. Neither of these objections for substance were well taken, and the court properly overruled them.)

2. Defendant moved to vacate and set aside the special venire, which motion was also overruled. As shown by the minutes of the court at the March term, commissioners were appointed to select jurors for the May term, which was the next succeeding term. By inadvertence in heading the several lists of the jurors selected, these commissioners wrote "April Term," instead of "May Term," and so returned in the sealed envelope delivered by them to the judge. There being no April term of the said court, it is insisted that the list could not legally be used for the May term, or any other term, because the stat-



ute requires expressly that the "several lists of names drawn shall be certified under the hands of the commissioners to be the lists drawn by them for said several weeks, and shall be sealed up in separate envelopes, indorsed: "List of Petit Jurors for the — Week of the — Term of the — Court of — County." Rev. St. art. 9082. In substance the contention is that the jurors must be selected for the term at which they are to serve, and that "the lists" must show the term precisely for which they have been selected, or else the jury will be an illegal one. As before stated, the minutes of the court show that the commissioners were selected to draw jurors for the May term, and the bill of exceptions recites that, after the performance of this duty, they came into court, "and delivered to the judge of the court, in sealed envelopes, the lists of persons selected by them to serve as grand and petit jurors at the next May term of this court." It is not stated nor shown anywhere in the bill of exceptions that these envelopes were not indorsed properly as to the lists of jurors, and properly as to the term of the court. It is only objected that the wrong term was stated in the "heading of the lists" sealed up in the envelopes. The presumption is that the envelopes were properly indorsed, notwithstanding the "headings of the lists" inside made the mistake as to the month in which the next term was to be held. If the sealed envelopes were properly indorsed, then that indorsement would correct the mistake or inadvertence made on the headings of the lists. Moreover, the statute does not require the "headings of the lists" to be indorsed in the same manner as the envelopes are. As presented in the bill of exceptions, no legal requirement appears to have been neglected or omitted in the matter complained of.

3. It is insisted that the court should have granted defendant's application for continuance to the next term of the court, in order to enable defendant to testify as a witness in his own behalf, under the provisions of the act of the legislature approved April 4, 1889, authorizing and permitting a defendant in a criminal action to testify in his own behalf. Gen. Laws, 21 Leg. p. 37. Defendant also proposed to testify in the case, and the court refused him the privilege. His contention on the last point is that the bill contains an emergency clause, and expressly enacts in the body of the bill that "this act take effect from its passage." By the thirty-ninth section of article 3 of the constitution it is declared that "no law passed by the legislature, except the general appropriation act, shall take effect or go into force until 90 days after the adjournment of the session, at which it was enacted, unless in case of an emergency, which emergency must be expressed in a preamble, or in the body of the act, the legislature shall, by a vote of two-thirds of all the members elected to each house, otherwise direct, and said vote, to be taken by yeas and nays, entered upon the journals." In

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the publication of this act it is shown that the same did not receive the vote of two-thirds of the members elected, and consequently the emergency clause did not become operative so as to take it out of the general rule that 90 days must elapse after adjournment before the act became effective. The session was adjourned on the 6th day of April, and the law did not go into effect until the 6th day of the following July. This trial took place on the 23d day of May, 1889; and, the law not having gone into effect, defendant could not claim and was not entitled to the benefit and privileges it afforded. Nor was he entitled to have his case continued until said act should become operative in order that he might avail himself of the rights it accorded.

4. One A. Roemer, summoned as one of the special venire men, on his examination answered, under oath, that he had a bias in favor of defendant, though he stated that such bias would not prevent him from "trying the case fairly and impartially as between the state and defendant." He was challenged for cause by the prosecution, and the challenge was sustained by the court. There was no error in this ruling. Code Crim. Proc. art. 636, subd. 12; Mason v. State, 15 Tex. App. 534; Pierson v. State, 18 Tex. App. 524. No injury is shown, and no objectionable juror was forced upon the defendant. Loggins v. State, 12 Tex. App. 65; Bolding's Case, 23 Tex. App. 173, 4 S. W. Rep. 579; Henning's Case, 24 Tex. App. 315, 6 S. W. Rep. 137.

5. An exception was saved by defendant to the refusal of the court to allow him to prove by his witness Coszar "statements made to him by defendant three hours before the homicide, as to threats that had been made by deceased against defendant on that day, and the further statement that deceased, on the same day, assaulted defendant with a knife. This was offered as part of the *res gestæ*. Statements of defendant, made three hours before the homicide, were not *res gestæ* as to the homicide, and were not admissible as evidence in his behalf. To be admissible as *res gestæ*, the declarations must stand in immediate causal relation to the act, and become part either of the action immediately producing it, or of the action which it immediately produces." Bradberry's Case, 22 Tex. App. 273, 2 S. W. Rep. 592. A defendant cannot make evidence for himself by his acts and declarations, which were not part of the *res gestæ*. Willson, Crim. St. § 1047. Again, the court refused to permit the defendant to prove by his witness Henry Bee, who was a policeman, that the members of deceased's family had requested the witness to keep the deceased from their house, as they were afraid of him. This testimony, it was claimed, was in rebuttal to evidence brought out by the state. We find no evidence in the record to which this evidence could properly be called rebutting evidence. That the state might have been permitted,

without objection from defendant, to elicit immaterial and irrelevant testimony in line or keeping with that proposed, is no reason why irrelevant, immaterial, and incompetent evidence for defendant should be admitted when promptly and properly objected to by the state.

6. Defendant's witness Beissner testified to facts upon which he based his opinion that defendant was insane. On cross-examination the prosecution asked him whether, in his opinion, defendant knew right from wrong. The question was objected to by defendant because too general; that the inquiry should be restricted and limited to defendant's mental capacity and knowledge as to the right and wrong of the particular act charged. In *Carter's Case*, 12 Tex. 500, cited by appellant's counsel, it was held that the question in cases of insanity is whether the defendant was capable of distinguishing right from wrong, which capacity is necessary for the existence of a criminal intent. In cases of partial insanity, the question is whether the defendant was capable of distinguishing right from wrong in the particular connection in which the unlawful act was done. The effort upon this defense was to establish general, and not partial, insanity. General insanity renders the party wholly irresponsible for his acts, and general proof as to a knowledge of right and wrong is an appropriate test. In cases of partial insanity, the inquiry must be more particularly directed to the mental status at the time of and with reference to the particular act charged. This is with reference to the character of the evidence adduced in support of or in refutation of the truth of the plea. When the court is charging the jury in a case when the plea is interposed, whether the issue be general or only partial insanity, the test is whether the defendant knew the right or wrong as to the particular act charged, and such, it seems, should and must be the nature of the instruction. *Thomas v. State*, 40 Tex. 60; *Erwin v. State*, 10 Tex. App. 700; *Willson, Crim. St.* § 81. In this case it has not been made to appear that the question asked and the answer thereto were illegal or objectionable, or that defendant has in any manner been injured. It does not appear that the defendant was denied the right to examine the witness fully as to defendant's knowledge of right and wrong, with reference to the very particular act with which he was charged.

7. Defendant proved by his witness De Four and others that, shortly before the homicide, the deceased, Crawford, had boasted that he (deceased) had had carnal intercourse with the defendant's former wife, and that he had assigned that as the reason of the animosity and hostility between them. To meet this evidence the prosecution was permitted to prove by Mrs. Bathman, defendant's divorced wife, (who had been divorced in October prior to the killing, which occurred in December,) that defendant had never charged her with nor suspected her of improper rela-

tions with deceased. Objection to this evidence was that it was irrelevant, and not in rebuttal of any evidence introduced by the defense. We are of opinion that the evidence was relevant, and in rebuttal of defendant's witnesses, and was not inadmissible upon the ground of objection urged to it. The statutory inhibition against husband and wife's testifying to communications had between the parties while the marriage relation subsisted (*Code Crim. Proc. art. 734*) was not urged as an objection to the evidence.

8. Special instructions were requested to be given the jury upon the law of manslaughter, accidental or negligent homicide, and insanity, which were refused. No charge was given by the court upon manslaughter or accidental and negligent homicide. As to manslaughter and negligent homicide, we are of opinion that in no phase of the evidence are such issues fairly and legally raised, and the court did not err in refusing to give such instructions. As to accidental homicide, the court expressly charged the jury that, in order to convict, they must find that the killing was intentionally done, and, in the light of the facts, this was sufficient. Upon the question of insanity, the charge was in the language of approved forms. *Clark v. State*, 8 Tex. App. 350; *Smith's Case*, 22 Tex. App. 317, 3 S. W. Rep. 684; *Willson, Crim. Forms*, No. 715. It is insisted that the instruction is erroneous, and a charge upon the degree or measure, if not upon the weight of evidence, in that it requires the insanity to be clearly proved to establish a defense on that ground. This identical position is discussed and settled in support of the instruction in *Smith's Case*, 19 Tex. App. 111. In *People v. Hamilton*, 62 Cal. 377, the supreme court of California say: "In the connection in which the words are used to say that insanity must be 'clearly established,' is not to say that the evidence must more than preponderate, but only that the preponderance must be plainly apparent. Such must be the case in every instance where the affirmative of an issue is sought to be established, and a peculiar presumption be overcome. There may be a greater or less degree of lucidity, but the preponderance must be distinctly perceptible. \* \* \* In civil cases fraud is proved by a preponderance of the evidence, yet, inasmuch as the law, to the credit of human nature, presumes that men are oftener honest than dishonest, the preponderance must clearly appear. Thus only can the fact of fraud or insanity be 'satisfactorily proved.'" Under the rule now well settled in this state, "to render his plea of insanity available as a defense it devolves upon an accused to establish his insanity by a preponderance of evidence, to the satisfaction of the jury." *Leache's Case*, 22 Tex. App. 281, 3 S. W. Rep. 539.

Upon the law of self-defense we are of opinion that the charge of the court was as full and explicit as the facts demanded. That portion of it with reference to the right of an

officer to use a deadly weapon upon an arrested party in his custody, only when in the necessary defense of his own person from serious bodily injury then about to be inflicted upon him by such prisoner, is not, in our opinion, obnoxious to the objection urged that it bases the right of self-defense upon the actual existence of danger, and not upon its reasonable appearance. The whole doctrine of self-defense rests upon the comprehensive principle of reasonable necessity, and apparent reasonable necessity is the whole law of defense. It is the right to do whatever is reasonably necessary to be done in warding off or avoiding serious injury, under the circumstances of the case. *Weaver v. State*, 19 Tex. App. 548. The defense must appear necessary, whether it arises from real or apparent danger.

We have discussed all the questions raised and so ably presented in the brief of counsel for appellant, and upon the voluminous record submitted in the case we have found no reversible error. The judgment is affirmed.

#### ALEXANDER v. STATE.

(Court of Appeals of Texas. Nov. 9, 1899.)

##### FORGERY.

1. Pen. Code Tex. art. 431, provides that "he is guilty of forgery who, without lawful authority, and with intent to injure or defraud, shall make a false instrument in writing, purporting to be the act of another, in such manner that the false instrument, so made, would (if the same were true) \* \* \* have transferred, or in any manner have affected, any property whatever." Article 438 of the same Code provides that, "by an instrument which would 'have transferred, or in any manner have affected,' property, is meant every species of conveyance or undertaking in writing which supposes a right in the person purporting to execute it to dispose of, or change the character of, property of every kind, and which can have such effect when genuine." An alleged forged instrument read as follows: "Mrs. A. C. Neal: Please send my diploma to me by this young man, W. W. Wolfe;" the diploma referred to being an instrument issued to W. W. Wolfe by an educational institution. *Held*, that that being such an instrument which, if true, would have transferred the possession of property, it was a proper subject of forgery.

2. The indictment set out the instrument as follows: "Mrs. A. C. Neal: Please send my diploma to me by this young man, (meaning T. S. Alexander.) [Signed] W. W. Wolfe." *Held*, that the words in parenthesis, inserted by the pleader by way of innuendo, do not constitute a variance, and the instrument was properly admitted in evidence.

Appeal from district court, Rusk county; J. H. Wood, Special Judge.

T. S. Alexander was convicted of forgery, and appeals. The indictment was brought under Pen. Code Tex. art. 431, which provides that "he is guilty of forgery who, without lawful authority, and with intent to injure or defraud, shall make a false instrument in writing, purporting to be the act of another, in such manner that the false instrument, so made, would (if the same were true) have created, increased, diminished, discharged, or defeated any pecuniary obligation, or would have transferred, or in any manner have affected, any property whatever."

Article 438 of the same Code provides that "by an instrument which would 'have transferred, or in any manner have affected,' property, is meant every species of conveyance or undertaking in writing which supposes a right in the person purporting to execute it to dispose of, or change the character of, property of every kind, and which can have such effect when genuine." The indictment set out the instrument as follows: "Mrs. A. C. Neal: Please send my diploma to me by this young man, (meaning T. S. Alexander.) [Signed] W. W. Wolfe."

*Asst. Atty. Gen. Davidson*, for the State.

*WILLSON, J.* It is charged in the indictment that the defendant, without lawful authority, and with intent to injure and defraud, made a false instrument in writing, purporting to be the act of W. W. Wolfe. Said instrument in writing is set out in the indictment, and is as follows: "Mrs. A. C. Neal: Please send my diploma to me by this young man, W. W. Wolfe." The diploma referred to in said instrument was issued to said W. W. Wolfe by the board of directors of the Prairie View State Normal Institute, on May 31, 1887, and certified that said Wolfe had completed the prescribed course in that institute, etc. It was proved on the trial that Mrs. A. C. Neal had the lawful possession of said diploma; that the same belonged to said Wolfe, and was of the value of three dollars; that the defendant, by means of said forged instrument in writing, obtained possession of said diploma from said Mrs. Neal. It is contended by counsel for defendant that the indictment does not allege an offense against the law, and that the facts proved do not show an offense against the law, because the instrument in writing alleged to have been forged is not such an instrument as is embraced within the meaning of our Code defining forgery.

We agree with counsel for defendant that said instrument in writing does not come within the meaning of "pecuniary obligations." It is not an instrument having money for its object, nor is it an obligation for the breach of which a civil action for damages might be lawfully brought. Pen. Code, art. 437. But is not the instrument in question such that, if it had been genuine, it would have transferred, or in some manner have affected, property? If so, it is within the meaning of forgery. *Id.* art. 431. By such an instrument "is meant every species of conveyance or undertaking in writing which supposes a right in the person purporting to execute it to dispose of, or change the character of, property of every kind, and which can have such effect when genuine." *Id.* art. 438. Does said instrument come within the scope of this definition? It is not a "conveyance" within the legal meaning of that word. A "conveyance" is the act or instrument by which property in real estate is transferred. 4 *Amer. & Eng. Cyclop. Law*, 132; *Bouv. Law Dict.* This word can-

not be applied to an instrument in writing relating to personal property. Is the instrument "an undertaking in writing?" An "undertaking" is defined by Bouvier to be "an engagement by one of the parties to a contract to the other, and not the mutual engagement of the parties to each other; a promise. It does not necessarily imply a consideration." We think the instrument in question is an undertaking in writing. It is an engagement by Wolfe, the owner, that the defendant shall have possession of the diploma; a promise by Wolfe that the same shall be delivered to the defendant. It supposes a right in Wolfe to dispose of the diploma,—that is, to change the possession of it; and to change the possession of it would, in our opinion, be a disposing of it, within the meaning of the statute. It is true, we think, that the rights and privileges conferred by the diploma could not be transferred or assigned. Such rights and privileges were peculiar and personal to said Wolfe, and he alone could exercise them. But while he could not invest another with such rights and privileges, he certainly could control the possession of the instrument, and pass possession of it from one to another. And, furthermore, Wolfe could certainly transfer his property in the paper or substance upon which the diploma is written or printed; and, while his transfer would not entitle the transferee to exercise the rights and privileges conferred upon Wolfe, it would vest in such transferee the title to the substance upon which the diploma is made, and which substance might be valuable, with or without the diploma upon it. That the instrument forged, if it had been genuine, could have the effect to transfer the possession of the diploma must, we think, be admitted. It passed the right of possession from Mrs. Neal to the defendant, and by means of the false instrument such change of possession was actually effected. We think the indictment charges, and the evidence establishes, facts which constitute, under our Code, the offense of forgery.

In accord with our views above expressed is the charge of the trial court, and we think the charge gives all the law of the case. In so far as the special instructions requested by defendant are correct, they are substantially given in the court's charge.

It was not error to admit in evidence the alleged forged instrument. It was correctly set forth in the indictment. There is no variance between the allegations and the proof. In setting forth the instrument in the indictment, the pleader inserted in parentheses certain words by way of innuendo, explanatory of the meaning of said instrument. This was not improper, but usual, and necessary to this instance. These inserted words do not appear as the words of the instrument being set forth, and are not susceptible of being so treated. Believing that there is no error in the conviction, the judgment is affirmed.

## LEVY v. STATE.

(Court of Appeals of Texas. Nov. 18, 1889.)

### MANSLAUGHTER — EVIDENCE — UNCOMMUNICATED THREATS — INSTRUCTIONS.

1. Where it is in doubt, in a murder trial, as to whether the attack was commenced by the defendant or the deceased, uncommunicated threats by the latter may be put in evidence by the former, to show that in all probability deceased made such attack, and his motive in doing so.

2. But, manslaughter being predicated upon "adequate cause," and it being impossible for facts unknown to defendant to constitute any part of "adequate cause," uncommunicated threats can have no weight in establishing manslaughter, or in mitigating its punishment.

3. The exclusion of merely cumulative evidence is no ground for exception.

4. The clothing worn by deceased at the time of the homicide was properly admitted in evidence.

5. If, for the purpose of laying the predicate to contradict a witness, the prosecution, fixing time, place, and circumstances, asks the witness if he did not make statements contradictory of his evidence on the stand, and the witness answers that he "does not remember," the prosecution may introduce evidence to prove that he did make such contradictory statements.

6. It being apparent from the evidence that, if manslaughter entered into the case at all, it rested solely, for adequate cause, upon insulting language used by deceased about defendant's female relative, the court, in its charge upon manslaughter, properly restricted "adequate cause" to such insulting language used by deceased.

7. However correct in principle a requested charge may be, it is properly refused, if it rests upon no evidence in the case.

Appeal from district court, Robertson county; J. N. HENDERSON, Judge.

M. H. Levy was convicted of manslaughter, and appeals.

*Simmons & Crawford and Clark, Dyer & Bolinger*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. We have maturely considered, weighed, and determined every question raised in the voluminous record before us, and so ably submitted in the brief and oral argument of distinguished counsel for appellant. Many of these questions will not be noticed, further than to remark that under well-settled rules and decisions they either fail to show any whatever, or, at most, none of them reversible, error in the rulings complained of. We only propose to discuss such matters as present the most serious issues in the case.

Defendant has been found guilty of manslaughter. Certain evidence with regard to uncommunicated threats was held inadmissible by the court. In our opinion, the excluded evidence, as set forth in the bill of exceptions, shows vituperative and abusive language about, rather than threats of violence against, defendant. It could only be cumulative of the great amount of similar evidence which was freely admitted by the court. If the proposed evidence could be fairly construed as threats, still, being uncommunicated, they could not possibly have influenced the conduct of defendant, or had any bearing upon, or afforded any presumption as to, his action in killing deceased, unless there had

been a doubt as to which of the parties commenced the attack, in which case such uncommunicated threats would be admissible and proper evidence, for the purpose of showing that in all probability deceased made the attack, and his motive in doing so. Whart. Crim. Ev. (9th Ed.) § 757. Such evidence has also been held admissible to corroborate evidence of communicated threats previously admitted. *Holler v. State*, 37 Ind. 57; *Horr & T. Cas.* 568, 569. But such evidence could possibly have no weight in establishing manslaughter, or in mitigating its punishment, because manslaughter is predicable only upon "adequate cause," and facts unknown to defendant cannot enter into and become constituent elements or factors in creating "adequate cause." But, as stated above, the proposed evidence, as set forth, cannot, by any fair construction of language, be denominated "threats," or, indeed, anything more than vulgar and abusive epithets; and, such being their character, they were properly excluded, because uncommunicated, and affording no light as to the homicide. There was any amount of such evidence admitted.

Clothing worn by the deceased when he was shot was permitted to be produced in evidence before the jury. Such evidence was admissible and proper. *King v. State*, 13 Tex. App. 277; *Hart v. State*, 15 Tex. App. 203; *Holley v. State*, 75 Ala. 14; *Jones v. State*, 65 Ga. 508; *People v. Hong Ah Duck*, 61 Cal. 391; *Com. v. Brown*, 121 Mass. 69; *McDonel v. State*, 90 Ind. 320; *Story v. State*, 99 Ind. 413; *People v. Knapp*, 11 Pac. Rep. 793. Deceased's coat was identified, beyond question, as the one worn by him on the fatal occasion. It had been given to a negro, who had worn it since it had come into his possession. He had cut off the skirt of the coat, and his wife had sewed patches over the bullet holes in the side and breast; but there was not the slightest evidence that there had been any illegal or unwarranted tampering with the coat, nor is there any pretense that it did not show the character and location of the bullet holes, just as they appeared upon it the day of the homicide.

When defendant's witness Ditto was upon the stand, the prosecution, for the purpose of laying a predicate to contradict his testimony, on cross-examination, fixing time, place, and parties, asked if he did not tell Mat Oldham that he did not see the killing of Joiner by Levy, and that he knew nothing about it, to which the witness replied that he "did not remember whether he did or not." And again, fixing time, place, and parties, the witness was asked if he did not tell Mat Oldham that he did not see Levy shoot Joiner, and did not know anything about the killing, and was glad of it, as he did not wish to be a witness in the case. The witness replied that he "did not remember telling Mat Oldham any such thing." Mat Oldham was called by the state, to prove that the above statements were made by the said witness

Ditto. Defendant objected to such contradictory evidence, upon the ground that it is only upon a denial, direct or qualified, by the witness that he had made such statements, that proof of his having done so was authorized and allowable. The court overruled the objection, and permitted the contradictory statements to be proved. This was not error. In *Walker's Case*, 17 Tex. App. 16, it was held that "when a witness denies, or fails to remember, that, on former occasions, he made statements inconsistent with his testimony on the trial, evidence that he did make such statements is admissible, upon the establishment of a proper and sufficient predicate."

Upon the admissibility of this character of evidence, the supreme court of Alabama say: "The rulings in such cases have not been uniform. Phillips, in his work on Evidence, says that TINDAL, C. J., in a case before him, [*Pain v. Beeston*, 1 Moody & R. 20.] 'said he had never heard such evidence admitted in contradiction, except where the witness had expressly denied the statement, and be rejected the evidence; and, on another occasion, Lord ABINGER, C. B., [*Long v. Hitchcock*, 9 Car. & P. 619.] expressed a similar opinion. But PARKE, B., in a case before him, [*Crowley v. Page*, 7 Car. & P. 791.] held that contradictory statements of a witness could be introduced to impeach his evidence, though in order to lay a foundation for them, and to enable the witness to explain them, a proper predicate must be laid. \* \* \* If the witness admits the conversation imputed to him, there is no necessity to give further evidence of it; but, if he says he does not recollect, that is not admission, and you may give in evidence on the other side to prove that the witness did say what was imputed, always supposing the statement to be relevant to the matter at issue.' 2 Phil. Ev. (4th Amer. Ed., with Cowen & Hill's and Edwards' Notes,) 959, 960. We agree with Mr. Phillips that the ruling of Baron PARKE is the most sound, and fittest to be followed. If the rule were otherwise, it might happen that, under the pretense of not remembering, a witness who has made a false statement, and knows it to be false, would escape contradiction and exposure. This particular question seems to have rarely come up in the American courts whose decisions are reported. We find, however, that in Vermont the rule corresponds with that adopted by Baron PARKE. *Holbrook v. Holbrook*, 30 Vt. 433. \* \* \* If the witness says he has no recollection of having made such contradictory statements, they must be proved." *Payne v. State*, 60 Ala. 80; *Williams' Case*, 24 Tex. App. 637, 7 S. W. Rep. 333.

The only other matters we propose to discuss are the complaints that have been urged to the charge of the court as given, and the refusal of certain requested instructions propounded in behalf of defendant.

It is urgently insisted that the charge upon manslaughter was erroneous, in that it

restricted "adequate cause" alone to insulting language used by the deceased towards or about defendant's mother. Defendant has been found guilty of manslaughter, and, in our opinion, if manslaughter be in the case made by the facts, it rests solely upon the insulting language of deceased about or towards the defendant's mother. Defendant's language, used at the instant after he fired the fatal shot, as testified to by his witnesses Ditto and Darwin, "I am no son of a bitch, and my mother is no whore," most clearly indicates his motive in, and the cause which impelled him to commit, the homicide. Some of the state's witnesses also say that the defendant remarked: "I am no son of a bitch!" "He can't call me a d—d son of a bitch!" If these latter were either of them the cause of the killing, then to use such expression about another would not come within the meaning of our statutory term, "insulting words towards a female relative," and would not be adequate cause to reduce a killing to manslaughter. *Simmons' Case*, 23 Tex. App. 653, 5 S. W. Rep. 208; *Willson*, Crim. St. § 1022.

It is objected that the sixteenth paragraph of the court's charge is not sufficiently full. The court's instruction was: "If defendant sought Joiner, and brought on the difficulty with him, and killed him, then, in such case, defendant cannot rely on self-defense, and cannot avail himself of threats made against his life." It is insisted that this instruction is incomplete, in that it should have been further supplemented by the additional, converse proposition, that "if defendant sought Joiner, not for the purpose of provoking a difficulty with him, but to ask him to refrain from further talking of and about him, or retract some abusive language he had used towards defendant, or for any other innocent purpose; and that Joiner, before any act done or word spoken by defendant, made a hostile demonstration, as if to draw a weapon, and defendant then killed him,—that then defendant's right of self-defense would not be impaired or lost." And, upon the same subject, it is claimed for error that the court refused defendant's second requested instruction, to the effect "that if defendant, after being informed of the vile and opprobrious epithets and language used by deceased towards him, and of the serious threats to take his life, armed himself with a shotgun, and sought an interview with deceased, not for the purpose of provoking a difficulty with deceased, and doing him serious bodily harm, or taking his life; and that he only carried the gun for his own protection; and that as soon as Joiner saw him, (defendant,) he made a hostile demonstration, as if to draw a weapon, and defendant thereupon shot and killed him, in his own necessary self-defense,—you will find defendant not guilty."

In our opinion, the evidence did not call for or warrant these additional instructions.

They announce sound principles, if they were only applicable to the facts. We have seen that from the language used by defendant the instant after the killing the only inference deducible is that he killed deceased because of his insulting language concerning his mother. If that was the provocation, and he sought the occasion with the intention to avenge the insult by killing deceased, then it matters not, his own intention being to commit a felony, whether deceased attempted to draw a weapon or not, or whether he shot to save himself from being killed. Defendant could not claim self-defense in such a state of case, but his crime would be, in either event, manslaughter, he having provoked the occasion which produced the necessity to take the life of deceased.

Did he seek deceased with the innocent intention of inducing or persuading deceased to retract his abusive language? Did he carry his double-barreled shotgun, loaded with deadly buckshot, as a means of persuasion or of protection? Deceased had sent him, not only most abusive and insulting messages, but had also said that he intended to kill defendant before night. Defendant knew his desperate character, and that he was a man likely to execute his threats. He not only had received these messages, but it is further shown that just after he was informed of them he was in such proximity to the deceased that he must have heard, in person, the additional revilings and denunciations which the enraged man, doubly infuriated by his drunkenness, continued to breathe forth unceasingly. He can stand it no longer. He goes off some distance; gets his trusty shotgun, already loaded; comes back; sees his deadly enemy across the street, and advances towards him, with his gun ready to present. The party conversing with deceased sees him; starts to intercept him, and begs him not to shoot. Defendant waves him away, and tells him to stand aside, and, without one word to deceased, fires upon him. If his intentions were peaceable, and his mission an innocent one, why not apprise the deceased of it? And especially so when, if it be true, he saw deceased, mistaking his motives and purposes, was apparently preparing to draw a deadly weapon upon him. Under these circumstances, can there be the slightest doubt that defendant intentionally provoked the occasion which produced the killing? If so, there can be no self-defense in his case. A person cannot avail himself of a necessity which he has knowingly and willfully brought upon himself. *Willson*, Crim. St. § 981; *Thumm's Case*, 24 Tex. App. 668, 7 S. W. Rep. 236; *Allen's Case*, 24 Tex. App. 216, 6 S. W. Rep. 187.

Our conclusion upon the whole case is that the law has been fairly and justly administered on the trial in the court below; and, no reversible error having been made to appear on the record before us, the judgment is affirmed.

## ARCIA v. STATE.

(Court of Appeals of Texas. Nov. 12, 1889.)

## RECEIVING STOLEN GOODS—TIME—FORMER JEOPARDY.

1. In order to support a conviction, it must clearly appear from the evidence that the offense charged was committed anterior to the presentment of the indictment.

2. The error of the court in giving, as its main charge, an instruction authorizing conviction upon evidence that the crime was committed at a date after the presentment of the indictment, is not cured by giving, upon special request, a conflicting instruction, conforming as to time with the indictment, without withdrawing the main charge.

3. A plea of former jeopardy is not sustained where it appears that the defendant agreed to the discharge of the jury complained of, upon condition that the trial be continued until the next term, which condition was fulfilled.<sup>1</sup>

4. Pen. Code Tex. art. 724, defines "theft" as the fraudulent taking of property belonging to another from his possession, or from the possession of some one holding the same for him. Article 729 declares that "possession" is constituted "by the exercise of actual control, care, or management of the property, whether the same be lawful or not." Held that, in an indictment for receiving stolen property which belonged to an express company, it is sufficient to lay the possession in the agent who had, at the time it was taken, "the actual control, care, and management of it."

5. Appeals must be determined upon the record of the particular proceeding appealed from, and the court of appeals cannot resort to the transcript on a former appeal of the same case in order to supply evidence, or correct possible or manifest inaccuracies in the record of the testimony.

Appeal from district court, Webb county; RUSSELL, Judge.

Marteriano Arcia was convicted on an indictment for receiving and concealing stolen property knowing the same to have been stolen. He appeals from the judgment of conviction. Pen. Code Tex. defines "theft" as the fraudulent taking of property belonging to another from his "possession," or from the possession of some one holding it for him. By article 729, "possession" is declared to consist in "the exercise of actual control, care, or management of the property, whether the same be lawful or not."

*B. Coopwood*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. Appellant was convicted for receiving and concealing stolen property knowing the same to have been stolen. The indictment charged that the offense was committed on or about June 8, 1888. The indictment was presented and filed in court on June 11, 1888. It is fundamental that the proof must correspond with the allegation. With regard to the allegation in an indictment of the time of the commission of the crime, the rule is also well settled by our statute that "the time mentioned must be some date anterior to the presentment of the indictment, and not so remote that the prosecution of the offense is barred by limitation." Code Crim. Proc. art. 420, subd. 6. But while the time alleged must be anterior to

the presentment of the indictment, it is not material that the exact date stated in the indictment be proved as alleged. The proof may extend back to any date not barred by limitation, on the one hand; and on the other, may establish any subsequent date to that alleged, provided it be a date anterior to the date of the presentment or finding of the indictment. *Temple v. State*, 15 Tex. App. 804; *O'Connell v. State*, 18 Tex. 366; *Lucas' Case*, 27 Tex. App. 322, 11 S. W. Rep. 443; *Willson*, Crim. St. § 1049. If, however, the proof shows that the date of the commission of the offense was not anterior, but subsequent, to the date of the finding and presentment of the indictment, then, indeed, it is manifest, beyond question, that the variance between the allegation and proof is fatal, because it is evident that the indictment could not possibly have embraced and comprehended an offense not committed, and a defendant could not legally be convicted of an offense not legally charged and embraced in the indictment.

In determining the question as to whether the evidence in a case appealed to this court is sufficient to support and sustain the allegations in an indictment, "we must be controlled as to the facts of a case by the statement of facts, and cannot presume or infer that the evidence adduced on the trial was different from that embraced in a duly-authenticated statement of facts, except when a bill of exceptions contradicts or adds to such statement, in which case the bill of exceptions will control. \* \* \* This is the only safe rule. It would be a dangerous practice, and one which we think is not sanctioned by the law, to indulge in presumptions and inferences in such cases. Such has not been the practice heretofore." *Davenport v. State*, (Austin term, 1889,) 11 S. W. Rep. 836. This rule is in no manner modified or changed by the fact that the case has been once before on appeal to this court. *Arcia v. State*, 26 Tex. App. 198, 9 S. W. Rep. 685. We are not authorized to look to the record on a former appeal to correct errors or omissions in a statement of facts on the pending appeal. As presented on the second appeal, as to the facts in evidence, the case must stand upon its own merits. We could as well, in support of the verdict and judgment, supply the testimony of a most important witness who testified on the previous trial, but whose testimony was not heard and passed upon by the jury who found the second verdict. The conviction must be sustained, or it must fall on the record made up upon the trial from which the appeal is taken, without reference to extraneous facts.

Now, in the case as we have it before us on this appeal, the indictment alleges that the crime was committed on June 8, 1888. The indictment was filed June 11, 1888, three days thereafter. The trial from which this appeal is prosecuted was had on July 23, 1889, one year and twenty-two days after the finding of the indictment. The witness Hat-

<sup>1</sup>As to what will support a plea of former jeopardy, in general, see *Territory v. Willard*, (Mont.) 21 Pac. Rep. 801, and note; *Ruble v. State*, (Ark.) 10 S. W. Rep. 262, and note.



ley (or Hartley) testified that a sack of money was taken from his possession on June 9, 1888, and that he got it all back but \$44 from Mr. Sanchez, the sheriff, on the following day, but he does not know from whom it was recovered. Cecilia Salazar testified: "I recollect the robbery of the express, but don't remember the date;" and, after detailing facts with regard to the acts and doings of defendant and one Renteria, with regard to money which they took out of a sack or white bag, she says: "This occurred at my house, I think in June, last year." Another witness, Mendiola, says: "I was in Laredo on June 10, 1888, attending court. I saw the money sack as they were bringing it to the court-house." This is the sum total of the testimony directly going to establish the fact that the crime was committed in June, 1888, as alleged in the indictment. On the other hand, the deputy-sheriff, Yglesias, speaks of the transaction as having occurred on "the 9th of June last," and the date at which he was testifying, being July, 1889, would make "June last" refer to June, 1889. Sanchez, the sheriff, also testifies that he "was sheriff on the 8th of June last;" and he testifies to the circumstances connected with the robbery, and defendant's arrest in connection therewith, fixing no date other than stated. Garcia, the city marshal, testified that he was marshal "last June," and, further, as to the assistance rendered by him in ferreting out the perpetrators of the robbery, and arresting defendant. Manifestly there is a conflict in the evidence as to the date of the commission of the offense. But this is not all. In his charge to the jury the learned trial judge, in the fourth paragraph, (to which defendant saved a bill of exceptions,) applying the law to the facts of the case, says: "Therefore the jury are instructed that if they shall believe from the evidence, beyond a reasonable doubt, that defendant, in Webb county, Tex., on or about June 9, 1889, did receive and conceal the property described in the indictment, etc., they will find him guilty," etc.; thus authorizing the jury to find the defendant guilty of a crime which might have been committed 11 months after the indictment was found, and which, according to some of the testimony, must have been committed, if at all, at that time. Instructions are erroneous which warrant the jury to convict on proof of acts not alleged in the indictment. The fact that there is evidence tending to prove such extraneous acts aggravates the error of such instructions. *Powell v. State*, 12 Tex. App. 238; *Randle v. State*, Id. 250; *Tooney v. State*, 5 Tex. App. 163; *Mitten's Case*, 24 Tex. App. 347, 6 S. W. Rep. 196; *Willson*, *Crim. St.* §§ 2335, 2336.

But the assistant attorney general contends that the patent error in the charge of the court was corrected by a special requested instruction, which the court gave at the instance of the defendant, in the following words: "Before you can convict the defendant, it must appear from the evidence, be-

yond a reasonable doubt, that the defendant, in Webb county, Tex., on or about the 9th day of June, 1888, did receive and conceal the money described in the indictment," etc.; otherwise to acquit defendant. As before stated, the charge in the fourth paragraph was specially excepted to by defendant. The defendant's special instruction which the court gave was in direct conflict with and repugnant to the said fourth paragraph on one of the vital issues of the case as made by the evidence. There being a direct conflict between the main charge and the special instruction, the special instruction, in the nature of things, could not cure the error in the said fourth paragraph, as long as the same was permitted to remain a part of the main charge. Either that portion of the main charge should have been withdrawn, or the special instruction should have been refused, because the two were irreconcilable. *Railway Co. v. Robinson*, 73 Tex. 277, 11 S. W. Rep. 327; *Spivey v. State*, 26 Ala. 103. There is a marked difference between the case at bar and the case of *McCoy v. State*, 7 Tex. App. 381, in which case a similar error was committed in the introductory clause of the charge without any evidence as to such wrong date, and the error was also thoroughly cured in subsequent paragraphs of the main charge. Here the error is in the principal paragraph of the main charge, and the error is most strongly supported by the testimony. Under such state of case, it is palpable that the error was not, and could not be, cured by the special instruction. *Morgan v. State*, 16 Tex. App. 594.

As the case must be reversed for this error, we are saved a discussion of many interesting questions presented in the assignment of errors and able brief of counsel for appellant. In view of another trial, in so far as the ownership of the money was laid in the agent of the express company, we deem it only necessary to say that it was correctly laid in said agent, he having at the time the "actual control, care, and management" of the same; and such possession, under our law, constitutes all the necessary elements of ownership in cases of this character. *Tinney's Case*, 24 Tex. App. 112, 5 S. W. Rep. 831; *Pen. Code*, arts. 724, 729.

As to defendant's plea of former jeopardy, the issue is clearly not maintainable. At the previous trial it is shown by the statement of facts the defendant in person expressly agreed with the district attorney that the jury might be discharged on condition, which was complied with, that the case should be continued to the next term of court. There is no rule prohibiting the discharge of a jury when the defendant in person agrees that it may be done. *Willson*, *Crim. St.* §§ 2387, 2389. Because of error in the charge of the court, and because there is too great uncertainty as to whether there is any evidence to support the date of the crime as alleged in the indictment, the judgment is reversed, and the cause remanded.

## REAGAN v. STATE.

(Court of Appeals of Texas. Nov. 27, 1889.)

## RAPE—INDICTMENT—INTOXICATION—NEW TRIAL.

1. It is proper to join in an indictment a count charging an assault with intent to rape and one charging an attempt to rape.

2. Under Pen. Code Tex. art. 533, defining rape as "the carnal knowledge of a woman without her consent, obtained by force, threats, or fraud," where it is alleged that the attempt was made by threats only, it is not necessary to allege further that the threats were directed against the person of the prosecutrix.

3. It is not necessary to a conviction for attempt to rape that the indictment be for rape.

4. Pen. Code, art. 40a, provides that neither intoxication nor temporary insanity produced by the recent voluntary use of liquor shall constitute an excuse for crime, but that evidence of such temporary insanity may be shown in mitigation of the penalty, and, in cases of murder, for the purpose of determining the degree. *Held* that, where a specific intent is necessary to the commission of a crime, the statute does not eliminate that element, and, in determining the existence of such intent, the jury should be allowed to consider the mental condition of the accused, and the fact that he was intoxicated at the time of the alleged commission.

5. Where defendant discovers the absence of one of his witnesses before the conclusion of the testimony, and ascertains that he cannot be present, but fails to move for a continuance or postponement because of the absence of such witness, such absence is not ground for a new trial.

6. Evidence will not be regarded as newly discovered, so as to entitle defendant to a new trial, where it appears that by reasonable diligence defendant could have produced it on the trial.

Appeal from district court, Falls county; DICKINSON, Judge.

Indictment of Tim Reagan for attempt to rape.

The alleged attempt to rape Mrs. Regian was made in a certain house on the Watson farm, in Falls county, into which Mrs. Regian and her husband had moved on the previous day. It was abundantly proved that, for two years prior to its occupation by the Regians, the said house had been occupied by negroes, as a house of prostitution. Mrs. Regian testified that her husband went hunting on the evening of January 28, 1888, and that she retired alone that night, leaving the front door unlocked, for the convenience of her husband. Between 10 and 11 o'clock, defendant pushed the door open, and entered said house, and proposed to witness to sleep with him. Witness ordered him to leave. He refused, and put his hands on witness' person. Witness escaped him, and fled from the house, pursued by defendant, who caught her, and attempted to throw her down, and pull up her clothes, declaring that he would kill witness and her children, if witness did not yield. Witness fled into the house, and locked the doors. Defendant endeavored to force the doors and windows, calling to witness that if she did not admit and serve him he would kill her. Witness' husband arrived while defendant was trying to force the house, and ordered defendant to leave. Defendant got on his horse, and left, but after a time returned, and started to enter the house, when witness' husband knocked him down with a stick. Soon afterwards, de-

fendant left. Defendant did not stagger, but witness smelt whisky on his breath. He did not appear drunk to witness. Regian testified that on his return to his house, on the night in question, he found the defendant looking in through the windows. He asked him what he was doing there. Defendant replied that he was looking for escaped convicts. Witness told him that he would find none there, and to leave. He left, and witness went into his house, and learned from his wife of defendant's recent conduct. Soon afterwards, defendant came back, and started into the house. Witness knocked him down, and for the moment senseless, with a stick. When he regained consciousness, he asked defendant not to shoot him again. Witness then ordered him to mount his horse, and leave. He replied that he could not. Witness then helped him up, and he got on his horse, and left. Wesley Jones testified for the state that he went hunting with Regian on the night in question. Soon after he got home the defendant arrived at his house on horseback, and reported that he had been in a row about hunting convicts without papers, and wanted to borrow "shooting irons." He also asked witness to go with him, and help him throw into the river the people with whom he had the row. He then started off towards Regian's, but, before going far, returned, and asked witness: "Is that man married to that yellow woman up there?" Witness replied that there was then no yellow woman at the house,—indicating, as did defendant, Regian's house. Defendant replied that he knew there was, for he had seen her that night. Witness replied to him: "Mr. Regian lives there. He married Mr. Givens' daughter." The witness thought the defendant was drunk. Prior to the preceding day, when Regian moved in, the said house was occupied by three negroes,—Ann Roberts, Lena Stuart and Sallie May, who was a light colored woman,—as a house of prostitution. Canterbury testified for the defense that he was in charge of the convict farm near the Watson farm, and, on the evening preceding the alleged offense, talked with defendant about recapturing certain escaped convicts, telling him that a reward of five dollars a head was standing. When defendant left witness, he remarked that he would try to "round up" some of them. A short time before this the witness told defendant that there was a good-looking yellow girl at the house on the Watson farm. Defendant replied that he was aware of the fact, as he had been there several times. Witness knew defendant well, and knew the effect of whisky upon him. A few drinks would make him drunk, transform him into a "frenzied fool," and deprive him of all self-control. When under the influence of drink, he was utterly incapable of distinguishing right from wrong. Several witnesses corroborated Canterbury as to the effect of whisky upon defendant, and one witness testified that he saw defendant on the night of

the alleged attempt, and soon after he was struck by Regian. He was then drunk, and scarcely knew what he talked about. He told witness that he was hunting convicts that night when a long yellow fellow shot him. As set out in the motion for new trial, defendant expected to prove by Diaz that he, Diaz, saw defendant on the night of and soon after he was struck by Regian; that defendant was then very drunk, and was laboring under the hallucination that while hunting for convicts he had been shot by a yellow man. Further, that he had been to the house with defendant when it was occupied by Ann Roberts and Sallie May as a house of prostitution. The alleged newly-discovered testimony was comprised in the affidavit of Harwell, to the effect that he heard one Griffin, on the day after the alleged offense, urge Regian to prosecute defendant for the assault on his wife, to which advice Regian replied that he was disinclined to prosecute because he was satisfied defendant was drunk, did not know what he was doing at the time, and was mistaken as to who then occupied the house. Pen. Code Tex. art. 528, defines rape as the "carnal knowledge of a woman without her consent, obtained by force, threats, or fraud."

*Goodrich & Clarkson and W. Shelton, for appellant. Asst. Atty. Gen. Davidson, for the State.*

HURT, J. This is a conviction for an attempt to rape. There are two counts in the indictment: (1) An assault with intent to commit rape; (2) an attempt to commit rape. The first is sufficient for an assault with intent to commit rape; but, is the second sufficient for an attempt to rape? Counsel for appellant contends that it is not, the objection being that as this count charges that the rape was attempted alone by threats, it should have been alleged that the threats were directed against the person of the prosecutrix. This is not necessary. See definition of "Rape," Pen. Code, art. 528. It is urged by counsel for appellant that only under an indictment for rape can the accused be convicted of an attempt to rape. We hold to the contrary. *Melton's Case*, 24 Tex. App. 284, 6 S. W. Rep. 39. There is no duplicity in the indictment. This objection to an indictment applies when two or more distinct offenses are joined in one count. While two or more distinct offenses may, under proper circumstances, be joined in an indictment, it must ordinarily be done in separate counts. In this case we have two counts,—one for an assault with intent to rape, the other for the attempt.

It appears from the record that one Felix Diaz had been in attendance upon the court at the trial term, as a witness for the defendant, in obedience to a subpoena, until August 1st. Neither the witnesses for the state nor the defendant being present, an attachment was issued and executed August 2d. When the parties were called upon to announce, the sheriff stated to counsel for appellant that

Diaz had been attached, and would be in attendance upon the court. Counsel for defendant, believing this to be true, announced ready for trial. Diaz did not attend; and defendant, being convicted, brings forward this matter as ground for new trial, stating in the motion the facts expected to be proved by Diaz. Conceding, for the argument, the materiality of the facts, still the court did not err in refusing a new trial upon this ground, because at some time before the evidence was concluded the defendant discovered that Diaz was not present, if, in fact, he needed him. Now, under this state of case, it was the duty of appellant to move to withdraw his announcement and continue or postpone the case, setting out in his motion all the facts, as well as the testimony expected from Diaz. This rule of practice is well settled.

The motion relied upon testimony discovered after the trial. From an inspection of the record, it clearly appears that this testimony could have been ascertained, if, indeed, appellant was not aware of the facts himself. He had visited the house, in company with Diaz; knew its character and its occupants; and could have procured the attendance of several witnesses who would have testified to all facts stated in the affidavits filed in support of his motion.

There is very cogent testimony tending to show that appellant was very drunk at the time he made the attempt. The court gave in charge to the jury the statute relating to drunkenness, which reads: "Neither intoxication nor temporary insanity of mind, produced by voluntary recent use of ardent spirits, shall constitute any excuse in this state for the commission of crime, nor shall intoxication mitigate either the degree or the penalty of crime; but evidence of temporary insanity produced by such use of ardent spirits may be introduced by the defendant in any criminal prosecution, in mitigation of the penalty attached to the offense for which he is being tried, and, in cases of murder, for the purpose of determining the degree of murder of which the defendant may be found guilty." Pen. Code, art. 40a; Willson, *Crim. St.* § 92. Appellant requested the following instruction: "The jury may take into consideration the evidence before them as to the drunkenness of the defendant at the time of the assault, if any was made, in determining whether the defendant had at the time the specific intent to commit the offense of rape, as that offense is defined in the charge of the court,"—which was refused, and the defendant excepted. Let us return to article 40a. It is seen that neither insanity nor intoxication produced by the voluntary recent use of ardent spirits shall be an excuse for crime. This is the common law, and the law of common sense. Acts may be excused, but there can, in the very nature of things, be no excuse for crime. For if, indeed, appellant attempted to rape Mrs. Regian, in morals, as in law, there is no excuse. But it may be contended that the statute means that proof

of insanity or intoxication so produced shall not be used to negative—disprove—the specific intent to ravish. The specific intent to rape must accompany the means used to effect the rape. The intent is an absolutely essential ingredient of the offense, without which, though the means may have been used, there can be no attempt to rape. Now, then, has the legislature eliminated this ingredient in all cases in which the defendant is temporarily insane from the use of ardent spirits,—insane, or so drunk, from the voluntary, recent use of ardent spirits as to be incapable of forming the intent? If so, then the offense is complete without the specific intent; such insanity or drunkenness being substituted for intent. We will not believe this to be the intention of the legislature until it is expressed in plain and unquestionable language.

This we deem a correct and well-settled rule, that, if the offense consists of an act combined with a particular intent, it is as necessary to prove the intent as to prove the act, and the intent must be found by the jury, as matter of fact, before a conviction can be had. Especially is this so when the offense, consisting of the act and the intent, constitutes, as in this case, an attempt to commit a higher offense than that charged; "and, as the particular intent charged must be proved to the satisfaction of the jury, beyond a reasonable doubt, no intent in law, nor mere legal presumption, differing from the intent in fact, will be allowed to supply the place of the latter." *Roberts v. People*, 19 Mich. 402; 1 East, P. C. 417; *King v. Thomas*, 1 Leach, 380; *Rex v. Holt*, 7 Car. & P. 518; *Reg. v. Cruise*, 8 Car. & P. 541; *Reg. v. Jones*, 9 Car. & P. 258; *Reg. v. Ryan*, 2 Moody & B. 213; *Ogletree v. State*, 28 Ala. 693; *Maher v. People*, 10 Mich. 212; *People v. Scott*, 6 Mich. 296; *Loza v. State*, 1 Tex. App. 488. Our statute, above quoted, declares that intoxication shall be no excuse for crime, etc. If a crime has not been committed, the statute is inapplicable. No excuse is needed until a crime has been committed.

Now, as bearing upon the question as to whether the attempt was committed with the intent to ravish, it was material to inquire whether the defendant's mental faculties were so far overcome by the effects of intoxication as to render him incapable of entertaining the intent; and for this purpose it was the right and duty of the jury to take into consideration the nature and circumstances of the attempt; the actions, conduct, and demeanor of the defendant; his declarations before, at the time of, and after the attempt; and, especially, to consider the nature of the attempt, and what degree of mental capacity was necessary to enable him to entertain the intent to rape. The question we are considering relates solely to the capacity of the defendant to entertain the particular intent. It is a question rather of the exercise of the will than of reasoning powers; and, as matter of law, the jury should

have been instructed that, if defendant's mental faculties were so far overcome by intoxication that he was not conscious of what he was doing, or that if his actions and the means used were naturally adapted or calculated to effect his purpose, still, if he had not sufficient capacity to entertain the intent to ravish Mrs. Regian, in that event they should not infer that intent from his acts; but if he knew what he was doing, and why he was doing it, and his actions and the means used were naturally adapted or calculated to effect his purpose, then the attempt to rape might be inferred from his acts in the same manner as if he were sober. Appellant is not to be held responsible for the intent, if he was too drunk for a conscious exercise of the will to the particular end; or, in other words, too drunk to entertain the intent, and did not, in fact, entertain it. If he did, in fact, entertain it, though but for the intoxication he would not have done so, he is responsible for the intent as well as for the acts. We are of opinion that the requested instructions should have been given. Reversed and remanded.

#### HAWTHORNE v. STATE.

(Court of Appeals of Texas. Nov. 16, 1889.)

HOMICIDE—SELF-DEFENSE—MANKLAUGHTER—ADEQUATE CAUSE.

1. Where the evidence does not raise the issue of self-defense, it is error to charge upon that issue; but, the error being in favor of defendant, he cannot object thereto, though the charge be imperfect and erroneous.

2. Any condition or circumstance which is capable of creating sudden passion sufficient to render the mind of a person of ordinary temper incapable of cool reflection may constitute "adequate cause" for an assault; and, when the evidence shows a number of conditions or circumstances, tending either singly or collectively to constitute what a jury might consider adequate cause, the court's charge should leave the jury at liberty to consider them all in determining the question of adequate cause.

Appeal from district court, Bosque county; J. M. HALL, Judge.

Poney Hawthorne was convicted of an assault with intent to commit murder, and appeals.

*Lockett & Lockett*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. In some important particulars, there is conflict between the evidence adduced by the state and that adduced by the defendant. For the purposes of this opinion, we will state, substantially, only so much of the evidence as presents the defensive theories of the case. Some weeks prior to the difficulty, Bennett, the injured party, accused the defendant of the theft of a plow. Shortly thereafter the parties met, and a quarrel ensued between them about said accusation; and there is some evidence tending to show that Bennett, on that occasion, sought to assault defendant with a pistol. Bennett thereafter threatened to kill defendant, and the threat was communicated to the defend-

ant prior to the difficulty now under consideration. A mutual friend of the parties sought to have them settle their troubles amicably, but Bennett would make no concessions, and persisted in his accusations and enmity against the defendant. However, a few days before the difficulty in which defendant shot Bennett, the latter sent word to the former to come and see him, that they might have a peaceable settlement of their trouble. Defendant received this message, and, in company with one Waddill, a friend of his, went to see Bennett, and found him in his field, at work. Defendant told Bennett he had come to have a peaceable settlement. Bennett replied: "All right." Waddill then asked Bennett if he would sign a written instrument stating that he did not believe that defendant stole the plow, or that he had no evidence that he stole it. Bennett answered that he would not, and sprang a few feet away, and seized a gun which was on the ground. Defendant also seized the gun; and while he and Bennett were struggling over it, Waddill took it away from them. Bennett then ran, and defendant pursued him, firing three shots from a pistol at him as they ran, one of which shots struck Bennett in the arm. Defendant overtook Bennett, caught and threw him down, and inflicted several blows on his head with a rock. It was proved by several witnesses that Bennett's general reputation for peace and quiet was bad, and that he was a man who would be likely to execute a threat made by him.

As we view the evidence, it does not raise the issue of self-defense, because it is manifest that at the time the defendant shot at Bennett, and at the time he beat him with the rock, he (Bennett) was disarmed, was fleeing from his adversary, and threatening no violence to him. Whatever danger may have existed at the commencement of the difficulty had entirely ceased at the time the defendant fired the shots and inflicted the blows with the rock. The right of self-defense is based upon and limited by necessity. When the necessity, real or apparent, ceases, the right no longer exists. *Blake v. State*, 3 Tex. App. 581; *West v. State*, 2 Tex. App. 462; *Hobbs v. State*, 16 Tex. App. 517. But the trial judge, in his charge to the jury, submitted self-defense as an issue in the case; and, the error of the charge in this particular being favorable to the defendant, he cannot complain of such error, nor that the law of self-defense was imperfectly or erroneously explained.

We are of opinion that the evidence fairly presents the issue of aggravated assault and battery. Upon this issue the charge of the court is, we think, incomplete,—in some particulars, incorrect,—and does not plainly present the law applicable to the facts proved. In explaining the laws of aggravated assault, the charge gives the statutory definition of manslaughter. In explaining "adequate cause," it states that "insulting words or gestures, or an assault and battery so slight

as to show no intention to inflict harm or injury, unaccompanied by violence, are not sufficient to reduce the degree of murder to the grade of manslaughter, but an assault and battery causing pain or bloodshed is an adequate cause," etc. While this portion of the charge is absolutely correct, it is not applicable to the evidence. There was no proof that Bennett committed a slight assault and battery upon the defendant, or an assault and battery causing pain or bloodshed. Under this charge the only adequate cause was an assault and battery committed by Bennett upon the defendant, causing to the latter pain or bloodshed. Of course, the jury would conclude, under this charge, that adequate cause did not exist, because no such assault and battery was committed, and therefore, self-defense not being shown, they must necessarily find the defendant guilty of an assault with intent to murder. "Adequate cause" should not have been so restricted. Any condition or circumstance which is capable of creating sudden passion sufficient to render the mind of a person of ordinary temper incapable of cool reflection may constitute "adequate cause;" and, when the evidence shows a number of conditions or circumstances tending either singly or collectively to constitute what a jury might consider adequate cause, the charge should leave the jury at liberty to consider them all, in determining whether or not adequate cause existed. *Orman's Case*, 24 Tex. App. 495, 6 S. W. Rep. 544. Thus, in this case, the jury should have been given the liberty under the charge of considering, in determining the question of adequate cause, that Bennett had accused the defendant of the theft of a plow; that he had refused to retract or modify such accusation; that he had threatened the defendant's life; that he had sent defendant word to come and see him, for the purpose of having a peaceable settlement of their trouble; and that, when defendant went to see him about the matter, he still refused to retract or modify the accusation of theft, and seized his gun in a threatening manner. The jury should have been left free to determine the question of "adequate cause" from all the facts in evidence tending to show such cause, instead of being restricted, as they were by the charge, to a single cause, and that a cause not shown by the evidence.

Again, if "adequate cause" existed at the commencement of the difficulty, and the defendant then acted under the immediate influence of passion produced thereby, to that degree which rendered his mind incapable of cool reflection, such passion may have continued to exist throughout the difficulty, and may have influenced him in firing the shots, and in beating Bennett with the rock; and, if it did, he would not be guilty of an assault with intent to murder. This phase of the case is, we think, presented by the evidence, and called for appropriate instructions from the court, but was not embraced in the charge.

and hence the charge is in this particular materially imperfect. *West v. State*, 2 Tex. App. 460; *Hobbs v. State*, 16 Tex. App. 517; *Howard's Case*, 23 Tex. App. 265, 5 S. W. Rep. 231.

It was competent for the defendant to prove, if he could, that he was innocent of the accusation of the theft of the plow; and any testimony tending to establish his innocence of that charge, if offered by him, should have been admitted. *Wadlington v. State*, 19 Tex. App. 266; *Tillery's Case*, 24 Tex. App. 251, 5 S. W. Rep. 842. It appears from a bill of exception in the record that some such testimony was offered by defendant, and rejected; but the bill of exception is so imperfect and indefinite that the ruling of the court is not presented in such manner as to enable us to revise it. Because of the defects and errors in the charge of the court which we have specified, the judgment is reversed, and the cause remanded.

### FLEMING v. STATE.

(Court of Appeals of Texas. Nov. 27, 1890.)

CRIMINAL LAW—PLEADING AND PROOF—CONTINUING OFFENSE—AGREEMENT TO NOL. PROS.

1. Where an indictment alleges the keeping of a disorderly house from October 22, 1887, and on each day thereafter, to October 28, 1887, it is error for the court to instruct the jury that the indictment charges the keeping of the house from October 8 to January 31, 1888.

2. In criminal cases, when a continuing offense is alleged to have been committed on a certain day, and on divers days and times between that and another day specified, the proof must be confined to the acts done within the time.

3. A plea of former conviction cannot avail defendant where it appears that such conviction was under an indictment which charged her with keeping a disorderly house from the 1st to the 29th day of February, 1888.

4. The county attorney agreed with the defendant's attorney that if she would abandon her appeal from one conviction, and plead guilty to another indictment, he would dismiss other indictments found against her for keeping a disorderly house. The defendant complied with her agreement, but the county attorney dismissed only a part and refused to dismiss all the cases. It appeared that the statute regulating the dismissal of prosecutions was in no degree complied with. Held, that the state could not be held bound by the unauthorized agreement of the prosecuting attorney.

Appeal from county court, Ellis county; MCDANIEL, Judge.

Indictment for keeping a disorderly house.

A. A. Kemble, for appellant. Asst. Atty. Gen. Davidson, for the State.

HURT, J. This is a conviction for keeping a disorderly house. Nineteen indictments were presented against appellant on March 9, 1888,—one for selling beer to a minor, and eighteen for keeping a disorderly house. This indictment alleged that the house was kept from October 22, and on each day after that date, until October 28, 1887.

At a former term of the court appellant was tried and convicted on an indictment alleging that the house was kept from the 1st to the 29th day of February, 1888. This

trial occurred at the April term, 1888. This conviction is pleaded in bar to the prosecution in the present case. The court tells the jury that the appellant is charged by the indictment with keeping the house from October 8 to January 31, 1888. This is not so, the indictment in fact alleging that the house was kept from October 22, 1887, to October 28, 1887.

The court also charged the jury that if they believed from the evidence that the defendant did at any time from October 8, 1887, to January 31, 1888, keep the house, etc., they should convict. This is error, because, as is said by Chief Justice SHAW: "The rule is well settled in criminal cases that when a continuing offense is alleged to have been on a certain day, and on divers days and times between that and another day specified, the proof must be confined to acts done within the time." *Com. v. Briggs*, 11 Metc. 573; *Com. v. Pray*, 13 Pick. 364; *Com. v. Elwell*, 1 Gray, 463.

When the time is carved, as in this case, then the offense being continuous, whether there be a plea of former conviction or acquittal or not, the proof must be confined to acts done within the time alleged. And if the proof is confined to the time carved, and no part of the time thus carved has been used or utilized by a former conviction under an indictment covering the whole or a part of the time used in the indictment, the plea of former conviction will not avail. But, on the other hand, if any part of the time specified in the indictment has been used by or under another indictment,—either one which carved or one which did not,—the plea will prevail. This being a continuous offense, a non-carving indictment covers the whole time from its presentment back to limitation.

It appears from the record that appellant was convicted for selling beer to a minor, referred to above; that her motion for new trial was overruled; and notice of appeal entered of record. Under this state of case, counsel for appellant and the county attorney agreed that if she would abandon her appeal in the beer case, and plead guilty to one case for keeping a disorderly house, all of the other cases should be dismissed. Appellant complied with her agreement, and the county attorney dismissed a part of the cases, but refused to dismiss them all. Article 38 of the Code of Criminal Procedure reads: "The district or county attorney shall not dismiss a case unless he shall file a written statement with the papers in the case, setting out his reasons for such dismissal, which reasons shall be incorporated in the judgment of dismissal; and no case shall be dismissed without the permission of the presiding judge, who shall be satisfied that the reasons so stated are good and sufficient to authorize such dismissal." In the first place, the presiding judge was not consulted at all. He was not permitted to pass upon the sufficiency of the reasons so far as appears from the record. They were not reduced to writing, as

the law directs, and filed with the papers in the case. Hence the county attorney had no authority to make such a contract. This being so, the state, the principal, was not bound by the contract, there being no authority in the agent to thus bind it; and, while the agent was acting within the apparent scope of his authority, the appellant knew, or was bound to know, that he was exceeding his powers, for she is held to know the law. Because of the errors in the charge above noted the judgment is reversed, and the cause remanded for another trial.

**BROWN v. MITCHELL et al.**

(Supreme Court of Texas. Nov. 5, 1899.)

**WILLS—UNDUE INFLUENCE—PLEADING—EVIDENCE—FOREIGN JUDGMENT—WITNESS.**

1. In proceedings by heirs to set aside the probate of a will, a decree of a court of another state will be admitted to show the adoption of a petitioner by deceased, without proof as to the law of adoption in that state; there being no proof that the court had no jurisdiction.

2. An averment of the petition that certain persons conspired and confederated with themselves and others, and used and exercised undue influence over deceased, in order to fraudulently procure the execution of said instrument, was a mere statement of conclusions, without any facts to show fraud or undue influence.

3. The probate of a will should not be set aside on mere suspicion of undue influence, or on a showing that opportunity to exercise such influence may have existed.

4. Where a witness testifies by deposition that deceased had, prior to making her will, stated that her husband had worked hard to make the property owned by them, and that at her death she wanted him to have it, no part of the answer will be excluded on an objection, made for the first time during the trial, that the answer was not responsive to the interrogatory.

5. Under Rev. St. Tex. art. 2243, providing that in actions by or against the heirs or legal representatives of a decedent, arising out of any transaction with decedent, neither party shall be allowed to testify against the others as to statements by the testator, unless called to testify by the opposite party, testatrix's husband, a legatee under the will, cannot testify in his own behalf as to declarations made by his wife bearing on the validity of the will.

6. It is not error to allow witnesses who were present when the will was executed, and had testified fully as to testatrix's condition, her appearance and conversation at that time, to give their opinion as to her mental capacity at that time.

7. An instruction that, "in determining whether or not she [testatrix] had mental capacity to make said will, you will determine from all the evidence before you whether or not, at the time of her signing said will, she knew what she was doing, understood the nature of the business she was engaged in, the nature and extent of her property, the person to whom she meant to devise the same, and whether or not she had the capacity to concentrate or fix her mind upon the objects of her bounty," is erroneous, as it requires the jury, in determining testatrix's testamentary capacity, to decide whether she had actual knowledge and understanding of the extent and nature of her property.<sup>1</sup>

Appeal from Tarrant county court; R. J. BOYKIN, Special Judge.

*F. M. Brantly and D. W. Humphreys, for*

<sup>1</sup> See, on the general subject of mental testamentary capacity, *Thompson v. Ish*, (Mo.) ante, 510, and note 2.

appellant. *Ball & McCart, Ross, Herd & Ross*, and *Templeton & Kern*, for appellees.

STAYTON, C. J. This is a proceeding instituted in the county court for Tarrant county, by John Mitchell and Lizzie Winters, to set aside the probate of the will of Mrs. Lizzie Brown. Mitchell claimed to be the son of Mrs. Brown, and Lizzie Winters claimed to be an adopted daughter. Mrs. Lizzie Brown was the wife of appellant at the time of her death, and there was evidence tending to show that John Mitchell was her son by a former marriage. The evidence of the relationship of Lizzie Winters to Mrs. Brown consisted (1) of a copy of an instrument purporting to be signed by Brown and wife, and by the parents of the child, whereby Brown and wife, in terms, adopted the child, and her parents consented thereto, and agreed that she should bear the name of her adopted parents in the future. This was acknowledged by all the parties to it, before a notary public in the state of Michigan, where all the parties were then domiciled. (2) A decree of the probate court for Wayne county, state of Michigan, showing its action on the paper before referred to, which, after reciting the substance of the contents of the act of adoption, and many other things, among which was a reference to the act of the legislature of the state under which the procedure was had, proceeded as follows: "I, the said judge of probate, in pursuance of the act aforesaid, do order that the said George and Elizabeth Brown do stand in the place of parents to said child, and that her name be changed to 'Nettie Elizabeth Brown,' and that this order be entered in the journal of the probate court for said county of Wayne. [Signed] ALBERT H. WILKINSON, Judge of Probate." The decree refers to the act of adoption, and is duly certified in accordance with the act of congress. This evidence was objected to on the ground (1) that the act of adoption was not acknowledged, or certified to have been acknowledged, as are deeds and other papers executed by married women required to be by the laws of this state; (2) because no proof was offered of any law of the state of Michigan authorizing the proceedings recited in the papers. These objections were overruled, and, had there been nothing more than the act of adoption, signed by the parties and acknowledged as it was, the objection should have been sustained on both grounds urged; but we are of opinion that the decree of the probate court was properly admitted without proof as to the law in force in the state of Michigan; for it ought to be presumed, in the absence of evidence to the contrary, that the court had jurisdiction, and that its proceedings were legal. *Bryant v. Kelton*, 1 Tex. 436. Such presumption, however, would not be conclusive, and it would be the right of appellant to show that the court had no jurisdiction either of the subject-matter or parties. It is proper, further, to say that the fact of adoption was ad-



mitted by appellant. The only reason why the relationship of appellees to Mrs. Brown becomes important in this proceeding was that it was necessary for them, or at least one of them, to show an interest in the will. The action could have been sustained if only one of the contestants showed such interest. The answer of appellant denied that appellees were related to the testatrix; but neither party requested the court to submit an issue as to that, and none was submitted. It would seem that such an issue should be presented in cases of this character, and tried as are matters in abatement. No question is now raised as to the effect which could be given to an act of adoption by a married woman domiciled in another state.

Appellees asked that the probate of the will be set aside on two grounds: (1) Because it was executed through undue influence exercised over the testatrix by appellant and others; (2) because the testatrix had not sufficient mental capacity to make a will at the time it was executed. Appellant excepted specially to so much of the petition as set up undue influence, and the grounds of the exception were as follows: "That the petition failed to show the nature of, or what, fraud or undue influence was used or exercised, or how, or in what manner, the same was used or exercised, in order to procure the execution of such will." This was overruled. The averment of the petition was: "Your petitioners further allege that said Geo. B. Brown and J. G. Simpson conspired and confederated with themselves and others, and used and exercised undue influence over said Lizzie Brown, deceased, in order to fraudulently procure the execution of said instrument of writing." This was the mere statement of conclusions, without the statement of a single fact to support them, and the exception should have been sustained. *Wright v. Wright*, 3 Tex. 181; *Hendrix v. Nunn*, 46 Tex. 149. The evidence bearing on the issue of undue influence was no more specific than the pleading; and we are of the opinion that there was no such evidence as justified the court in submitting that issue to the jury. That such an issue was submitted is assigned as error, and the assignment must be sustained. The probate of a will cannot be set aside on proof of facts which, at most, do no more than show that opportunity to exercise undue influence may have existed, or to raise a bare suspicion that such influence may have been used.

The real issue in the case was whether Mrs. Brown had testamentary capacity at the time the will was executed; and on that question there was great conflict in the evidence. We do not deem it proper or necessary in the disposition of the case to express any opinion as to the sufficiency of the evidence to sustain or defeat the will. Many questions were raised on the trial as to the admission and rejection of evidence, but the rulings thereon will be considered only so far as the same questions are likely to arise upon another trial. Mrs. Blandin testified by deposition

to statements made by the deceased prior to making the will, to the effect that her husband had worked hard to make the property owned by them, and that at her death she wanted him to have it. The objection, urged for the first time during the trial, was that the answer was not responsive to the interrogatory. A part of the answer, which gave her reason for desiring her husband to have the property, was excluded. The answer may not have been strictly responsive to the interrogatory; but, whether so or not, it was error to exclude any part of it on objection made for the first time during the trial. *Lee v. Stowe*, 57 Tex. 444.

The court did not err in excluding evidence offered to show the reasons which induced appellant and wife to accept the child before referred to, nor in excluding the evidence as to what property appellant and his wife then had, or expected to have.

Appellant proposed to testify in his own behalf to many declarations made to him by his wife before and after the will was made, which would have been admissible, coming from a disinterested witness; but they were objected to, on the ground that they were statements by the deceased which could not be proved by his evidence. This is in effect an action by the heirs of the deceased arising out of a transaction with her, if they sustain to her the relation claimed; and we are of opinion that appellant cannot be permitted to testify to any statement made by her having bearing on the validity of the will in controversy. Rev. St. art. 2248.

Mrs. Livingston, who was present when the will was executed, stated fully the condition of Mrs. Brown at that time, her appearance and conversation; and the court did not err, in connection with this evidence, in permitting the witness to give her opinion as to her mental capacity at that time. *Garrison v. Blanton*, 48 Tex. 303; *Cockrill v. Cox*, 65 Tex. 669; *Busw. Insan.* §§ 240-249; 1 Redf. Wills, 140-145. The testimony of the attending physician was of the same character as that given by Mrs. Livingston, and was properly received, as was that of the witness Perry. A statement here of the testimony of these and other witnesses would serve no useful purpose; and it is sufficient to say that it was such as showed that they were familiar with the condition of Mrs. Brown, and with the facts which tended to show her mental condition.

After instructing the jury what issues they should consider, and how they should decide in case they made certain findings, the court below instructed the jury that: "In determining whether or not she had mental capacity to make said will, you will determine, from all the evidence before you, whether or not, at the time of her signing said will, she knew what she was doing, understood the nature of the business she was engaged in, the nature and extent of her property, the person to whom she meant to devise the same, and whether or not she had

the capacity to concentrate or fix her mind upon the objects of her bounty." The inquiry to which the mind of the jury was intended to be called by this charge was the vital one in the case; for by it and preceding parts of the charge the jury were instructed to determine whether the testatrix had testamentary capacity at the time she executed the paper admitted to probate. The charge, in effect, informed the jury that the determination of that question depended upon the solution of other issues of fact therein enumerated, which relate, not solely to the capacity of the testatrix to know or understand, but to her actual knowledge or understanding of the matters referred to. If there be matters to which the mind of the jury was directed which it was not necessary that the testatrix should have known or understood to give validity to the will, then the charge was misleading. The evidence is clear that the paper was correctly read to the testatrix before she executed it, and that it was executed in the mode required by the statute. There is no pretense that the testatrix was deaf, or her hearing in any way defective; and, under this state of facts, although the charge should have directed the jury to inquire as to the capacity of the testatrix to know and understand, no injury, probably, resulted from so much of the charge as directed the jury to inquire whether "she knew what she was doing, and understood the nature of the business she was engaged in;" for, if she did not, the inference that this was because she had not sufficient capacity almost necessarily follows. There is no doubt that capacity to understand the nature and extent of the property disposed of by will must exist at the time a will is made; but it is not true that actual knowledge or understanding of the extent and nature of property disposed of by will is necessary to the validity of such a disposition. The charge given required the jury to determine whether the testatrix had knowledge of, or understood, these things; and they must have understood, if they believed that she had not such knowledge or understanding, that the will was invalid. If actual knowledge or understanding of the nature and extent of property devised was necessary to the validity of a will, but few wills by which considerable estates are disposed of would be valid. The question is one of capacity to know, and not of actual knowledge; and the want of the latter cannot be made the test of the existence of the other.

The succeeding paragraph of the charge was as follows: "If she had the capabilities mentioned in the preceding paragraph, you will conclude that she had sufficient capacity to make such will. If she did not have such capabilities, then you will conclude that she did not have sufficient mental capacity to make such will." The preceding paragraph, except in the last clause, had not mentioned or enumerated "capabilities," but had referred to matters of actual knowledge of things, the result of the exercise of capacity.

The preceding paragraph undertook to inform the jury what they must consider in order to determine whether testamentary capacity existed; and the facts so to be considered did not relate to capacity to know or understand, but to knowledge or understanding of the enumerated facts. In the paragraph of the charge last quoted the jury must probably understood the court to instruct them that the testatrix had not sufficient mental capacity to make a will unless she knew what she was doing, understood the nature of the business she was engaged in, the nature and extent of her property, the person to whom she meant to devise it, and, further, had capacity to concentrate or fix her mind upon the objects of her bounty. As before said, this prescribed a test of testamentary capacity which the law does not recognize. It was necessary that the testatrix should know what she was doing, and understand the nature of the business and act she was engaged in, at the time she executed the paper, but, in the absence of fraud or undue influence, the paper having been executed in the form and manner required by law, whether she knew all the facts necessary to give validity must be determined by her capacity to know and understand; for, if this existed, no one can be heard to say that she did not know and fully understand the nature and effect of her act, or that she did not intend to make the disposition of her property evidenced by the will. The court below might safely have informed the jury that the testatrix had testamentary capacity if her mind and memory were such as to enable her to know and understand the matters referred to in the charge at the time she executed the paper; but it may be doubted if charges enumerating so many things have a tendency to enable juries as clearly to understand their duties in such cases as would a simple charge to the effect that one had testamentary capacity of his mind and memory, at the time the paper was executed, were they sufficiently sound to enable him to know and understand what he was doing, and the effect of his act. There are many other questions raised by the assignments of error which will probably not arise upon another trial, and they will not be discussed. The court below should have sustained the demurrer to so much of the petition as attempted to set up undue influence, and should not have submitted that issue, and we are further of the opinion that the charge to which we have referred was calculated to mislead the jury; for which reasons the judgment of the court below will be reversed, and the cause remanded.

#### MISSOURI PAC. RY. CO. v. HENNESSEY.

(Supreme Court of Texas. Nov. 19, 1889.)

RAILROAD COMPANIES—NEGLIGENCE—PLEADING AND PROOF.

1. In an action against a railway company for personal injuries, where the facts alleged as com-

stituting negligence are failure to ring the bell, to whistle, to give signals to stop the train, and running too fast, failure of defendant to have a light at the place of the accident when it occurred cannot be proven to show the company's negligence, as the facts constituting the cause of action must be clearly stated, and the evidence confined to the allegations.

2. Evidence that a railway company, after an accident, put a light at the place of the accident, is inadmissible to show former negligence.

Commissioners' decision. Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

Action by Patrick Hennessey against the Missouri Pacific Railway Company for personal injuries. Judgment for plaintiff, and defendant appeals.

*Finch & Thompson*, for appellant. *W. R. Laury and Ball & McCart*, for appellee.

COLLARD, J. On the 10th of March, 1885, Patrick Hennessey filed this suit against the Missouri Pacific Railway Company, claiming damages in the sum of \$15,000 for personal injuries received on the 10th day of August, 1884. On the 27th day of September, 1887, Hennessey, by his next friend, filed his amended petition, in which it is alleged that he was walking upon a certain street, (Front street,) in the city of Fort Worth, on the 10th day of August, 1884, which street was intersected by the defendant's railroad track, the Y's and switches thereof, the same being a public crossing; that while so walking, by the gross negligence of defendant and its servants in running said train at a great rate of speed, and without giving the proper and necessary warning and signals, as was then required by the statutes of the state and the ordinances of the city, he (said Hennessey) was run over by defendant's train of passenger-cars so that thereby he was taken unawares, knocked down, his skull and divers members fractured, etc., for which the damages are laid at \$20,000. The second count in the petition avers that he was run upon by said cars while he was on the track, and injured as aforesaid; that the "injuries were caused by the willful negligence of defendant's agents in failing to ring the bell and blow the whistle," and because of the great speed of the train, in violation of the statutes of the state and the ordinances of the city, and by the willful acts of defendant's agents "in failing to warn plaintiff of his danger, and in failing to stop the train before it reached plaintiff, when they saw he was about to be taken unawares, and injured." Defendant answered by general demurrer, general denial, and by plea of contributory negligence on the part of Hennessey in walking and sitting down on the track before a moving train of cars. Verdict and judgment for plaintiff for \$12,500. After this, pending defendant's motion for a new trial, Hennessey died, whereupon the administrator of the estate appeared to prosecute the case. After this the motion for new trial was overruled, and the defendant appealed, and assigned various errors.

Over the objection of defendant, witness for

plaintiff, George A. Barnes, was allowed to testify that there was no target light at the place where the accident occurred, on the night of the occurrence, but that there was a post and light put just west of where the Y track crossed the street a few days afterwards. The admission of this testimony was objected to, and is assigned as error because not responsive to the pleadings. It is elementary and statutory in this state that the petition shall set forth "a full and clear statement of the cause of action;" that is, the facts which constitute the cause of action. Rev. St. art. 1195; *Ramsay v. McCauley*, 2 Tex. 189; *Milburn v. Walker*, 11 Tex. 329; *Moody v. Bengel*, 28 Tex. 545; *Malone v. Craig*, 22 Tex. 609; *Gray v. Osborne*, 24 Tex. 157. This is necessary, in order to apprise the opposite party of the facts that are expected to be proved. A mere abstract proposition that defendant was guilty of negligence which resulted in injury to plaintiff would not be sufficient. The act done or omitted constituting negligence must be averred and proved. Hence it follows that an act done or omitted which is relied on to establish negligence must be alleged, or proof of it will not be allowed. Where, from the nature of the case, the plaintiff would not be expected to know the exact cause, or the precise negligent act which becomes the cause, of an injury, and where the facts are peculiarly within the knowledge of the defendant, he would not be required to allege the particular cause, but it would be sufficient to allege the fact in a general way, as that there was a defect of machinery or structure, or want of skill in operating on the part of defendant or its servants, or some such fact as would give the defendant notice of the character of proof that would be offered to support the plaintiff's case. *Railway Co. v. Brinker*, 68 Tex. 502, 3 S. W. Rep. 99; *Williams v. Railway Co.*, 60 Tex. 206. If an injury occurs under such circumstances that a negligent act on the part of the defendant cannot be alleged or proved, and where no relation exists between the parties that demands immunity from injury, there can be no recovery. *Railroad Co. v. Crowder*, 61 Tex. 262, 70 Tex. 223, 7 S. W. Rep. 709. In the case before us the act of negligence proved consisted of the failure of defendant to have a light at the crossing, and this was shown by the fact that in a few days after plaintiff was injured a light was placed, presumably by the defendant, near the crossing where the accident occurred. The effect of the evidence was that defendant knew the light should have been there before and at the time of the accident, and that it was negligence not to have it there. The want of lights at the crossing was not a fact peculiarly within the knowledge of defendant and its servants. It was open to observation, and might have been as well known to plaintiff and his witnesses as to defendant. It was easily proved, constituted a distinct act of negligence, not alleged or relied on for recovery in the petition, and was not admissible to show such negli-

gence. The fact that it was dark, or that there was no light near the crossing, under the allegations made, might have been proved as a circumstance in the case, explanatory of the acts of both the parties, but not to show that it was the duty of defendant to keep the place lighted, or that it was negligent not to have the light there. This could not be done, in the absence of averment of the fact. The admission of the testimony under the pleading was violative of another familiar rule, that the proof must conform to the allegations. Plaintiff in his petition particularly specified the facts constituting negligence,—failing to ring the bell, to whistle, to give signals to stop the train, and in running too fast, etc. The evidence should have been restricted to the allegations. It was good pleading on the part of plaintiff to set up every material fact upon which he relied for a recovery, but he would not be allowed to prove other material facts, upon which the petition did not rely. Before we dismiss the subject, it would be proper to add that evidence of improvement made in the appliances and mode of operating a railroad after an accident should not be received as evidence of former negligence. For this reason, the evidence that defendant, two or three days after the injury to plaintiff, put up a light at the crossing, was inadmissible. It would be a bad rule that would discourage improvements on and in the use of a road. *Railroad Co. v. McGowan*, 11 S. W. Rep. 336; *Patt. Ry. Accident Law*, 421, 422. Under the circumstances, we think other assignments need not be noticed. For the error in admitting improper evidence prejudicial to defendant, as herein pointed out, we conclude the judgment of the court below should be reversed and remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment is reversed and remanded.

**LYTLE et al. v. HALFF et al.**

(*Supreme Court of Texas*. Nov. 15, 1889.)

**JUDICIAL DISTRICTS—CONSTITUTIONAL LAW.**

1. Const. Tex. art. 5, § 1, vests the judicial power in certain courts, including district courts. Section 7 provides that the state shall be divided into 26 judicial districts, which may be increased or diminished by the legislature, and that the district judges shall be elected by the qualified voters of the district. Section 14 fixes the judicial districts, and the time of holding the court therein, until otherwise provided by law. Section 7 further provides that a district judge shall hold the regular terms of court at one place in each county in the district twice a year, in such manner as shall be prescribed by law, and that the legislature may increase the number of terms, when necessary for the dispatch of business; and section 9 provides for a clerk of the district court of each county. *Held*, that they do not show an intention to forbid the creation of more than one judicial district in a county, or the sitting of two district courts, with a single clerk, at one place, the county-seat.

2. As the leading purpose of Gen. Laws Tex. 1889, p. 165, was to establish two judicial districts, and to secure the holding of two district courts, in Bexar county, provisions of the act declaring that grand juries shall be impaneled in only one of the

districts, and that criminal cases shall reach the other only when transferred from the first, as to the legality of which there may be question, are not so inseparably connected with the leading purpose of the act as to require the entire act to fall, nor are they such as to induce the belief that the legislature would not have passed the act with them omitted.

Appeal from district court, Bexar county; W. W. KING, Judge.

*Barnard & Green* and *Geo. C. Altgelt*, for appellants. *Simpson & James, J. A. & H. O. Green*, and *J. H. McLeary*, for appellees.

STAYTON, C. J. The legislature at its last session passed an act whereby the county of Bexar was divided into two parts, by a line running through the court-house, and that part of the county on the north and west of that line was declared to constitute a new judicial district, to be known as the "Forty-Fifth District," while all that part of the county south and east of that line was declared to constitute the "Thirty-Seventh Judicial District." Bexar county before the act composed the thirty-seventh judicial district, and the judge and district attorney in office in that district were continued in office in the new district bearing the same number, but provision was made for the appointment of a judge for the forty-fifth district, his successor to be elected by the electors resident in that part of the county which was declared to constitute the new district. The act provided that the courts in both districts should have concurrent jurisdiction throughout the limits of Bexar county of all matters, civil and criminal, to the extent this is conferred on district courts by the constitution, and that grand and petit juries should be selected and drawn from the body of the county, providing, however, that no grand jury should be organized in the forty-fifth district. The judge of the thirty-seventh district, however, is required at each term of his court to organize a grand jury, empowered to inquire into all offenses committed within the entire county, whose indictments, together with all appeals in criminal cases from inferior courts in the county, are made returnable to the district court for the thirty-seventh judicial district. Civil actions brought in the county or appealed to the district court from inferior tribunals, in any part of the county, may be filed in either court, at the option of the plaintiff or appellant. The act authorizes the judge of either district, at his discretion, to transfer any cause, civil or criminal, which may be pending in his court, to the other court, and upon the taking effect of the act the clerk of the district court for Bexar county is directed to enter on the docket of the court for the thirty-seventh district all causes then pending in that court, or to be filed therein subsequently, under the provisions of the act, and to place on the docket of the court for the forty-fifth judicial district all causes that may be transferred to that court by the judge for the thirty-seventh district, or filed in that court under the provisions of

the act. The act further declared all laws and parts of laws in conflict with it repealed. Gen. Laws 1889, p. 165.

In accordance with the act, a judge was appointed for the forty-fifth judicial district, and, the act having become operative, appellee brought an action in the district court of that district against appellants on a promissory note for more than \$500. Citations were duly issued and served on appellants, who failed to answer, and a judgment by default was entered against them. Before the adjournment of the court, appellants filed a motion to set aside the judgment and dismiss the cause, upon the ground that the act creating the district was unconstitutional, but the motion was overruled, and from the judgment this appeal is prosecuted. It is agreed by the parties that there is no question involved other than the validity of the act before referred to, and that if the act be held constitutional the judgment shall be affirmed, but if it be held otherwise the judgment shall be reversed and the cause dismissed.

It is contended on the one side, while there is no provision in the constitution which expressly prohibits the creation of two judicial districts in one county, an implied prohibition arises from the various provisions of that instrument, and that some parts of the act are in violation of article 3, § 56, of the constitution, which forbids the passage of local or special laws therein enumerated. On the other hand, it is claimed that none of the provisions of the act are in conflict with the section of the constitution referred to, or with any other, and that so much of the act as creates two judicial districts in one county is not so repugnant to any express provision of the constitution as to justify a holding that such legislation is impliedly forbidden. There is no pretense that the act in question in any way conflicts with any superior law other than the constitution of this state, and if it be not forbidden by that it must be sustained. It has frequently been said that an act of a state legislature must be held valid unless some superior law, in express terms or by necessary implication, forbade its passage. A prohibition of the exercise of a power cannot be said to be necessarily implied unless, looking to the language and purpose of the constitution, it is evident that without such implication the will of the people, as illustrated by a careful consideration of all its provisions, cannot be given effect. The prohibition which it is claimed ought to be implied in this case is not one affecting any private or personal right, nor is it one that can arise because the power to do the act has been conferred on some department of the government other than the legislature, from which an implied prohibition to the legislature will arise. The implication sought to be raised relates to a mere matter of expediency, which there is a manifest propriety in leaving to the determination of the legislature from time to time, and which it is seldom the purpose of a constitution to deter-

mine. It affects neither a public nor a private right. An intention to restrict the power of a state legislature, and especially in reference to such a matter, further than this is done by express limitations, is not to be presumed; and, when it is claimed that this is done by implication, those so claiming ought to be able to point out the provision or provisions of the constitution which require such implication, to give effect to the will of the people evidenced by the entire instrument. That necessary implications exist, under the provisions of the constitution of this state, we do not question; and one of them is found in article 5, which establishes certain courts and fixes their several jurisdictions. In absence of an express prohibition, the legislature would have no power to declare that the several courts thus created should not exercise the powers conferred on them, or to create other courts, and transfer those powers to them, except as the constitution may provide for such change of jurisdiction. Here there is an implied limitation placed on the legislature, resulting from the fact that the people, acting in their sovereign capacity, have declared that certain courts, with defined powers, shall exist, and constitute one of the three departments of the government, which the people never could have intended might be destroyed in whole or in part by another department, or all the other departments. The declaration is that the executive, legislative, and judicial departments shall exist,—this is the fiat of the people,—and neither one nor all of the departments so created can enlarge, restrict, or destroy the powers of any one of these, except as the power to do so may be expressly given by the constitution.

It is contended that article 5, §§ 1, 7-9, of the constitution, impliedly prohibit the creation of two judicial districts in one county. Article 5, § 1, of the constitution, provides: "The judicial power of this state shall be vested in one supreme court, in a court of appeals, in district courts, in county courts, in commissioners' courts, in courts of justices of the peace, and in such other courts as may be established by law." So much of this section has no bearing on the question before us, for it does not attempt to determine what territory may be made a judicial district; but simply, among other things, provides for district courts as a part of the judiciary department, on which, by succeeding sections, a given jurisdiction is conferred. It may be said that all the courts named in this section are created by it. It is true that this section of the constitution expressly recognizes the power of the legislature to establish "criminal district courts," which illustrates the fact that the people desired that such courts should be established as would meet the demand resulting from growth of population and other causes; but it is most likely true that this recognition of power was made in order to prevent any doubt as to the power of the legislature to confer on

them, if created, a jurisdiction by the constitution itself conferred on the district and inferior courts; and, further, in connection with the recognition of the power, to declare its limitations. In the one case, it is the establishment, creation, of a court, which, when brought into existence, will exercise a jurisdiction conferred by the constitution on other courts; while in the other, the power exercised is but that of fixing the territory within which an established court shall be held. The express grant or recognition of the one power ought not to be held impliedly to prohibit the exercise of the other, and especially so in view of the provisions of the constitution next to be considered.

Article 5, § 7, provides: "The state shall be divided into twenty-six judicial districts, which may be increased or diminished by the legislature." And section 14 of the same article provides that "the judicial districts in this state, and the time of holding the courts therein, are fixed by ordinance forming part of this constitution, until otherwise provided by law." Both of these sections evidence the fact that it was intended the legislature, the only body empowered to make laws, should have power to increase or diminish the number of judicial districts, and to determine what territory should be embraced in a given district; and, in the absence of some limitation in these respects, nothing further appearing to illustrate the intention, the presumption would be that it was the intention to confer on the legislature the power to create a judicial district out of a territory, however small, if the business within it so required. Section 7 provides that the district judges shall be elected by the qualified voters of the district, but there is nothing in this which evidences an intention that a judicial district might not embrace less territory than a county. It further provides a district judge "shall hold the regular terms of court at one place in each county in the district, twice in each year, in such manner as may be prescribed by law. The legislature shall have power by general act to authorize the holding of special terms when necessary, and to provide for holding more than two terms of the court in any county for the dispatch of business." These provisions evidence an intention to leave with the legislature full power to require district courts to be had as frequently as may be necessary to dispose of the business of any county with reasonable dispatch, but absolutely to require that at least two terms of court shall be held every year in each county. There is nothing in these considerations to induce the belief that it was intended no judicial district should be composed of less territory than an entire county. Prior to the adoption of the present constitution, it may be true that the business of no county in the state was so large that it could not be transacted by one district court with reasonable promptitude, and that no consideration was given to the question whether a time would

come when the increase of population and wealth, and consequent increase of litigation, would render it impossible for one court to do this; but, if it be true, we could not conceive it possible that the people intended to deny to the legislature the power to do that to which no thought was given, and so, in the face of the manifest intention, to give to the legislature full power to compel such courts to be held so long and so often as might be necessary for the prompt trial of all causes which might be brought before them.

In reference to counties, article 9 of the constitution expressly confers on the legislature "power to create counties for the convenience of the people, subject to the following provisions." Then follows a provision that no new county should be formed from territory not then within existing counties, with a less area than 900 square miles, in a square form, unless prevented by pre-existing boundary lines; and still the further provision that, "within the territory of any county or counties now existing, no new county shall be created with a less area than seven hundred square miles, nor shall any such county now existing be reduced to a less area than seven hundred square miles." We have here an instance in which the people thought it necessary expressly to impose a limitation on the power of the legislature to create a subdivision of the state whose purpose is kindred to that for which judicial districts are created, and, if it had been intended that a like limitation should be imposed on the power to create judicial districts, the inference is fair that such intention would have been expressed in language as explicit. We have another instance in which it was deemed necessary expressly to declare that a subdivision of the state, for purpose of representation, should not be severed, in that article 3, § 25, after providing for the division of the state into senatorial districts, to be composed of contiguous territory, declares that "no single county shall be entitled to more than one senator." When the constitution was adopted it is reasonable to suppose that it was expected to continue in force for a considerable period, and it cannot be presumed that the people did not expect some of the counties and towns and cities then existing to become populous, and the business in the courts greatly to increase, while it remained in force; and it would be hard to believe, in view of the solicitude shown to furnish courts sufficient for the prompt disposition of business, if a specific intention existed that there should not be more than one district court held in a county, that the legislature should have been denied power to organize counties so small that the litigation pertaining to the jurisdiction of a district court might be disposed of by one court. It must be presumed, in view of the action of the legislature, that one district court cannot dispose of the business of that jurisdiction in Bexar county, and that another is necessary to that end; and, before a prohibition against the ex-

erise of the power to create two judicial districts within that territory can be implied, the language of the constitution should very clearly evidence the intention of the people to deny power to the legislature so to organize the districts as to give more than one district court to a county, if necessary to accomplish the purpose for which courts are created. It seems to be insisted that the declaration that district judges "shall hold the regular terms of court at one place in each county in the district in each year" shows an intention to forbid the creation of more than one judicial district in a county; but we do not think such an implication necessary to give effect to the intention of the people as manifested by the entire constitution. The purpose of this provision was to secure the holding of such courts, and to deprive the legislature of the power to make any law which would deprive the people of any county of at least two terms of court during each year. Without this declaration, the legislature would have had such power; and it would not necessarily follow, because the legislature was deprived of the power to diminish the number of terms to be held in a county, by a provision intended to secure to the people at least that number of terms in each year, that an intention existed to withhold from it the power to provide for the holding of terms, as many as might be found necessary, by more than one district court in a county. The denial of the power to deprive each county of two terms in each year ought not to be construed into a denial of the power to give more terms during the year, even though held by more than one court, created by the constitution, whose jurisdiction, territorially, must, in the nature of things, be determined by the legislature; and, especially so, in the face of the provision which expressly declares the power of the legislature "to provide for holding more than two terms of the court in any county for the dispatch of business," which clearly evidences that the former provision was a limitation on the power to reduce the number of terms in each year, and nothing more.

The terms of court are required to be held at one place in each county in the district, twice in each year. By the words "one place" we do not understand to be meant one town or one house; for, if this was the meaning, in the case of removal of a county-seat, which is provided for by the constitution, it might be necessary to hold a court at a place other than the county-seat. The constitution does not declare at what place in each county the district courts shall be held, but leaves that to be determined by the legislature, which has declared that such courts shall be held at the county-seats of the several counties. By the words "one place" we understand to be meant the place prescribed by law,—the county-seat. Two district courts may sit therein as well as one, and we see nothing in the act in question which contravenes either the letter or spirit of the consti-

tution, in so far as that instrument provides where district courts shall be held.

It is urged that article 5, § 9, of the constitution, which provides for a clerk of the district court for each county, for his election, and for his appointment in case of a vacancy, evidences an intention that but one district court should be permitted to be held in any one county. This section may tend to show that the people may not have considered whether it ever would become necessary to create more than one judicial district in a county, and that they determined that one clerk of the district court would be enough in any county. But, if this be admitted, it does not meet the question before us; for power of the legislature to enact a given law cannot be held to be impliedly denied merely because it may appear, from an examination of the constitution, that it was not foreseen at the time of its adoption that a necessity for the exercise of such a power would ever arise. If the constitution were the source from which springs the power of the legislature, there would be force in the proposition that the people did not intend to confer a power the necessity for the exercise of which was not foreseen; but no force can be given to such a fact when all legislative power, except in so far as this power is restricted by constitutional limitations, rests with the department of government to which the law-making power is confided. The act in question provides that the clerk of the district court for Bexar county shall perform, in two courts, the duties which the law imposes on such clerks in every county in the state, and neither enlarges nor restricts the powers and duties imposed by law on that officer. Difficulties in the way of appointment to that office in case of vacancy are suggested, but these are not insuperable, and arise on a supposed state of facts which cannot exist without failure of duty on the part of the judges. Such considerations ought not to be given a controlling influence in determining a question of legislative power.

We do not see that section 8, art. 1, of the constitution, has any bearing on the immediate question under consideration, though it may have on the validity of so much of the act as declares that no grand jury shall be impaneled in the forty-fifth judicial district, and that criminal cases shall reach that court only when the judge in the thirty-seventh judicial district may see proper to transfer criminal causes to it. Courts are not authorized to hold that a legislature has exceeded its power, unless able to point to some part of the constitution which denies to that body the right to exercise the given power. As said in *Orr v. Rhine*, 45 Tex. 354, uncertain and doubtful inferences and deductions are not sufficient to authorize a court to hold that the legislature exceeded its power in the passage of a statute; and finding no provision of the constitution which, expressly or by necessary implication, denies to the legislature the power to create more than one ju-



dicial district in a county, we are not authorized to hold that it had not such power.

It is suggested that so much of the act as assumes to deny to the district court to be held in the forty-fifth judicial district the power to impanel and have the services of a grand jury, and in so far as it assumes to deny the power of that court to try criminal cases other than such as may be transferred to it by the court to be held in the thirty-seventh district, is contrary to the constitution. It is clear that the legislature has no power to withdraw from any district court any part of the jurisdiction conferred on such courts by the constitution, unless this may be done in cases contemplated by section 1, art. 5, of that instrument. No person can be held to answer for a felony unless on the indictment of a grand jury, (Const. art. 1, § 10;) and it may be true that an act which denies to a district court the power to have inquisition and accusation by a grand jury denies, in an essential matter, the full exercise of that jurisdiction conferred on such courts; for if the court has no power to have an accusation made, as required by the constitution, the basis for its power to hear and determine is taken away, except in so far as indictments may be sent to it by another court for trial. It may be further true that the legislature has no power to make the jurisdiction of a district court to try any criminal cause, of which it is given jurisdiction by the constitution, based on a crime committed within the territory over which it is given jurisdiction, dependent on the volition and act of another district court. It is contended that the act is in conflict with the paragraphs of article 3, § 56, which prohibit the passage of local or special laws regulating the affairs of counties, regulating the practice or jurisdiction of courts, and the summoning or impaneling of grand or petit juries. Every law fixing the territory which shall constitute a judicial district is necessarily local in its character, but the power of the legislature to do this is expressly recognized. The creation of two judicial districts in a county operates no further towards the regulation of the affairs of the county than does the establishment of one, and it seems to us that the act in question is not within the meaning of the constitution on regulating the affairs of a county; for that paragraph of the section referred to has application to such affairs as are common to all the subdivisions of the state referred to in it. That the legislature is denied the power to pass local or special laws regulating the practice or jurisdiction of courts is true, and there may be some provisions of the act in question which contravene that provision, and this may be true of so much of the act as provides that no grand jury shall be summoned or impaneled in the court to be held in the forty-fifth judicial district; but it is unnecessary for us to pass upon these matters, or others that have been referred to, for it does not follow, if this be so, that the court sitting in either of the dis-

tricts established in the county is not a legal court, having jurisdiction to try the cause before us on appeal. The leading purpose of the act was to establish two judicial districts, and thus secure the holding of two district courts in the county; and the parts of the act claimed to be in conflict with the constitution are not so inseparably connected with that part of the act we hold valid as to require a holding that the entire act must fail, did we hold some of its provisions in conflict with the constitution. Nor are the provisions, as to legality of which there may be question, such as to induce the belief that the legislature would not have passed the act with those omitted. At the same session at which the act in question was passed the legislature created two judicial districts in the county of Dallas, and in the act doing this some of the provisions in that before us claimed to be invalid are not found. It may be that some of the provisions of the act are not in harmony with existing legislation, but it cannot be held, because there may be conflict between statutes, that either for this reason is unconstitutional; and, if there be conflicts or want of harmony between the act in question and other laws, it will be the duty of the legislature to correct this, as will it be to pass such general laws as may be found necessary in order to the harmonious and efficient working of two district courts within one county. We do not wish to be understood to decide that all the provisions of the act before us are in harmony with the constitution, nor that they are not, but simply to decide that the courts sitting in the two judicial districts organized in Bexar county are legal courts, entitled to exercise the jurisdiction conferred on district courts by the constitution, from which it follows there is no error in the judgment in this cause appealed from. We deem it proper further to say, if there be provisions in the act inconsistent with other laws and in conflict with the constitution, then the repealing clause in the act cannot be held to repeal the former law inconsistent with such provisions. The judgment of the court below will be affirmed.

TAYLOR v. THURMAN.

(Supreme Court of Texas. Oct. 29, 1889.)

ATTACHMENT—LEVY AND LIEN—PROCEEDS OF SALE—ACTION TO RECOVER—EVIDENCE.

1. Where property is held under the levy of an attachment sued out by plaintiff, and also by sequestration in proceedings to foreclose a mortgage thereon, plaintiff has no interest in the proceeds of the sale of whatever interest other persons may have acquired by the levy of a subsequent attachment, it appearing that the sheriff did not part with the property after such sale, but holds it still under such prior levies.

2. In an action against the sheriff to recover the proceeds of such sale, evidence that the sheriff held the property until it was sold to satisfy plaintiff's claims, and that plaintiff received the proceeds of the latter sale, is relevant.

Appeal from district court, Marion county; JOHN L. SHEPPARD, Judge.

*John Penman and R. R. Taylor, for appellant.*

STAYTON, C. J. Appellee instituted an action against C. W. Heap in justice's court, and sued out a writ of attachment, which was levied on certain personal property. He also brought suit in district court against Heap to foreclose a mortgage on the same property to enforce the payment of another debt due to him, and in that action caused the property to be sequestrated. These actions may have been against Spearman & Heap, but the record does not make this clear. After these things had occurred, Curtis & Co. brought suit in justice's court against Spearman & Heap, and sued out a writ of attachment, which was levied on the same property. The levies seem to have all been made by appellant, who was sheriff of Marion county, and the property to have remained in his possession, or in the possession of appellee, who held for him. After the last writ of attachment was levied, the justice who issued the writ, on application of Curtis & Co., directed the property to be sold as perishable property, and the writ commanding this was placed in the hands of appellant, who proceeded to sell the property subject to the mortgage and attachment liens held by appellee. At that sale Curtis & Co. bid \$65 for the property, but no part of this sum was actually paid; the attorneys for Curtis & Co. holding it subject to the order of the court. Appellant's costs in that matter amounted to \$12.50, which, had the money been paid, would have left in appellant's hands \$52.50. This is a proceeding by Thurman against appellant, and the sureties on his official bond, to recover the \$52.50, proceeds of sale, claimed to be in the hands of appellant, and subject to the payment of appellee's debt. The court below held that such was the right of appellee, and rendered a judgment against appellant and his sureties for \$52.50, with interest on that sum from the date the sale before referred to was made.

In view of the fact that the property was in the hands of the sheriff under a seizure first made on writ issued from the district court, the justice ought not to have directed the sale of the property at all, or at least ought not to have directed a sale otherwise than subject to the prior liens. If, however, it was proper for appellant to obey the writ, his action was in no way hurtful to appellee, and gave him no right to the proceeds of sale; for the sale was only of such interest as Curtis & Co. had acquired through the levy of their attachment, and left the property still subject to whatever right appellee had, to have it subjected to his liens; it appearing from the evidence that the sheriff did not part with possession of the property when he made the sale referred to, but still held it under the prior levies made under appellee's writs. Appellant proposed to prove that he held all the property until it was sold to satisfy the claims of appellee, and that when sold the latter received the proceeds of sale; but the court ex-

cluded evidence to this effect on the ground that it was irrelevant. The evidence was not irrelevant, though it may have been unnecessary to defeat appellee's claim. The fact that whatever interest in the property subject to the lien acquired by Curtis & Co. was sold on their application, gave to appellee no right whatever to the proceeds of that sale, and on that ground alone—the property remaining in the hands of appellant to be sold in satisfaction of appellee's claim—the judgment should have been for appellant. After the judgment was rendered in justice's court foreclosing the attachment lien acquired by appellee, it was amended so as to direct appellant to pay to appellee the sum received or bid at the sale made under the application of Curtis & Co. Neither Curtis & Co. nor appellant were parties to that proceeding, and they were not bound by it. Appellee claimed that a rubber belt, seized under the writs in his favor, was in some way lost after the levies. There is no evidence showing that this was true, although there was some evidence tending to show that a "band wheel" was not delivered after the sale made to satisfy appellee's judgments. It does not appear who purchased at that sale, but appellee testified "that he had received the entire proceeds realized by virtue of the sale of all the property levied upon by virtue of his two prior writs,—sequestration and attachment. The court below based its judgment evidently on the fact that appellant had sold the property under writ issued on application of Curtis & Co., and for the sum there bid, less costs; and under the uncontroverted facts no such judgment ought to have been rendered. The facts proved, without reference to the additional facts which appellant proposed to prove, required a judgment in his favor, and the judgment of the court below will be reversed, and here rendered for appellant.

CONLY *et al.* v. WOOD *et al.*

(Supreme Court of Texas. Oct. 29, 1889.)

WRONGFUL ATTACHMENT—EVIDENCE—PROVINCE OF JURY.

Plaintiffs brought an action on an open account, and sued out an attachment on the ground that defendants were about to dispose of their property for the purpose of defrauding their creditors. Defendants upon the trial admitted the justice of plaintiffs' demand; pleaded in reconvention that the attachment was wrongfully and maliciously sued out; and claimed damages therefor, both actual and exemplary. The only evidence of probable cause for issuing the attachment was the testimony of a witness that one of defendants had stated that his co-defendant was disposing of the proceeds of the sale of their goods for his own benefit. The defendant denied having made such statements. Held that, there being a conflict of testimony, it was error to withdraw from the jury the question of exemplary damages.

Appeal from district court, Morris county; JOHN L. SHEPPARD, Judge.

Action by Conly & Ledbetter against Wood & Lee.

Moore & Hart, for appellants.

**GAINES, J.** Appellees brought this suit upon an open account against appellants, and sued out a writ of attachment against their property. The ground of the attachment was that the defendants were about to dispose of their property for the purpose of defrauding their creditors. The defendants pleaded, in reconvention, that the attachment was wrongfully and maliciously sued out, and claimed damages therefor, both actual and exemplary. Upon the trial the justice of plaintiffs' demand was admitted, and the case went to the jury upon the issues made by the plea in reconvention. The court charged the jury that there was no evidence to warrant the finding for exemplary damages, and they accordingly returned a verdict for the plaintiffs for the amount of their demand, and for the defendants for \$150, as actual damages. The action of the court in taking the question of exemplary damages from the jury is assigned as error. In view of the disposition we shall make of the case, we do not deem it proper to discuss the evidence. But we may remark that the only testimony tending strongly to show a probable cause for issuing the writ was that of certain witnesses who swore that Conly, one of the defendants, had stated, in effect, that his co-defendant was disposing of the proceeds of the sales of the goods for his own benefit. Conly testified that he did not make such remarks. This made a conflict of testimony which it was the province of the jury to pass upon. If there was a want of probable cause, they might have inferred malice. *Culbertson v. Cabeen*, 29 Tex. 247. For the error of the court in withdrawing the question of exemplary damages from the jury the judgment is reversed, and the cause remanded.

**HOUSTON, E. & W. T. RY. CO. v. BLAGGE et al.**

(*Supreme Court of Texas*. Feb. 12, 1889.)<sup>1</sup>

**TRESPASS TO TRY TITLE—VARIANCE.**

In trespass to try title, a variance of three years between the alleged and proven date of a lost deed, it being immaterial which was the correct date, will not prevent proof of its execution and contents.

Appeal from district court, Jasper county; **W. H. FORD**, Judge.

Trespass to try title by Caroline E. Blagge and others against the Houston, East & West Texas Railway Company. Judgment was for plaintiff, and defendant appeals.

**R. S. Lovett**, for appellant. **A. C. Howell**, for appellees.

**HENRY, J.** This was an action of trespass to try title. Plaintiffs' chain of title was set out in their petition. One link in the chain is a deed from Stephen H. Everitt to Jones Butler, charged in the petition to have been executed and delivered on March 1, 1842. On the trial it was shown that this deed

had been destroyed. Parol evidence sufficient to establish its execution and contents was introduced. The witnesses by whom this proof was made stated their belief to be that the lost deed was dated in 1845. This evidence was objected to by defendant on the ground of variance between the proof and allegation. The objection was overruled, and the evidence admitted. This ruling of the court is assigned as error. We do not think that in this case the date of the last deed was material, and, if not, the evidence was properly admitted. The judgment is sufficiently supported by the evidence, and is affirmed.

**MOSS v. SANGER et al.**

(*Supreme Court of Texas*. Dec. 8, 1889.)

**FRAUDULENT CONVEYANCES—CHANGE OF POSSESSION.**

1. Invoices made by an insolvent, covering his entire stock, and attached to bills of sale which were accepted as payment by an attorney of alleged creditors, will not defeat a subsequent attachment, where it does not appear that the goods were so described or separated as to identify those sold each creditor.

2. A finding that the goods were not so separated and described will not be disturbed, on appeal, where it appears that the goods were left as usually arranged in the store, without marks to distinguish those of each purchaser, the several purchasers frequently having goods of the same kind, and the evidence not being wholly consistent.

3. On trial of title to goods alleged to have been purchased by the intervening claimants in satisfaction of debts due them from the insolvent, refusal to allow claimants, after the case has been closed, to introduce evidence that the valuation of the sheriff is excessive is not error, especially where no issue was made as to value.

Appeal from district court, Ellis county; **ANSON RAINEY**, Judge.

Action by Mary Moss against Sanger Bros. and others to try title to goods attached by defendants as the property of A. Moss. Plaintiff appeals from judgment in favor of defendants.

**W. H. Fears** and **Crawford & Crawford**, for appellant. **D. F. Singleton** and **M. B. Templeton**, for appellees.

**STAYTON, C. J.** Appellees were creditors of A. Moss, and caused writs of attachment to be levied on a stock of dry goods and groceries which had belonged to him; but appellant claims that on the same day, but before the attachments were levied, she bought a part of the goods, and received them in payment of a sum of money due to her by A. Moss, who was her son. After the attachments were levied, appellant made claim to the part of the goods which she asserts that she bought; and on the trial of this cause, which is one under the statute regulating the trial of the right of property, the issues were as follows: Appellees averred that the debt which appellant claims was due her from A. Moss was simulated; that, if a conveyance was made to appellant, this was done for the purpose of hindering, de-

<sup>1</sup>Publication delayed by failure to receive copy.

laying, or defrauding the creditors of A. Moss, and, further, that no title to the goods had passed to appellant, because those claimed by her were never separated from the bulk of the goods, or so identified in any way as to make the transaction anything more than an executory contract to sell. Appellant alleged that A. Moss was justly indebted to her in the sum claimed, and that the goods were received, in good faith, in payment of that debt; and that the transaction was a sale completed, through which the title of the goods passed to her. The cause was tried without a jury, and the findings of law and fact were as follows: "(1) That on the 16th day of August, 1887, A. Moss was a retail merchant in Ennis, having a stock of dry goods of the value of \$5,500 and a stock of groceries of the value of \$2,500; that said stock of goods and merchandise were situated in a store-room, and arranged as in an ordinary retail store. (2) That on said 16th day of August, 1887, said A. Moss was insolvent. (3) That, with intent to hinder, delay, and defraud his creditors, he attempted to sell his entire stock of goods in severalty to the following parties, viz: Rose Moss, his wife, whom he claimed to owe about \$1,800; Mary Moss, his mother, whom he claimed to owe about \$890; Bernhard Frieberg, his brother-in-law, whom he claimed to owe about \$4,400; David Golden, his clerk, whom he claimed to owe about \$750; and John P. Richardson, whom he claimed to owe about \$200. (4) That A. Moss attempted to sell to each of said named parties the particular lot of goods described in the several claim bonds in evidence, and placed W. H. Fears, as agent for said named parties, in possession of his entire stock of goods. (5) That there was no separation or segregation of said goods to the several named parties, so that the same could be identified. (6) That all the claims of said named parties, except that of John P. Richardson, were pretended and fraudulent, and did not in fact exist. (7) That on the 16th day of August, 1887, plaintiffs levied writs of attachment on said stock of goods; that said goods, at the time of said levies, remained mixed, and not separated in lots or parcels; and that plaintiffs' claims are as stated in the judgement herein rendered. (8) That the purpose of A. Moss in attempting to make said sale, and the purpose of the said parties in attempting to buy said goods, was to hinder, delay, and defraud the creditors of A. Moss. (9) The value of the goods claimed to have been sold was not unreasonably in excess of the amount of the indebtedness claimed." Conclusions of law: "(1) That, the pretended transfer of said goods being for the purpose to hinder, delay, and defraud creditors of A. Moss, the same is null and void. (2) There being no separation or segregation of the goods so as to be identified, no sale was perfected. Judgment is therefore ordered for plaintiffs."

The third, sixth, and eighth findings of

fact are questioned, but they all depend on the correctness of the sixth finding; for, if A. Moss was actually indebted to appellant, and the goods conveyed to her were not of value greater than the sum due, the other findings, in view of the ninth finding, were erroneous. It seems to us that the preponderance of the evidence sustains the proposition that A. Moss was indebted to appellant as claimed by her; but it is unnecessary for us to pass on that question, if the fifth finding of fact and second conclusion of law be sustained; for these findings would defeat all claim for the property, whether this be based on a sale or contract to sell. On the morning of August 16, 1887, A. Moss was a merchant, and the owner of a stock of dry goods and groceries situated in a house in which he was doing business. The dry goods were of the value of \$5,500 and the groceries of the value of \$2,500, and at the time were on shelves, and otherwise distributed as such things usually are in the course of a mercantile business. In the morning an agent of Sanger Bros. demanded payment from Moss of a sum due to his firm; and, after this, Moss sought the advice of a lawyer as to the best mode to secure appellant, Rose Moss, (his wife,) Bernhard Frieberg, and David Golden, in sums which he claimed to be indebted to each of them. The lawyer seems to have had the claims of appellant and Frieberg in his hands at that time, and the claims of Golden and Rose Moss were placed in his hands on the same day. The advice of the lawyer to him was to sell to each of the persons named, and to another, whose claim was suggested by the lawyer, separate parts of the goods and groceries, in satisfaction of their respective claims, but there is no pretense that it was a sale to them all in bulk. With a view to such a sale, Moss was directed to return to his store and make out separate invoices of goods which each creditor was to have in satisfaction of his claim; there being no agreement, however, as to the price at which goods were to be taken or what class of goods any one creditor was to receive. The lawyer states that Moss returned to his office with invoices, which he attached to bills of sale made out to each creditor, but neither the bills of sale nor invoices were offered in evidence. Only Moss and his clerk, Golden, assisted in making the invoices which were claimed to have been made; but another witness stated that he made out copies of the invoices from invoices furnished by Moss, made out on bill-heads, and these copies seem to be those claimed to have been attached to the several bills of sale. The copies were not shown to have been made in the house, or by a person who knew anything about the actual invoicing of the goods and groceries. The testimony of A. Moss bearing on the question of identity of the goods sold to each person was as follows: "When I got back to the store, after leaving Mr. Fears' office, Mr. Golden and myself went to work invoicing. We commenced about 9 o'clock A. M., and fin-

ished about 1 P. M., having gone through the entire stock, and made the invoices in lots to suit the different debts to be paid. I was very familiar with the stock, and worked very rapidly. A great deal of the stock was new, and in unbroken packages. The sugar and molasses, and heavy articles, were not moved at all. The goods were invoiced by my private mark, which was original cost, with 10 per cent. added. When the invoices were completed, I took them up to Mr. Fears, and he attached them to the bills of sales, which I signed, and he delivered to me the notes canceled. Mr. Fears and I then went down to the store. I walked back to the office, gave Mr. Fears the keys, and took my hat and coat, and walked out. I did nothing while in the store. I stayed there not exceeding two or three minutes. I am absolutely certain, and cannot be mistaken about it, that I did nothing except give Mr. Fears the keys, and took my hat and coat and walked out, and went to the hotel, as I was very tired. I had about \$5,500 worth of dry-goods and \$2,500 worth of groceries in my house. The store was an ordinary store-room. I had the goods arranged upon the shelves, as is usual in retail stores. In taking the invoices I was assisted by my clerk, Mr. Golden, and E. Raphael. We started in working separately, and worked that way about twenty minutes. Then I called, and Mr. Golden wrote down, the articles and prices, without running them out. The goods for the various purchasers were not separated in distinct lots to themselves, all of the parties frequently getting goods of the same kind. In taking the invoices the goods were moved upon the shelves more or less. Some of the goods sold were in a warehouse behind the store. I did not take Mr. Fears to this warehouse at all, neither did I go out of my back door at all. I am certain of this, and cannot be mistaken." This witness, on being asked the direct question, if it is not a fact that he did take Mr. Fears out at the back door of his house, and to his warehouse, and point out the goods in bulk to Mr. Fears, then answered that he did; and, to the further direct interrogatory, if it is not a fact that before going to the hotel he (witness) went through his stock in the store-room with Mr. Fears, and in a general way pointed out to him the various lots of goods as per invoice, to which witness answered that he did. "I intended by my bills of sale to transfer all of my goods. It is true, however, that this invoice made by the sheriff shows about 1,000 yards of calico more than is included in all of the bills of sale, and about 22 boys' and 7 men's suits, and 777 pairs of hose, more than is included in all of the bills of sale." David Golden, witness for plaintiff, testified: "I had been clerking for A. Moss over two years when he failed. When I first went with him, I loaned him \$100. On the 16th day of August, 1887, he owed me for clerk hire and this \$100,—in all, about \$700. It was upon an open account, and not in notes. I am sure of this, and cannot be

mistaken. Mr. Moss instructed me, between 9 and 10 o'clock on the morning of the 16th of August, 1887, to aid him in taking an invoice of his entire stock of goods. He said he had sold out, but I did not know to whom, nor for what. We began to take the invoice,—he calling, and I putting down. We did not take the invoice from bills or file, but actually went through the stock. I put the invoice in a book, and not on bill-heads. We took the invoice straight along, without showing on the invoice to whom the goods were going. I did not then know to whom Moss had sold. Moss told me to go and see Fears about my claim. When we got through, I went to Mr. Fears, to see him about my claim against Moss. He told me he would sell me goods to satisfy my claim. There was one lot of goods in the back part of the house, piled up by itself, upon which there was a paper marked '700.' Mr. Fears told me he would sell me that pile of goods for my claim. I did not trade with Mr. Moss, and said nothing to him about it, but bought the goods from Fears. A few days after this, Mr. Fears came to me, and I sold him these goods back, and took his (Mr. Fears') note for about \$700. I then sent the note to Mr. Frieberg, in Cincinnati, by mail, and it was returned to me with his name on it." Witness then said he did not send the note Fears signed to Frieberg, but sent another note, of like amount, which was returned with Frieberg's name on it. "I then gave to Mr. Fears the note signed by him. While Moss and I were taking the invoice, we kept the doors of the store closed."

The lawyer who transacted the business did not claim to know how the invoices were made, but testified that on reaching the store-house, after the bills of sale had been made, he went back with them into the store. "Moss and Golden were still there. We then went around to look at the goods,—Moss, Raphael, and myself,—and Moss pointed out different lots of goods as having been invoiced to different parties, whom I represented. The goods were on the shelves and counters, as arranged for retail trade, and in somewhat disordered condition. There were also some goods in the warehouse back of the store-house, which Moss pointed out to me, and turned over to me. I do not remember whose invoice they were on, but I knew then. Golden's debt was evidenced by two notes. Golden placed these notes in my hands some time during that day. I think it was before the invoices had been furnished me. I am not now certain whether the invoices were all brought to my office at the same time, nor who brought them. After Moss had gone through with me, and had pointed out the goods I could have, I then selected out the different lots. The goods were pointed out by lots, and not by articles. No particular articles were pointed out to me as belonging to any particular person. I did not see and identify any particular goods. I bought by invoice and thought I was getting

the whole stock. There was no mark placed upon the goods to distinguish them. No particular 138 pairs of hose were pointed out to me as belonging to Rose Moss, nor 198 pairs as belonging to Mary Moss. Don't know where the 777 pairs of hose which were not included in anybody's invoice were, nor, in fact, where any of the hose were. After going through the house with Raphael and myself, Moss left the store, and did not return. I then stayed in the store a few minutes, and left, leaving the store in charge of E. Raphael. When I left, I told the boys to straighten out the goods, and go to boxing some of them. I did not know what the goods were worth which were invoiced to Frieberg,—whether they were worth \$500 or \$5,000. I depended on Moss as to that; nor did I know the value of the goods in any of the invoices. I accepted all the goods in the store and warehouse at one and the same time. I never did go through to verify the invoices. In some instances, Rose Moss and all of the other claimants may have had goods of the same kind on the same shelf not separated. There was no visible division line between different lots of goods. The goods were pointed out to me by their location in the house. The barrels of sugar and molasses were piled together in the rear of the store." E. Raphael, a witness for defendant, testified as follows: "I made my invoices from the invoices furnished me by A. Moss, made on bill-heads, and not on books. Moss and Golden were taking the invoices in the store while I was writing them at Cerf's, and would furnish me with them from time to time. About 1 o'clock, W. H. Fears engaged me to go up and take charge of the Moss stock for him. I went with him, and found Moss and Golden in the store. Moss turned the keys over to Mr. Fears in my presence, and immediately went out to the hotel. After getting his coat, Moss did not go through the stock, nor point out any goods before leaving. The goods were on the shelves, as usual, but somewhat disordered." Several witnesses stated that the goods, when seized, were on shelves and counters, and arranged as they had theretofore been,—somewhat disordered, but in no manner separated into lots; and many others, who qualified themselves to testify as to the time that would be required to invoice such a stock of merchandise as Moss had, one of whom subsequently assisted in making an invoice, stated that it would take two men at least four days to invoice the stock, and that it would have been impossible for two men to have done this in four hours. Fears denied selling goods to Golden, or that there was a lot of goods in one pile marked "700," and further stated that Golden's claim was evidenced by two notes which Golden placed in his hands some time during the day.

The discussion of this evidence would be an unprofitable task. It was all before the court below; and the plaintiffs, being compelled to make out their case, brought the

testimony of every person who was connected with the transaction. The evidence to show that the merchandise was ever so separated actually, or by description, as to enable any one to identify that part intended to be sold to one from that intended to be sold to another, looking to its situation and all the surroundings, was not such as to require a finding that such separations had been made. The statements looking in that direction most strongly were not entirely consistent with other statements. The contracts not being for a sale in bulk, to give title or right to title, it was necessary that the merchandise to which each purchaser was to become entitled could be identified in some way. The court below found that no such state of facts existed; and, under the evidence, we cannot say that such finding is not justified by the evidence.

There being no issue as to the value of the property claimed, on the day after the evidence was closed for both parties, appellant proposed to reintroduce some of the witnesses who had testified before, and perhaps some others, to prove that the valuation placed on the property by the sheriff was excessive; but, on objection, it was excluded. The bill of exception does not state what the objection to the evidence was, and the presumption is that it was sufficient to sustain the ruling of the court, to whom a large discretion must be allowed as to the introduction of testimony after both parties have closed their evidence. It would further seem that when parties desire to contest the valuation fixed by a sheriff an issue should be presented.

Looking to all the evidence we are not prepared to say that the fifth finding of fact is so clearly against it as to justify this court in reversing the judgment on that ground. That finding standing, the second conclusion of law is conclusive of the rights of the parties, and the judgment of the court below will be affirmed.

#### MOSS v. SANGER *et al.*

(*Supreme Court of Texas. Dec. 3, 1889.*)

#### APPEAL—REVIEW—TRIAL—REMARKS OF COUNSEL.

1. A general verdict will not be disturbed on appeal, though the evidence on one of the two issues tried preponderates in favor of appellant; the other being within the province of the jury.

2. In his closing argument counsel was allowed to say: "This is a deliberate scheme to swindle and defraud, gotten up by a Jew, a Dutchman, and a lawyer," describing one party as "the old he-Jew of all, who, no doubt, planned the whole thing. All Jews, or Dutch Jews, and that is worse." Held, that the verdict should be reversed, it appearing from the evidence that the language might have prejudiced the jury.

Appeal from district court, Ellis county; ANSON RAINEY, Judge.

Action by Rose Moss to try title to goods attached by defendants Sanger Bros. and others as the property of her husband, A. Moss. Plaintiff appeals from a judgment in favor of defendants.

*W. H. Fears*, for appellant. *D. F. Singleton* and *M. B. Templeton*, for appellees.

STAYTON, C. J. Appellees, being creditors of A. Moss, the husband of appellant, caused writs of attachment to be levied on a stock of dry goods and groceries which at one time belonged to him. She claims to have bought a part of the goods on the day the attachments were levied, and made her claim under the statute regulating the trial of the right of property. The cause was tried before a jury, and resulted in a judgment against her upon a general verdict. Appellant claims to have bought the merchandise in payment of a debt due to her from her husband; and appellees denied the existence of the debt, alleged that it was simulated, and further denied that the goods were so identified as to pass title. The cause was tried on the same statement of facts as was the case of *Mary Moss v. Sanger Bros. et al.*, ante, 616. There were but two questions in the case, and the court, in effect, so charged the jury. To our minds, the evidence greatly preponderates in favor of the proposition that A. Moss was indebted to his wife, as claimed by her. She proved the source from which the money alleged to be the consideration for the claim came, where it was deposited, and that \$1,250 of the \$1,500 came into the possession of her husband through a draft drawn by her on that depository. This last fact was proved by a witness who testified as follows: "I know A. Moss and Rose Moss. I knew them in 1884. I was then teller in the Ennis National Bank. On September 1, 1884, A. Moss presented at our bank an eight-day sight-draft for \$1,250, signed by Mrs. Rose Moss, and drawn on Marienthall Bros. & Co., Cincinnati, Ohio. Said draft was paid on 12th day of September, 1884, and placed to the credit of Moss & Wise, less exchange. This was all done by the direction of A. Moss. Rose Moss was not in the bank, nor did she give any directions about the matter." So far as the record shows, this witness was disinterested, and in no way related to the parties. It may be that the evidence preponderated in favor of the proposition that there was not such a designation of the merchandise as was necessary to identify it, but this was a question for the jury, under all the evidence, and, as the case was tried by a jury, we will not pass upon that question. The verdict was general, and we cannot know whether the finding was against appellant on both issues involved. The jury may have found in her favor on the last issue referred to, and against her on the first, as a finding against her on either would have required a general finding against her.

In the closing address to the jury, counsel for appellees used the following language, which was excepted to: "This entire business is a concocted scheme from beginning to end; a deliberate scheme to swindle and defraud, gotten up by a Jew, a Dutchman, and a lawyer. Who are the parties at interest?

A. Moss; his wife, Rose Moss; his mother, Mary Moss; his clerk, D. Golden; and then, B. Frieberg, the old he-Jew of all, who, no doubt, planned the whole thing. All Jews, or Dutch Jews, and that is worse. Will an honest jury of Ellis county let these people, (pointing at A. Moss, Golden, and Raphael,) whose every thought is how to cheat and swindle, perpetrate this infamous and outrageous fraud? I think not." Conveyances of parts of the stock of merchandise were claimed to have been made by A. Moss to Mary Moss, David Golden, and B. Frieberg, at the same time the conveyance is claimed to have been made to appellant; and the relationship of the parties was shown. Everything shown by the evidence to have occurred at the time of the transaction, as well as the relationship between the parties, was legitimate subject for fair comment; but the language of counsel went beyond this, and beyond any fact shown by the evidence. It was an inflammatory appeal to a prejudice, no doubt, conceived by counsel who made it to exist, and intended to influence the jury. It was the arraignment of a race not on trial. Cases ought to be tried in a court of justice upon the facts proved; and whether a party be Jew or gentile, white or black, is a matter of indifference. The course pursued in this case was one that no court of justice ought for a moment to tolerate; and it certainly must be true that the judge who tried this cause did not fully understand the language of counsel, or he would not have permitted it,—would have rebuked it, and ought to have punished its author. We are asked to reverse the judgment on the ground, among others, that the language referred to was used. Cases have arisen where the use of such language has been held sufficient to reverse a judgment. Is this one of them? As before said, the evidence preponderated in favor of appellant on the first issue, and we cannot know that the second was not by the jury determined in her favor. This being true, it may be true that the course pursued by counsel influenced the verdict. Counsel doubtless intended it should,—probably thought he understood the prejudices of the jury addressed by him; and may have succeeded in arousing that, rather than in stimulating an earnest inquiry into the very truth of the case. Parties ought not to be punished for misconduct of their counsel, not sanctioned or influenced by them; but they must be held bound to relinquish a judgment when there is reasonable ground to believe that it may have been obtained through such means as were used in this case. The verdict may or may not have been influenced by the language, but it was calculated and intended, doubtless, to have an influence; and, as the case stood, with a preponderance of evidence in favor of appellant on one of the vital issues in the case, we deem its use a sufficient ground to require a reversal of the judgment; and it will for this reason be reversed, and the cause remanded.



## EQUITABLE LIFE ASSUR. SOC. v. HAZLEWOOD.

(Supreme Court of Texas. Dec. 6, 1889.)

## INSURANCE—WARRANTY—WAGERING POLICY.

1. A warranty in an application for insurance of the truth of answers made to the company's medical examiner will not avoid the policy for untruth in the answers as "written," in the absence of express stipulations, or of suspicion or knowledge of the applicant that the answers are incorrectly written.

2. Where defendant alleges that the policy was taken out by plaintiff as a wagering policy, its agent may testify that he urged the parties to apply; that the insured paid the premium, and thought at first of making plaintiff's minor children the beneficiaries, but concluded to make plaintiff the beneficiary, in order that in the event of his marriage it might be changed more easily.

3. Where it appears that an applicant, who had answered that no policy had been applied for in any other company which had been refused, had been rejected by the Legion of Honor, it may be shown that the agent told him that the Legion of Honor was not regarded as a life insurance company.

4. Recovery on a policy for \$15,000, taken out by plaintiff on the life of his brother, who was indebted to him in the sum of \$1,200, cannot be defeated on the ground that it was a wagering policy.

Appeal from district court, Delta county; E. W. TERHUNE, Judge.

Action by R. R. Hazlewood upon a policy of insurance issued upon the life of his brother, Henry C. Hazlewood, by the defendant, the Equitable Life Assurance Society of the United States. Defendant appeals.

*Mazey, Lightfoot & Denton and Hodges & Lane*, for appellant. *J. A. Templeton, E. B. Perkins, and E. H. Bennett*, for appellee.

HENRY, J. Upon the application of Henry C. Hazlewood, appellant, in August, 1887, issued its policy upon his life, payable to Robert R. Hazlewood, if living, if not, then to his brother, Henry C. Hazlewood, for the sum of \$15,000, payable at the death of the said Henry C. H. C. Hazlewood was a younger brother of R. R. Hazlewood. He died in March, 1888, aged then about 28 years. Appellee, beginning with the year 1881, and between that time and the date of the application for the insurance, had advanced to the said Henry C. various sums of money, amounting to about \$1,200, for which the said Henry acknowledged an indebtedness. On the back of the application for the insurance, and just above the signatures of both of said Hazlewoods, is a printed agreement in the following words: "It is hereby agreed that all the foregoing statements and answers, as well as those made, or to be made, to the society's medical examiner, are warranted to be true, and are offered to the society as a consideration of the contract." In the body of, and on the back of, the application, and above said signatures, there are a number of questions and answers relating to the risk. Attached to the application is another paper, styled, "Medical Examiner's Report," at the beginning of which appears the signature of Henry Clay Hazlewood, and at the end of it the name of the medical ex-

aminer. Between the two signatures there appear a great number and variety of questions and answers, relating to the history of the said Henry and of his ancestors, and collateral kindred, and to his physique, system, general health record, habits, and environment. The answers are usually "Yes" or "No," and, from the space allowed for them in the form used it is evident that they are required to be monosyllabic. Some of the answers are evidently made by the medical examiner, and some by the subject of the examination. There is nothing but the nature of the answers to distinguish those of the medical examiner from those of the subject of the examination; and it is not easy to distinguish, in some instances, by which one the answer was really made. While many of the questions answered by the witness relate to facts necessarily within his knowledge, and to which he evidently ought to have been able to give categorical and truthful answers, there are others seemingly required to be and in fact answered by him, about which he could not, in the nature of things, have had exact and positive knowledge, and about which it is not probable that he could have expressed himself satisfactorily by simply answering "Yes" or "No." All answers were written down by the medical examiner. The policy sets out on its face that it is issued "in consideration of the application, and of each statement made therein." Among the provisions of the policy is one reading: "If any statement made in the application for this policy be in any respect untrue, this policy shall be void." The application set out on its face: "I certify that I am temperate in my habits, and am, to the best of my knowledge and belief, in sound physical condition, and a satisfactory subject for life assurance." This was signed by the insured, and indorsed by the beneficiary. Under the general health record, the question was asked in the written and printed medical examination which was sent forward to the company in New York: "(18) Any history of serious illness, injury, or infirmity, etc.?" to which the insured answered, "No." "(16b) When, and for what, has medical advice been sought within the last three years?" to which the insured answered, "Nothing." The medical examiner of defendant testified that he asked both of the above questions, and the assured answered them as recorded, and made no other statements under those heads. He says: "I wrote the answers. Mr. H. C. Hazlewood was sitting at my left elbow. I asked him each question, and wrote the answer as he gave it. First, had him sign at the top. Asked him questions 1 to 18, inclusive, and then wrote the answers. After the examination, he asked me what sort of a risk he was. I told him he could see for himself, and gave him the report; and he read it over himself. I asked him each question separately, and wrote his answers. He told me he had not sought medical advice in three years. That question is considered material. All are so

regarded, as all go to make up the report. \* \* \* Henry Clay Hazlewood gave no history of mental disorder or derangement. Applicant ought to have informed me of any mental derangement. Absent-mindedness, or hallucinations of fear, and the like,—general belief that some one was after applicant, to kill him, or imagining something to exist that did not,—would be a serious question." In the written examination the question was asked: "(6) Any history of mental derangement?" to which the applicant answered, "No." In the medical examination is the printed question to the applicant: "(8a) Ever spat blood, or any history of chronic hoarseness or cough, or of asthma, or shortness of breath?" To which the insured answered, "No." The controverted questions as to breaches of warranty raised by the pleadings, referred to in the evidence, and discussed in the brief of appellant's counsel, are thus stated in the brief: "The applicant covenants in writing, and warrants, that to the best of his knowledge and belief he is in sound physical condition. He warrants that he has not sought medical advice for anything within the last three years. He warrants that there has been no mental derangement. He warrants that there is no application pending for other insurance. He warrants that there has been no severe illness, coughs, or other ailments," etc. It is contended that the court erred in refusing to give the following charge at the request of defendant: "If the jury believe from the evidence that Henry Clay Hazlewood, in the application for the policy of assurance, warranted that all the statements in such application, and all the statements and answers made to the society's medical examiner, were true, and that such application was made a part of the policy, and it was therein provided that if any statement in such application was in any respect untrue, the said policy should be void, then I charge you that all three of such instruments, taken together, constitute the contract between the parties, and a warranty on the part of the assured that all the statements and answers to the medical examiner were true; and, if you further believe from the evidence that the said Henry Clay Hazlewood, in his medical examination, in answer to the printed questions propounded by the society, had his answers to said questions put down in writing by the medical examiner opposite said questions, after said Hazlewood had signed said medical examination, and that after said answers were put down he read over and examined the same, and assented thereto, and the same was sent forward with the application, as the basis of the policy, and the same was issued by defendant upon the reliance of the truth of such answers, then, if you find from the evidence that said written answers in said medical examination were in any respect untrue, you will find for the defendant." And also: "In refusing to grant the defendant's motion for a new trial in this, that it was clearly proved

that the contract was embraced in the application, the answers of the assured to the medical examiner, and the policy, taken together, and they constitute a warranty that the statements therein made were true, when the facts fully show that they were not true, that at the time of the application the assured was not in sound physical condition, but was in bad health, and misled defendant and its officers by his statements regarding his condition."

The doctrine contended for by appellant, that a warranty must be strictly complied with, is fully maintained by the authorities quoted in his brief. Mr. Bliss, in his work on Insurance, says: "By introducing them, they stipulate, in effect, that they are so material that if not strictly complied with the whole contract is rendered void. A misstatement in a warranty is therefore fatal to the contract, although arising from the most innocent mistake, or from false information afforded by others, or from mere inadvertence, and as much so as if made with the most willfully fraudulent intent." Section 36. In the case of *Jeffries v. Insurance Co.*, 22 Wall. 53, the court says: "The proposition at the foundation of this point is this: that the statements and declarations made in the policy shall be true. This stipulation is not expressed to be made as to important or material statements only, or to those supposed to be material, but as to all statements. The statements need not come up to the degree of warranties. They need not be representations, even, if this term conveys an idea of an affirmation having any technical character. 'Statements and declarations' is the expression; what the applicant states, and what the applicant declares. Nothing can be more simple. If he makes any statement in the application, it must be true. If he makes any declaration in the application, it must be true. A faithful performance of this agreement is made an express condition to the existence of a liability on the part of the company." Again, on page 56: "Many cases may be found which hold that where false answers are made to inquiries which do not relate to the risk the policy is not necessarily avoided, unless they influenced the mind of the company, and that whether they are material is for the determination of the jury. But we know of no respectable authority which so holds, where it is expressly covenanted, as a condition of liability, that the statements and declarations made in the application are true, and when the truth of such statements forms the basis of the contract." In the case of *Insurance Co. v. France*, 91 U. S. 512, the court adopts the reasoning in the above case, and adds: "It is only necessary to reiterate that all the statements contained in the proposal must be true; that the materiality of such statements is removed from the consideration of the court or jury by the agreement of the parties that such statements are absolutely true, and, if untrue in any respect, the pol-

icy shall be void." In the case of *Insurance Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. Rep. 837, referred to in the brief of appellant, the insured made certain statements and representations respecting himself, his life, and his past and present health, to which he appended a declaration warranting their truthfulness, and agreeing that they should be the basis of any contract between him and the company, and that if they, or any of them, were in any respect untrue the policy which might be issued thereon should be void; and further agreeing that, inasmuch as only the officers of the home office had authority to determine whether or not a policy should issue on any application, and as they acted only on the written statements and representations referred to, no statements or representations made or information given to the persons soliciting or taking the application for the policy should be binding on the company, or in any manner affect its rights, unless they were reduced to writing, and presented at the home office, in the application. The statements and representations, with this declaration accompanying the application, and forming part of it, were forwarded to the home office. The policy recited that it was in consideration and upon the faith of the statements and representations contained in his application, all of which had been warranted by him to be true. In delivering the opinion of the court, Justice FIELD says: "It was his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. It would introduce great uncertainty in all business transactions if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made, or business fairly conducted, if such a rule should prevail. \* \* \* But here the right is asserted to prove, not only that the assured did not make the statements contained in his answers, but that he never read the application, and to recover, upon a contract obtained by representations admitted to be false, just as though they were true. If he had read even the printed lines of his application, he would have seen that it stipulated that the rights of the company could in no respect be affected by his verbal statements, or by those of his agents, unless the same were reduced to writing, and forwarded, with his application, to the home office."

We think there is a material difference between the undertaking by the insured in that case and in the one before us. In that case he agreed that he would be bound by the statements as written down, and that no statements not written down should be binding on the company, or in any manner affect its rights. In the case before us the agreement of the insured was that his answers

made, or to be made, to the medical examiner were warranted to be true. He did not warrant that his answers would be written down correctly by the medical examiner, or that the answers given by him would be correctly reported to the company. While the doctrine of warranty will be strictly applied, it should be as strictly limited to the precise undertaking of the party making it. If, beyond requiring that the insured should warrant the truth of all answers given by him, the company intended, as it had the right to do, that he should also warrant that his answers should be correctly written down and reported, and that he would warrant them, not only as given by himself, but as written down, the agreement could have been made to so express, and it ought to have been done. The charge as requested by the defendant, as above stated, and refused by the court, reading that if the jury found from the evidence that said "written" answers were "in any respect" untrue they should find for the defendant, extended the warranty of the insured so as to bind him for the truth of the answers as written, instead of their truth as given by him. In view of the fact that plaintiff's contention was that the insured gave true answers to the questions, which were incorrectly written down and reported by the medical examiner, and that the insured did not read the answers, or sign the paper containing them, which there was evidence tending to support, we think the charge was incorrect in this particular. The signature of the insured, being at the beginning of the examination instead of at its close, seems to us to have been required to be placed there as one means of identifying him as the person who had made the application, rather than for the purpose of binding him, as a party, for the truth of the contents of the paper. The assumption in the charge that the insured "had his answers to said questions put down in writing by the medical examiner" finds nothing in the evidence to support it. The direction to find for the defendant, if the jury should find the written answers were in "any respect" untrue, was, we think, if no other objection to it existed, inapplicable to this case, and tended to mislead the jury. Under it, the jury would have been required to consider every answer of the insured, whether any contention existed over it or not, and however difficult it might have proved for them to separate answers really proceeding from the medical examiner himself from those made by the insured; and, if they believed any one answer was in any particular untrue, they could have found against plaintiff for that reason. No charge on the subject should have been given that was not confined to such questions and answers as were put in issue by the pleadings and evidence, and the one requested should not have been given, because not so limited. What we have said about the charge is applicable to the assignment of error with regard to overruling defendant's motion for

new trial, predicated upon the same ground. While the insured cannot, as is contended for by appellant, be held bound as a warrantor for the truth of the answers as written, it does not by any means follow that he was under no obligation about their being correctly written down, in so much as that depended upon him, or was properly within his control. He had undertaken to make true answers; and he must be presumed to have known that the object in having them written down was to furnish information to the absent officers of the corporation of material importance to them in determining whether or not they would execute the contract. Where there were no circumstances to excite his suspicion to the contrary, we see no reason, however, why he may not have trusted to the medical examiner's correct and honest performance of his duty. We do not think his contract, or the exercise of ordinary prudence, demanded of him to assume that there was any want of capacity, care, or honesty upon the part of the medical examiner, or make it his duty to assume the exercise of a supervisory power over the work of that officer. As a general rule, no doubt, the subjects of insurance will be but little qualified for such a task. If, however, it did by any means come to the knowledge of the insured that answers given by him had been incorrectly written down, it then became his duty to see that the proper corrections were made; and, if he failed to do so, then, although not bound by a warranty, plaintiff ought now to be held estopped from disputing them as written; and if, under such circumstances, incorrectly written answers materially affected the risk, and the issue was properly raised by the pleadings, and sustained by the evidence, a recovery ought not to be had. We deem it sufficient to say that we do not think this character of issue was presented by the pleadings or the charge of the court, and the record before us suggests that the evidence upon it would have been thoroughly conflicting, and amply sufficient to support a verdict in favor of plaintiff.

The defendant alleged in its answer that the insurance was taken out by plaintiff as a speculative and wagering policy. It was proved that plaintiff loaned to the insured the money with which he paid the required premium. The corporation's agent through whom the insurance was effected was permitted to testify to the negotiations preceding the application, tending to show that both the plaintiff and the insured were urged by the agent of the corporation to apply for the insurance; that the premium was paid by the insured; and that he first thought of making the minor children of the plaintiff the beneficiaries of the policy, but he finally concluded not to do so, because, in the event of his own marriage and desire to change the beneficiary to one more nearly connected with himself, it would be easier accomplished if his brother was the beneficiary than it would be if his minor children were the beneficiaries. The

application for insurance contains the following questions and answers: "Is any negotiation for other insurance now pending or contemplated?" to which the insured answered, in writing, "No." "Has a policy ever been applied for which was not thereafter issued, or which, if issued, was modified in amount, kind, or rates? If yes, for what company, and when?" to which the insured answered, in writing, "No." There was conflicting evidence as to whether the insured had not applied for membership in an order known as the "Legion of Honor." Plaintiff was permitted to prove, by the agent of the corporation by whom the application was secured, that pending negotiations between him and the insured, and before the insured made answer to said questions, he (the insured) asked him (the agent) "what was meant by that,—if it referred to assessment companies or mutual companies." Witness explained that it did not; and the insured then said he had made application to the Legion of Honor for assurance, whereupon witness told him that the Legion of Honor was a mutual company, and was not regarded as a life insurance company, and he was instructed by the general agent of defendant not to consider them as assurance companies. We think the evidence was properly admitted in each instance. On the issue as to whether it was a wagering policy, the statements made by the witness were pertinent, and have no tendency to control any written evidence or the contract. Nor can we see any impropriety in permitting the agent of the corporation to give the subject of the insurance information about facts proper for him to know. Lodges that furnish insurance to their members may also perform other important functions, and a rejection of an applicant by one of them would not necessarily be predicated upon his unfitness for insurance. It may be a rule of the defendant company not to treat such societies as coming within the meaning of the question, and, if it is, we are not able to perceive any sufficient reason why the fact that the statement was made may not be proved. Outside of the evidence objected to, the record fails to show that the insured in fact ever made an application for such membership, or that he was ever rejected.

It is contended that the plaintiff had no insurable interest in his brother's life, wherefore the cause of action sued upon was a wagering contract, and void, as against public policy. The rule is stated generally, in *Bliss on Life Insurance*, § 7, that "no person can procure a valid insurance upon a life, unless he has an interest in such life." The supreme court of the United States, in the case of *Insurance Co. v. Schaefer*, 94 U. S. 460, say: "It is generally agreed that mere wager policies, that is, policies in which the insured party has no interest whatever in the matter insured, but only an interest in its loss or destruction, are void, as against public policy. \* \* \* It is well settled that a man has an insurable interest in his own life, and in that

of his wife and children; a woman, in the life of her husband; and the creditor, in the life of his debtor. Indeed, it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life; and there is no doubt that a man may effect an insurance on his own life for the benefit of a relative or friend.

\* \* \* The essential thing is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the assured has no interest." In the case of *Price v. Knights of Honor*, Chief Justice WILLIE, speaking for this court, said: "It is almost universally conceded that policies procured by persons having no interest in the life of the insured are void at common law, as against public policy." 68 Tex. 366, 4 S. W. Rep. 633. In the case of *Insurance Co. v. France*, 94 U. S. 561, it appears that the insurance was applied for by Chew on his own life, for the benefit of his sister, Lucetta P. France, who was a married woman, and in no way dependent on her brother for her support. The evidence tended to show that Mrs. France had at different times loaned her brother \$2,400. The insurance was \$10,000. At the time the policy was issued, Chew was unmarried, but was engaged to be married, and was in fact married the next day. The policy was held "sustainable at law, on account of the nearness of the relationship between the parties, and especially as Mrs. France, at the time the insurance was effected, was one of Chew's next of kin, prospectively interested in his estate as a distributee." The doctrine is well settled by the weight of authority that a person not having an insurable interest in the life of another cannot take and hold by an assignment a policy upon the life of such other person, and that a creditor can only take and hold such a policy, by assignment, to an extent sufficient to secure his debt. *Cammack v. Lewis*, 15 Wall. 643; *Warnock v. Davis*, 104 U. S. 782; *Price v. Knights of Honor*, 68 Tex. 366, 4 S. W. Rep. 633. It is contended by appellee that every person has an insurable interest in his own life, and that when he is the actor he may take out an unlimited amount of insurance upon his own life, and make it payable to whoever he may please, as beneficiary, without regard to such person's having an insurable interest in his life. In *Bliss on Life Insurance*, it is said: "A person has undoubtedly an insurable interest in his own life, and that interest supports a policy whether he makes the loss payable to himself, his executors, or his assigns, or to a nominee or appointee named in the policy. Nor is a policy obtained by one on his own life, for the benefit of another, which latter advances the premium, necessarily void. The question is whether the policy was in fact intended to be what it purports to be, or whether the form was adopted as a cover for a mere wager. If the plaintiff and the insured confederate together to pro-

cure a policy for the plaintiff's benefit, when he is not, and does not expect to be, a creditor of the insured, and with a view of having the policy assigned to him without consideration, the policy is void." Section 26. The only distinction we can see in any case between the assignment of a policy taken by a person on his own life to one having no insurable interest, and the designating such person, without insurable interest, in the original transaction as the beneficiary, is that the insurer may not know of the assignment, but would necessarily be aware of the designation in the policy. So far as the question of public policy is concerned, we can see no substantial distinction between the two proceedings; and, if one is invalid, it seems to us the other ought to be held equally so. An assignment of a valid policy to one having no insurable interest in the life insured does not invalidate the policy. The assignee may collect and apply the proceeds, if he is a creditor, to the extinguishment of his own debt, and such sums as he may have disbursed for the purpose of keeping the policy alive; and the surplus may be collected for the benefit of the heirs of the person whose life was insured. We see no reason why the same rule may not be applied to a person designated in the policy as the beneficiary, treating him, when he has no insurable interest, as an assignee, appointee, or trustee, to receive the proceeds for whoever may be lawfully entitled to enjoy them. The insurer will then be required to pay the sum it has promised to pay, and the money cannot be appropriated by anybody not having a legitimate right to it. The exact degree of relationship that must exist between two persons to give one an insurable interest in the life of the other, on account of the relationship alone, we have not found to be clearly defined. Brothers and sisters seem to be on the dividing line. Whether that degree of relationship can be included, has been disputed. The case of *Insurance Co. v. France* is an authority in support of the proposition that it may be included, and we are unwilling to hold that it ought to be excluded. To what extent a creditor may insure the life of his debtor is not announced when it is decided that he can only appropriate of such insurance an amount sufficient to pay his debt and interest. He must be allowed to provide for a sum sufficient, when collected, to cover his demand, and such disbursements as may be required to keep the policy in force, with accrued interest. The sum required for the purpose may very many times exceed the debt. It would be an extreme case in which a court would be justified in saying that the amount secured was too great. When the insurance is obtained by a person on his own life, and made payable originally, or by assignment, to another, having none, or only a limited insurable interest in his life, as the surplus, after the payment of the charges, will go to the party whose life is insured, we see no reason for limiting the amount for which the

insurance may be taken out. When the insurance is not contracted for by the person whose life is insured, but by a creditor, in his own name, so that there is no party to the contract except himself and the insurer, it becomes immaterial what amount may be contracted for, as no more will be collected than will be ultimately sufficient to discharge his debt and disbursements on the policy, including interest upon both. We find no error in the proceedings, and the judgment is affirmed.

**SCHONFIELD *et al.* v. TURNER.**

(*Supreme Court of Texas.* Dec. 6, 1889.)

**MUTUAL BENEFIT INSURANCE—ASSIGNMENT OF CERTIFICATE—DIVORCED WIFE.**

1. Assignment of a benefit certificate in a benevolent association to one not related to the member, but who has merely advanced him \$50, is against public policy, and the fund goes to the heirs, after deducting dues and advancements paid by the assignee; and it is immaterial that by the rules of the order the fund was to be paid to the member's "family, or as he may direct," and that the certificate was surrendered, and a new one issued to the assignee, according to the constitution.

2. A divorced wife is entitled to no share of a benefit fund which by the rules of the association goes to the member's heirs, no beneficiary having been appointed by him.

Error to district court, Rusk county; J. G. HAZLEWOOD, Judge.

*Rufus Price* and *F. B. Sexton*, for plaintiffs in error. *Booty & Young, J. H. Turner*, and *Martin Casey*, for defendant in error.

**HENRY, J.** The order of Knights of Honor is an incorporated body. One purpose of its existence is to furnish insurance upon the lives of the members of its subordinate lodges. In the year 1880 one David Schonfield became a member of the order. Among the objects of the corporation, its charter states one in the following language: "To promote benevolence and charity by establishing a widows' and orphans' benefit fund, from which, on satisfactory evidence of the death of a member of the corporation who has complied with its lawful requirements, a sum, not exceeding five thousand dollars, shall be paid to his family, or as he may direct." The constitution of the corporation at the same date, among others, contained the following provisions: "Each applicant shall direct in his application to whom he desires his death benefit paid. The beneficiary may be changed as the member may thereafter direct, in accordance with the laws of this order, and such changes shall be entered in the benefit certificate. A member may at any time, while in good standing, surrender his certificate, which, together with a fee of fifty cents, shall be forwarded by the reporter of his lodge, under seal, to the supreme reporter, who shall thereupon cancel the old certificate, and issue a new one in lieu thereof to such member, payable as he shall have directed; said direction and surrender to be made on the back of the benefit certificate

surrendered, signed by the member, and attested by the reporter, under seal of the lodge. In the event of the death of one or more of the beneficiaries designated by the member before the decease of such member, if he shall make no further disposition thereof, upon his death such benefit shall be paid in full to the surviving beneficiary or beneficiaries, each sharing *pro rata* as provided in the benefit certificate. In the event of the death of all the beneficiaries designated by the member before the decease of such member, if he shall make no other disposition thereof, the benefit shall be paid to the heirs of the deceased member, and, if no person or persons shall be entitled to receive such benefit by the laws of this order, it shall revert to the widows' and orphans' benefit fund."

When Schonfield first became a member of a lodge, he received a "benefit certificate," issued under the above-quoted charter and constitutional regulation, binding the supreme lodge of the corporation to pay out of the widows' and orphans' benefit fund to one Friedlander the sum of \$2,000, in accordance with and under the laws governing the order, upon satisfactory evidence of the death of said member and the surrender of the certificate: provided that the certificate had not been surrendered by said member, or canceled at his request, and another certificate issued in accordance with the laws of the order. After paying his dues for several years, Schonfield's health failed him, and he seems to have become very poor; having neither the money necessary for his personal maintenance or to pay his dues to the lodge. In this condition of affairs, the appellee, T. P. Turner, furnished him \$50, and took from him a transfer of his benefit certificate. The transfer was made by Schonfield, by filling up and signing a blank transfer on the back of the benefit certificate. Subsequently, on the 28th day of June, 1884, the Supreme Lodge, Knights of Honor, upon Schonfield's surrendering the first certificate, issued to him, in lieu thereof, a second one, for the same amount, payable to T. P. Turner, and similar in all respects to the first one. The laws of the order when the two certificates were issued, as well as the terms and conditions of the certificates themselves, were substantially the same, and so remained until the 1st day of July, 1884, when an amendment of the constitution of the order went into effect, whereby a clause of the constitution formerly reading that the insurance money be paid "to his [the member's] family, or as he may direct," was so changed as to read that it should be paid "to such member of his family, or person dependent on him, as he may direct, and may designate by name." After Turner purchased the certificate, he paid the required assessments and dues until Schonfield died. The whole amount paid out by him, including the \$50, having been, according to his own testimony, "seventy-five or eighty dollars." It seems that it was not considered by any of the parties necessary to

consult Friedlander about the transfer, or the surrender of the first certificate, and that in fact he did not participate in either act. David Schonfield, when he joined the order, had a wife and five minor children. He did not live with or provide for them, and it seems that none of the parties to the aforesaid transaction had any knowledge that he had a family, or that he had ever had a wife. He was divorced from his wife. He died on the 20th day of September, 1884. The corporation collected the money from its members; but, before it was paid to Turner, as the holder of the benefit certificate, the children of Schonfield, and their mother, asserted a claim to it, upon which the corporation declined to pay it to either party. Turner sued the corporation to recover the money. The corporation answered, admitting that it held the money, and asking that the five children of David Schonfield, who were all minors, and whose names were alleged in the answer to be, Emma, Bertie, George, Tibbie, and Fred Schonfield, and their mother, Laura Schonfield Schuterlee, be made parties defendant. The defendant brought into court the amount of money in controversy, to be held by the clerk, and paid over to the party adjudged to be entitled to it. The record does not show that process was issued or served as prayed for by defendant, but Laura Schonfield Schuterlee, Emma Schonfield, Bertie Schonfield, Fred Schonfield, and Tibbie Schonfield appeared by attorney and answered, alleging that they had been cited to answer. Afterwards an order was entered appointing a guardian *ad litem* for Emma Schonfield, Bertie Schonfield, George Schonfield, Fred Schonfield, and Tibbie Schonfield. The record does not show that the minor George Schonfield was ever cited, or that any answer for him was ever filed. There was a suggestion of the marriage of Laura Schonfield Schuterlee, but her husband was never made a party, and never appeared or pleaded. A judgment was rendered, on the verdict of a jury, in favor of plaintiff. The minors, Emma Schonfield, Bertie Schonfield, George Schonfield, Fred Schonfield, and Tibbie Schonfield, by their guardian *ad litem*, prosecute this writ of error to reverse the judgment.

Turner was not related by blood or otherwise to David Schonfield. He was not his creditor, and consequently had no insurable interest in his life. It is contrary to public policy to allow any one not owning such insurable interest to become the owner, by assignment or otherwise, of insurance upon the life of a human being. A creditor of the assured may lawfully become the owner of such insurance to an extent requisite to protect him from ultimate loss of his demand; and a purchaser or assignee of it will be recognized as having an interest in it sufficient to repay him the purchase or other money invested in it by him, including advancements, in the nature of dues, assessments, and premiums, to preserve and keep the insurance in force, with lawful interest thereon. What

amount a creditor, as such, may procure insurance for, and the rules regulating his collection of it, depend upon contingencies not necessary to discuss in this case. What the policy of the law forbids to be done must be treated by courts, when administering the law, as never having been done. The undisputed evidence is that Turner's first claim of ownership of the insurance was through an assignment to him of the Friedlander benefit certificate. The case, in this respect, comes directly within the decision of this court in the case of Price v. Knights of Honor, 68 Tex. 361, 4 S. W. Rep. 633, in which it is held that such a transfer is prohibited by law. The fact that subsequently Schonfield surrendered the transferred certificate to the lodge, and procured another one, payable directly to Turner, does not change the principle, or affect the result. The public policy that forbids such transactions is entirely independent of the consent or control of the insurer or the insured. We think it clear that the laws of the order at the dates of the transactions in question recognized David Schonfield as the only beneficial owner of the insurance, and that the person named in the certificate, whether it was Friedlander or Turner, was only an appointee to collect and receive the money, in the event that Schonfield died without otherwise disposing of it. The rule and the practice that permitted the member, and him alone, to dispose of the insurance at his own pleasure, without regard to any right or claim of any person to whom it had been issued or transferred, is utterly inconsistent with the idea of a beneficial interest in any person other than the member himself. That mode of dealing with it is consistent only with the proposition that the party in whose name it was, whether originally or by transfer, held it merely as a trustee, for the use and benefit of the member. Upon the death of the member the beneficial interest vested in his heirs. When the person designated to receive the insurance is held by the law incapable of taking it for his own use, on grounds of public policy, it will be entirely consistent with the manifest purposes of the order to make the same disposition of the money that would have been made if he had been dead. As we have seen, the laws of the order direct it to be paid, in that contingency, to the heirs of the member; not to the heirs of the holder or transferee of the benefit certificate. Such holder of the certificate may, no doubt, collect the money for the use of the heirs, and enforce such proper claims of his own against the fund as the law recognizes. After allowing to appellee the \$50 originally paid, and amount subsequently paid by him for dues and assessments, with interest thereon at the rate of 8 per cent. per annum, the remainder of the money belongs to the heirs of David Schonfield, as they existed at the date of his death. If his wife had then been divorced, she was not one of them, and is not in any capacity entitled to a share of the money. On another



trial the exception to the pleading of plaintiff charging that she was divorced, instead of being sustained, ought to be overruled. The judgment is reversed, and the cause is remanded.

#### CREEKMORE v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 12, 1889.)

##### INTOXICATING LIQUORS—SALE AT RESIDENCE.

1. Gen. St. Ky. 1878, c. 106, art. 2, § 3, and acts amendatory, allowing distillers to sell spirits at their own residence, provided the residence is "located upon the distillery premises or premises adjacent," does not protect sales by a distiller who leases, at a nominal rent, two or three narrow strips of land connecting his residence with the distillery, a mile and a half distant.

2. Act Ky. April 30, 1888, amending the law regarding the retail sale of ardent spirits, and providing that sale may be made at the distiller's residence only when the same is on the distillery premises, which is made to apply to one county only, is not unconstitutional, but a proper exercise of the power to make public police regulations.

Appeal from circuit court, Madison county.  
"Not to be officially reported."

Indictment of A. W. Creekmore for unlawfully selling liquors, and judgment against the defendant, who appeals.

Wm. Cromwell, Parrish & Turner, and C. F. & R. A. Burnam, for appellant. P. W. Hardin, Atty. Gen., for the Commonwealth.

LEWIS, C. J. By section 8, art. 2, c. 106, Gen. St. 1878, it was provided that "distillers of ardent spirits have the privilege of selling at the distillery any spirits of their own manufacture, in quantities not less than a quart, but not to be drunk on the premises." But by act of March 20, 1876, the words "their residence" were substituted for the words "the distillery," and such is now the general law. But by an act approved April 30, 1888, § 3, art. 2, as it now stands, was amended by inserting after the word "premises" the following: "Provided, nothing herein shall be construed to authorize any distiller or firm of distillers to sell ardent spirits at more than one place: and provided, further, that the residence at which the spirits are sold by authority hereof shall be located upon the distillery premises or premises adjacent;" but the act was made to apply to Madison county only. The effect of that act was to change the operations of the general law as to Madison county that the residence of the distiller, where the ardent spirits is sold, shall be located upon the distillery premises, or upon premises adjacent thereto. To evade the operation of that statute, for he could have no other purpose in view, appellant obtained possession by lease of two or three narrow strips of land, at a nominal rent, with a view of connecting his residence, where the liquor is charged in the indictment to have been sold, with the distillery, which he also occupied as tenant of the owner. It seems to us the residence of appellant cannot, in legal contemplation, be at all regarded as upon the distillery prem-

ises, which includes the buildings thereof and adjuncts; nor on premises adjacent to the distillery premises, for it was about one and a half miles from the distillery, and not adjacent to or connected with it. The power of the legislature to pass laws regulating the liquor traffic by retail, whether applied to the entire state, to particular counties or districts; or even arbitrary geographical divisions of counties, has been frequently recognized by this court as existing under the general power to enact all laws relating to public police of the commonwealth, and therefore not an infringement of the constitution.

Judgment affirmed.

#### LOGSDON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 19, 1889.)

##### CRIMINAL LAW—EVIDENCE—CHARACTER.

On a trial for murder, it is not competent to prove the general character of one of the participants in the fight in which deceased was killed by reciting the history of a difficulty that previously occurred between him and the witness who is asked in regard to it.

Appeal from circuit court, Grayson county.  
"Not to be officially reported."

Samuel Logsdon was convicted of manslaughter, on an indictment for murder, and appeals.

W. R. Haynes, for appellant. P. W. Hardin, Atty. Gen., for the State.

LEWIS, C. J. Appellant was indicted for the murder of James Bassett, and convicted of manslaughter, and, though he has appealed from the judgment, no proof has been filed in his behalf. The killing occurred at a place where appellant and one Williams had met for the purpose of engaging, and did engage, in a fist fight. There is some discrepancy in the testimony of witnesses; but the prominent fact is well established, and undisputed, that appellant went on the ground with a loaded pistol that he kept concealed in his coat, that he had taken off to engage in the fight, and with which he shot Bassett. George Bassett was at the same time, also, killed by Jo Logsdon. A motion was made for continuance of the case, but, as no exception was taken to the action of the court overruling it, we cannot consider it. It was not competent to prove the general character of George Bassett by reciting the history of a difficulty that previously occurred between him and the witness who was asked in regard to it. Perceiving no error of law occurring during the trial of this case, and there being evidence before the jury of appellant being guilty of the charge, the judgment must be affirmed.

#### SCHEIBLE v. HART.

(Court of Appeals of Kentucky. Dec. 19, 1889.)

##### ADVERSE POSSESSION—DIVISION FENCES—MOTION FOR JUDGMENT NON OBSTANTE.

1. Where parties have respectively claimed adversely up to a division fence for 30 years, such

fence fixes the line between them, and determines their respective rights.

2. But, if there is a marked line between the two pieces of land for which the deed of one of the parties calls, then he does not acquire possession beyond it by the adjoining owner's permitting him to join to his fencing, if he does not claim to the division fence.

3. A motion for judgment *non obstante veredicto* must be made before the entering of judgment.

Appeal from circuit court, Hardin county.  
"Not to be officially reported."

Action by George C. Scheible against Silas Hart for trespass. Judgment for plaintiff. Defendant appeals.

J. P. Hobson, for appellant. *Sprigg & Wilson*, for appellee.

HOLT, J. In 1887 the appellee notified the appellant that he would no longer abide by the division fence which had existed for many years between their lands, and would, between the 1st day of December and 1st day of March following, that being when the statute permits it, cut loose from him. This he did; and the appellant, having extended his fencing near enough to the new fence built by the appellee to in effect keep his lands inclosed, the appellee sued him in trespass, claiming that the appellant, in doing so, had entered upon his land. The petition avers that notice was given of the intention to cut the fencing loose, but does not say that it was given three months before it was done, as required by the statute. Gen. St. 761. There was no objection made to the petition, however. The answer made no issue of insufficient notice. It only put in issue the right to the land where the acts complained of were done, and also set up a counter-claim for a portion of the division fence, which, it was claimed, appellee had appropriated without right. A trial resulted in a small verdict for the appellee, upon which a judgment was rendered. A motion was then made, based upon written grounds, for a new trial. It was overruled. Then a motion was made to set aside the judgment, and render one for the appellant upon the pleadings *non obstante veredicto*, because the petition failed to aver the three-months notice.

This objection to the pleading came too late. A motion for a judgment *non obstante* properly comes from the plaintiff. It is true the appellant was such as to his counter-claim, but a motion of this character is due before the entering of the judgment. *Freem. Judgm. § 7.*

It appears that one Montgomery formerly owned the Scheible land, and one Brooks the Hart land. Montgomery built the division fence; and, Brooks complaining that it was too far over on him, Montgomery moved it back to where it was when this trouble arose between the appellee and the appellant. There is some evidence that, when this was done, Brooks and Montgomery agreed upon a division line between them, which they marked with stones, and that it left the fence upon Montgomery's side. The effort of the

appellant in this action was to get the court, by its instructions, to confine the jury, in reaching a finding, to the line so fixed, while the appellee claimed that the division fence should govern. Brooks sold to Hart in 1854, and, whatever may have been the claim of the former, it is evident the appellee, from the time of his purchase, or for about 35 years, held and claimed to the division fence. There is no testimony showing that he ever recognized the stones as marking the true line, or that he ever admitted he was holding the land between the fence and a line so marked subject to the right of Montgomery, or those holding under him. For a period of over 30 years the fence was recognized as the division one between these parties. The claim and occupancy of the appellee up to the fence was thereby made definite, positive, and notorious, because there is not the least showing that he ever recognized any claim of the adjoining owner beyond it. His occupancy was adverse from its inception. He could not, of course, acquire any right to any part of the fence, or the land between it and the line marked by the stones, by a use by the consent of Montgomery, or those holding under him.

In view of the evidence presented, the court correctly, by proper instructions, told the jury, in substance, that if the parties had respectively claimed adversely up to the division fence for 30 years, or even 15 years, then it fixed the line between them, and determined their respective rights. It also presented to them the appellant's view of the case, by telling them that, if there was a marked line between the two farms for which appellee's deed called, then he did not acquire possession beyond it by the adjoining owner permitting him to join to his fencing, provided the appellee did not claim to the division fence. The issue was thus fully submitted to the jury, and the judgment is affirmed.

#### COSTIGAN v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 19, 1899.)

##### CONTINUANCE—ABSENT WITNESS.

1. On a trial for murder, with plea of self-defense, a witness for the defense had been sworn, and had been fined for non-attendance, and a capias issued for his arrest. The witness, learning that he would have to go to jail if he failed to pay his fine, left the town, in order to avoid imprisonment. Counsel for defense, believing that it would be dangerous to progress in the trial without him, moved to set aside the swearing of the jury and continue the case until the witness could be obtained. This the court refused to do, and also refused to permit defendant's counsel to read an affidavit of the absent witness as a deposition. The trial progressed, ending in defendant's conviction. The absent witness was finally found, and made an affidavit that he was cutting corn near the place of the killing, and, hearing the difficulty, stopped his work, and listened; heard the accused say, "Don't you come," and deceased, who was carrying an axe, responded, "By ———, I am coming!" ——— and then the rocks began to rattle. "There were no eye-witnesses but deceased's son, who swore that his father did not attempt to use the axe. Held, that the testimony was material to the defense, and the

court erred in not continuing the trial until it could be procured.

Appeal from circuit court, Owen county.

"Not to be officially reported."

Indictment for murder.

*Lindsay & Botts*, for appellant. *P. W. Hardin*, Atty. Gen., for the Commonwealth.

PRYOR, J. The appellant, Costigan, was indicted for the murder of Elijah Abrahams, and convicted of manslaughter. He assigns numerous errors for a reversal, only two of which are necessary to be noticed. It appears from the testimony that the deceased and Costigan were neighbors, and had been unfriendly for a long time prior to the difficulty resulting in the death of Abrahams. It is maintained by the accused that when on his way home he heard chopping on his land, and found that deceased was getting wood from the premises without permission; that angry words ensued, when Abrahams attempted to inflict upon him serious injury with an axe, and, to prevent it, the accused threw at him with stones, striking him on the head, causing his death. This was, in substance, the testimony of the accused himself. A son of the deceased was present, and the only eye-witness, who swears that his father never attempted to use the axe, and was killed without cause. When the case was called for trial, both parties announced themselves ready; and the witnesses were sworn and separated, on the motion of the parties, and all retired from the court-room, except those under examination. Marion Aubrey, a witness for the defense, had been sworn, and, it seems, had been fined for non-attendance as a witness, or for some other reason, the sum of \$30, and a *capias* issued for his arrest. The witness, learning that he would have to go to jail if he failed to pay his fine, left the town, in order to avoid imprisonment. The parties had gone into trial; and the accused, by his counsel, hearing of the absence of their witness, and knowing the importance of his testimony, had attachment issued and placed in the hands of the officer, to have him brought into court, and, finding or believing that it would be dangerous to progress in the trial without him, moved to set aside the swearing of the jury and continue the case, or delay until the witness could be obtained. This the court refused to do, and then counsel for the accused asked that they be permitted to read what the absent witness would state, if present, and at the time embodied in an affidavit, as a deposition; and this was also refused, and the trial progressed, ending in appellant's conviction. So the materiality of this witness is the principal inquiry in the case. There appears to have been no collusion between the accused and the witness, but, on the contrary, every effort was resorted to, within the power of the defense, to have him present; and, if his testimony was important, the judgment cannot stand. This witness was finally found, and made an affidavit as to why he left the town after being

sworn, and stated, in substance, that he was cutting corn near the place of the killing, and, hearing the difficulty, stopped his work, and listened; heard the accused say, "Don't you come," and Abrahams responded, "By God, I am coming!"—"and then the rocks began to rattle." This was the substance, also, of the affidavit made by the accused on the motion to continue, and, in our opinion, was highly important to the accused, and it conducted to corroborate his statement as to why the rocks were thrown; and the court should have delayed the trial, or continued the case, until the witness was obtained. If there was the slightest evidence authorizing the belief that the absence of the witness was by the procurement of the accused, this would not be regarded as error; but the statements of the accused, as well as that of the sheriff or his deputy, and all the circumstances attending the sudden departure of the witness, tend to show that the accused was interested in having him present, and that his absence was to avoid imprisonment for the non-payment of the fine.

In regard to the instructions given to the jury, it seems to us that the fifth instruction is abstract, and misleading. The accused is guilty of murder or manslaughter, if he did not act in his necessary self-defense. The instruction that, if he sought and begun the conflict, he cannot rely on self-defense, has but little to do with this case. The killing by the accused is clearly proven; and his plea of self-defense is properly interposed, if he did it to save his own life, or his person from great bodily harm, and used no more force than was necessary for that purpose. This is a question for the jury, and the law of self-defense is found in instruction No. 4. Courts should be careful to instruct a jury as to the essential facts of the case; and a departure from this rule tends to confuse, instead of to enlighten, the jury in the consideration of the issue upon which their verdict is to be rendered. Judgment reversed, and remanded for a new trial, and proceedings consistent with this opinion.

#### SIMPSON v. COMMONWEALTH.

(*Court of Appeals of Kentucky*. Dec. 19, 1889.)

PRINCIPAL AND SURETY—STATUTE OF FRAUDS.

Under Gen. St. Ky. c. 23, § 1, which provides that "no action shall be brought to charge any person" upon a promise to answer for the debt of another, unless the promise, "or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or by his authorized agent," a surety is not liable on a note to which his name was written by another, upon mere verbal authority.

Appeal from circuit court, Harlan county.

"To be officially reported."

Indictment for false swearing.

*J. G. Forester*, for appellant. *P. W. Hardin*, Atty. Gen., for the Commonwealth.

LEWIS, C. J. Appellant was indicted for the offense of false swearing, committed by tes-

tifying, as a witness at the trial of an action, that he never signed, or authorized any one to sign for him, a promissory note to one Blanton, to recover judgment on which said action was brought. The note appears to have been executed by E. W. & John Napin, as principals, and, if appellant was a party to it all, he was so as surety only. He did not sign it himself, nor was it signed by an authorized agent. Hence he was not bound to pay it; for section 1, c. 22, Gen. St., provides that no action shall be brought to charge any one upon a promise to answer for the debt of another, unless the promise, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or by his authorized agent. It was in evidence that appellant gave verbal direction or authority to a person to write his (appellant's) name to the note, which was done in his presence. But he was not made, thereby, liable; for putting the name of a surety to a note by another does not satisfy the statute, which in terms requires, in order to bind him, that it be signed by himself, or signed by an authorized agent. The note in question was not signed by either, but, instead, the name of the surety was simply written by another; not, in either the language or meaning of the statute, signed to it. To construe the statute so as to charge a person with the debt of another, upon such evidence, would not only do violence to the language used, but tend to defeat the object of it, which is to prevent frauds and perjuries. And no better illustration of the wisdom of the statute, and necessity for strict adherence to it, could be afforded than is presented by this case; for, in the civil action, out of which grew this prosecution, a surety was sought to be made liable on a note, to which his name was written by another, upon mere verbal authority, which, he stated on oath, in the trial of the civil action as well as in this case, he did not give, and, if given or understood by the other to be given, was probably done by him under misapprehension. We therefore think it was error to refuse the following instruction, asked for appellant: "That, unless the jury believe the defendant was a principal in the note, verbal authority to sign his name to it was not an authority to sign his name; and, unless they believe he signed his name to said note, made his mark, or gave authority in writing to sign his name, then he did not in law authorize his name to be signed to the note, and the jury should find him not guilty." Judgment reversed, and cause remanded for a new trial, consistent with this opinion.

#### DYE v. COOK *et al.*

(*Supreme Court of Tennessee.* Dec. 10, 1889.)

##### HOMESTEAD—OBLIGATION OF CONTRACT.

Under the Tennessee homestead law, (Const. art. 11, § 11, Mill. & V. Code, § 2935,) exempting to each head of a family land of the value of \$1,000, the right attaches upon the marriage of a debtor

to his lands theretofore acquired, as against his debts which were not liens on the land. Such construction does not impair the obligation of any contract.

Appeal from chancery court, Sumner county.

*W. C. Dismukes and S. F. Wilson*, for appellants. *J. J. Turner*, for appellee.

LURTON, J. This case involves the right of a debtor to a homestead exemption. At the time he entered into the contract, upon which judgment was finally procured against him, he was the owner of the land in which he now claims a homestead exemption. He was then an unmarried man, and not the head of a family, and not, therefore, entitled to any exemption. Subsequently, but before any lien had been fixed upon this land by either judgment or levy, he became a married man, and the head of a family. He now claims that, as the head of a family, he is entitled to a homestead exemption in this land; it being worth less than \$1,000.

By the state constitution and legislative enactments, (Const. art. 11, § 11, Mill. & V. Code, § 2935,) every head of a family is entitled to a homestead, to the value of \$1,000, which is declared to be exempt from sale by legal process. The debtor in this case, as the head of a family at the time it was sought by legal process to sell this land, was clearly entitled to the benefit of this provision of the law, unless the law be obnoxious to that provision of the constitution of the United States which prohibits any state from passing any law which impairs the obligation of a contract. The contention of the creditor is that, as to debts created before he became the head of a family, the law impairs the obligation of the contract, if it be held applicable to property owned by the debtor before he became the head of a family, and at the time he entered into the obligation; such property being then subject to forced sale. This court held in 1872, and in advance of the supreme court of the United States, and contrary to the decisions of the courts of a number of other states, Justice FREEMAN delivering the opinion of court, that, as to debts and contracts existing at the time of the enactment of our homestead law, the law was unconstitutional, in that the remedy of the creditor against his debtor was destroyed by the exemption of his property from liability. *Kennedy v. Stacey*, 1 Baxt. 220; *Hannum v. McInturf*, 6 Baxt. 225. The supreme court of the United States subsequently announced the same conclusion. *Gunn v. Barry*, 15 Wall. 610. The validity, however, of such exemptions, as to debts created after this law, was never seriously challenged. The law which gives a creditor his remedy and the law which gives the debtor his exemption are as much part of the contract as if they had been set forth in the stipulations of the agreement by which the debt was originated. The homestead law was in force at the time this contract was entered into between Dye and Cook & Co. The law has not been changed. The attitude of their debtor

towards the law has been changed by his subsequent marriage. The creditor knew that, if before they had fixed a lien upon this land their debtor should become the head of a family, he would be entitled to a homestead exemption. The *status* of their debtor at the time they should attempt to subject his land to forced sale would determine their right, and his exemption. The *status* at the time the debt was created neither fixed his right nor their remedy. They also knew that if he should incur it, or sell it, before they had acquired a lien, they could not subject it to their debt. The law no more prohibited his doing the one than the other. He had the legal right to marry, and thus become the head of a family, and thereby entitled to a homestead. So he had the right to sell it, or to secure another creditor by an incumbrance. The creditors had no more right to demand that he should hold the property subject to their claim than they had to demand that he should remain single. No legal right of creditors has been impaired, and no fraud has been practiced upon them. A different question would arise if they had acquired a lien by levy or judgment before his marriage, upon which it is unnecessary to intimate an opinion. *Pender v. Lancaster*, 14 S. C. 25. The view we have reached is in accord with the cases of *North v. Shearn*, 15 Tex. 174; *Trotter v. Dobbs*, 38 Miss. 198. We have been unable to find any holding to the contrary, and the learned counsel for appellants have cited us to none. The decree must be affirmed.

#### YOUNG v. HUDSON.

(Supreme Court of Missouri. Dec. 2, 1889.)

WRIT OF ERROR—ATTACHMENT—BANK CASHIER—POWERS—ASSIGNMENT OF ACCOUNT.

1. Rev. St. Mo. 1879, § 489, which provides that, upon determination in favor of plaintiff of a plea in the nature of a plea in abatement, putting in issue the facts alleged in an affidavit for attachment, the cause shall proceed, and that proceedings upon the plea shall be reviewable by appeal, does not authorize their review by writ of error, as a longer time is allowed for error than for appeal.

2. A bank cashier may indorse to himself, and sue on, a note payable to the bank.

3. It is no objection to suit by an assignee of an account in his name that no consideration for the assignment is shown.

4. Error in admission of evidence purely cumulative, on trial by the court, is not ground for reversal, where the findings are sustained by other unchallenged evidence.

Error to circuit court, Cass county; NOAH M. GIVAN, Judge.

The action is based on three demands, stated as separate counts, two of which are upon promissory notes made by defendant to a bank, and the third is upon an account for merchandise sold, all alleged to have been regularly transferred to plaintiff. The proceedings began by attachment, based on several grounds. There were two trials,—the first, on defendant's plea, denying the grounds of attachment; the second, on the

merits. Both resulted in favor of plaintiff. After the trial of the issue in abatement, defendant moved for a new trial, which being denied, he filed exceptions, and took an appeal to this court. No disposition of the appeal appears to have been made, further than may be inferred from the subsequent trial of the cause on the merits at a later term. Defendant then moved for new trial, and saved exceptions to the adverse ruling on that motion. Afterwards he sued out this writ of error.

*Woolridge & Daniel*, for plaintiff in error. *Ralley & Burney*, for defendant in error.

BAROLAY, J., (after stating the facts as above.) 1. Plaintiff objects to the consideration of defendant's exceptions at the trial on the plea in abatement, insisting that they are not properly subject to examination upon writ of error. Our statute (Rev. St. 1879, § 489<sup>1</sup>) regulating such proceedings is not altogether free of ambiguity respecting the proper time and effect of steps to be taken by a defendant for a review. But bringing into view the law previously in force, as interpreted by this court, and endeavoring to give effect to the apparent purpose of the present enactment, we consider its fair import to be that upon a finding for plaintiff on the attachment issue the cause shall proceed to judgment on the merits, as indicated in the first part of the section, without prejudice to defendant's right to have his exceptions to the proceedings on the plea in abatement reviewed upon appeal taken after the latter judgment. Looking at the section in its entirety, we think the law-makers did not intend by it to declare that the proceedings in the case should be suspended to await the result of an appeal on the plea in abatement, when the finding thereon was for the plaintiff. Such a delay might prove entirely unnecessary. Should defendant succeed upon the merits, that disposition of the cause would ordinarily be as satisfactory to him as a finding in his favor on the preliminary issue in abatement. It would obviate the need of reviewing, at his instance, the earlier exceptions. So the legislature has provided that "the cause shall proceed" when plaintiff prevails on that plea. It has further enacted that the proceedings upon that plea shall be reviewable by appeal. The effect of this is to limit the time within which there may be such review, since the right of appeal, by our laws,

<sup>1</sup>Rev. St. Mo. 1879, § 489, provides that when, upon a plea in the nature of a plea in abatement, putting in issue the facts alleged in an affidavit for attachment, the issue is found for defendant, the action shall be abated, and that plaintiff may appeal, and that such appeal shall operate as *superseas*, and preserve the attachment until dismissed or determined. If the issue is found for plaintiff, defendant may reserve his exceptions, and the cause shall proceed. When plaintiff calls for an appeal, defendant shall not be required to plead until the time for perfecting the appeal has expired, or, if the appeal is taken, until its determination.

must be exercised within a briefer period than that allowed for bringing a writ of error. It was plainly within the bounds of legislative discretion to determine the limit of time, and the mode for reviewing such proceedings. The law-makers saw fit to designate appeal as the proper mode; and the courts cannot lawfully enlarge their meaning, so as to include another means of review, available for a much longer period. We have been greatly aided in reaching this conclusion by the views of the St. Louis court of appeals in *Duncan v. Forgey*, 25 Mo. App. 310. The construction then placed on this statute we consider the reasonable, natural, and practical one, and entirely approve. We hence sustain the plaintiff's objection to reviewing the proceedings upon the plea in abatement.

2. But the writ of error is efficient to secure an examination of the defendant's assignments of error relating to other parts of the record of the trial court. Upon the hearing on the merits, it appeared that the negotiable promissory notes sued on had been indorsed by plaintiff, as cashier of the bank, (the payee,) and in its name, to himself, individually. Defendant objected to these indorsements, on the ground that plaintiff could not lawfully make them. In the absence of any showing limiting his power, a bank cashier, as such, may certainly collect a note due his bank, and may adopt such a measure, to that end, as bringing suit upon it. He certainly has implied power to indorse such paper for collection, and a holder for collection has sufficient title to maintain an action. These principles are well settled, and the defendant's objection was therefore properly overruled.

Later on, he objected to the sufficiency of plaintiff's evidence of the assigned account, which formed the basis of another of the causes of action. The assignment was regular and formal. There was evidence of defendant's admission of the original indebtedness it exhibited, but no consideration for its transfer to plaintiff appeared. The account was evidently assigned to him to collect for the use of the assignors. That did not preclude a recovery. An assignee of a chose in action arising out of contract may sue upon it in his own name, though the title was passed to him only for the purpose of collection.

Some minor objections are urged to other rulings, but they relate to particulars of the testimony merely cumulative to the main proof supporting plaintiff's case. They may be disposed of by the remark that, under our statutes governing appellate procedure, an error in admitting testimony purely cumulative, upon a trial by the court, does not furnish ground for reversal, where, as in this instance, the finding for plaintiff is abundantly sustained by other unchallenged evidence, and the defendant has offered no testimony tending to establish any defense. Rev. St. 1879, §§ 3569, 3775. The assignments

of error are not sustained. The judgment is affirmed.

SHERWOOD and BRACE, JJ., concurring.  
RAY, C. J., and BLACK, J., absent.

#### STATE v. BROOKS.

(*Supreme Court of Missouri. Dec. 2, 1889.*)

ACCUSED AS WITNESS — ASSAULT — SELF-DEFENSE.

1. Where the accused is a witness in his own behalf, it is not prejudicial error to charge that what he testified to against his interest is to be taken as true.

2. On the trial of an indictment for an assault with intent to kill, an instruction that if defendant was so assaulted as to give him reasonable cause to believe there was a design to do him great bodily injury, and struck his assailant, with a knife, to prevent such injury, he was justified, is rightly refused, as not limiting the right of self-defense to the use of such violence only as appeared necessary.

BLACK, J., dissenting.

Appeal from circuit court, Buchanan county; SILAS WOODSON, Judge.

Defendant was tried upon an indictment containing three counts,—the first two for assault with intent to kill, and the third for an assault with a knife, and a felonious maiming, wounding, etc., of the injured party. Defendant was convicted under the third count, and, after the usual motions, appealed. The instructions referred to in the opinion as offered by defendant and refused by the court are the following, viz.: "(1) The witness Wright had no right or authority to approach the defendant in a rude or insolent manner, nor did he have the right, in a rude, insolent, or angry manner, to touch or lay his hands upon the defendant. Therefore, if the jury, believing from the evidence that the defendant was peaceably on the picnic grounds mentioned in the evidence, and said Wright approached the defendant, and caught hold of him, in a rude, insolent, or angry manner, and threw or pushed the defendant from him, and struck the defendant one or more blows with his fist, and that the defendant had reasonable cause to believe that there was a design on the part of said Wright to do him some great bodily harm or great personal injury, about then to be accomplished, and that the defendant struck said Wright, with a knife, to prevent such injury or bodily harm, then the defendant was justified in so doing, and the jury, in that case, should find the defendant not guilty. (2) If the jury believe from the evidence that the witness Wright assaulted or struck the defendant as stated in the other instructions, and the jury further believe that the defendant had reasonable cause to believe that there was a design on the part of witness Wright to do the defendant some great bodily harm or great personal injury, about then to be accomplished, and the defendant struck said Wright to avoid such injury, then the jury should find the defendant not guilty, and it would make no difference in that case whether said defendant was in actual danger from said

Wright or not, or whether such danger was then pending and about to fall on him or not." "(6) If the jury believe from the evidence that the witness Wright caught hold of and pushed the defendant, or that he struck the defendant one or more blows with his fist, and that the defendant had reasonable cause to apprehend a design on the part of said Wright to do him some great bodily harm or great personal injury, then about to be accomplished, and the defendant struck and cut said Wright to avoid and prevent such injury, then the defendant was justified, and the jury should find the defendant not guilty." The agreed statement of facts, signed by counsel, is as follows: "It is admitted by the defendant herein that the defendant struck and wounded one James F. Wright (the same party mentioned in the indictment) with a knife, in Buchanan county, Missouri, on the 1st day of August, 1885. It is also admitted by the prosecuting attorney of Buchanan county, Missouri, that at and before the time of the wounding said Wright and the defendant were engaged in a difficulty, and that, under the evidence advanced on the trial of this case, it was proper for the court to instruct the jury, on behalf of the defendant, as to the law of self-defense, as defined by 1 Rev. St. 1879, § 1235, p. 219; and that the defendant was a witness on his own behalf in the case. It is also agreed by and between the parties aforesaid that the points presented shall be determined by the supreme court on the above agreed facts, without the testimony being set out in the bill of exceptions; the only errors complained of and to be presented being the action of the court in giving and refusing instructions."

*Haynes, Casteel & Parrish, for appellant.*  
*The Attorney General, for the State.*

BARCLAY, J., (*after stating the facts as above.*) This cause is presented on an agreed statement of facts, in which counsel, with the commendable purpose of facilitating investigation, have given, in the compass of a few lines, an accurate view of the points of difference between them.

1. It is contended, first, that the court erred in this instruction, given at the instance of the state, viz.: "While the defendant is a competent witness to testify in his own favor, yet the jury, in determining what weight, if any, they will give his testimony, have the right to consider his interest in the result of this prosecution; and what defendant has testified to against his interest, if anything, is to be taken as true, and what he testifies to in his favor is to be given only such weight as the jury may believe, from all the evidence in the case, it is entitled to." The point of criticism is that the court told the jury that defendant's statements against his interest, as a witness at the trial, were to be taken as true. The question is not as to the effect of testimony by other witnesses purporting to recite defendant's language out of court, but of defendant's personal admis-

sions, in his own cause, in presence of his counsel, under our laws permitting him to testify. The authorities upon evidence make a broad distinction between solemn admissions in the course of judicial proceedings and admissions against interest, made otherwise. Whatever the significance ascribed to the latter, the former are regarded as conclusive upon a party, at least for the purposes of the case in which they are made. 1 Greenl. Ev. (14th Ed.) §§ 15, 27; Whart. Crim. Ev. (9th Ed.) § 638. This rule has been distinctly recognized in this state. In *Shirts v. Overjohn*, 60 Mo. 308, it was declared that an admission in court, in the testimony of a party, has the same effect as if made in his pleadings. The latter are "taken as true," for the purposes of the action. Rev. St. 1879, § 3545; *Wright v. Town of Butler*, 64 Mo. 165. But admissions by pleadings in civil causes are certainly of no more solemn character than admissions against interest, by the defendant in a criminal case, before his triers and his counsel. Such admissions, sometimes called "judicial confessions," if made voluntarily, intelligently, and deliberately, are likewise conclusive. *State v. German*, 54 Mo. 528; *State v. Richardson*, 12 S. W. Rep. 245. To say that they are to be "taken as true," as was done in this instance, is saying no more than that they are "presumed to be true," or are conclusive, for the purposes of the case in hand. 1 Greenl. Ev. (14th Ed.) §§ 27, 32; *Webster, Dict.* (Unabridged, 1883,) "Presume." Of course, such effect is affixed only to admissions adhered to, until the time for action thereon by the triers of the fact or of the law. If one makes an admission in a pleading, and afterwards withdraws it, by amendment or otherwise, it is no longer conclusive upon him, though it sometimes may yet be admissible against him with disputable effect. Just so when admissions are made by a party as witness in a civil or criminal cause. If, by mistake, or in the embarrassment of his situation, a misstatement of this nature occurs, he may, by timely explanation, correct it. Conclusive force belongs only to the final and deliberate admission. The defendant in a state case may, if he sees fit, plead guilty to the entire charge. With greater reason may he, on the witness stand, admit subordinate facts bearing on the issues involved, thus waiving their formal proof. Oftentimes it may be less damaging to his interests to do so than to require the evidence to be furnished in other ways. The declaration of law under review did no more than express these principles. Indeed, it is difficult to discern how a defendant could be prejudiced by an instruction directing the jury to take any part of his testimony as true. We do not think the court's declaration on that point contained any error to the prejudice of the defendant.

2. It is next urged that the court erred in refusing certain requests for instructions, and in declaring the law, of its own motion, as follows: "If the jury believe from the evi-



dence that witness Wright assaulted defendant with such violence as to give defendant reasonable ground to apprehend a design upon the part of said Wright to do him some great bodily injury, and to believe that there was danger of the immediate accomplishment of such design, then the defendant had the right to repel such assault, and, in doing so, to use such force and means as would seem to be necessary, under the appearances of the case as presented to defendant at the time." Defendant's offers were all faulty in omitting to indicate the legal limit of his right of self-defense. In those situations where the law sanctions resort to force to protect one's person, or other proper legal object of care, from attack, it requires that no greater violence be used in defense than appears, to the person defending his rights, to be reasonably necessary, in the circumstances, to repulse the assault. This rule of law was ignored in defendant's requests on that branch of the case, while the court's declaration accurately stated it. In so far as the refused instructions embodied correct principles, the court adopted and gave them. The case appears to have been tried with discriminating care and fairness. No error has been found in the record prejudicial to defendant's rights, under the law. The judgment is affirmed.

SHERWOOD and BRACE, JJ., concurring.  
RAY, C. J., absent. BLACK, J., dissents.

#### *In re GOANS.*

(Supreme Court of Missouri. Dec. 21, 1889.)

#### MURDER—BAIL.

The children of defendant and deceased had quarreled, and deceased threatened to shoot defendant's children. Later, defendant drove deceased's children from his spring, when deceased took a pail and pistol, and started, in a rage. Defendant, seeing him coming, took his gun, and went to meet him; but there was evidence that he did not shoot until deceased, a savage man, drew his pistol, and threatened to kill him. Defendant at once gave himself up, and was discharged by a justice, but after two terms, was indicted for murder, and tried, the jury disagreeing. His conduct was good, and he had refused to escape when other prisoners broke jail. Const. Mo. art. 2, § 24, declares that all persons shall be bailable, "except for capital offenses, when the proof is evident, or the presumption great." *Held*, that it was proper to admit him to bail.

Petition for writ of *habeas corpus*.

D. E. Wray, John W. Blevins, and John D. Bohling, for petitioner. A. L. Ross and W. D. Davison, for respondent.

BARCLAY, J. Goans, the petitioner, is under indictment in the Morgan circuit court for murder in the first degree, for killing Frank Wilson on the 28th August, 1887. The stipulation between counsel for the accused and the prosecuting attorney shows that the accused gave himself up immediately after the homicide; that the coroner's jury found he killed Wilson in self-defense; that a preliminary examination was held on a charge of murder, preferred by the prosecut-

ing attorney, and the accused was discharged by the justice; that two terms of the circuit court intervened before the finding of the indictment, at each of which a grand jury was duly impaneled; and that there was a mistrial in August, 1889, since which time he has been confined in the Cole county jail. The evidence adduced on the trial, a full transcript of which is before us, shows that Goans and Wilson resided in a country district, at a distance from each other of about 400 yards. Each had a family, consisting of a wife and a number of children. There is a small, inclosed field on Goans' premises, and a road, running south, from Wilson's house, to and around the east side of the field, and thence, in a westerly direction, to a spring on Goans' premises, which is close to his cabin. In the forenoon of the day of the homicide, the children of the two families got into some trouble at the house of the accused, he and his wife being then at a neighbor's house. Wilson's children ran home, and in a short time Wilson went to the house of the accused, flourishing a pistol, and threatening to kill the children. They ran to the neighbor's house, and informed the accused. He went home, and discharged an old load from his shotgun and reloaded it. After noon time, Wilson's children came to the spring for water, and the accused notified them that they could get no more water from the spring. They returned home, and the deceased, in a great rage, got a pail and a pistol, and started towards Goans' house. Goans was in his yard, and saw Wilson coming, and thereupon got his shotgun, and went about 100 yards towards Wilson, to a point on the inside of the inclosure, and shot the latter when on the opposite side of the fence. Some statements of the accused put in evidence tend to show that he shot before Wilson made any threats or threatening demonstration. The accused states that deceased drew his pistol and swore he would kill him, (Goans,) and thereupon the latter fired the fatal shot. Wilson is shown to have been a boisterous, desperate man, and on several occasions had threatened to kill Goans, to whom the threats had been communicated. The accused has the reputation of a quiet, law-abiding citizen. Since his confinement, his conduct has been exemplary. Some of the prisoners broke jail, in which he was confined, and escaped; but he refused to avail himself of the opportunity thus afforded, and did all in his power to assist the officers, and to prevent other inmates from escaping.

Our constitution (article 2, § 24) declares that "all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident, or the presumption great." The indictment for a capital offense furnishes a strong presumption of guilt, and this presumption must be applied, in all such cases, on application for bail. There must be other facts and circumstances which overcome this presumption before the prisoner can be bailed. One or even two

mistrials will not furnish the accused the absolute right to give bail. As said in Alexander's Case, 59 Mo. 598: "There may be circumstances connected with trials, which would produce a disagreement, which would entitle the prisoner to no claims whatever. The failure, however, to agree upon a verdict twice in succession is a strong consideration, and, coupled with other facts, may turn the scale, and show that the object sought may be attained by admitting to bail." The object of imprisonment before trial is said to be to secure the forthcoming of the person charged with the commission of a crime. In that case there had been two mistrials, and the prisoner refused to escape, though an opportunity had been afforded him so to do. The court, in substance, said that where a jury has disagreed twice, and where it satisfactorily appears that the attendance of the accused to stand his trial will follow, the court may, in the exercise of a sound discretion, admit to bail; and accordingly the prisoner was admitted to bail in that case. In the leading case of *People v. Tinder*, 19 Cal., at page 549, it is said: "So, bail may be taken where upon trial the evidence for the prosecution and defense has been produced, and there has been a disagreement among the jurors, or where, after verdict, a new trial has been granted for the insufficiency of the evidence to warrant a conviction. Cases of this kind justify the allowance of bail, in the discretion of the court, without hearing other evidence as to the guilt or innocence of the accused." One mistrial, and attending circumstances, may go further to overthrow the presumption of guilt arising from the finding of the indictment than two mistrials. Here there has been one mistrial, under favorable circumstances for the prosecution; and the prior and subsequent conduct of the accused shows to our satisfaction that he has not, and has never had, any thought of evading trial. The only undisputed circumstance against allowing bail is the fact, disclosed in the evidence, that accused went towards deceased with his gun, when he knew deceased was in a great rage. This evidence tends to show that he invited and brought on the difficulty, rather than acted in self-defense. On the other hand, there is much evidence tending to show that deceased prepared himself, and started to the spring, intending to provoke a difficulty; and that the accused understood these actions and movements, and stepped away from the cabin, that the children might be out of danger; and that he did not shoot until deceased drew his revolver and threatened to kill the accused. Under all the circumstances of this case, we are of the opinion that the accused should be let to bail, and accordingly we fix the amount of the recognizance at the sum of \$10,000. In view of the adjournment of the court before securities can be procured and bond given, the prisoner is remanded; but, upon his entering into a recognizance in said sum, with two or more sufficient securities,

conditioned according to law, and approved by the judge of the circuit court of Morgan county, he shall be discharged. All concur.

#### DUKE v. MISSOURI PAC. RY. CO.

(*Supreme Court of Missouri*. Dec. 21, 1899.)

##### DAMAGES—PERSONAL INJURIES—INSTRUCTIONS.

1. An instruction to assess sums expended "for professional services, physicians, and nurses," authorizes assessment only for services of physicians and nurses.

2. An instruction authorizing assessment of sums expended for professional services and medicines is sufficient to cause a verdict, in an action for personal injuries, to be set aside, where it merely appears that plaintiff was treated in a city hospital, and there is no evidence as to the value of the services and medicines, or that she paid or incurred any liability therefor.

Appeal from circuit court, Lafayette county; JOHN P. STROTHER, Judge.

*Robt. Adams and T. B. Buckner*, for appellant. *A. Comingo and Andrews & Lee*, for respondent.

BRACE, J. This is an action for damages for personal injuries, alleged to have been sustained by the plaintiff while a passenger on one of defendant's passenger trains, caused by the derailment of the train, and the overturning of the car in which plaintiff was seated, and its precipitation down an embankment, through the negligence of the defendant's servants. The jury found for the plaintiff, and assessed her damages at \$5,000.

1. No errors are assigned on the admission or exclusion of evidence. The instructions, as a whole, presented to the jury not unfavorably to the defendant the measure of care which a carrier of passengers is required to exercise, and defendant, in the argument, concedes that there was evidence given which, under proper instructions, would authorize a verdict for the plaintiff; but complains that "the amount of the verdict, under the evidence, is such as to justify the belief that the jury were misdirected." So that, practically, the only questions to be inquired into in this case arise upon the instructions given upon the subject of damages and the amount assessed. The allegation of damages in the petition is "that, on account of said injuries, it was necessary for plaintiff to expend, and she did expend, a large sum of money for professional services of physicians and nurses, and for drugs, to-wit, one thousand dollars, and was damaged in bodily pain, anguish, and suffering, and in the permanent injury of her hip and ankle, and the loss of her suit of hair, in the sum of twenty-five thousand dollars." So much of the instruction for the plaintiff as bears upon the question of damages, and to which objections are urged, is as follows: "And if you further believe that, on account of such injuries, it became and was necessary for plaintiff and that she did expend large sums of money for professional services, physicians, and nurses, and also for drugs and medicines, and that,

from the overturning of the train as aforesaid, she suffered mental anguish and bodily pain, and was, as to the physical parts of her body heretofore mentioned, permanently injured and disabled, and that the overturning of said car in which the plaintiff was seated as a passenger was the direct and proximate cause thereof, you will find for the plaintiff, and assess her damages at such sum as will, in your opinion, compensate her therefor, not to exceed twenty-five thousand dollars." The criticism upon the wording of this instruction—that it authorizes the jury to allow for professional services other than those of physicians and nurses—is not well founded. The words "physicians and nurses" are in apposition with the words "professional services" in the sentence, and the meaning is the same as if the sentence read "professional services, i. e., physicians' and nurses' services," and is no more than equivalent to the expression "professional services of physicians and nurses," as used in the petition.

2. The principal objection urged against the instruction is, however, that it authorizes the plaintiff to recover for "large sums of money expended for such services, and for drugs and medicines," when in fact the evidence fails to show that any sum whatever was expended therefor. A careful and critical examination of all the evidence in the case, as it appears in the 175 pages of appellant's printed abstract, has been made, and it must be conceded that this objection is well grounded. It appears from the evidence that the plaintiff, after the accident, was attended by physicians in a hospital in Kansas City, and that drugs and medicines were administered to her, and from her condition and surrounding circumstances that she must have received the benefit of such nursing as her situation required; but it nowhere appears that she ever expended a single dollar for such services or medicines, or that she ever incurred any express liability therefor; and if, by reason of the circumstances, she did incur a liability *quantum meruit* therefor, upon an implied *assumpsit*, or if, perchance, they were bestowed gratuitously, or paid for by a stranger, yet there is no evidence whatever showing the value of the professional services rendered, or of the drugs and medicines furnished, for which the jury are instructed to compensate her in damages. There was an entire failure of proof as to the allegation in the petition that the plaintiff "expended a large sum of money for professional services of physicians and nurses and for drugs," under the most liberal construction that can be placed upon it; and it was error in the court to instruct the jury as if there was evidence in the case in support of that averment. "Instructions must be confined to the case made by the evidence within the issues defined by the pleadings." 2 Thomp. Trials, § 2809; White v. Chaney, 20 Mo. App. 389; Wadingham v. Hulett, 92 Mo. 528, 5 S. W. Rep. 27; Lester v. Railroad Co., 60 Mo. 265. Where there is no evidence showing the

amount, or the proximate amount, of expenses incurred for medicines, medical attention, or like services, the jury have no basis upon which to form an estimate of the damages that ought to be assessed on account thereof; and damages of this kind cannot be found except upon such proof. Reed v. Railroad Co., 57 Iowa, 28, 10 N. W. Rep. 285; Eckerd v. Railroad Co., 70 Iowa, 353, 30 N. W. Rep. 615; Crowley v. Railway Co., 24 Mo. App. 119; 2 Shear. & R. Neg. (4th Ed.) § 759. Where compensatory damages only are given, the recovery must be confined to the actual damages sustained, (Bridge Co. v. Schaubacher, 57 Mo. 582;) and when such damages are susceptible of proof with approximate accuracy, and may be measured with some degree of certainty, they should not be left to the guess of the jury, even in actions *ex delicto*, (Parsons v. Railway Co., 94 Mo. 286, 6 S. W. Rep. 464; Pritchard v. Hewitt, 91 Mo. 547, 4 S. W. Rep. 437; Thomp. Trials, supra, § 2077.) When so left, it is impossible to tell to what extent the verdict may have been affected by the vague estimates the jury may have placed upon values concerning which there was no proof; consequently it is impossible to say the defendant was not prejudiced by this erroneous instruction on the question of damages, and for such error the case must be reversed and remanded for new trial. All concur.

#### ADAMS v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri. Dec. 21, 1889.)

##### CARRIERS OF PASSENGERS—NEGLIGENCE.

A passenger aged 67, and in good health, was directed to get off defendant's train, a freight carrying passengers, before reaching his station. His duties requiring haste, he started on beside the train, the road-bed being closely fenced with barbed wire, but soon came to a bridge, to get over which he had to mount a flat-car, as did also another passenger. Reaching the front of the car, and being anxious lest the train might start, he, having first examined the ground, jumped from the coupling outward, with one hand on the car in front, and in landing broke his leg. Held, that the facts did not constitute a cause of action. BRACE and BLACK, JJ., dissenting.

Appeal from circuit court, Cass county; NOAH M. GIVAN, Judge.

T. J. Portis and Adams & Bowles, for appellant. Railey & Burney, for respondent.

BRACE, J. This is an action for personal injuries, in which the plaintiff recovered judgment in the circuit court for \$10,000 damages, from which the defendant appeals. At the time of the injury the defendant was carrying passengers on all its freight trains. The plaintiff, by profession a minister of the gospel, aged about 67 years, in good health, earning about \$700 per annum in his profession, took passage on one of defendant's freight trains at Archie, a station, for Harrisonville, another station, on defendant's road, paying the usual fare to the conductor, and informing him of his place of destination. When the caboose in which plaintiff was

riding, and which was at the rear end of the train, arrived at a point about one-quarter of a mile from the depot at Harrisonville, at which passengers were usually landed, the conductor came to him, and said: "You will have to get off here. I am not going to stop when I start. I will not stop at the depot. I shall go on as fast as I can;" and, leaving him, went forward on the flat-cars loaded with coal in the train, towards the engine and the depot. The plaintiff seeing no other employes of the road about, and being unacquainted with "the ground around there," got off the caboose at the rear end thereof, and discovered that the train was stopping on a "fill," and that the road-way on each side was fenced with a barbed-wire fence of five strands. His business being urgent, he started on the road-bed along-side the train, towards the front, to make his way up to the depot. He had proceeded in his course but a short distance, (three or four car-lengths from the caboose,) when he came to a bridge across a water-way, provided for through the fill in the ravine. The bridge resting on two perpendicular stone abutments, about 15 feet high, the whole space of the bridge occupied by one of the flat-cars in the train, loaded with coal, and the space between the bridge and the barbed-wire fence running parallel with the road, closed by a similar fence running from the one to the other, his further progress in the direction of the depot was thus completely blocked, except by way of the coal-car over the bridge. His subsequent movements appear from the following extracts from his evidence given on the trial: "Question. Now state to the jury why you didn't go on to the depot. Answer. There was a barbed-wire fence right before me, and one at my right side, and I could not get out. There was a young man on the other side of the train. It was Mr. Kerens, and he was a little more active than I was, and got up on one of the flat-cars, and I got up on that flat-car, and walked the length of it, until we passed over the culvert, and then I swung off, and tried to get down as cautiously and prudently as I could. The train was standing still at that time. In getting off I was probably considerably excited for fear the train would start. I was a long ways from the engine, and I didn't know when the engine would start. I hurried to get off, and when alighting I fell over, so that I think my foot struck the end of one of the ties, and snapped the leg right there. Q. State to the jury if it was hurt as you got off the train. A. I hadn't made a motion with the other foot until I felt my leg give way. Q. State to the jury what was the condition of your eye-sight at that time. A. My sight is not as good as it was some years ago. I examined the ground before I got down; I thought I could make it. Q. State to the jury what was the condition of the ground there, so far as you could see. A. The ground was quite descending. It was rather steep. It was lower from the side track out to where the grade

commenced. I thought it was pretty level where I looked and where I was stepping. I looked as well as I could, hurriedly. I saw no reason why I could not make it safely. Near the ties, if I remember rightly, it was level,—that is my recollection of it,—and it descended rapidly a few feet further. On *Cross-Examination*. Q. Describe the manner in which you got off the car. A. Well, I remember of holding to the car in front of me with one hand. I was considerably exercised, for fear that they would start. I was hurrying, and using all the care and caution that I could. I remember of putting my hand on the car in front of me, but whether I had hold of anything with my right hand I could not say. I was between the freight-cars, and had hold of the one in front of me with my left hand. I do not know what I had hold of with my right hand. I do not know that I could have reached anything. Q. Then you put your hand on the car and sprang to the ground? A. Well, yes, sir; I sprang as far as I thought necessary,—was as careful as I could be. Q. Do you know the height of those cars? A. No, sir; I do not. Q. Can you approximate it? A. It would be guess-work. I should think from three to four feet; I was on the coupling between the cars. Q. The train was still there when they took you away? A. Yes, sir. Q. When you called to Mr. Kerens to get assistance, he was off the train, was he not? A. Yes, sir. Q. He had gotten off on the ground? A. Yes, sir; I think it was from the flat-car ahead of me." The fracture was an oblique one of both bones of plaintiff's left leg. The external bone was fractured into the ankle joint; the internal bone was fractured higher up. The plaintiff, after the injury, received prompt surgical attention, was confined to his bed about ten days, and his leg kept bandaged for about two months, and then he began gradually to regain the use of it, with the assistance of crutches. The defendant offered no evidence, but at the close of plaintiff's evidence asked, and the court refused, an instruction in the nature of a demurrer to the evidence of the plaintiff, and thereupon the case was submitted to the jury under instructions asked for by the plaintiff, and a verdict returned in his favor for the amount for which judgment was rendered. It is urged, as ground for reversal, that the court erred in refusing to sustain defendant's demurrer to the evidence, and in refusing a new trial for excessive damages.

1. There is nothing in the evidence tending to show the existence of any rule, regulation, or custom on defendant's road in discharging passengers from its freight trains different from that applicable to passengers upon its regular passenger trains, and the plaintiff having been received by the defendant as a passenger upon its freight train, into a car appropriated to the purpose of carrying passengers, it incurred the duty of transporting him in safety, so far as his safety could be secured by the exercise of the high-

est degree of care attainable by the most prudent persons engaged in the business of a common carrier of passengers for hire, to the place where its passengers were usually received and discharged in the course of its business, at the station of his destination, where it is to be presumed the defendant had provided suitable conveniences for passengers to alight from its trains, and thence to depart from its premises and go their own way. The defendant's conductor, in requiring the plaintiff to get off its train at a distance from the station to which he had paid his fare, was guilty of a breach of this duty. The plaintiff in obeying his orders, and getting off the train at the place where he was directed to do so, was obeying the orders of defendant. When he landed safely on defendant's road-bed, beside the caboose, he was still a passenger of the defendant, to whom it owed, not only the duty of transporting him on its train to its station at Harrisonville,—a duty which it had refused, was then refusing, and continued to refuse to perform, up to and including the moment in which the plaintiff was injured,—but to whom the defendant also owed the further duty of providing for him a convenient and safe way by which he might leave defendant's train, its right of way and premises, and go about his own business. The duties that impelled the plaintiff to take passage on defendant's train were demanding his presence at the point of his destination. Thus far he had done all he could to meet the requirements of his sense of those duties, but now he was about to fail, and must fail, to meet the requirements of those personal duties, unless he takes up the discharge of defendant's duty, thus unexpectedly and against his will thrust upon him, of finding a way and transporting himself to the station. To do this on foot, and by the way that seemed to him most practicable, was the only course left open to him. To this course he was constrained by defendant's neglect of duty. That duty attended him, however, and every step taken by him in the effort to reach the station was the direct effect of defendant's neglect of duty towards him. That the plaintiff, when he was wrongfully set afoot at a distance from, would seek to reach, the station, with ordinary care and caution, by the most practicable route, was to be expected, and ought to have been foreseen by defendant's servants. If there was danger in that way, such danger ought to have been foreseen, and that he was liable to encounter it. If in such encounter he was injured, such injury was the proximate, because the natural, although not the necessary or inevitable, result of the defendant's negligence, and for it the defendant ought to be held responsible. *Miller v. Railway Co.*, 90 Mo. 389, 2 S. W. Rep. 439.

Putting one's self, then, in the place of the plaintiff, when and where he was set afoot beside the defendant's caboose, ignorant of the topography of the country, and of the

obstacles in his way, and uninformed as to when the train would move, what would be expected of an ordinarily prudent man, in his effort to reach the station as expeditiously as he had hoped to reach it, when he intrusted himself to the defendant's care? He must go forward. He could not expect to reach it by turning back upon the track he had just passed over. A barbed-wire fence on each side forbade an attempt to leave the road-way either to the right or left, to seek some other feasible route to the station; and he immediately starts forward, along-side the train, upon the only route apparently open to him. He has proceeded but a short distance, when he discovers that his further progress in that direction is effectually barred, except by way of the top of the flat-car resting on the bridge. The conductor, when he parted from the plaintiff after ordering him to disembark, had passed forward on similar cars, similarly loaded, and presumably on this car over the bridge. Another passenger who had taken passage with him at the same time and place, and who was proceeding in the same direction, on the other side of the train, mounted the car, and was passing over the bridge. He followed his example, mounted the car, passed on it safely over the bridge, and to the front end of the car. He examined the ground before he got down. Saw no reason why he could not make it safely. Got upon the coupling between the cars, which brought him as near the ground as possible, and, with one or both hands on the cars, swung down, springing out from the train as far as was necessary to clear its pass way should it start, of which he was fearful, and alighted upon the ground, and in so doing his leg was broken, the train all the while standing still.

We fail to discover, in the course of his whole progress, a single movement that might not have been reasonably expected of an ordinarily prudent man, seeking to make his way expeditiously to the station from the point where the defendant had placed him. He followed the only way the defendant had left open to him to pursue his journey. It had caused him to alight from its train at an unsuitable and dangerous place, distant from the place of his destination. Its neglect of duty was continuous from that time up to and inclusive of the moment in which he was injured, and because of that neglect, and not by reason of any act of his own volition, he was compelled to resort to the car to cross the bridge, and to leave the car after the bridge was crossed. In so doing he was injured. The neglect of duty and the injury were not only contemporaneous and coincident, but the latter was the direct and immediate result of the former, so far as a physical effect can be the direct result of a moral cause. There ought to be no difficulty in distinguishing such a case from those in which a purely voluntary action intervenes between an injury and a completed act of neglect, but for which such voluntary action might not have been taken, or from those

other cases in which the passenger has been guilty of recklessness or want of ordinary care in endeavoring to extricate himself from a situation in which he has been placed by the neglect of the carrier. The rule that ought to obtain in this case is well stated by THOMPSON, J., in *Winkler v. Railway Co.*, 21 Mo. App. at page 106: "If a railway carrier, instead of discharging his passenger at the place of destination called for by the contract of carriage, lands him at another place, from which he cannot reach the place of destination by any practicable route without encountering a serious danger, and the passenger immediately thereafter, proceeding by the only practicable route to the place of destination without fault or negligence on his part, encounters such danger, and is hurt, we have no difficulty in saying that the hurt is a proximate consequence of the wrong done by the carrier. A prudent carrier would foresee such danger to the passenger, and should, we think, be held bound to foresee it, and answer the consequences of it." See, also, *Railway Co. v. Doane*, 17 N. E. Rep. 918, and cases cited in note on page 914. And in this case we have no difficulty in saying that the plaintiff's injury was the proximate result of defendant's neglect, and that no negligence of the plaintiff contributed to that injury. There was no error, therefore, in the action of the court in overruling defendant's demurrer to the evidence. On the evidence the plaintiff ought to have had a verdict and judgment for a reasonable amount, as damages for his injury.

2. The amount of damages in cases of this kind must be left largely to the discretion of the jury, and their verdict ought not to be disturbed unless the amount is so gross as to shock the sense of justice of the judicial mind, and satisfy it that such verdict must have been the result of passion, prejudice, or partiality. In view of the age of the plaintiff, his income, the physical demands of the profession in which he earned it; that the pain he suffered seems not to have been different or greater than that usually suffered by persons of his age from a broken limb; that the cost of surgical attendance could not have been large; that he was confined to his bed but a few days, and that within two months after the injury he was able to dispense with bandages, and gradually, with the assistance of crutches, resume the use of his leg, with care; and since has suffered, and in the future will in all probability continue to suffer, only such pain and inconvenience as usually results to one of his age from a limb that has been broken, and will not be prevented from following his usual vocation, and earning as much money therein as he did before,—we find it impossible to reconcile a verdict of \$10,000 for his injuries with our sense of justice, and must conclude that this verdict was the fruit of either prejudice or partiality, and that the amount of plaintiff's damages ought to be submitted to another jury. The judgment of the circuit

court ought, therefore, to be reversed, and the cause remanded for new trial.

In the foregoing views BLACK, J., concurs; but RAY, C. J., and SHERWOOD and BARCLAY, JJ., being of the opinion that plaintiff's evidence failed to show facts sufficient to constitute a cause of action against the defendant, the judgment will simply be reversed.

#### RINE v. CHICAGO & A. R. Co.

(*Supreme Court of Missouri.* Dec. 21, 1899.)

RAILROAD COMPANIES—ACCIDENT TO PERSONS ON TRACK.

1. Deceased, going from the street towards a depot 500 feet distant, walked on the main track 50 feet to a switch, and then on a side track, on which, some distance ahead, some cars were standing. An engine returning, cab foremost, from a coal shaft was then from 90 to 150 feet away. The engineer could have seen deceased while on the main track, and the fireman, being on top of the tender breaking coal, could have seen him at any time. The switch was open, and deceased was run over about 100 feet from it. Held that, as employees would naturally be watchful near a depot, and as the fireman would naturally be on the watch not to collide with cars which had shortly before been left on the side track, there was evidence tending to show that the engineer and fireman, who were not called as witnesses, knew that deceased was on the track in time to have avoided the accident.

2. Under Rev. St. Mo. 1879, § 2121, awarding a penalty for the death of any person from the negligence of "any officer, agent, servant, or employe whilst running or managing any locomotive, car, or train of cars," the negligence need not be that of the superior in charge.

SHERWOOD, J., dissenting.

Appeal from circuit court, Saline county; JOHN F. STROTHER, Judge.

H. I. Priest and G. B. Macfarlane, for appellants. J. D. Sheualter, for respondent.

BLACK, J. This is the second appeal prosecuted by the defendant in this case. The first is reported in 88 Mo. 392. It was then, and is now, conceded that young Rine was wrongfully upon the track at the time and place when and where he was killed, and that he was guilty of negligence in going upon and remaining upon the track. In view of these facts, we held, on the former appeal, that the defendant's liability must be limited to negligence on the part of the fireman and engineer after they knew that Rine was in an exposed and dangerous position, and that, when they had such knowledge, it became their duty to use all the means at their command to save his life. The case was tried pursuant to those directions, on instructions given at the request of the plaintiff, and others given at the request of the defendant, to which no substantial objections are made.

The point is now made, and much relied upon for a reversal, that there is no evidence tending to show that the fireman or the engineer saw Rine on the track in time to have avoided the calamity.

While the evidence is, in a general way, the same as on the former appeal, it is not the same upon the question of knowledge of Rine's presence on the track, from the fact that the

fireman and engineer were not called as witnesses on the second trial by either party. The evidence now is, in substance, this: Rine came into Corder on the local freight train from the east. The depot at that place is on the north, and the warehouse on the south, side of the main and two side tracks. Part of this freight train was left standing at the depot on the main track; and, while the evidence is not direct, it seems some of the cars were removed to the outer side track, and left standing at the warehouse. The engine and tender then went to a coal shaft, about a quarter of a mile west of the depot, and in the mean time Rine went to the village. On his return he came to a point where the highway crosses the main railroad track, which point is 500 feet west of the depot. He then went east towards the depot, on the main track, some 50 or 60 feet to a switch attachment, and then looked back, and must have seen the engine and tender on their return, for they were not more than 90 or 150 feet distant from him. He stepped on the outer side track, and walked on, with his back to the approaching tender and engine, the tender being the nearest to him, for a distance estimated at 60, 80, and 120 feet, when the tender ran over him. The engine and tender were going at the rate of 8 or 10 miles per hour, and could have been stopped in a distance of from 15 to 25 feet. No effort was made to check or stop them. The engineer was at his proper place on the north side of the cab, and could have seen Rine before he got on the side track, but not after that, except by going to the south side of the cab. The fireman was on top of the tender, with something in his hand, breaking coal, and could have seen Rine at any time after the latter got on the main track at the road crossing. Rine evidently stepped upon the side track, supposing the engine and tender would go back to the depot on the main track. There can be no doubt that he was in a dangerous position from the moment he stepped upon the side track, and the question is, whether the foregoing evidence tends to show that the fireman or engineer saw him upon that track. •

This question must be determined from all the circumstances. There were no obstructions, such as cars, on any of the tracks between the coal shaft and the depot or warehouse. The switch seems to have been left open by design, doubtless so the engine and tender could go back to the warehouse, and get the cars left at that place. The fireman must have known this switch was open; certainly so, when he passed over it. He knew the cars were standing on the track at the warehouse, and that he would come in contact with them. It was his duty to guard against a collision with the standing cars, and it is reasonable to believe that he had an eye in that direction. The accident happened at a depot, while the engine and tender were going back and forth over the tracks, and common information teaches us that the em-

ployes would, in the discharge of their ordinary duties, be on the watch. Evidence of negligence need not be direct and positive. "In the nature of the case, the plaintiff must labor under difficulties in proving the fact of negligence; and, as that fact itself is always a relative one, it is susceptible of proof by evidence of circumstances bearing more or less directly upon the fact of negligence,—a kind of evidence which might not be satisfactory in other classes of cases open to clearer proof." 1 Shear. & R. Neg. (4th Ed.) § 58. A demurrer to the evidence admits every fact which the jurors may infer from the evidence before them, and should be allowed only when the evidence thus considered fails to make proof of some essential averment. *Noeninger v. Vogt*, 88 Mo. 592, and cases cited. All the circumstances surrounding the accident are to be considered, and, when this is done, we are of the opinion that there is evidence from which the jury could well find that the fireman at least saw Rine on the track, and that, too, in time to have saved his life. The principal objection made to this conclusion is, that as the servants of the defendant were not bound to be on the watch for Rine, they ought not to be held to have had knowledge that he was on the track, simply because they were in a position, and had an opportunity, to see him. Had the court told the jury that an opportunity to know was equivalent to knowledge, then there would be force in the objection; but the court did not so instruct. Knowledge, like actual notice, may be proved by direct evidence, or it may be inferred from other facts and circumstances. When it is inferred from facts and circumstances it is actual knowledge, the same as when proved by direct evidence. An opportunity to know will, under some circumstances, go far to show knowledge, and, under other circumstances, it may be of little value. We think the plaintiff made out a *prima facie* case,—one entitling her to go to the jury; and, as the defendant did not call those servants who could have given direct evidence, it has no one to blame but itself for any mistake on the part of the jury, if any they made.

The defendant makes the further point that it is liable only to pay the penalty of \$5,000, when the negligence is that of the servant who is the superior in command, namely, the engineer in the present case. The statute awards the penalty whenever any person shall die from an injury occasioned by the negligence of "any officer, agent, servant, or employe, whilst running or managing any locomotive, car, or train of cars." Section 2121, Rev. St. 1879. This statute manifestly includes the negligence of any and all servants who are engaged in running or managing the locomotive, car, or train of cars. The fireman is as much within the contemplation of the statute as the engineer, or even the conductor. The sense of the law is too plain to admit of doubt, or to call for extended remarks.



The judgment is therefore affirmed. All concur (BARCLAY, J., in the result,) except SHERWOOD, J., who dissents.

STATE v. YOUNG.

(Supreme Court of Missouri. Dec. 21, 1889.)

DEFILING FEMALE EMPLOYE—VENUE IN CRIMINAL CASES.

1. Under Rev. St. Mo. 1879, § 1260, providing that "if any guardian of any female under the age of 18 years, or any other person to whose care or protection any such female shall have been confided, shall defile her by carnally knowing her while she remains in his care, custody, or employment," he shall be punished, a conviction may be had of one in whose family such female was employed as servant; there being evidence that he promised her father to see that she did not go out nights, and to treat her as one of the family.

2. An instruction that it must appear "that defendant was her lawful guardian, or occupied a relation similar to a guardian to her, in which a peculiar and confidential trust was reposed," is rightly refused.

3. Evidence of continuation of illicit intercourse after termination of the employment is admissible as tending to prove the offense charged.

4. Where no evidence was given as to the county in which the crime was committed, judgment will be reversed.

Appeal from circuit court, Dent county; C. C. BLAND, Judge.

L. B. Woodside, for appellant. *The Attorney General*, for the State.

BLACK, J. Defendant was indicted, under section 1260, Rev. St., for defiling Eliza A. Smith. He was convicted, and his punishment assessed at a fine of \$100, and imprisonment in the county jail for 24 hours. The evidence shows that a sister of the defendant's wife engaged Eliza A. Smith in December, 1883, to go to defendant's house to do kitchen work. The defendant's wife was then sick, and Eliza remained in the employ of the defendant, in the capacity of a kitchen girl, from that date until January or February, 1885. She was 16 years old when she went to live at defendant's house. Mr. Smith, the father of the girl, testified that a few weeks after she went to the defendant's house he saw defendant, and asked him how Eliza was getting along, and he said, "All right." He says: "I told him she was not strong, and I did not want her to work very hard. He said her work was light. About two or three weeks after this I spoke to him again, and told him I wanted him to see that Eliza did not work too hard, and that I did not want him to let her go out at night, except to church. He said all right, she would be treated just like one of the family." The evidence of the girl is to the effect that defendant gave her some money and presents at different times, and flirted with her until May, 1884, without anything wrong being done. That one night in that month he put his arm around her, and they then had sexual intercourse, which act was repeated in about a week thereafter. After that they had like intercourse two or three times a week, —sometimes in the dwelling-house, some-

times in the hen-house, and often out in a woods pasture. There is other evidence tending to corroborate her statements in some respects. The defendant testified that he never had any intercourse with Eliza; that her father never spoke to him about her; that she was hired at his house to do kitchen work, and he never had, or assumed to have, any control over her. He denied the statements of Eliza, and says he never had the alleged conversations with her father. The court, at the request of the state, instructed the jury as follows: "(1) The court instructs the jury that it is not necessary for the state to prove that the defendant had the legal custody and control of the person of Eliza Smith, but if they find from the evidence that she was in his employ, and that her father committed her to defendant's especial care, with the expectation and understanding that defendant would use a supervisory control over her, and that while she was so committed to defendant's care, and when she was under eighteen years of age, he debauched her by having carnal intercourse with her, they should find him guilty, and it makes no difference how readily or how often she consented to have sexual intercourse with the defendant,"—and the court, of its own motion, told the jury "that the mere fact that Eliza Smith was employed by the defendant as his hired servant, and that while so employed she was defiled by him, does not authorize his conviction;" but refused, at the request of the defendant, to say that to find defendant guilty it must appear "that the defendant was at the time her lawful guardian, or occupied a relation similar to a guardian to her, in which a peculiar and confidential trust was reposed." The statute is in these words: "If any guardian of any female under the age of 18 years, or any other person to whose care or protection any such female shall have been confided, shall defile her by carnally knowing her, [while she remains in his care, custody, or employment,] he shall" be punished, etc. The words in brackets were first inserted by Rev. St. 1879.

The chief complaints are that there is no evidence to show that defendant sustained the relation to the girl specified in the statute, and to the refusal of the court to give defendant's instruction. In the case of *State v. Arnold*, 55 Mo. 90, the evidence showed that defendant's sister-in-law, by the consent of her father, went to defendant's house to assist him in planting corn for one day, and while thus assisting him he had carnal knowledge of her. It was held that permission given by the father was not confiding her to his care and protection; that by "other person" the statute contemplated some one who should occupy a position similar to that of guardian, or stand in some attitude in which a peculiar or confidential trust was reposed. The court said: "The female was allowed to go and assist him in laboring for one day, but there is no evidence that she was specially confided to his protec-

tion and care as designed by the statute." That case was decided in 1874, before the amendment above noted. The Kansas statute is the same as that of this state before the amendment. In *State v. Jones*, 16 Kan. 608, the defendant took the female home with him, and in the absence of his wife slept with her that night, and took her back the next day. Says the court: "We think that the trust reposed in the defendant by the father and mother of the girl, in confiding her to his care for the purpose that he might take her to his own home, so that his wife could employ her as a hired girl in his own family, was such a trust as is fairly contemplated by the statute." The case now before us is unlike the *Arnold Case* in two particulars. This female was not employed for a day only, but she became a regular inmate of the defendant's family, and lived with him for over a year. In the next place there is evidence tending to show that he promised the father of the girl to see that she did not go out nights, and to treat her as a member of his family. If this evidence be true, he assumed towards her a relation akin to that of a natural guardian. The confidence reposed by the father in defendant to see that the girl did not go out at nights, and to treat her as a member of his family, was of the highest order, and a care confided to him which brings him clearly within the statute, even before the amendment, and about which there can be no doubt since the amendment. The argument is made that the words "while she remains in his care, custody, or employment" do not change the relation that the defendant must bear towards the female, but only fix the time at which the defilement must take place. If no more than this had been intended, the legislature would probably have used the words "care or protection," but "employment" is added, showing this much, at least, that one occupying the position of an employed servant may be within the class of females for whose protection the statute is enacted. It follows that the defendant has no ground to complain of the instructions given. The instruction asked by the defendant was properly refused. It is but an abstraction, and does not attempt to define what would constitute a peculiar or confidential trust.

The prosecuting witness testified that she left defendant's house and went to live with Mr. Sankey in February, 1885, and that the sexual intercourse between her and defendant continued as often as once a week until July; that about the 20th of that month she met the defendant, by appointment, at the woods pasture before mentioned, and he gave her \$8 to go away on. She left the next day; her child was born on 24th September, 1885. If the evidence of acts of intercourse after the witness left defendant's employ tends to prove the particular offense with which the defendant stands charged, it is no valid objection to it that it tends to prove some other distinct offense. *State v. Greenwade*,

72 Mo. 298. There appears to be some contrariety of opinion as to the admission of evidence of subsequent illicit relations, but if such evidence is so connected with the act in question as to show a continuation of the relation it is admissible. Says Wharton: "In prosecutions for adultery, or for illicit intercourse of any class, evidence is admissible of sexual acts between the same parties prior to, or, when indicating continuousness of illicit relations, even subsequent to, the act specifically under trial." Whart. Crim. Ev. (9th Ed.) § 35. No specific ground of objection to the evidence of the payment of the \$8 to the witness is assigned in the brief for defendant, and we can see no valid objection to this evidence. She was pregnant, and, if he gave her money to go away with, it is evidence tending to show that he was the cause of the mischief, and, with the other circumstance, is both important and competent evidence.

According to the indictment, the offense was committed in Dent county, and the point made that there is no proof of the venue is well taken. We find no evidence tending to show in what county the offense was committed. No venue is laid even in the instructions. For want of any proof as to the county in which the crime was committed, the judgment must be and is reversed, and the cause remanded. All concur.

#### STATE v. THOMAS.

(Supreme Court of Missouri. Dec. 21, 1889.)

HOMICIDE—INDICTMENT—EVIDENCE—RECORD  
KEPT BY GRAND JURY.

1. In the absence of demurrer or motion to quash, an indictment sufficiently charges a killing feloniously and by defendant which states that he, in and upon deceased, "feloniously \* \* \* did make an assault with certain deadly weapons \* \* \* which he \* \* \* then and there had and held in his hands, him, the said (deceased) feloniously \* \* \* did strike," etc.

2. The court need not instruct separately on two counts, the only difference between which is that one states the implements with which the killing was done, while the other states that they were unknown.

3. Evidence of the finding, at short distances from defendant's house, of a bloody handkerchief, a week after the murder, and some rotten drawers and overalls about two years thereafter, is irrelevant and harmful, without evidence to connect them with defendant.

4. Rev. St. Mo. 1879, § 1791, providing that grand jurors may be required to testify whether testimony of a witness is consistent with that given before them, and section 1780, providing that a grand jury may appoint a clerk "to preserve minutes of their proceedings, and of the evidence given before them, which minutes shall be given to the prosecuting attorney," do not render admissible the minutes of evidence before a grand jury, signed by the witness, to impeach the witness.

Appeal from circuit court, Saline county; J. E. RYLAND, Judge.

J. P. Strother and Davis & Wingfield, for appellant. Atty. Gen. Wood and A. F. Riotor, for the State.

BRACE, J. At the March term, 1888, of the criminal court of Saline county the de-

defendant was indicted for murder in the first degree. The indictment, in two counts, charges him with having murdered John Lowry on the 11th of October, 1884, in said county. He was arraigned, pleaded not guilty, and the case was continued until the September term, when it was set down for trial on the 2d day of January, 1889, at which time he was tried, found guilty of murder in the first degree, and sentenced to be hanged. His motion for new trial and in arrest of judgment having been overruled, he appeals, the circuit court staying the execution until his appeal be heard.

So far as the personal knowledge of any of the witnesses who testified in this cause goes, the last time that John Lowry was certainly seen alive was on the evening of Saturday, the 11th of October, 1884, when "the sun was about a half an hour high." The evening was "dark and rainy." He was in his pasture, driving a cow, and had on a "gum coat and overalls." About sunset of the same day, or a little before, a man was seen standing in the front door of Lowry's house, whom one of the witnesses supposed to be Lowry; but, as he was at a distance, and the view obstructed by trees, it may or may not have been he. On Monday, the 13th of October, the mother and sister of John Lowry's wife, about 2 o'clock in the afternoon, went to Lowry's house. They found a cow in the house, in the east room, used as a dining-room and kitchen. The table was set, chairs around it; the dishes indicating that a meal had been eaten. On the window-sill there was a coal-oil lamp; the oil consumed, the light gone out. In the adjoining room, on the bed, fresh ironed clothes were found lying. No living soul was found. The daughter went to the door; hallooed two or three times, when Lowry's bird dog came to them. "He acted strangely; went to the door, and looked back; went down the steps, and looked back again; ran to the fence, hopped over, and waited." The daughter followed him to the dead body of John Lowry, clothed in a gum coat and overalls, about 150 yards north-west of the house, and about 20 or 30 feet north-west of the barn, lying on his breast, with his skull crushed in on the right side, just above the ear, and above a puncture, as if made with a blunt instrument, and "two small cuts on the left side of his neck;" his hat lying, also punctured, 8 or 10 feet south-east of him. The alarm was given; some neighbors came; and soon afterwards the body of John Lowry's wife was found, dead, behind an old hen-house, about 50 or 60 feet north of the house, her head crushed, the back of the skull split open, as if with a sharp, wedge-shaped instrument, after the body had fallen. Decomposition had set in when the bodies were discovered; and the physician who examined them, soon after their discovery, on Monday, expressed the opinion that "the wounds on both Mrs. Lowry and John Lowry were made on the Saturday evening before. He

testifies that he formed this opinion from the condition of the wounds, and the circumstances surrounding the case at the time; the bodies having been rained on since they had fallen, and there having no rain fallen after Saturday night. "I remember there was no rain between that time and the time I made the examination of the bodies." "He [John Lowry] must have been killed Saturday evening. There had been a rain-fall since the body had fallen. The blood had been washed away from the lower part of the face." Another witness testified: "It had rained on the body where it laid. The mud had been washed off his shoes, and the wrinkles in the gum coat showed it had rained since the body fell." The other evidence tended to show that it commenced raining Saturday evening, between 2 and 3 o'clock, continued, in showers, until after dark,—probably until about 8 o'clock,—when it ceased, and did not rain any more until after the bodies were found. The whole evidence tends to show that John Lowry and his wife were murdered between sundown and 8 or 9 o'clock Saturday evening, October 11, 1884. At the time of the murder, Lowry and his wife were living alone, in their little two-roomed house. About 50 yards south of their house was a public road, running east and west. North and east of the house, and near along by the barn, ran Straddle creek. South-east from the barn it crossed the public road west of and between Lowry's premises and a neighbor by the name of William J. Adams, whose home was east of the creek and of Lowry's about a quarter of a mile. North-east of Lowry's house, across the creek and distant about three-quarters of a mile, was the home of John Thomas, defendant's father. The defendant, then a youth between 19 and 20 years of age, was living with his father, mother, two brothers, and two sisters. The discovery of the murdered bodies of Lowry and wife created great excitement, and in a short time almost every man in the neighborhood was there. No further developments seem to have been made on that day, or the next. On Wednesday, however, in the creek north-east of the barn, and close to it, an axe and part of a wagon-brake, being an iron bar about 2 feet long, 1 inch wide, and  $\frac{1}{2}$  inch thick, were found, both having blood on them. They were fished out of the creek by witness Miller, who says he found tracks near the edge of the water, at the place where the axe and bar were found, as if some one had walked up to the creek and stepped back. The track was about the size of a No. 8 boot. There had been a good many people there. Thinks there had been rain since the track was made. He followed the track to a foot log, crossed over creek, and found same track. Followed it out of the timber going north. About 200 yards from the place where the axe and rod were found, he measured the track with a stick, which he notched, but afterwards lost.

Does not know whether he got the exact size of the track or not. About a week afterwards, in Marshall, he measured tracks of defendant, and says they "corresponded very well." About a week after the murder a witness found a white handkerchief with a red border, "with blood on it,"—looked like hands had been wiped on it,—about 10 steps from a road, and about a quarter of a mile north-west of Thomas' house. In the summer of 1886, a witness found a pair of drawers and overalls in some buck bushes that he was cutting north of the creek, about one-third or one-fourth of a mile south-west from Thomas' house. The drawers were cotton flannel, and "pretty much rotten." "The drawers were dirty. Can't say they were bloody."

The foregoing statement contains, substantially, the positive and direct evidence for the state. The connection of the defendant with the murder is sought to be established by his extra-judicial confessions, criminating admissions, conduct, and contradictory statements, which will be now given, as briefly as possible. On Sunday after the murder, and before the bodies were discovered, the defendant took dinner at the house of the said William J. Adams. In a conversation which he then had with Mrs. Adams in regard to a noise which she heard on the creek the night before, she said to him: "Rid, was you out coon hunting, Saturday night?" to which he replied: "No, he was in town Saturday night. If he had been coming home an hour earlier or later [the witness didn't remember which] he would have heard the noise, and found out what it was." The defendant went home from Adams', and arrived there about 1 o'clock. Went up to the boys' room, where a neighbor youth, by the name of Chat Lacey, was. Lacey, on leaving a short time afterwards, left his knife in the room. John W. Bartlett, for the state, testified that in October, 1884, he was city marshal of the city of Marshall, and John R. Cason was then deputy-sheriff. First heard of the killing of Lowry on Monday. Was out there next day, (Tuesday.) "Saw a good many tracks along creek. I crossed on north side. Found large tracks along fence, going north, towards Thomas' house. Creek was crossed on water-gap and log. Water-gap is a little east of north of Lowry's residence. Did not know defendant before. Cason was with me. We conversed with defendant at that time. First saw him on Thursday, at his father's premises. Cason told defendant we were investigating the Lowry murder, and talking to every one we could about it, and asked him what he thought of the killing. He said he thought it was done by a man intimate with the family. He thought the man was killed first, and then the woman. When we came up to where he was, he was very much excited. We caused him to come over the fence to where we were, which he did; and he laid down, and held to the grass. In answer to questions, said he was hunting on the creek

in the forenoon, at home in the afternoon, and went to bed at 8 o'clock; that he could prove it by his father. Cason said that he could prove by two men that he was on the creek, near Lowry's, Saturday evening. Defendant said he went down on the creek late Saturday evening, to get a knife he left down there Saturday morning, which he used in skinning a squirrel. He gave us the knife. He said he saw and talked with Gaudin and his son as he came back. Said they were gathering corn, and could prove by them what time he came home. We left defendant at home, and came to Marshall. Next day, got warrant. Went out, and found him at his father's. He went with and showed us where he said he left his knife on Saturday. He said that the reason he went after knife was that if it was found down there it would go harder with him. We brought him to town that evening, and turned him loose, and later in the evening we took him back to his father's house, and turned him loose. Defendant and Cason went up-stairs, to look at defendant's clothes. Late Saturday evening we went to Thomas' house, and brought him to town. We went by W. J. Adams'. He asked Adams if he had told Cason that he said that he was in town Saturday night. Adams said, 'Yes.' Thomas said it was a lie. \* \* \* Cason gave the knife to J. W. Lacey." On cross-examination, witness said: "Defendant told Cason he would show him the clothes he wore Saturday evening. When Cason told him he could prove by two men that he was on the creek Saturday evening, it was a trick of Cason's to catch him. Cason had been in office 16 years, and was working in criminal cases, and was a very expert detective. I swore out the warrant. Cason read it to him Friday morning, on the creek about where he said he found the knife. We saw no tracks there. It had rained since, and the rain would have filled up the tracks. We found him at his father's Friday and Saturday at work, wearing the same clothes as when we first saw him. We put him in jail, to await grand jury. He was discharged, and has lived with his father since. I have seen him frequently here in town. I have been before every grand jury, except one, since the killing. Cason asked him a great many questions,—some catch questions. Cason told him that Meredith, defendant's brother, said he was not there to help him feed. Meredith did not tell us any thing of the kind. We did not want the house watched, as we did not care if he got away or not." This witness was corroborated by Adams in the statement that defendant denied that he told Adams he was in town Saturday night. Martin Gaudin testified that he and his son were gathering corn in his field, about half a mile north of Lowry's, and west of Thomas' place, late Saturday evening, and that he did not see or talk with defendant that evening. J. W. Lacey, the father of Chat, testified that he saw a knife in the possession of Cason and Bartlett that be-

longed to his son, Chat; and Chat Lacey, that Bartlett had the knife that he left at Thomas,' and he afterwards got it from the defendant.

The facts, as they appear in the evidence thus far, seem to have been well known in the community, as well as the fact that a large reward had been offered for the murderer, and although, as appears from the evidence of Bartlett, he had been before every grand jury but one since the killing, yet the defendant was not indicted until March, 1888, nearly three and one-half years after the murder. An explanation of the fact that he was then indicted, and not before, may perhaps be found in the evidence of the following witness for the state.

Andrew Bogle, for state, testified: "Am about 32 years old. Live now near Orcarville. In 1884, lived at Hugh Chrisman's. I lived out here, near six miles south-west of here, close to Malta Bend road, north-west of Marshall. Was acquainted with John Lowry. He lived near a mile, straight course,—nearly two miles, around the road. Don't know exactly distance. Remember the killing of Lowry. Was right this side of Chrisman's farm when I heard of it. I believe it was the 11th or 12th, somewhere, that I heard of it, on Monday. Stayed at Chrisman's till the next March. Was acquainted with defendant in 1884. Got home from Marshall between sundown and dark, and was at Chrisman's Saturday night. Think it was next day after I heard of killing that I saw defendant,—ain't certain. Two days after, I think it was. Don't know how long it was,—one or two days. Don't know exactly just how long it was. It was at his father's, about  $\frac{1}{2}$  west of Chrisman's. Next saw him Thursday or Friday—ain't sure which—in buggy with Cason and Bartlett. Next saw him in jail. Had conversation with him in jail, near two weeks after I heard of killing,—don't know exactly. He asked how things were out in the country. I told him things were a little bad out there; people round there suspicioned him mighty strong; he was in a mighty bad fix. He asked who had suspicioned; 'They ain't got anything straight on it.' I says: 'I don't know as there is anything straight. People suspicion you mighty strong. Everybody is talking about it. All our people talks just that way. You are in a bad fix, unless you prove out. That is the only chance.' He said he could not prove anything. He just had to stay there. Said they came out here to Marshall, and Virg. was young. They got her kind of excited, and she told he was not at home. Said he would just sit down and let them prove it on him. He did not think they could do that. I next saw him, a few days after he was turned out of jail, out at Mr. Thomas'. Saw him every week or so. We were around together some, once or twice a week. Next talked to him about the killing the spring after that, about April, I suppose. Said he got out all right, they could not prove anything. He was all right then,

he supposed. He talked like he was going to leave the country. I believe next conversation was latter part of summer or fall, at Marshall. He said he was all right; they had got no hold on him; he was not afraid of any of them. Next talk was about the first of December. Wanted to know if I had been before the grand jury. Said he thought they were trying to put it on him. Next talk was about the first of January, last, at Mr. Thomas'. Said he heard they were working on it again; they had tried to put it on him and had failed; they had accused him of paying Cason; that was nobody's business. About two weeks after that, I was then talking to him about it, and he said they were working on it, and he said he was not afraid of them, though they accused him of it, but none of them don't know it. He had not told them, and was not going to tell it. He was going to do nothing. I told him he need not mind telling me anything about it. He said he saw Gauldin over there in the field that evening, and he thought Gauldin saw him when he went down to Hudson's woods. He was down there, squirrel hunting, that evening. Along in February, latter part of January, or first of February,—I ain't certain which,—he was talking about it, and said they had a detective up there, passing off as an album peddler. He said he did not know him. I asked him what sort of a looking fellow he was. He said he was a slim, smooth-faced fellow. I says I thought I knew him. I thought it was Mr. Stipes. He wanted me to promise to tell Stipes, for him, he would buy four albums,—one for himself, and one for each of his friends; and he said he would never sell any more. He wanted to know of me if I would lend him my revolver. He said Lowry was killed; that he was no account, and he did not care. If he knew who was working it up, he would kill them off. They need not bother him about it. I went on to tell him,—I told him I suppose they were working on it; that that was that fellow's business. I guessed he was a detective; and I told him that I knew that fellow,—that it was Stipes. He said, well, if he came around there, he would never tell nothing that he had done. He said, if he did kill him, he would not tell it; he would not tell Stipes. I said, 'No; it would not be very safe telling Stipes.' I says: 'That is what he is working at.' I says: 'If you tell anybody about that, you had better tell some of your best friends.' He said he would not trust to anybody, much. I says, 'It will be kind of particular business, going to trust it with everybody;' and he talked like it would. He says to me, wanted to know if I thought it was him; and I says, 'Yes; I kind of thought it was him.' 'Well,' he said, 'I never denied it;' and I told him, 'No, you never denied it to me,'—and he went on and told me what he had done. *Question.* Just give his conversation. *Answer.* He said he hated to kill them. He said he hated to kill Mrs. Lowry. Rid talked like he had been

fooling around there right smart with John's woman, and John kind of objected to it, and was getting cross, and talked to his wife like he was going to shoot him if he came around there; and he said he thought he would kill John, and not hurt her, and he went down to the woods that evening with the intention. That he was squirrel hunting, and heard John chopping, and thought he would go down there, and shoot him, and he went down. John was chopping, and he saw some teams passing the road, and he would not kill him. He was afraid. He was afraid he would halloo, and somebody would come over, and he could not get back to the house until they would catch him. And he went on back, down the creek, and talked to John awhile; and he went back up to the house, and took his gun back up, and went past the corn-field, where Gauldin and his son, Martin, were at work, in the corn-field. He took his gun to the house, and went out to the old shop of Mr. Thomas, and got a wagon-brake that was there, and he thought he would go down there, and kill him; that that would make no report; and he said he went down there. John never laid his axe down, and he was afraid to get close enough to hit him with the brake. He just walked down the creek; told John he went down and killed a squirrel, and left his knife on a log; and he went down to the house, and talked to John's wife, and fooled with her right smart; and he said John came in after awhile. John did not talk well. He was uneasy, and out of humor; and he stayed there quite awhile, and John started to go after his cow. It was kind of sprinkling rain a little; and he told John he believed he would go home; and John told him it was no use being in a hurry; and he asked John if he would loan him his gum coat,—he did not want to get wet; and John told him, as soon as he got his cow he would lend him his coat; and John went after his cow; and he stayed there, and fooled with his woman awhile, until he came back; and he said she told him John was mad at him, and he said he told her he was going to kill John, and she said she did not care. And John came back, and he stayed there awhile; and John started out to get a load of wood, and he started with him; and John went out to the fence; and John's axe was setting side of the fence or gate where he went out, and he picked it up as he went out. He thought he would just knock him in the head with it. And John asked him what he was going to do with it, and he said he swore an oath, and told him he would show him what he was going to do with it; and he said John broke out to the road. He was in the yard, and John outside. He ran up to the fence, ahead of John, to keep him from going to the road; and John halted, and came back into the gate, where he headed him off, and he went towards the barn; and he followed him out, and ran him close to the barn, and there he caught up to him, and hit him with the axe,

and knocked him down; and then he hit him a lick or two, and then went back to the house, and told John's wife what he had done. He said she did not have any sense; she commenced to halloo, and run out in the yard, and told him he ought not to kill John; they would take her up for having a hand in it. And he said he hated to kill her, but he had to do it, to keep her from giving him away. She halloosed, and raised the whole neighborhood. He had to kill her, to keep her from giving him away. I said: 'It was too bad to kill the woman. John was not worth much, but,' I says, 'it was mighty bad to kill the woman.' And he says, then, it was too bad; he hated to kill her, but it was better to kill her than to be hung for killing John; and he says she was halloosing and cutting up, and raising the whole neighborhood, and she would give it away. I said: 'Yes; I suppose she would give it away, if she was halloosing and cutting up, that way.'"

On cross-examination the witness stated: "That the defendant said he killed Mrs. Lowry with axe; then started to go towards the road. Thought he heard somebody coming down the hill out there, by Thomas', and he whirled, and went back, and said he gave John one lick, as he passed him, for fear he was not dead, and went down to where we crossed Straddle creek, going to church, and threw his things in the creek, and crossed, and went towards home, in Hudson's field, and went on, close up to corner of field, and pulled off his shirt, and threw it into the buck bushes; said he did that because it was bloody from killing Mrs. Lowry. This conversation about the killing of the people was at John Thomas'. I was there; was taking my revolver up to him, (Rid Thomas.) He requested it of me; had told me what he was going to do,—was going to shoot Stipes. This conversation took place about fifty yards, as near as I can guess, from the house, at Thomas' front gate. It was about the last of January or first of February. We stood there in that conversation, about three-quarters of an hour, as near as I can guess, late in the evening about dark. Pack Hutchison was there. Pack, Rid, and I started to the gate together, and Pack parted with us at the gate. \* \* \* I took dinner at Thomas' the day of the confession. There was a funeral that day, and dinner was late. I never was before the grand jury. I knew there was a reward offered for the discovery of the murderer. I was not working for it when I told Rector. I went to Rector voluntarily, and began the conversation myself. I told Stipes about the conversation the same day I told Rector, and an hour or so after. This was the first time I had seen Stipes after the confession. \* \* \* I had a talk with Rid afterwards, in jail; and he told me, if I did not give him away, he was all right. I talked to him as a friend. I did not tell him I had told it on him. I knew at the time the confession, if true, would hang him, if I could make it stick. I went to the jail twice, for

the purpose of spying on him. I was well acquainted with John Lowry and his wife; lived right by them. \* \* \* I know John Jones. \* \* \* Don't remember having any conversation with him about the Lowry murder. I don't remember whether Jones said there was a reward of \$2,100, and that I said: 'It would be a nice thing for a young man to get.' "

For the defense, Pack Hutchison testified that he saw Bogle at Thomas' the Sunday that Mrs. Arnold was buried; that he took dinner there, and stayed about 15 minutes after; that Bogle was standing out in the yard, at the wood-pile, talking to Rid Thomas. "He was out there about 15 minutes when I went out there. He asked me if I was going home. He got on his horse, and started home. Left Rid at wood-pile. Rid did not come to gate. Don't think they were out over 15 minutes." John Jones testified that some time after March 11, 1887, going by Lowry's house in a buggy, he had a conversation with Bogle about the killing. "I told him there was reward of \$2,100 for the arrest of Lowry's murderer, and that it was a pretty good thing for a boy to get. He said he thought so, too, and said he thought he could find out who did it." Ridley Thomas, defendant, testified: "Was born near Fairville, in this county, and am 24 years old. Lived with my father, where he now lives, about nineteen years. Was living with him in October, 1884. I first heard of the Lowry murder on Monday, October 13th. I was helping my father work the road, near our house. I think it was about 2 P. M. when J. W. Adams told us about it. My father went to Lowry's at once, and told me to gather some corn to feed the hogs, which I did, and then went to Lowry's place myself. Sun was about two hours high when I got there. Stayed till about dusk, and went home with some of our women folks. I went back to the Lowry house Tuesday evening. On Saturday morning, October 11th, I went down on Straddle creek, due west from our house, to kill squirrels. I went from there down the creek, which is away from the Lowry house, and returned about dinner-time. I caught my mare about 2 o'clock, and went to Marshall. Got there about 3, or half past 3, o'clock. Stayed an hour or two, and started home. Went by my sister's, Mrs. Sam Short's. Think it was about 5 o'clock when I got there. My sister and my sister-in-law, Mrs. George Thomas, were there. I ate supper, and stayed but a short time. I remember seeing my mother, while in town, on north side of square. I bought some newspapers at Franklin's book-store, the post-office room, and had them with me at Short's, and took them home. Went directly home from Short's. It rained on me going home, and part of the time I went in a lope. I got home, turned my horse loose; and think, as I went to the house, I fed some pigs. Went in house on the east side, into the dining-room. All the family, except father, John

Thomas, were there. I stayed there about fifteen or twenty minutes. Pulled off my coat and boots, and went up-stairs, to my room. One of my sisters came up and got the lamp; and, before that, came up and got a paper. From that time until the following Thursday I was at home, except went to Sunday-school on Sunday, and eat dinner at Adams' about noon. From there I went home. Chat Lacey and my brother was there, and may be George Fisher. I think I borrowed Chat Lacey's knife. He went off, and forgot it. I went over to Bill Fellows' that evening, and then to Union church, thinking there would be singing there, but there was not. I then went up to Bill Fellows, and stayed half an hour. Mrs. Adams came up, and we talked awhile; and I then went home. [He gave what he did Monday, and part of Tuesday.] Tuesday, I gathered some apples. Wednesday evening commenced work on the fence, near the orchard. Thursday, saw Cason and Bartlett there. I was down on my knees, digging post-holes. Mr. Cason walked up to within two or three feet of me; put his arm on the top rail of fence, and rail broke off. He spoke to me, and asked how I was getting along. He asked me to get over the fence; he wanted to talk to me. Said he was working up that murder case, and asked me where I was. I told him where I was,—the same that I have told here. He got up, and went off, and told me, if I heard anything, to let him know. I told him I would. Friday morning I was still at work, when they came out again. Cason asked me to go with them to Straddle creek, and show him some tracks. We went to the springs and got a drink, and sat down to rest awhile. All three of us sat down. He said he had a warrant for me. He would not let me see it. He said he had to take me to Marshall. I wanted to go home, and change my clothes; but he said my clothes were good enough. I came to town with him. He turned me loose down by Robertson's stable, north-west of the court-house, and told me he would not put me in jail, and that I had better skip; I might get into trouble. I then went to Gower's restaurant. I saw Mr. Gaudin in the center of the street. Cason come right up behind me. I don't know where Bartlett went. I stayed in town the most of the evening. I left about an hour, by sun. Cason and Bartlett, John Patterson, and a little fellow called Woodson, went with me. I went back home. I don't know where Cason and Bartlett went from there. Cason wanted to look at my clothes. He looked at all of them, and said he could see nothing wrong with them. He said he would give me from then until the next day, at 4 o'clock P. M., to get away. The next evening, Saturday, he brought me to town, and put me in jail. I stayed there about six weeks. Bartlett asked me for my knife. The knife I gave him was Chat Lacey's. I had a knife of my own, but not with me. I used it Saturday morning, down



at Gauldin's pasture, where I killed the first squirrel. I left it there. I took it out, where I first shot the squirrel, to cut a stick to put through the squirrel's hind legs. I gave Chat Lacey's knife back to him some time after I was released. It was a black-handled knife, and had two blades. I knew Andrew Bogle. I have known him five or six or seven years. At the time of the killing, he worked at Hugh Chrisman's. I saw him at different places. I saw him at my father's house. I used to see him there often. In December, 1887, I saw him in Marshall. I saw him Christmas night, at our house. We talked about Mr. Stipes. He asked me if I knew Mr. Stipes. I told him I did not. He asked me if I had seen an album peddler up there. He told me he was a mean man, and to have nothing to do with him. I remember the day Mrs. Arnold was buried. I know it was on Sunday. I saw Bogle that day. I had a conversation with him between the house and gate. We talked about ten minutes, I suppose. He told me he had left a revolver there. He said Dick Hickman, George Standard, and Horace Stipes were coming up there, to string me up. I told him I had done nothing. I got the revolver, and put it in the kitchen. I did not tell Bogle in any conversation that I killed John Lowry and wife. I never at any time told him so. I knew John Lowry. I may have known him a year. I was not acquainted with Lowry's wife. I was never in Lowry's house. I had never seen her, except at a distance, before the killing. I had never been nearer the house than the fence. I saw the wagon-brake that John Cason had. I had never seen it before. I never saw the axe. I did not kill John Lowry. I did not kill his wife. *Cross-Examined.* About a week before the killing I went to Lowry's, to borrow some caps from John Lowry. Ed Gaudin and myself and somebody else went hunting either Thursday or Friday. We did not go nearer Lowry's than about 100 yards. I don't think, when I went after the caps, I was by myself. The last time I saw Mrs. Lowry—I supposed it to be her—was one day that week. I don't know what day. I saw a woman in front of the house. I supposed it to be Mrs. Lowry by her being with her husband. I saw her carrying water from the spring once, when we were cutting wheat; that is, I supposed it to be her. I was never introduced to her. I never spoke to her. The knife I left in the woods on Saturday I carried two or three years, and traded it to my youngest brother. When I got home from town, on Saturday evening, I don't remember who was there, but the family. I don't remember whether father was at home or not. I think one of Mr. Short's children was out there. I think they were in the dining-room when I got home. I think my brother and sister had just got up from the table."

The evidence of the defendant as to his whereabouts on the evening of the murder was corroborated by his father and mother,

by his married sister, Mrs. Short, by Mrs. George Thomas, and by his sister, Miss Lota Thomas. On the cross-examination of Miss Lota Thomas, she was asked whether she was a witness before the grand jury in September, 1887, and answered that she was. "Question. Was your testimony written down, and did you not sign it?" Answer. I don't know. Q. (Here witness was handed a written statement, and asked, "Is this your signature?") A. Yes. Q. Was this written statement read over to you, before you signed it, by Mr. Rainey? A. I don't recollect that it was. Q. Is that your statement? Read it over, and answer. A. I can't read it."

In rebuttal, the state introduced two witnesses, (one of whom was Mr. Rainey,) who were members of, and present at her examination before, the grand jury, in September, 1887, who testified that Miss Lota was a witness before that grand jury, that she testified, and that her evidence was written down by the juror, Mr. Rainey, who testified that he wrote the statement shown the witness, that she signed it, that he wrote it down as she gave it, and it was read over to her in the presence of the grand jury, and that she signed it, at the request of the foreman; but he could not remember what she testified to, or whether she was asked if it was her statement. Over the objection of the defendant, the state was permitted to read this written statement to the jury.

All the possible grounds upon which this case could be reversed are urged in the brief of counsel, and they will be noticed in the order presented.

1. It is claimed that the indictment is insufficient, in that it fails to charge that the homicidal act was done feloniously, and to state who did it. In respect of the defect suggested, the two counts are the same, and appear in the following language of the first count: "The grand jurors, &c., on their oaths, present that Ridley Thomas, on the eleventh day of October, 1884, at the county of Saline and state of Missouri, in and upon one John Lowry, then and there being, feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought, did make an assault with certain deadly and dangerous weapons, to-wit, a certain axe, a certain knife, and a certain piece of iron rod, three feet long and of the weight of eight pounds, which said axe, knife, and iron rod, he, the said Ridley Thomas, then and there had and held in his hands, him, the said John Lowry, feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought, did strike, cut, crush, penetrate, and mangle in and upon the body of him, the said John Lowry, giving and inflicting then and there, with the said axe, knife, and iron rod aforesaid, by the means of the striking, cutting, crushing, penetrating, and mangling as aforesaid, two mortal wounds," etc. It will be observed that by the insertion of the word "and" between the words "hands" and "him" the whole point of this criticism dis-

appears; and, even without the conjunction, the defendant is clearly charged with having done the homicidal act, and that he did it feloniously. There was no demurrer or motion to quash in this case; and such an omission cannot be held to be such an one as tended "to the prejudice of the substantial rights of the defendant upon the merits." Rev. St. 1879, § 1821.

2. The definition of malice in the first instruction given for the state has been frequently approved by this court. *State v. Thomas*, 78 Mo. 327; *State v. Dickson*, Id. 438. The only difference between the two counts in the indictment was that the first stated the implements with which the homicide was committed, the second stated they were unknown. There was no necessity for an instruction on each count, or for discriminating between them in the one drawn and given by the court. *State v. Hollenscheit*, 61 Mo. 302. The objections urged to the fourth and fifth instructions for the state are without merit, and are simply hypercritical. The refusal of the court to give instruction No. 9 for the defendant cannot be made ground for reversal in this case, in which the court gave other instructions properly embodying the law upon the question of reasonable doubt.

3. The evidence of the finding of a bloody handkerchief near a road about a quarter of a mile north-west of the Thomas home, a week after the murder, and of a pair of rotten drawers and overalls about a quarter of a mile south-east of the Thomas house, nearly two years after, to the admission of which defendant objected and excepted, was irrelevant, and of no probative force. There is no evidence in the case tending to show any connection whatever between the defendant and these isolated and remote facts, or with the articles found; and the defendant's objections to this testimony ought to have been sustained. It has frequently been held by this court, in criminal cases, that the admission of improper testimony will not be cured by an instruction for its exclusion. *State v. Mix*, 15 Mo. 153; *State v. Wolff*, Id. 168; *State v. Schneider*, 35 Mo. 533; *State v. Marshall*, 36 Mo. 400; *State v. Daubert*, 42 Mo. 242. And it follows that evidence, the relevancy of which is not apparent, and which may be prejudicial to the defendant, cannot be admitted, even upon the understanding that, unless the party tendering it produces other testimony which would make it competent, it may be excluded. The trial courts are, however, invested with a large discretion in regard to the order of proof; and, if evidence is offered, the competency and relevancy of which are not apparent, and for that reason it be objected to, but which is of such a nature that it may be rendered competent or relevant by other testimony, the proper course to pursue is not to admit such testimony until such competency or relevancy is disclosed by the subsequent evidence. If this course had been pursued it would have been readily seen, when the other evidence in

this case was all in, that these facts did not tend to prove the offense, or to connect defendant with it, and the evidence would doubtless never have gone to the jury. There was not, however, even an effort made to obviate any prejudicial impression this irrelevant evidence may have made by an instruction to the jury to disregard it, at any stage of the trial.

4. The admission of the minutes of the purported evidence of the witness Lota Thomas before the grand jury, written by one of the grand jurors, and which she signed at the request of the foreman, was error. The ancient rule excluding the evidence of a grand juror as to any matter that transpired in the jury-room, while the grand jury was in secret session, in the discharge of its duties, founded upon considerations of public policy, the nature of the tribunal, and a tender regard for a juror's conscience, has been much relaxed in modern practice in those states in which the limitations upon such disclosures are measured only by the oath of secrecy which the grand juror is required to take, notable illustrations of which will be found in the following cases, as well as cogent reasons therefor: *Com. v. Hill*, 11 Cush. 187; *Com. v. Mead*, 12 Gray, 167; *Gordon v. Com.*, 92 Pa. St. 216; *State v. Broughton*, 7 Ired. 96; *Burdick v. Hunt*, 43 Ind. 381; *Bressler v. People*, 117 Ill. 422, 8 N. E. Rep. 62,—to which many others might be added. In this state the matter is regulated by statute. Section 1774, Rev. St. 1879, prescribes the oath which a grand juror is required to take, which is in the usual and ancient form. Section 1793 provides that "no grand juror shall disclose any evidence given before the grand jury, nor the name of any witness who appeared before them, except when lawfully required to testify, as a witness, in relation thereto." Section 1791, that "members of the grand jury may be required by any court to testify whether the testimony of a witness examined before such jury is consistent with or different from the evidence given by such witness before such court; and they may also be required to disclose the testimony given before them by any person, upon a complaint against such person for perjury, upon his trial for such offense." The evil sought to be remedied by this legislation was the immunity which witnesses might enjoy, under the old rule, from prosecution for perjury for swearing falsely before the grand jury, and from the discredit which would follow upon the deliverance on trial in open court of evidence different from that delivered under oath before the grand jury. In other words, to remove, as far as was consistent with public policy, the temptation to false swearing before the grand jury. Under this statute it was held in *Tindle v. Nichols*, 20 Mo. 326, in an action for slander for a charge of false swearing by plaintiff's wife before the grand jury, that a grand juror could not be permitted to testify what the wife testified to before the grand jury; and in *Beam v. Link*, 27

Mo. 261, which was an action for malicious prosecution, it was held that a grand juror could not be permitted to testify that defendants went before the grand jury and testified as witnesses. In this case, Judge SCOTT, citing the former case, says: "This opinion is founded on the statute; and the statute itself has its origin in principles of the common law. Grand juries are now, and have always been, sworn to secrecy. This oath restrained them from disclosing the evidence given before them. The clerk of the grand inquest could not be sworn as a witness in regard to matters that transpired before it. These considerations show that there is no reason in law for relaxing the force of the statute in relation to this subject." And in the former case it was said: "These provisions of our statute concerning secrecy of grand jurors have their origin in the common law. Any person who may be present on the occasion is bound not to disclose what may transpire; and the jurors themselves are, by the terms of their oath, laid under the same obligations." The extent to which those common-law rules of exclusion have been relaxed is to be measured by the terms of the statute, and extends only so far as (1) to permit a grand juror who has heard a witness testify before the grand jury to give evidence of what that witness testified to, upon a complaint against such witness for having committed perjury in such testimony, or upon his trial for such perjury; and (2) when a witness who has testified before the grand jury is being examined in the trial court in regard to the same matter, and has testified thereto, and it is sought to impeach his evidence, after laying a proper foundation therefor, by showing that he testified differently before the grand jury. In order that it may be determined whether the evidence given before such jury is consistent with or different from that given by such witness before such court, a grand juror may be required as a witness, on oath, to disclose the testimony given by such witness before the grand jury. The grand juror cannot be made the judge as to whether the testimony of such witness is consistent or inconsistent. He can only testify as to what the evidence of the witness was before the grand jury. It is for the traverse jury to determine the question of consistency or inconsistency, and give credit accordingly. And, when the testimony is thus disclosed under the solemn sanction of the juror's oath, according to the best of his recollection, that recollection may be tested by cross-examination. The minutes of the evidence kept by one of their number, unsanctioned by the oath of anybody, cannot be made a substitute for this fair, just, and orderly way of getting at the evidence that was actually given before the grand jury. While the statute permits "every grand jury to appoint one of their number to be clerk thereof, to preserve minutes of their proceedings, and of the evidence given before them, which minutes shall be given to the prosecuting attorney," (section 1780,) it

has nowhere authorized the admission of these minutes as evidence anywhere, or for any purpose. They are not required to be signed, and are not sworn to by anybody. They are not the statement, deposition, or affidavit of the witness, but simply a memorandum by which, perhaps, a grand juror's memory might be refreshed, but upon which could not be shifted the responsibility of the juror's oath as to what the witness did actually testify to. The juror who wrote the minutes in this case could not swear to what the witness testified to before the grand jury, and does not know whether she was ever asked whether it was her statement when it was read to her. She signed it because the foreman told her to. He had no authority to require her signature. It was simply the *ex parte*, unsworn minute of the juror who wrote it, of what he thought at the time was the substance of her testimony, but which he could not verify by his oath, when called upon to testify. In Iowa, where, under the statute, a grand juror may be permitted to disclose the evidence of a witness before the grand jury, under the same circumstances as with us, it was ruled that the minutes of such witness' testimony are inadmissible. In *State v. Hayden*, 45 Iowa, 11, the learned judge delivering the opinion remarked. "It is the duty of the clerk of the grand jury to take and preserve the minutes of the proceedings, and of the evidence given before it. \* \* \* The witness is in no way connected with the act of taking these minutes of his testimony. They are not required to be read over to him, nor to be signed by him. Unlike a deposition or affidavit, they do not purport to give statements of facts in full, but are what the law requires, —mere minutes. They are often taken down by persons wholly inexperienced in reducing the language of others to writing. A long experience upon the district bench has enabled the writer hereof to observe that the evidence taken before grand juries is often of the most indefinite and uncertain character, and, if used as the means of impeaching witnesses, would lead to the grossest injustice to witnesses, and tend to defeat a proper administration of justice." The question of the admissibility of such minutes as evidence has never been passed upon by this court, for the reason, perhaps, that until recently the idea of the competency of such evidence, under the statutes of this state, never suggested itself to the mind of the profession. In *State v. Matthews*, 88 Mo. 121, in which the question was suggested, the minutes were not read, and the court held that the defendant was not injured by the use made of them by the prosecuting attorney, for the purpose of cross-examination. In *State v. West*, 95 Mo. 139, 8 S. W. Rep. 354, the incompetency of such evidence was urged in the brief of counsel, but the question, not having been properly saved for review, was not considered on appeal by this court.

The error of the court in admitting the improper testimony mentioned, particularly the

last, must have tended to prejudice the defendant's case. The strength of the state's case rested almost wholly upon the extrajudicial confessions and admissions of the defendant, as testified to by two witnesses. Under our practice, the court can instruct the jury only upon questions of law arising in the case. The jury are the exclusive judges of the weight of the evidence and the credibility of the witnesses. It would be error for the court to comment on the evidence, and a cautionary instruction warning the jury of the intrinsic infirmities of this class of evidence would have been beyond its province. It was therefore of the last importance that against such evidence the defendant should have the full benefit of all the protection the law throws around him, and the witnesses in his behalf. To meet it, in this case, he undertook to establish an *alibi*. His salvation, in a measure, depended upon the success of this defense. By the introduction of these minutes, the state sought to break down the evidence of one of the most important witnesses by whom it was proven. The defense was broken down; and who can say that it was not by the force of this illegal evidence? For such prejudicial error the judgment ought and must be reversed, and the cause remanded for new trial. It is accordingly so ordered. All concur; BARCLAY, J., in the result.

#### WINTERS v. KANSAS CITY CABLE RY. CO.

(Supreme Court of Missouri. Dec. 21, 1889.)

##### CABLE-ROADS—INJURIES TO PERSONS ON TRACK—CHILDREN—IMPUTED NEGLIGENCE.

1. Where it appears that the gripman on a cable-car saw, as he was about to pass around a curve at the intersection of two streets, a young child near the lamp-post, but, seeing that the track was clear, went on, looking to neither side until within about a foot of the child, who had, according to other witnesses, toddled, at a child's rate, to the track, when he was unable to stop the car to avoid running over the child, there is evidence to sustain a verdict against the company.

2. Defendant cannot object for the first time on appeal that there is no evidence that it was operating the road, where its answer alleges that plaintiff was allowed "to get in front of defendant's car" by the negligence of its mother.

3. In an action by a child for personal injuries, negligence of its mother in allowing it to go upon the street accompanied only by its young sister is no defense.

4. Negligence of his sister, 10 years old, in allowing plaintiff, 8 years old, whom she was accompanying, to get in front of defendant's cable-car, will not defeat his action.

Appeal from circuit court, Jackson county; TURNER A. GILL, Judge.

Action by William Winters, by his next friend, D. R. Stevens, against the Kansas City Cable Railway Company, to recover for personal injuries. Defendant appeals from judgment in favor of plaintiff.

Johnson & Lucas, for appellant. Jewell & Thompson, for respondent.

BLACK, J. One of the defendant's cable-cars ran upon the plaintiff, a boy three years of age, at the crossing of Ninth street and

Grand avenue, in the city of Kansas, crushing one of his legs so that amputation became necessary. Hence this suit by his next friend for damages.

The refusal of the court to give defendant's instruction, in the nature of a demurrer to the evidence, makes it necessary to set out the substance of the evidence on the one side and the other. Ninth street runs east and west, and Grand avenue north and south. The train of cars was going east on Ninth street, and thence around the curve, at the crossing of the two streets, and north on Grand avenue. The accident occurred just as the front or grip car passed around and cleared the curve. The car, in approaching the curve, ascended a grade, but the surface of the streets at the crossing could be seen by the gripman for 100 or more feet before he reached it. There were no obstructions on the streets. The grip-car was open at both ends, but closed at the sides for a space of about two feet from the floor, and above that there were glass windows. The gripman's position placed him in the middle of the car. The boy and his sister, 10 years of age, went to a building, about a block distant from the crossing, by permission of their mother, to gather kindling wood. She lived close to the same place, and says she let them go because she was not able to buy kindling. The children crossed over the tracks from the south to the north side of Ninth street, and thence went east on the sidewalk to Grand avenue, and thence eastward across that street towards their home. The car ran against the boy at a point about 35 or 37 feet east of the west curb of Grand avenue. Of two witnesses, who were nearly a block distant, one of them testified: "When I first saw the boy he was three or four feet from the lamp-post at the north-west corner of the streets. He ran straight from that point until the car hit him. It did not seem to last longer than the snap of the finger." The other witness says: "The boy was trying to cross the street. There was a little girl ahead of him. The last I saw of her she was going." Mr. Vincent, who was 20 or 30 feet distant, says he first saw the boy when near the west track; that he heard some one having a child's voice call, but did not see the little girl until after the car struck the boy. This witness, and another person who was in the car, and saw the boy when within two feet of the car, say he was toddling along, about as a boy of his age would move. Other evidence shows that the gripman was looking to the front; that his attention was called to the presence of the boy, but too late to enable him to stop the car in time to avoid the injury. Mr. Davis testified for the defendant: "I was on the north side of the grip-car, about three seats from the front. I saw the girl and boy starting over the crossing. Just as was swung up on top of the hill the girl stopped, and turned her head and looked at us. As the grip-car came around the curve, she ran back screaming, and threw up her hands, leaving

the child by himself. He went in front of the train. At the time the girl turned and ran back she was three or four feet from the track. The gripman then had no time to stop the car. I first saw the child when about one step from the sidewalk. He had a pail or little bundle in his hand." The gripman testified: "I saw the child just as I was about to strike it. It was not more than a foot from the car. I stopped the car within about six feet after I saw the child." On cross-examination, he says: "When I first saw the child it was at the lamp-post, on the sidewalk. There was a young lady close to him,—a rod from him. Saw no children near the boy. I did not see any little girl. I just looked out and noticed everything was clear, and went on. I did not look any more. The first I knew the child got across, and was struck. *Question.* These grip-cars have closed windows all around? *Answer.* Yes, sir. *Q.* Standing at the grip, you could see this place, between the lamp-post and where the boy was hurt? *A.* Yes, sir. *Q.* If you had been looking? *A.* You could see a part of the way there; you could see it all by stooping down."

If the defendant's liability in this case is limited to want of care on the part of its servants after they saw the boy in a dangerous situation, then the plaintiff failed to make out a *prima facie* case. The evidence is all to the effect that the gripman used all the means at his command to avoid the calamity, after he knew the boy was in danger. But the principle of law just stated does not control this case. The defendant is operating dangerous machinery, at a rapid speed, on and along the public streets of the city, and must know, and in law is bound to know, that men, women, and children have an equal right to the use of the highway, and will be upon it. It is the duty of the defendant's servants to be on the lookout, and to take all reasonable measures to avoid injuries to persons who may be upon the street. The duty to be on the watch is no more than ordinary care under such circumstances. The care to be used, to be ordinary care, must depend upon the surrounding circumstances. Now the evidence of the gripman tends to show that when he came to the crossing he rang his bell, looked out and saw the way was clear, and then went on around the curve, neither looking to the right nor left. There is other evidence to the effect that the boy toddled along for a distance of at least 85 feet on the street, and in the direction of the approaching car, after the gripman saw him on the sidewalk, and the car must have traveled a much greater distance. Other persons saw the boy and girl when they started across the street in front of the approaching car. Had the gripman cast an eye to the left when he reached the curve, or while passing it, he would doubtless have discovered these children in time to have avoided the injury. He says he stopped the train in a space of six feet after the grip-car had passed

the curve, and, if that be so, then there is reason to believe that the evidence of another witness to the effect that it could have been stopped on the curve in a space of four feet is true. But, assuming that both estimates should be doubled to approach accuracy, still the jury might well have found, as they did, by their answers to interrogatories, that the gripman could, by the exercise of ordinary care, have seen the plaintiff in time to have stopped the train before plaintiff was injured. It was admitted on the trial that this accident happened on one of the principal traveled streets in the city. If we say the jury should have been directed to find for defendant, then we must hold, as a matter of law, that it was sufficient care on the part of the gripman, when approaching the curve, to ring his bell, see that the track before him was clear, and go ahead without thereafter looking to the right or left. This we are not prepared to do. The question of negligence in this case was one of fact, and our duty is performed when we see that there is sufficient evidence to support the verdict, so far as the demurrer to the evidence is concerned. If the child ran in front of the car, and the gripman was free from negligence, then there ought to be no recovery. This proposition was placed before the jury in very clear terms by an instruction, given at the request of the defendant, wherein it is said that before the plaintiff can recover he must prove that he was injured in direct consequence of the negligence or carelessness of the person in charge of the defendant's car. But it is said there is no evidence that the defendant was operating the road at the time of the accident, and that some of the instructions are bad because they assume that it was the defendant's car which ran over the plaintiff. No such question was mooted in the trial court. Besides, it may be inferred from the evidence of the brakeman and superintendent that defendant was operating the road. But, aside from all this, the answer says the plaintiff's mother contributed to the injury by placing him in charge of a careless person, who allowed plaintiff "to get in front of defendant's cars suddenly, while they were in motion, so that the injury suffered by plaintiff was inevitable." The ownership of the car and operation of the road by defendant are admitted facts in the case. We fail to discover any merit in either of these objections.

The court, at the request of the plaintiff, gave this instruction: "(3) The court instructs the jury, as a matter of law, that negligence on the part of the little girl who was with the child injured, or near him at the time of said injury, cannot affect the question of the right of plaintiff to recover in this case;" but refused to give the following instruction asked by the defendant: "(2) If the plaintiff's mother and natural guardian permitted plaintiff to go on or near the tracks of defendant, alone, or in charge of a careless or incompetent person, and the

carelessness and incompetency of such person contributed directly to plaintiff's injury, then the finding will be for the defendant." *Hartfield v. Roper*, 21 Wend. 615, is cited to show that the court erred in its ruling on both of these instructions. The substance of the doctrine there asserted is that where a child of such tender years as not to possess the discretion to avoid danger is permitted by its parents or guardian to be in the public highway the negligence of the parent or guardian will defeat a recovery in a suit by the child. This doctrine has been followed in some of the states. It is sometimes placed on the ground that the parent is the agent of the child, and other cases place it on the ground of identity between the parent and child. It probably stands as well on no ground at all as it does on either of them. The whole doctrine has been severely criticised by some of our best text-writers and denied by many courts. This court more than 20 years ago repudiated the doctrine in the case of *Boland v. Railroad Co.*, 36 Mo. 485. Says WAGNER, J., for the court: "Whilst the decision in *Hartfield v. Roper* may be supported by the facts in the case as failing to show such negligence as would fix liability on the defendants, the reasoning of the learned judge on infantile responsibility is certainly harsh and repugnant to justice." The court then gives its adherence to the contrary doctrine, asserted in the leading case of *Robinson v. Cone*, 22 Vt. 213. This is a suit by the child itself, and the negligence of the mother, if any there was, in allowing it to go upon the public streets, unattended by a person of mature years, constitutes no defense whatever to this action. In support of this conclusion, and the former ruling of this court, it is sufficient to cite 1 Shear. & R. Neg. (4th Ed.) § 78; Beach, Contrib. Neg. § 43; *Railway Co. v. Schuster*, 113 Pa. St. 412, 6 Atl. Rep. 269; *Railroad Co. v. Snyder*, 18 Ohio St. 399. Even in the case of a suit by the parent, all the circumstances are to be taken into account; and if the parent took as much care of the child as reasonably prudent persons of the same class, and in the same situation in life, ordinarily do, then the parent is not to be held guilty of such negligence as will defeat his action. 1 Shear. & R. Neg. (4th Ed.) § 72; *O'Flaherty v. Railway Co.*, 45 Mo. 70; *Frick v. Railroad Co.*, 75 Mo. 542. The negligence of the parent to defeat his or her action must be the proximate cause of the injury. *Isabel v. Railroad Co.*, 60 Mo. 483. Unless these principles of law are adhered to, the poor of the land will be deprived of all benefit of the public schools in our cities, which cannot be reached but by passing over and along the public highways. But no more need be said upon this subject, for this is not a suit by the parent or guardian.

Appellant contends that the court erred, under the modified doctrine stated in *Stillson v. Railroad Co.*, 67 Mo. 672. There the little girl, eight years old, was in the actual pres-

ence of the father. She attempted to pass through a small aperture between two cars standing on a track, and at a place which was not a public crossing, and was injured by the cars coming together. It was held that the negligence of the father should be imputed to the child in a suit by the child, inasmuch as the father was present, and pointed out the place for her to go through, and she was attempting to follow out his directions when injured. Of the cases there cited that of *Holly v. Gas-Light Co.*, 8 Gray, 132, was one where the injury seems to have been caused from the negligent act of the father. In *Waite v. Railway Co.*, 96 E. C. L. 728, the child was in charge of its grandmother. The case of *Railway Co. v. Stratton*, 78 Ill. 88, is a case where the boy, 10 years old, was traveling with his father. The case concedes that the negligence of the parent or guardian having charge of a child of tender years would not excuse the carrier from using all the means in its power to prevent the injury, but relieves the carrier from liability for the negligence of the parent when the parent's negligence is the proximate cause of the injury. "In that event," says the court, "it is not the negligence of the defendant, but of the party having the control of the child; and, if any liability attaches to either party, it must be to the latter." The girl in the present case was to some extent the protector of the little boy, but she was a child only herself, and it is both unreasonable and inhuman to say that she filled the position of a parent or guardian. It might as well be said of twin children, out of the sight of the mother, that each is the responsible guardian for the other. If the girl was to some extent negligent, that would not relieve the defendant from the exercise of due care. The *Stillson* Case does not profess to disturb the former ruling of this court, and it is believed has never been so regarded. It is at most no more than an exception to a general rule, and must stand on its own peculiar circumstances, and is wholly inapplicable to the present case. The facts as in that case stated would indicate that the negligence of the father, and not of the defendant, was the proximate cause of the injury. The court, in a subsequent part of the opinion, after stating that the question of negligence was one for the jury, uses this language: "But there must be some evidence on which to base instructions to a jury. After a careful examination of the testimony in this case, aided by the maps in the record, we have been unable to conjecture in what respect it is claimed that there was negligence on the part of the defendant. There being no negligence on the part of the defendant, it was no more liable to an infant than an adult; so that, after all, the father's negligence was the proximate cause of the injury; and that case should be regarded as standing on this ground and no other."

It follows from what has been said that the court did not err in its ruling upon these

two instructions. In other instructions asked by the defendant the jurors were told, in clear terms, that before they could find for plaintiff he must prove that he was injured in direct consequence of the negligence of the person in charge of defendant's car; that if the gripman was using ordinary care in looking out and attending to his business, but did not see the plaintiff in time to stop the car before running over him, then there was no negligence on his part; and that ordinary care means that degree of care which an ordinarily prudent and careful person would exercise under like circumstances. The plaintiff's instruction is in accord with those given for defendant, and no substantial objection is made to them. The judgment is therefore affirmed. All concur.

**BROWN et ux. v. HANNIBAL & ST. J. R. CO.**

(Supreme Court of Missouri. Dec. 21, 1889.)

**RAILROAD COMPANIES—DEFECTIVE CROSSINGS—DAMAGES—PLEADING—AMOUNT.**

1. Where the evidence shows that an obstruction on the north side of one approach to a railroad crossing made it necessary to drive close to the south side, and that on the south side of the other approach, which was not in line with the former, but swung to the north, the planks extended over the embankment about 18 inches, the traveled track being only about a foot from the brink over which plaintiff was precipitated, the issue as to defective crossing is properly left to the jury, in an action for the injuries caused thereby.

2. An instruction that it was defendant's duty to maintain a crossing which would be "reasonably safe and convenient" is not erroneous, nor a departure from a petition alleging failure to maintain "a good and sufficient crossing."

3. An instruction that "it is not sufficient that the crossing is so constructed that it is possible to safely pass over it, but it should be so constructed and maintained in such condition as to be reasonably safe and convenient for public travel by persons exercising ordinary care," is correct, and not argumentative.

4. An instruction that the crossing should be "reasonably safe and convenient" is not inconsistent with one that it should be "reasonably safe."

5. Under an allegation of bodily injuries, plaintiff may recover for physical pain and mental anguish, though not stated in the petition.

6. Verdict for \$2,725 is not excessive for injuries which produced pains in the back, loss of memory, paralysis in one side for three weeks, and some hemorrhage, with a tendency to miscarriage; the plaintiff being pregnant at the time, and still suffering occasional pains in her sides and legs.

Appeal from circuit court, Clinton county; JAS. M. SANDUSKY, Judge.

*Strong & Mosman*, for appellant. *Thos. J. Porter*, for respondents.

**BLACK, J.** This is a suit by a married woman to recover damages for injuries sustained by reason of a defective crossing at a point where a public road crosses the defendant's track. She and her husband were moving with two teams, and passed over this crossing from the east to the west. The husband drove the forward team, and she followed, driving the other. She says she was looking at the road at the time, and drove in the traveled track, and had a gentle team. She passed over the east approach; and, just

as she passed over the track, the wagon turned over the south embankment. The east approach curves a little to the south, is about 6 feet high at the track, 10 feet wide, and 20 feet long. The west approach is about the same height, 16 feet wide, and 25 feet long. The plaintiff's evidence tends to show that by reason of some obstructions on the north side of the east approach the travel is diverted to the south side of that approach; that the south sides of the approaches are not in line, the one on the west being 4 or 5 feet north of the other; that the planks on the west side projected over the south edge of the embankment 18 or 20 inches; that the traveled track on that side of the railroad track was close to the brink, and, to cross with perfect safety, it would be necessary to turn north when on the railroad track, and pass over the ties, where the way was not prepared for travel. The road overseer says he called the attention of the defendant's road-master to the crossing, and requested him to fix it before the accident in question. The defendant's evidence tends to show that the crossing had been used for 18 years without accident, and that it could be crossed without danger, by the use of ordinary care. At the request of the plaintiff, the court gave two instructions, which, omitting some unimportant matters, are as follows: "(1) It was the duty of defendant to construct and maintain a crossing, and approaches thereto, at said place, which would be reasonably safe and convenient for public travel; and, if the jury believe from the evidence that defendant failed to construct and maintain such crossing and approaches at said place, and that the plaintiff, without fault or negligence on her part, had her wagon overturned in consequence of such crossings and approaches being insufficient, and not reasonably safe and convenient for public travel, whereby said plaintiff received the injury complained of, the jury should find for plaintiff." "(3) The court instructs the jury that it is not sufficient that the crossing is so constructed that it is possible to safely pass over it, but it should be so constructed and maintained in such condition as to be reasonably safe and convenient for public travel, by persons exercising ordinary care." The following, among others, was given at the request of defendant: "(8) The defendant was not required to make the crossing, or the approaches thereto, absolutely safe for persons using them. The defendant's duty was to so construct the crossing and approaches as to make the crossing reasonably safe to persons using ordinary care; and if the jury believe from the evidence that they were in such condition on the 4th day of November, 1888, they must find for the defendant."

1. While there is evidence tending to show that this crossing was reasonably safe, there is evidence to the contrary. There is no dispute about the fact that the two approaches were not in line, and that the travel was necessarily diverted to the south by reason



of the telegraph pole on the east approach. The boards which were on the west side of the railroad track, and which would be a guide to one not familiar with the crossing, extended out over the south embankment 18 or 20 inches. In the language of some of the witnesses, if one does not know the crossing, a wagon is liable to get too far south. The traveled track is about a foot from the brink. One can go further north, but would have to drive off the north end of the plank. The case was properly submitted to the jury, for all the issues tendered by plaintiff were supported by evidence in the case.

2. The testimony of the plaintiff is clear, and to the effect that she used due care; and it cannot be said that she was, on all the evidence, guilty of negligence. Whether she was or not was properly submitted to the jury.

8. The negligence alleged in the petition is that defendant "failed and neglected to construct and maintain a good and sufficient crossing," and in "permitting said crossing to be and remain in a dangerous condition, and wholly insufficient for safe passage across said railroad." The plaintiff's first instruction makes no departure from the pleadings when it says it was the duty of the defendant to maintain a crossing which would be "reasonably safe and convenient" for public travel. A crossing, to be good and sufficient, must be reasonably safe and convenient. We do not see any force in the criticism made upon the use of the word "convenient." Of what use is a crossing that cannot be used? To be a good one, it certainly must be reasonably convenient.

4. The objection to the plaintiff's third instruction, that it is argumentative, is without merit. The instruction states a correct proposition of law, and was properly given, and especially so in view of the first part of the third given at the request of defendant.

5. The difference between the expression "reasonably safe and convenient," used in the plaintiff's instruction, and "reasonably safe," as used in the defendant's, does not make them inconsistent. There is no substantial difference, when applied to a road crossing.

6. As to damages, the court directed the jury to allow such an amount as would be a "reasonable and fair compensation to plaintiff for such injuries received by her as were the direct result of the accident; and, in estimating the damages, the jury are authorized to consider her physical pain and suffering, and mental anguish, resulting from such injuries, not exceeding \$5,000." Objection is made to this instruction because it allowed the jury to take into their estimation of damages physical pain and mental anguish. That such pain and anguish are proper elements of damage in cases like this, is not denied; but it is insisted that there is no allegation of any such damage in the petition. The petition states that she "received great and permanent bodily injuries, by which injuries she was

confined to her bed for about the space of three months, and is permanently disabled." General damages are such as the law implies or presumes to have occurred from the wrong complained of, and they need not be pleaded. In such cases the wrong itself fixes the right of action. Special damages are such as really took place, and are not implied by law. They are either superadded to general damages arising from an act injurious in itself, or are such as arise from an act not actionable in itself, but injurious only in its consequences. Special damages must be stated in the petition with a reasonable degree of particularity, and it must appear that the damage is the natural, though not necessary, consequence of the wrong. 1 Chit. Pl. (16th Amer. Ed.) 411, 414; 2 Sedg. Dam. (7th Ed.) 606, and note; 3 Suth. Dam. 427; Bliss, Code Pl. (2d Ed.) § 297b; O'Leary v. Rowan, 31 Mo. 119; State v. Blackman, 51 Mo. 320. Now, in the present case, the mere statement of a breach of the duty on the part of the defendant to maintain a good and sufficient crossing would show no cause of action at all in favor of the plaintiff. She must show by her pleading that she sustained some special damage, and this is done, under the Code, by stating the facts. She does state that by reason of the defective crossing she received great and permanent bodily injuries. The sole question, then, is whether this statement is sufficient to include damages for physical pain and mental anguish. Facts which are necessarily implied from those alleged need not be stated. Bliss, Code Pl. (2d Ed.) § 176. Physical pain and mental anguish usually, and to some extent necessarily, flow from or attend bodily injuries. It is not necessary to make specific proof of pain and mental anguish. These elements of damage are sufficiently shown by the evidence which discloses the nature, character, and extent of the injuries. From such evidence the jury may infer pain and mental anguish. Railroad Co. v. Warner, 108 Ill. 538; Railway Co. v. Curry, 64 Tex. 85. It follows from what has been said that where bodily injuries are alleged in the petition, and proof thereof made upon the trial, and the person injured is the plaintiff, physical pain and mental anguish are proper elements of damage, though not stated in the petition.

7. The refusal of the court to give the defendant's fifth and sixth instructions constitutes no error, for the reason that they are embraced in one given by the court of its own motion. This instruction excluded all damages arising from loss of the wife's services on account of impaired ability to work, on the ground that such services could only be sued for by the husband. Whether the instruction should have been given, under our present married woman's act, is a question which we do not consider.

8. The plaintiff had a verdict and judgment for \$2,725. The injuries received by her produced pains in the back, loss of memory to some extent, paralysis in one side for three

or four weeks, and some hemorrhage, with a tendency to miscarriage; the plaintiff being pregnant at the time of the accident. She was able to do some work in four or five weeks, and to attend to her household affairs in five or six months. She still suffers at times from pains in her sides and lower limbs, and cannot use one arm in lifting, as before the accident. Under these circumstances, we cannot say the damages are excessive. We see and discover no reason whatever why this judgment should not stand, and it is therefore affirmed. All concur.

### HILTON v. CITY OF ST. LOUIS *et al.*

(*Supreme Court of Missouri*. Dec. 21, 1889.)

#### MUNICIPAL CORPORATIONS — EMINENT DOMAIN — INTERPLEADER — INTEREST — VERIFICATION OF PLEADINGS.

1. Under the provision of the charter of St. Louis (3 Rev. St. Mo. p. 1607) that if the ownership of property condemned be in controversy the damages shall be paid into court for the use of the successful claimant, the city, where suit has been begun by one claimant, may pay the damages into court and file an answer in the nature of a bill of interpleader, bringing in all the rival claimants.

2. It is not error to allow the voluntary appearance and answer of an adverse claimant who should and would have been brought in by interpleader.

3. Refusal to allow interest on damages assessed in condemnation proceedings by a city is not error, where, there being adverse claimants, suit has been inactively prosecuted, and it does not appear whether the property was vacant or improved, or that the city had yet taken possession.

4. Under the practice act of Missouri, pleadings need not be verified.

Appeal from St. Louis circuit court;  
GEORGE W. LUBKE, Judge.

M. Hilton, for appellant. L. Bell and H. D. Wood, for respondents.

SHERWOOD, J. The city of St. Louis instituted condemnation proceedings to open Park avenue from Jefferson avenue to Grand avenue. This was in February, 1880, and Dougherty *et al.* were defendants. The result of these proceedings was that damages were assessed in favor of the owner of lots 5, 6, and 7, in city block 1,282, at the sum of \$1,940.40. On the 30th day of March, 1881, the city passed an ordinance appropriating money to pay said damages, which ordinance went into effect April 30, 1881. This suit was brought by Mary E. Tanner, on November 19, 1881, for the damages assessed; she claiming to be owner of said lots. On the 14th of April, 1884, she filed her second amended petition for the damages, and, among other things, alleged that on the 30th of June, 1881, she demanded payment of the city of said damages, which the city refused to pay. On April 17, 1884, on the joint motion of Mary E. Tanner and Silas D. Hilton, the latter was substituted in this action in the lieu and stead of Mary E. Tanner. On the 10th day of July, 1881, Joseph S. Dobyns, attorney for Huntington Smith, made a demand on the city for the sum already mentioned. Smith was not a party to the con-

demnation proceedings, nor, so far as it appears, was Tanner or Hilton. On June 27, 1884, the city, acting under the provisions of section 11 of article 6 of the city charter, (2 Rev. St. p. 1607,) to-wit, that, "if the ownership of property condemned be in controversy, the amount of the damages assessed for said property shall be paid into court, for the use of the successful claimant of the property," paid the money assessed as damages into court. On November 21, 1884, the city filed a second answer. Among other things the answer set up, were that the city had paid into court, etc., as already stated; that not only Silas D. Hilton, claimed to be the owner of the property, and, as such, entitled to the damages aforesaid, and had notified the defendant not to pay the same to any one but himself, but that Huntington Smith and William D. Griswold also made like claims to said lots, and the sum assessed as damages; and prayed that Smith and Griswold might be made parties to the action, and required to interplead for said damages; and that defendant be discharged from further liability in this cause," etc. On January 5, 1886, Griswold entered his voluntary appearance and a disclaimer. On the same day, Huntington Smith entered his voluntary appearance; claiming to be the true owner of the lots, and of the sum assessed as damages. The plaintiff introduced no evidence in support of his claim, and objected to any being introduced on the part of the city, and on the part of Huntington Smith. But the court permitted evidence to be introduced showing that the city did pay the sum aforesaid into court, in accordance with the charter; and it was also shown that Dobyns, as attorney of Smith, had made demand on July 10, 1881, of the city for the amount of damages assessed. At the close of the testimony the plaintiff asked the following declarations of law, which the court refused to give: (1) The court declares the law to be that upon the pleadings and evidence in this case the plaintiff is entitled to recover; (2) the court declares the law to be, upon the pleadings and evidence in this case, plaintiff is entitled to a judgment in this case for the sum of \$1,940.40, with interest thereon from the 30th day of June, 1881, to date of judgment."

The court thereupon entered the following decree: "The court, having seen and fully considered the motion of plaintiff to strike from the files of this court the entry of appearance and reply of said Huntington Smith to the second amended answer of the city of St. Louis in this cause, doth now overrule said motion. And, the court being now also fully advised as to the matters in issue in this cause presented by the second amended answer of cross-petition of defendant the city of St. Louis, filed in this cause, doth find in favor of said defendant the said city of St. Louis, and doth find that heretofore, under an ordinance of said city, entitled 'An ordinance to establish and open Park avenue from Jefferson to Grand ave-

nue,' approved March 11, 1880, proceedings were had in this court, at the suit of said city, whereby, on February 21, 1881, a final decree was entered condemning for public use all that part of lots numbered 5, 6, and 7 in block 1 of Compton Hill addition to the city of St. Louis, and in city block 1,282 of said city, fronting 75 feet on the south line of Park avenue, as laid out in said addition, by a depth south on the west line of lot 7 of 9 feet 4 and  $\frac{5}{8}$  inches, and on the east line of lot 5 of 9 and 6-12 feet to the south line of said Park avenue, as established by city ordinance No. 11,314, and all that part of said lots numbered 5, 6, 7, embraced within the lines of said Park avenue; that in and by said proceedings of condemnation the net sum of \$1,940.40 was assessed as the damages which the owners of said realty so condemned would sustain by the taking thereof for public use as aforesaid; that afterwards, on March 30, 1881, by another ordinance of the municipal assembly of said city, approved that day, there was appropriated and set apart out of the fund of that city, for street openings, a sum sufficient to pay the damages of \$1,940.40 aforesaid; that thereupon one Mary E. Tanner, to whose rights the plaintiff, Silas D. Hilton, has since become assignee, claimed to be the owner of said realty so condemned, and demanded of defendant the payment of said damages; and that thereupon one William D. Griswold also claimed to be the owner of said realty, and demanded of defendant payment of said damages, but that William D. Griswold, since that time, here in open court, filed and announced a complete disclaimer of any right to said damages; and that, after said proceedings of condemnation were had, the said Huntington Smith also claimed to be owner of said realty, and demanded of defendant the payment of said damages; that neither the plaintiff nor Huntington Smith have here averred or shown that the defendant the city of St. Louis has taken possession of said realty in virtue of said proceedings of condemnation, or tendered to either of them, absolutely, payment of said damages, or deposited the same in court for them, in said condemnation proceedings. Wherefore, the court doth now consider, adjudge, and decree that at the commencement of this action by Mary E. Tanner she was not entitled to recover said sum of damages, but had only the right to enjoin and restrain defendant from taking possession of said realty until said damages had been paid or deposited in court for the parties in interest in said realty. And the court further finds that theretofore, on June 27, 1884, and after the filing of plaintiff's second amended petition in this cause, the defendant the city of St. Louis did deposit here in court, in this cause, the said sum of \$1,940.40, the damages so assessed as aforesaid, and that said sum has ever since been, and now still is, on deposit with the clerk of this court, subject to the order of this court in this cause; and that, in virtue of the proceedings of con-

demnation aforesaid, and of said deposit, the said city of St. Louis was, on the 27th of June, 1884, entitled to take possession of said realty so appropriated for public use as aforesaid; that said defendant the city of St. Louis has, ever since said deposit was made, disclaimed any interest in or right to said sum of \$1,940.40; that said defendant has been unable to determine who of said claimants is entitled to said money; that there is a controversy between plaintiff and said Huntington Smith as to the title to said realty; and that, under and by virtue of the charter of said defendant the city of St. Louis, said defendant had the right to pay said damages into court for the use of the successful claimant of the said property; and that the deposit made by the defendant in this action is to the use of plaintiff, Silas D. Hilton, and said Huntington Smith, and is a substantial compliance with the said provision of defendant's charter. Wherefore, it is now by the court considered, adjudged, and decreed that neither the plaintiff, Silas D. Hilton, nor the said Huntington Smith, shall take anything against the defendant the city of St. Louis by this action, but that the city of St. Louis go hence without day, and recover from them its costs and charges in this behalf expended, and have therefor execution against the said plaintiff, Silas D. Hilton, and said Huntington Smith; that from henceforth the defendant the city of St. Louis shall stand confirmed of its right to the possession of said realty by it acquired for public use, by virtue of the proceedings of condemnation, and payment therefor here into court, as aforesaid. And the court doth further order, adjudge, and decree that within twenty days after the entry of this decree the said Huntington Smith shall file in this cause his petition against the plaintiff, Silas D. Hilton, setting forth his title, claim, and demand to said fund; that, upon compliance by said Huntington Smith with this order, the said Silas D. Hilton shall plead to said petition of said Huntington Smith within ten days; and that thereafter this cause shall proceed to a final hearing and decree between said parties; and the court now reserves the question of costs between said parties until such final hearing and decree."

1. Under the provisions of section 11, art. 6, of the city charter, (2 Rev. St. p. 1607,) the city very properly paid the money into court, there being a controversy as to whom the amount belonged; and the assembly did appropriate the money, and provide, by ordinance 11,679, for the payment of the same, as required by section 10 of the charter. And, apart from the ordinance, the city complied with a similar provision of the constitution, which, if an ordinance were lacking, would have supplied any such lack. Section 21, art. 2, Const.; Railroad Co. v. Story, 10 S. W. Rep. 203. Besides, under its bill of interpleader, the city was entitled, in order to support that bill, to bring the money into court. 2 Story, Eq. Jur. § 809. On either of

the above-mentioned grounds, then, the payment of the money into court was an authorized act.

2. The city, being in doubt as to whom the amount paid into court belonged, pursued the proper course in filing an answer containing the elements of a bill, in the nature of a bill of interpleader. 2 Story, Eq. Jur. (13th Ed.) § 824. See, also, *Id.* §§ 807, 808, 810, 811, et seq. And it has been ruled that a court before which the proceedings are pending has the "power to cause rival claimants to the damages awarded to interplead," and that it is the duty of the condemning party "to bring in all parties having an interest in the estate, in order that the condemnation money may be properly applied." *Gerrard v. Railroad Co.*, 14 Neb. 270, 15 N. W. Rep. 231. In another case, the party out of possession, but claiming to be the true owner, was directed to bring ejectment within a month, for the purpose of trying his title. *Hatch v. New York*, 82 N. Y. 436; *Lewis, Em. Dom.* § 627. And it is the theory and requirement of our practice act that all parties in interest shall be brought in, and thus have all conflicting interests adjusted. This duty is enjoined on the trial courts by statutory enactment, and has been sanctioned, also, by several of our decisions. *Rev. St.* § 3568; *Hayden v. Marmaduke*, 19 Mo. 403; *Butler v. Lawson*, 72 Mo. 331; *O'Fallon v. Clopton*, 89 Mo. 284, 1 S. W. Rep. 302.

3. Now, if the protection of the city demanded the filing of an answer in the nature of a bill of interpleader, and if it was the duty of the court, upon noticing the defect, to cause new parties to be brought in, of its own motion, it is difficult to see what error could arise where one of such parties who should have been brought in, and would have been brought in, anticipated the summons of the court, came in, submitted himself to the jurisdiction of the court, filed his pleading, and asserted his claims. These remarks show the correctness of the action of the trial court in refusing to allow the respective motions of the plaintiffs to prevail, to strike out that portion of the city's answer in the nature of a bill of interpleader.

4. In the same light is to be regarded the action of the court in regard to the necessity of the answer of the city being verified by affidavit. Such was the course pursued in the old chancery practice, (2 Story, Eq. Jur. § 809;) but, under our practice act, pleadings require no such verification. An intimation to the contrary was made in *Bank v. Richards*, 74 Mo. 77, but we do not approve it.

5. As *Hilton*, the substituted plaintiff, seems to have adopted the petition of *Mary E. Tanner*, and made no allegations of his own, and inasmuch as he introduced no evidence as to his title or his claims, there is no clue furnished to ascertain just what his status is. Did the former plaintiff transfer to him her title to the damages assessed, or did she only transfer to him her title to the lots? This record fails to give any answer

to this question. If *Hilton* was only the purchaser of the lots subsequently to the damages being assessed, such damages would not pass to him by the deed of *Tanner*, if he received one, even though such damages were not specially reserved in the deed. *Losch's Appeal*, 109 Pa. St. 72; *Lewis, Em. Dom.* §§ 338, 538. If *Hilton* has not shown himself entitled to the damages, then he can raise no question about interest thereon. Furthermore, it does not appear what is the nature of the property in question,—whether vacant, or occupied by houses. But it is nowhere shown or averred, and so the decree recites, that the city has ever taken possession of the premises. If so, then it would seem that interest ought not to run while the party claiming it remains undisturbed in the possession of the premises. Moreover, some consideration is to be given to the fact that *Hilton*, though substituted as plaintiff, seems to have remained inactive in the prosecution of the suit, which, from all appearances, could have been terminated long ago. In the light of all these facts, we affirm the judgment. All concur.

#### SKINKER v. HAAGSMA et al.

(*Supreme Court of Missouri*. Dec. 21, 1889.)

DEEDS—PAROL EVIDENCE—ADVERSE POSSESSION—DIVISION FENCES.

1. Parol evidence is admissible to show that *Eugene J. Gannon*, the grantor in a deed, was the person described as "*Joseph E. Gannon*" in a devise of the land, and that the grantee described as "*Michael J. Gannon*, his wife," was not the wife of the grantor, but his brother, to whom was devised an undivided interest in the land.<sup>1</sup>

2. Continuous and uninterrupted possession, under claim of ownership, to the line of a division fence, will not bar title, where it appears that such occupation was under a belief that the fence was on the true line, and without intention of claiming beyond the true line, as described in the deeds.

3. Findings of the court, in ejectment, as to the location of the boundary line will not be reviewed, when there is evidence to support them.

Appeal from St. Louis circuit court; *W. W. EDWARDS*, Judge.

*Zach J. Mitchell*, for appellants. *T. K. Skinker*, pro se.

*BRACE, J.* This is an action, in ejectment, to recover possession of a strip of land of four acres off the south side of the north 30 acres of the E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 12, township 44, range 5, in St. Louis county. *Michael J. Gannon, Sr.*, who was the owner in fee of said east half, and which contained 81 90-100 acres, is the common source of title. By his will, he devised said east half to his two sons, *Michael J. Gannon, Jr.*, and *Joseph E. Gannon*. After the death of their father these two sons made partition of said tract of land, and each executed a deed to the other

<sup>1</sup> On the general subject of the admissibility of parol evidence in connection with writings, see *Coapstick v. Bosworth*, (Ind.) 23 N. E. Rep. 773, and note; *Nichols v. Crandall*, (Mich.) 43 N. W. Rep. 875, and note; *Bank v. McElwee*, (N. C.) 10 S. E. Rep. 295, and note; *De Loach v. Smith*, (Ga.) *Id.* 436.

for the half which he was thereafter to own and hold in severalty, describing the same by metes and bounds. Plaintiff claims that by the said will and deeds Michael J. Gannon, Jr., became seised and possessed of the north 80 acres of said 80-acre tract; and that he has acquired the title of the said Michael J. Gannon thereto, and that the 4-acre tract sued for, and which is in the possession of defendants, is a part of, and within the limits of, his said 80-acre tract. The answer of the defendants was a general denial, and a plea of the statute of limitations. The case was tried before the court without a jury. The finding and judgment was for the plaintiff, from which the defendants appeal.

1. The plaintiff, to sustain the issues on his part, offered in evidence a deed dated June 30, 1878, executed by Eugene J. Gannon, conveying to "Michael J. Gannon, his wife," the 80-acre tract aforesaid, and parol evidence showing that the grantor, Eugene J. Gannon, was the Joseph E. Gannon mentioned in the will of the said Michael J. Gannon, Sr., deceased, and to whom was devised an undivided half of said 80-acre tract in said will; and that the said Michael J. Gannon, the grantee in said deed, was his brother, and the person to whom said deed was made, and not his wife; and that he had no wife when the deed was executed; and said deed and evidence were admitted over the objection of the defendants. This action of the court is assigned for error, but in it we find no error. Inquiry to identify the persons and things to satisfy the description contained in a written instrument, even when appearing on its face to be perfectly intelligible, is always in order, (2 Tayl. Ev. § 1194; 1 Greenl. Ev. § 295; *Philibert v. Burch*, 4 Mo. App. 470;) and the evidence here, disclosing the fact that the Joseph E. Gannon, the devisee in the will, and the Eugene Joseph Gannon, the grantor in the deed, was one and the same person, was not inconsistent with either written instrument, but served simply to show their application; and the evidence showing that Michael J. Gannon, the grantee in the deed, was the brother, and not the wife, of the grantor served simply to eliminate from the deed a false description, which ought to hurt no one. *Broom, Leg. Max. \*629 et seq.*

2. The plaintiff, by this deed and through mesne conveyances from Michael J. Gannon, introduced in evidence, showed a good legal title in himself to the 80 acres of land contained within the metes and bounds of the description in said deed from Eugene J. Gannon to Michael Gannon, and introduced evidence tending to show that the four-acre strip off the south side of said tract, described in the petition, was within the limits of said metes and bounds, and that defendants were in possession of the same. The evidence for the defendant showed legal title in the defendants, through mesne conveyances from these brothers, to the remaining 51.90 acres of said 80-acre tract, as contained within the metes and bounds of a deed from Michael J.

Gannon to Eugene J. Gannon, of the same date as the former one from Eugene J. Gannon to Michael J. Gannon, so that the case resolved itself into a controversy as to the location of the boundary line between the two tracts. There was evidence to support the finding of the court that the true line, located according to the deeds under which the parties claim, would give the plaintiff the premises in controversy; and this finding will not be reviewed here, and would settle the case, but for the possession by which the defendants claim to have acquired plaintiff's title thereto.

3. The evidence tends to show that Eugene and Michael Gannon, shortly after Eugene became of age, which was in May, 1873, agreed to divide the 80-acre tract which their father had devised to them; that they selected three men to make the division; that these men went upon the land, and, supposing it to contain 80 acres, allotted the north 30 acres to Michael, and the south 50 acres to Eugene; they took no measurements, ran no lines, and fixed no dividing line. Before the deeds were made, however, a survey was made of the whole tract. It was then discovered to contain more than 80 acres, the dividing line between the two tracts was fixed by this survey, stones set to indicate the corners, and the dividing line marked on the ground; and the deeds were made in accordance with the descriptions given by the surveyor, by which Michael got the north 30 acres and Eugene the south 51.90 acres. In this connection, Eugene J. Gannon testified: "I immediately had a plank fence built along my east line, as far north as my north-east corner, as pointed out by the surveyor,—the corner called for by my deed. I stopped at that corner. I also had my tenant, Dunn, put up a cross-fence, consisting of poles and old rails. I think this latter fence did not go back to the west line of the tract,—only included the land available for cultivation, not the timber,—went about half way back. I never claimed, or intended to claim, any land outside the limits of that deed. The understanding was that I was to take that part. I claimed all the land, except the 30 acres in the north end. I claimed according to the description in that deed. Never authorized my tenant, or any one else, to fence any land outside of that 51.90 acres. If Dunn inclosed any outside of that, it was done without my permission. I don't believe it was done. I was there after the fence was built. I think the fence was built according to the deed and the description from the survey. *Question.* Then, if that land was inclosed by your tenant, was it, or was it not, by mistake? *Answer.* Yes, sir; \* \* \* and without my knowledge." On the 13th of December, 1875, Eugene J. Gannon sold and conveyed his south tract to Henry Waggoner, who testified he had no knowledge whether the fence was on the boundary line described by the deed or not; that he claimed nothing but what the deed gave him,—simply went by it, and

never authorized anybody to make any other claim for him. January 20, 1876, Waggoner sold the tract to defendant Broer B. Haagsma, who went into possession in the spring of 1877, and who testifies that under the Waggoner deed he took possession of all the land south of the fence, claimed under that deed up to the fence, and ever since has been in possession under such claim. From the time this partition was made and the deeds executed by the Gannon brothers, June 30, 1873, William Dunn was in possession of the south tract, as the tenant of Eugene, and occupied up to the division fence, which he built, until Haagsma went into possession, in 1876. This suit was instituted December 4, 1885. The fence that Dunn built disappeared some seven or eight years before this suit was brought, and two or three years before it was brought a wire fence was built, to which defendants claim, and which incloses in their tract the four-acre strip sued for, and which, according to the deeds, is within the boundaries of plaintiff's 30-acre tract. There was evidence tending to prove that the wire fence was on or near the same line on which the Dunn fence stood. It is unnecessary to set out or review the instructions in detail. Conceding that the wire fence is on the same line upon which Dunn built the rail fence; that the defendants, and those under whom they claim, have been in the continuous and uninterrupted possession of the four-acre strip of plaintiff's land inclosed by those fences, with the southern tract, claiming the land up to the line of that fence for more than 10 years before the institution of this suit,—yet the uncontradicted evidence is that they so occupied and claimed it under the belief that those fences were on the true line, and without any intention to claim beyond the true line, as called for in their deeds; and there is not a *scintilla* of evidence tending to show any agreement at any time between the adjoining proprietors establishing the line of such fence as the division line between the tracts, regardless of the fact whether it was the true line or not. They simply held to that line under the mistaken belief that it was the true line. Such holding is not adverse to the real owner, according to the true line, as has been held repeatedly in this state. *Krider v. Milner*, ante, 461, (last delivery); *Schad v. Sharp*, 95 Mo. 573, 8 S. W. Rep. 549; *Jacobs v. Moseley*, 91 Mo. 457, 4 S. W. Rep. 135. The instructions of the court were in harmony with the ruling in these and other cases to the same purport, which it is unnecessary to cite. The judgment was for the right party, and is affirmed.

All concur.

STATE ex rel. DAWSON v. ROMBAUER et al.,  
Judges.

(Supreme Court of Missouri. Dec. 21, 1889.)

DIVORCE—ALIMONY—PENDING APPEAL—WRITS OF  
PROHIBITION.

1. It being within the power of the circuit court, under Rev. St. Mo. 1879, § 2179, to decree

alimony *pendente lite*, the court of appeals, on appeal, may determine the time during which such order shall require payment to be made, and direct all arrears to be paid before entry of judgment in favor of the payor, though no exceptions were taken to such order.

2. Const. Mo. art. 6, § 8, providing that the supreme court shall have control over the courts of appeal by *mandamus*, prohibition, and *certiorari*, only authorizes the writ of prohibition when the court of appeals has no jurisdiction over the matter which it is proceeding to determine.

Petition for writ of prohibition.

*Martin, Laughlin & Kern*, for petitioner.  
*D. H. McIntyre* and *Zach J. Mitchell*, for respondents.

BLACK, J. This is an original proceeding in this court, by prohibition against the judges of the St. Louis court of appeals, to restrain them from making a threatened order or judgment in a cause now pending in that court on appeal from the circuit court of St. Louis county, wherein the present relator, James Dawson, is plaintiff and Eva Dawson is defendant and the appellant. The history of that case, so far as important to a disposition of this one, is this: James Dawson commenced the suit, which was for divorce, in February, 1885. The circuit court, on the 1st of June, 1885, made the following order: "It is ordered that the plaintiff pay to defendant, for her separate maintenance of self and child during the pendency of this suit, the sum of \$50 per month, on the first day of each and every month, commencing on the first day of June, 1885; also, the sum of \$100, to and for the use of counsel." Thereafter the defendant made affidavit of prejudice against the regular judge, and the parties agreed upon a special judge, who heard the evidence, and in December, 1885, rendered judgment dismissing the petition and cross-bill. The plaintiff appealed; and on the 11th May, 1886, the St. Louis court of appeals reversed the judgment, and directed the circuit court to enter up a decree of divorce in favor of the plaintiff; adding, however, these words: "The plaintiff first paying to the defendant, or into court for her use, all arrearages, if any, in the alimony heretofore awarded to her by the trial court." No exceptions had been taken to the order of the circuit court allowing alimony *pendente lite*, but a suggestion had been made in the court of appeals that plaintiff was two months in arrear in the payment of alimony at the date of the judgment of reversal. The regular judge of the circuit court, on the presentation of the mandate of the court of appeals, entered up a judgment of divorce in favor of the plaintiff; and the defendant appealed. This judgment of the circuit court was reversed for the sole reason that it should have been entered by the special judge. This second judgment of reversal contained the same directions to the trial court as did the former one. On the 22d June, 1888, the special judge heard the cause, found that the alimony had been paid, as he construed the former order, and gave judgment for divorce

in favor of the plaintiff. The defendant again appealed to the court of appeals. It appears that the plaintiff paid the \$50 per month, not only to the date of the first judgment of the circuit court dismissing the petition and cross-bill, but to the 11th May, 1886, the date at which the court of appeals rendered the first judgment of reversal, and by which it was held that the plaintiff was entitled to a decree of divorce; but he made no further payments of alimony. The sole question on the third appeal was whether he should have been required to pay the alimony *pendente lite*, down to the date of the last judgment entered by the special judge, on the 22d June, 1888. The court of appeals reached the conclusion, after two arguments, that he should, and entered a judgment requiring the plaintiff to pay into that court alimony *pendente lite*, to and including the month of June, 1888; otherwise, the decree of the trial court would be reversed, and the case remanded, with directions to enter a decree of divorce in favor of plaintiff, but with the addition that plaintiff be adjudged to pay the defendant the arrears of alimony above named. The relator contends—*First*, that the order of the circuit court for the payment of alimony *pendente lite* terminated with the judgment of the circuit court, made on 23d December, 1885, dismissing the petition and cross-bill, and did not contemplate the payment of such alimony pending the appeal in the court of appeals; *second*, that under no construction can it be held to extend beyond 11th May, 1886, at which date the court of appeals adjudged the defendant the guilty party, and the plaintiff entitled to a decree; *third*, that the court of appeals is without jurisdiction to decree alimony *pendente lite*, and, under the pretense of construing the order of the circuit court, has usurped jurisdiction over the matter of alimony, and, unless restrained, will carry into effect its last judgment, and make the payment of \$1,150 a condition to a decree of divorce.

Our jurisdiction to issue the writ of prohibition is invoked by authority of section 3, art. 6, of the constitution; but, aside from that, section 8 of the amendment of 1884 provides that "the supreme court shall have superintending control over the courts of appeal by *mandamus*, prohibition, and *certiorari*." Our jurisdiction must, however, be exercised according to the usages and principles of the common law. The purpose of the writ is to prevent the inferior tribunal from assuming a jurisdiction with which it is not legally vested. If the lower court has jurisdiction to determine the question before it, prohibition will not lie. *State v. Burckhardt*, 87 Mo. 533. There can be no doubt but the St. Louis court of appeals had the sole and exclusive jurisdiction to hear and determine the several appeals prosecuted in the divorce suit. No other court had jurisdiction of those appeals. But it cannot be said that the writ will be issued only in those cases where the

lower court has no jurisdiction whatever over the case before it. High says: "The province of the writ is not necessarily confined to cases where the subordinate court is absolutely devoid of jurisdiction, but is also extended to cases where such tribunal, although rightfully entertaining jurisdiction of the subject-matter in controversy, has exceeded its legitimate powers." High, Extr. Rem. (2d Ed.) § 781. Especially is this true where there is no remedy by appeal, as in the case now in hand. Enough has been said, however, to show that the relator is not entitled to the writ by simply making it appear that the court of appeals erred in its ruling. The writ cannot be awarded for the simple purpose of correcting errors, if any there were. It must clearly appear that the court of appeals has exceeded its legitimate powers.

Now, to determine whether the court of appeals may, in directing a decree of divorce, attach a condition that the plaintiff, being the husband, must first pay all arrears of alimony *pendente lite*, it is necessary to see whether the circuit court has that power. The circuit court may decree alimony pending the suit for divorce in all cases where the same would be just, whether the wife be plaintiff or defendant, and enforce such order in the manner provided by law in other cases. Section 2179, Rev. St. Under our ruling, it is the only court which can make the order, whether the case be pending in the circuit or appellate court, though the order, when made, may be reviewed on appeal. *State v. Court of Appeals*, 88 Mo. 135; *State v. Seddon*, 93 Mo. 520, 6 S. W. Rep. 342. Payment of such alimony may undoubtedly be enforced by execution and sequestration of property. But the power of the court does not end here. Though we have no ecclesiastical courts, still original jurisdiction in divorce matters is conferred upon the circuit courts; and, since we have adopted the common law, we have also adopted the English practice, so far as it relates to the substantial rights of the parties, except as the common law is modified by statute. *Morton v. Morton*, 33 Mo. 614; *Waters v. Waters*, 49 Mo. 386; *Crews v. Mooney*, 74 Mo. 26; 1 Bish. Mar. & Div. (6th Ed.) § 86. Taking away privileges in the cause is sometimes resorted to to enforce payment of alimony awarded pending the litigation. 2 Bish. Mar. & Div. (6th Ed.) § 498; 1 Amer. & Eng. Cyclop. Law, 485, 486; *Walker v. Walker*, 20 Hun., 400. It is said that the failure of the husband to pay alimony will, in extreme cases, only justify the court in striking out his answer; but, when he is the plaintiff, his failure or refusal to obey such an order will warrant the dismissal of the cause. *Peel v. Peel*, 50 Iowa, 520. In *Latham v. Latham*, 2 Swab. & T. 299, the court refused to make a decree nisi absolute until the husband paid money due to the wife on account of alimony *pendente lite*; he then residing in Indiana. It is not our purpose to say or indicate how far courts should go in depriving the husband, when plaintiff, of



his decree until he has paid all arrears of alimony. It is enough, for all the purposes of this case, to know that the power exists. If it exists in the trial court, it must exist in the appellate court, when that court undertakes to enter a final decree, or to give directions as to what decree should be entered. When the appeal came before the court of appeals, that court had the unquestioned right to give such judgment as in its opinion should have been given by the circuit court, or it could reverse the judgment and remand the cause, with directions. But, as no exceptions were taken to the order awarding alimony, and no appeal was taken therefrom, it is argued that the court of appeals had nothing to do with that order. The court had nothing to do with the order, so far as reviewing it was concerned; but, when the court came to direct what judgment should be entered by the circuit court, it had the right to look to the whole record in the cause, and this is what it did do. It took into consideration the fact that there was an existing order for the payment of alimony.

Now, as to the duration of the order of the circuit court awarding alimony pending the suit. This order was made at the outset of the litigation. It was certainly within the power of the circuit court to make an order upon that subject which would continue during the time the suit was pending on appeal. Whether the order expired when the circuit court dismissed the plaintiff's petition, or when the court of appeals declared the defendant the guilty party, or not until there was a final judgment dissolving the marriage contract, are questions which were considered on the last appeal. The court of appeals had the undoubted jurisdiction to hear and determine these matters. This court cannot review their rulings, save by making the writ of prohibition a substitute for a writ of error. Our duty is performed when we conclude, as we do, that the court of appeals acted throughout within its lawful jurisdiction. The writ is therefore denied. All concur; BARCLAY, J., in the result.

#### HENRY *et ux.* v. SNEED *et al.*

(Supreme Court of Missouri. Dec. 21, 1889.)

WITNESS—HUSBAND AND WIFE—NEGOTIABLE INSTRUMENTS—FRAUD—BONA FIDE HOLDERS—ESTOPPEL.

1. In an action to enjoin the enforcement of a deed of trust securing upon the wife's land certain notes given by the husband in a transaction induced by fraud, the husband and wife may testify as to conversations between themselves as to the transaction, as a part of the *res gestæ*, and also on the ground of fraud.

2. An answer alleging purchase in good faith supplies the omission of such issue in a petition to enjoin sale of securities.

3. It clearly appearing in such case that the notes were tainted with fraud, and the answer having alleged purchase in good faith, the burden is on defendant to show a *bona fide* transfer before maturity, which is not sustained by evidence from which the date of transfer does not appear except by inference.

4. Knowledge of an agent that "there was

some trouble about the trade" in which certain notes were given, charges his principal for whom he purchases such notes with knowledge of the fraud.

5. Where notes of the husband, procured through fraud, are secured by a recorded deed of trust on the wife's land, knowledge by an indorsee that the husband had executed a compromise of his claim of fraud will not make him an innocent purchaser as to the wife.

6. Though the wife on whose land notes of her husband are secured is a surety for him, a compromise by the husband on account of the fraud through which the notes were procured will not estop her from setting up the fraud, especially where there is no evidence as to the nature of her estate in the land.

Appeal from circuit court, Pettis county; J. P. STROTHER, Judge.

Petition by Wilbur F. Henry and E. Josephine Henry, his wife, for an injunction restraining Robert C. Sneed, and one Montgomery, trustee under a deed of trust, from selling thereunder the property of Mrs. Henry. The injunction was granted, and defendants appeal.

*John Montgomery, Jr., and Smith, Silver & Brown*, for appellants. *W. S. Shirk and E. J. Smith*, for respondents.

SHERWOOD, J. Robert C. Sneed, of Sedalia, owned a set of abstract books, worth, according to Money's statement, not over \$2,000, for which he was willing to take \$4,000, and offered them to H. D. Stringer for that sum, so Stringer says; but Stringer thought of something better than that, and so suggested it to Sneed. Thereupon they laid their heads together, and, by certain covinous contrivances, so managed matters that one Capt. Wilbur F. Henry, the nominal plaintiff herein, and whose powers of deglutition seem to rival those of the great fish off the coast of Tarshish, was induced by false memoranda, in the hands of Sneed, to believe that the abstract books had brought in to Sneed the previous year a revenue of \$7,000; and, after considerable apparent efforts on the part of Stringer, Sneed was led, with much pretended reluctance, to fix a price on the books at \$10,000.—Stringer in the mean while having so manipulated Henry, and inflamed his imagination as to the great profits to be gained thereby, as to have persuaded him to go in with him and buy the books; the terms stated to Henry being that Stringer would put in \$5,000, "spot cash," for one-half interest, and Henry, who was impecunious, and known to be so, was to raise his half of the purchase money by giving five notes, of \$1,000 each, having several years to run, and securing the same on the real property of his wife in Sedalia, as well as on his interest in the abstract books. The books were accordingly bought at the sum mentioned, (\$10,000;) and "Bed Shobe," who assisted in bringing about the consummation of the affair, and was the notary who took the wife's acknowledgment to the deed of trust, was the partner of Stringer in the real-estate business, and was handsomely paid for his trouble in assisting Sneed and Stringer in their machinations against Hen-

ry. When the trade was about to be closed, Stringer left town, but, on going, placed in Shobe's hands a check for \$5,000 on the First National Bank of Sedalia, of which Thompson, Sneed's brother-in-law, was cashier. This check was payable to Shobe's order, and he, on the trade being closed, indorsed and delivered it to Sneed, who went through the dumb show of examining the signatures, and then pronounced it "good," and also said that he had been to the bank to see, etc. Stringer had no funds in the bank, and he says in his deposition: "That check business was arranged by me to shut the Capt.'s eyes." Stringer was to get his half interest in the books "for nothing," in consideration of his services in effecting the sale of one-half interest in the books to Henry, or he was to receive \$1,000, at his option, and it seems he took the latter. The check was never presented to the bank, nor was it ever intended to be. Sneed knew this, and Thompson knew it. The latter at the time, and for years previously, had been the financial agent of the Salmon Falls Bank, and so continued during the time covered by this litigation. The last four of the five notes executed by Henry, and secured as aforesaid, were transferred by Sneed to Thompson to negotiate; the first one of them being retained by Thompson in order to prevent its being negotiated, and Sneed still owns this note. Thompson transferred the other four notes, so he says, to the Salmon Falls Bank, and paid Sneed \$3,700 as the proceeds of such transfer. Without Mrs. Henry's knowledge or consent, Sneed, after the deed of trust was given, released Henry's half interest in the abstract books from that deed. As soon as the \$1,000 note which first fell due matured, Montgomery, the trustee, advertised the property for sale, and this proceeding was instituted with the purpose to perpetually enjoin and restrain the trustee and the defendant Sneed from selling Mrs. Henry's property under said deed; that said deed might be set aside and annulled, and all cloud cast by the same on the title be removed, etc. The Salmon Falls Bank, as the petition recites, was "made a party hereto on its own motion, claims to be owner of said notes, and claims some rights under said deed of trust; wherefore it is made a party hereto, that its rights, if any, in the premises may be litigated and determined." The petition did not charge any fraud, nor any notice thereof, on the bank; but in its separate answer the latter set up the purchase of the notes before maturity for full value, and without any notice of the equities alleged by plaintiffs, etc. A short time after Capt. Henry had purchased the one-half interest in the books, and had commenced to do business with them, he observed the smallness of the receipts from them; heard from friends that he had been swindled; began to suspect the honesty of the transaction; and so went around to the bank, and asked Thompson if the check for

\$5,000, given by Stringer, had ever been presented or paid, but was told by the latter that that was a "bank secret." Growing more dissatisfied, Henry instituted, in his own name and behalf, a proceeding similar to the present one, which, upon representations and assurances of Sneed and Stringer that the transaction was honest, and that the check for \$5,000 had actually been paid, he was induced to compromise, and gave a writing to that effect, to Sneed, which the latter, it seems, lost no time in showing to Thompson, who thereupon asked Henry in regard to it, when he told him that the suit had been settled and dismissed, and that he knew no good reason why he should not negotiate the notes; and the notes were thereafter negotiated by Thompson as aforesaid. At this time, however, Henry did not know, though he strongly suspected, that the transaction was not a fair and honest one,—was not apprised, did not have the knowledge, that the "check business" was a mere sham, contrived for the very purpose of deceiving him, and through him his wife, into securing the notes; and Thompson evidently knew that Henry did not know the true character of the check, while he did.

Upon this state of facts, a mere outline of which has been given, the circuit court entered the following decree: "Now, at this time, come again the parties to this action, by themselves and their attorneys, and this cause having been tried, and the evidence heard, as well as the argument of counsel, at the last term of this court, and said cause having been taken under advisement by the court till now, and the court having fully considered the same, it doth now find all the issues herein for the plaintiffs, and doth find that on July 18, 1883, the plaintiff E. Josephine Henry, then and now wife of plaintiff Wilbur F. Henry, owned in her own right, as her general property, one hundred feet off of the north end of the west half of lot one, (1,) in block thirty-seven, (37,) in the original town (now city) of Sedalia, in Pettis county, Missouri; and that on said day the plaintiff Wilbur F. Henry executed to defendant R. C. Sneed his five promissory notes described in the petition, being for one thousand dollars each, and bearing seven per cent. per annum interest, and falling due in one, two, three, four, and five years, respectively from that date; that to secure said notes the plaintiffs executed and delivered to defendant John Montgomery, Jr., their deed of trust, which is recorded in Book 32 of deeds of trust and mortgage records in said county, on page 48, conveying to him the above-described real estate, and certain abstract books, and personal property described in it,—said books and personal property being the consideration of said notes, with power to sell the same on failure to pay said notes as therein provided; and the court doth find that the execution of said notes and deed of trust was procured by fraud and deceit, as stated in the petition herein, practiced on said W. F. Henry and E.

Josephine Henry; and that thereafter the said Sneed, for a valuable consideration, released said books and personal property from said deed of trust, said books and personal property being the property of said Wilbur F. Henry, and that plaintiff E. Josephine Henry had not at the time, or till about the commencement of this suit, any knowledge or notice of the said release of said books and property; and the court further finds that, although it appears that thereafter the defendant Salmon Falls Bank, through its agent, J. C. Thompson, bought all of said notes except the one first falling due, and before the maturity of the same, yet said bank is not an innocent purchaser thereof, but in fact had by its said agent full knowledge and notice of said fraud, and also of said release of said books and personal property, at the time of said purchase; and said agent assisted, by concealment of facts within his knowledge, and by declining when asked for the same by said W. F. Henry to state to him said facts as to the perpetration of said fraud; and the said bank thereafter, with notice of all said facts, bought said notes at a discount from their face value, and is not an innocent purchaser, or entitled to the protection of the court. Wherefore it is ordered by the court that the injunction herein be made perpetual, and that the defendants, and each of them, and all persons acting for them, or by, through, or under them, be forever restrained and enjoined from selling said above-described real estate, or any of the same, under said deed of trust; and that said deed of trust be, and the same is hereby, fully canceled, and held for naught; and it is adjudged that plaintiffs recover of said defendant B. C. Sneed their costs and charges herein expended, and that execution issue therefor."

1. We are met at the outset of the investigation of the errors assigned by the declaration that error was committed by the trial court in admitting the husband as well as the wife to testify in relation to conversations between themselves as to the transaction concerning the abstract books. It does not appear in the evidence before us whether the wife had a separate estate in the land in question, or whether she was seised of a fee in the land at common law, or whether she gained her title under the provisions of the married woman's act, or whether the husband and wife were in actual occupation of the property. If the wife were seised under the act just mentioned, it might be very difficult to state just how much, if any, "marital interest" the husband would have in his wife's land, in consideration of the stringent provisions of section §295, Rev. St. 1879. Nor does it appear whether the husband was tenant by the curtesy initiate. And, inasmuch as there is no testimony on this point, it would be unsafe to say just what the husband's interest in the case before us is. Several things are, however, made very clear by the testimony: (1) That the defendants Sneed, Stringer, and Shobe were engaged in

a most audacious scheme of fraud. (2) That the husband was used as the conduit through which the fraud-feasors operated to induce the wife reluctantly to sign and acknowledge the deed of trust, which would have accomplished the end desired and designed by the conspirators but for the timely interposition of a court of equity. The conversations, then, between the husband and wife, which brought about, and were intended to bring about, the result had in view, were clearly a part of the *res gesta*, (State v. Gabriel, 88 Mo. 631, and cases cited;) and would therefore seem to occupy a different attitude from the ordinary confidential communications between husband and wife. On one occasion we held that a letter written by the husband to his wife, authorizing her to take the title to certain land in his name, did not fall within the rule respecting confidential communications between husband and wife, nor did the testimony of the former touching such letter fall within such rule. Darrier v. Darrier, 58 Mo. 222, and cases cited. But that was a contest *inter sese*. We incline to the opinion, however, that the testimony of both the husband and wife, as to the conversations referred to, was admissible on a much broader ground and for a more elevated reason. At common law parties to the record were admitted as witnesses, as a marked exception to the general rule, where fraud was charged, or embezzlement, or where, on general grounds of public policy, it was deemed essential to the purposes of justice. 1 Greenl. Ev. (14th Ed.) § 348, and cases cited. In the present case Sneed attempted to take advantage of a legal technicality as to conversations between husband and wife to prevent the full extent of his fraud from being unearthed. Now, in view of the other facts in evidence, it would be simply monstrous to permit a party to take advantage of his own wrong and assist his own fraud by such an objection. The rule he invokes was intended to subserve a very wise, wholesome, and holy purpose, but never to further such an end as that for which he invokes it. And this exception to a general rule should certainly have place in a court of equity, which will throttle fraud in all of its Protean manifestations. We shall therefore rule that the testimony of both husband and wife was, *ex necessitate*, competent as to their conversations, on two grounds,—that those conversations were a part of the *res gesta*, and on the foot of the fraud.

2. But it is said that the bank was an innocent purchaser of the notes; that, as such purchaser, it took the mortgage with them as an incident possessing all the negotiable characteristics of the notes themselves, and therefore the bank should prevail. "The principle is well established that if the maker or acceptor, who is primarily liable for payment of the instrument, or any party bound by the original consideration, proves that there was fraud or illegality in the inception of the instrument, or if the circumstances raise

a strong suspicion of fraud or illegality, the owner must then respond by showing that he acquired it *bona fide* for value, in the usual course of business, while current, and under circumstances which create no presumption that he knew the facts which impeach its validity. This principle is obviously salutary, for the presumption is natural that an instrument so issued would be quickly transferred to another." 1 Daniel, Neg. Inst. (3d Ed.) § 815. Where nothing else appears,—no circumstances which would operate as constructive notice of the facts which impeach the original validity of the instrument,—the holder will make out a *prima facie* case by proving that the instrument was indorsed to him for value before maturity. Having done this, his right of recovery is impregnable, unless the defendant prove that he had actual notice of facts which should have prevented a purchase by him. Id. § 819.

In the case at bar, how has the professed holder of the notes upheld its title thereto? That the notes had their origin in a base fraud no one can dispute. That Thompson was aware of the true nature of the whole transaction is equally indisputable. Stringer never at any time had any funds deposited in the bank on which the check was drawn. The check was never presented for payment or paid. Stringer had been to Thompson shortly before Henry brought his first suit, and asked him to say that the check for \$5,000 "was good," and he refused. Henry had also been to see him, endeavoring to see Stringer's bank account, and to ascertain whether the check had been paid, but could gain no information from the reticent Thompson. And the latter, as he testifies, had information additional to that already mentioned, which he had obtained from other sources; for, speaking of the time when Stringer came to see him, he says: "At that time I heard there was trouble about the trade." It was not necessary, under the authorities, to fasten notice on Thompson and his principal, the bank, that he should have had notice of the particular fraud, etc., in order that such principal should be affected by it. On this point Daniel says: "Thus, if when he took the bill he were told in express terms that there was something wrong about it, without being told what the vice was, or if it can be collected by a jury, from circumstances fairly warranting such an inference, that he knew or believed or thought that the bill was tainted with illegality or fraud, such a general or implicit notice will equally destroy the title." 1 Daniel, Neg. Inst., § 799. And while it is true there is a presumption that the transfer of the papers occurred before maturity, yet, such presumption being without any written corroborative testimony, is of the slightest nature; and open to be blown away with the slightest breath of suspicion. Id. § 784a. The circumstances already related, then, bring this case fully within the rule in regard to commercial paper, and cast the burden on the indorsee to

show such a transfer of that paper as will afford absolute protection to the holder.

No issue, it is true, was tendered by the petition as to whether the Salmon Falls Bank was a purchaser in good faith of the notes in suit, but the answer of the bank tendered such an issue in complete form; and this, under the doctrine of "express ailer," supplied any lack of the petition in this respect. Garth v. Caldwell, 72 Mo. 622, and cases cited. The bank thus assumed the affirmative of the issue itself had made. How did it support that issue? It should certainly have done so by proof of an equally affirmative character. This it signally failed to do. Thompson does not state that the notes were transferred to the bank prior to maturity. He does not pretend to give the date when the transfer occurred. He says he has "a letter that will tell," but he does not produce it; and it is only by circuitous inference and a comparison of dates that the conclusion can be reached that the notes were negotiated while current. This sort of testimony does not meet the exigencies of the rule before mentioned. The bank was challenged by its self-raised issue to give the date when the transfer of the notes occurred, and it should have done so in order to maintain its position of an innocent purchaser.

3. But granting that the bank, owing to the agreement and representations made as aforesaid by Henry to Thompson, was such a purchaser as to him, can it be so regarded as to Mrs. Henry? Her name does not appear to the agreement, nor does it appear that Thompson knew that she had been consulted or had assented thereto, or that she was even aware of its being made. And the deed of trust, being upon record, apprised Thompson, and through him the bank, of the situation of affairs, of the wife's interest in the real estate, and the relation of surety which she bore to her husband. Bank v. Burns, 46 N. Y. 170. Being thus apprised of Mrs. Henry's interest in the premises, and, besides, aware of her interest from other sources, it belonged to him to ascertain that the matter had been adjusted, not only to Henry's satisfaction, but also to his wife's. Fair dealing demanded nothing less than this at his hands. The wife was as much a party in interest as the husband; indeed, more so, because she had everything at stake. In view of the foregoing facts, the bank cannot be regarded as an innocent purchaser as to the wife, even if it can be so regarded as to the husband; and the finding of the lower court on this latter point must therefore be held as supported by the evidence.

4. But there are other and stronger reasons which conduce towards upholding the decree aforesaid. It is strenuously urged that Henry was the principal in the notes, and his wife, having mortgaged her land to secure them, was in all respects his surety, and that this being the case, Henry being estopped by his compromise agreement, his wife, being his surety, is estopped also. It may

be conceded as a general rule that the contract of the surety is accessorial to that of his principal, and that consequently whatever will estop the principal will estop the surety also. But this doctrine, well established as it is, has no bearing on the present case, for these reasons: Under the rule stated, the surety is, indeed, estopped; but why? Because he is *sui juris*, and, being competent to contract, is equally capable of being estopped. This *status* cannot be affirmed of a *feme covert*, (7 Amer. & Eng. Cyclop. Law, tit. "Estoppel," 24,) at least unless possessed of a separate estate, and there is not a particle of testimony on this point in the case before us. Treating Mrs. Henry, then, as a *feme covert*, seized of an estate in the ordinary way, she was as incapable of being estopped by an act of her husband in which she did not join as she would be by her sole deed in which he did not join. Estoppels *in pais*, except as aforesaid, do not apply to married women. Rannels v. Gerner, 80 Mo. 474, and cases cited. An estoppel *in pais* can never operate to prejudice the rights of the person estopped, except when the sole deed of such person would have a similar operative effect. Mueller v. Kaessmann, 84 Mo. 818, and cases cited. No such effect would be attributed, under the rulings of this court, to the sole deed of a married woman unpossessed of a separate estate. The uniform position taken by this court is abundantly sustained by authority. There are cases, however, reported, where married women are held estopped by fraud unmingled with contract; but in such cases their conduct must be intentional and fraudulent. Bigelow, Estop. 510 et seq. But such a charge could not be maintained against the real plaintiff in this case, Mrs. Henry.

5. And owing to the nature of the estate which it will be assumed, in the absence of proof to the contrary, the wife held, the mere relation of husband and wife created no agency in the husband to bind her by his representations, or create an estoppel against her, even had he assumed to do so. Wilcox v. Todd, 64 Mo. 888; Hall v. Callahan, 66 Mo. 816.

6. Again, cases are not wanting to show that the wife, whose property is bound for the notes of the husband, will not be estopped by the representations of the husband, though made by him to an innocent purchaser who bought of the original payee, to the effect that such notes were "good and valid securities, that there was no defense to them, and that they would be paid at maturity." Campbell v. Babcock, 27 Wis. 512.

7. And it has also been ruled that where a wife was a surety for her husband and others in the purchase of the stock of a national bank, where the proceedings were characterized by illegalities and fraud, and where the fraud was especially directed against the property of the wife, that this would authorize the wife, as such surety, to successfully invoke equitable interposition for the protection of her property, in her behalf, notwith-

standing her principals were in no position to demand a like relief, nor when they could not recede from the contract into which they had entered. Denison v. Gibson, 24 Mich. 187.

As the foregoing views dispose of all questions of any practical importance in this case, and understanding the action of the circuit court to go no further than to protect the wife's interests in her land, we affirm the judgment. All concur; BARCLAY, J., in the result.

#### IN RE HALEY.

(Supreme Court of Missouri. Dec. 21, 1889.)

#### RECEIVERS—CONTEMPT.

A receiver appointed in an attachment suit begun in the common pleas and transferred to the circuit court of another county, becomes an officer of the latter court, and for disobedience to its orders to account, is liable to be punished by it for contempt.

Petition for writ of *habeas corpus*.

W. H. Morrow, for petitioner. D. A. Ball, for respondent.

SHERWOOD, J. Estes brought suit by attachment in the Louisiana court of common pleas in Pike county, against Jacob Fry. The petitioner was appointed receiver by that court, and in that capacity, from the sale of growing crops, attached as the property of Fry, collected, exclusive of commissions, \$400.91. After the appointment of the receiver the cause was removed to St. Charles county, and finally to Ralls county, where the attachment suit was abated; and the receiver, upon the order of the circuit court for the last-named county, filed his report, showing the balance in his hands to be the sum aforesaid. Thereupon that court ordered him to pay that amount to the personal representatives of the deceased defendant. This order, though duly notified thereof, he failed to obey, without offering any excuse for such failure. Upon this, the attorneys of the personal representatives of the defendant served a notice on the petitioner, notifying him that they would move for an attachment against him for failing to obey the order of the court. Some three weeks thereafter, the petitioner having failed to appear pursuant to the notice, and having continued to fail to comply with the previous order of the court, that court made an order reciting in detail the facts aforesaid, adjudged him guilty of a contempt, directed that an attachment issue against him, and that he be confined in the county jail unless he should, on or before the 15th of October next thereafter, purge his contempt by complying with the order to pay over the money in his hands, and requiring the sheriff to confine him in the jail until he obeyed. The order last named was duly served on the petitioner on the 1st day of November, 1889. The sheriff made demand upon him for the payment of the money; and he, still declining to pay, was, on the 11th day of that month, attached and committed

to prison, from which he seeks to be released by the present writ.

The transfer of the cause by change of venue took with it the whole cause, and every incident belonging thereto, to the Ralls circuit court, just the same as if the cause had originated in that court. Not a shred or patch of jurisdiction over the cause, or any of its incidents, was left in the Louisiana court of common pleas. The jurisdiction of the Ralls circuit court was therefore complete over the petitioner. Having failed to obey the orders of the court, he became guilty of a manifest contempt by such disobedience. He was an officer of the court to which the cause was transferred. He was required to report his proceedings to that court, and "to hold the moneys collected, and all property received by him, subject to the order of court." Rev. St. § 430. The court dealt very leniently with him. It chose to give him notice before making the final order committing him. It gave him ample time and space for obedience of its final order. There was, therefore, only one course left for the court to pursue in order to maintain itself, and the respect due to its orders. The judgment of that court committing the petitioner to jail being in conformity to law, (Rev. St. 1879, § 2648,) we shall remand him; and it is so ordered. All concur; BARCLAY, J., in the result.

#### KENTON INS. CO. v. WIGGINTON.

(Court of Appeals of Kentucky. Dec. 5, 1889.)

##### INSURANCE—PROOF OF LOSS—REPRESENTATIONS.

1. Failure to make preliminary proof of loss is excused where it appears that the insured applied for blanks to the local agent, who said he would write for some, which he did, but, receiving none, went to the home office, and was told some one would be sent to see about it, and so reported to the insured.

2. The building insured stood on a large tract which insured stated he owned unconditionally. He owned an undivided fourth in fee, and a life-interest in the remainder; but at the time the extent of his interest in the remainder, whether for life, or in fee, was in litigation. The building was his dwelling, built at his expense. Held that, as in a partition the building would be assigned to him with his fourth, his representation did not avoid the policy.

3. Representations as to the value of the property insured will not avoid the policy where they are made in good faith, and the evidence in an action thereon as to value is conflicting.

Appeal from circuit court, Carroll county.  
"To be officially reported."

Action by C. S. Wigginton against the Kenton Insurance Company on a policy of insurance. From a judgment of the circuit court for plaintiff, defendant appealed to the superior court, where the judgment was affirmed, and he again appeals.

*Collins & Fenley*, for appellant. *Geo. C. Drane* and *J. A. Donaldson*, for appellee.

PRYOR, J. The appellant, the Kenton Insurance Company, made a contract of insurance with the appellee, Wigginton, by which the company insured his dwelling-house

against loss or damage by fire for the period of three years from the 2d day of November, 1886. The policy of insurance contains the usual stipulations with regard to notice and the preliminary proof as to the loss, as well as the representations by the insured that he was the owner in fee of the property. The dwelling insured having been destroyed by fire, the appellant refused to pay the loss, for the following reasons: *First*. It contends that no preliminary proof of the loss was made and presented to the company as the contract of insurance required; and, that being a condition precedent on the part of the insured, the recovery should have been denied. *Second*. The insured owned only an interest of one-fourth in the property when he represented that he was the sole owner in fee. *Third*. The title to the property was in litigation in the Carroll circuit court when the insurance was effected by the appellee; and, the contract of insurance making the policy void if that fact is not disclosed, no recovery should be had.

The policy provides that no action shall be maintained until the proofs of loss are furnished as required by the contract, and the application must disclose the true character of the title; and, if incumbered or involved in litigation, such facts must be disclosed by the insured. An examination of this record has satisfied us that no valid defense has been made out, and the absence of the preliminary proofs essential to the demand of payment from the company was caused by the conduct of the company or its agents, and for which the appellee is in no wise responsible. As soon as the fire occurred, and the appellee's property was destroyed, he notified the local agent of the company, and asked him for the usual blank forms kept and furnished by such companies to the insured as a guide in proving the loss sustained, and, in response, was told that the agent had no blank forms, but would write or see the principal agent or the home office on the subject. The principal office having been notified of the destruction of the property, and the appellee becoming restless at the delay in delivering to him the formula for making his preliminary proof, the local agent went to Covington, the place of the principal office, and was there told, in effect, that some one would be sent down to see about the matter, or to settle it, all of which was communicated to Wigginton, who relied on the statements of the local agent, that are not denied by the company, but admitted to be true. The home office knew that the written forms had been applied for by Wigginton, the appellee, at the office of the agent at Carrollton; had been written to by this agent to send the forms, and, instead of doing so, or delivering them to the local agent, who had gone to the home office to inquire about the delay, said to the agent, "We will send some one down to see about it," and this "some one" did come, but never saw the appellee, or approached him on the subject, nor did he give

the latter the opportunity of seeing him, but left the town of Carrollton as if the matter was of no importance to the appellee or the company. The appellee began to comply with his contract the morning after the fire, and attempted to do everything that was necessary to notify the company of his loss, but delay after delay, resulting more from the action of the company than that of the appellee, prevented the proofs from being made within the 30 days; and that the appellee was lulled into security by the conduct of the company or its agents is too plain a proposition to be controverted. There was not the shadow of a suspicion that the dwelling was burned for the purpose of obtaining the insurance; and the appellee, no doubt a plain, unsuspecting farmer, confiding in the statements of the local agent, and with the full belief that this company was preparing to adjust the loss, took no steps to present the proofs, except in the manner stated, and is now met with the defense that the company was delaying payment for the want of the proof of loss, and the still further defense that no payment would have been made, if the proof had been furnished, because the appellee was not the owner in fee of the property insured. The general doctrine in regard to such conduct on the part of insurance companies can be well applied in this case: The preliminary proof of loss "will be excused on the ground of waiver by the insurers, if their conduct is such as to induce delay, or to render the production or correction useless or unavailing, or as to induce in the mind of the insured a belief that no proofs will be required." May, Ins. § 468.

It appears from the application made by the appellee that the building insured stood on a tract of land containing 224 acres, and, in the answer propounded to a question as to the title, he stated that he was the fee-simple owner, or rather the unconditional owner, of the entire tract. Whether any difference exists in a case like this in the meaning of the words "the owner in fee" and "the unconditional owner" is not necessary to determine; and, in considering the question of title, the case will be disposed of as if the appellee had represented to the agent that he was the owner in fee of the entire tract of land. He in fact owned but one-fourth of the whole tract in fee, with a life-estate in remainder, but was then claiming a fee in the whole; the sole question being involved in a litigation, then pending, as to the extent of his interest in the remainder, he claiming a fee, and the children of his wife by her first husband insisting that he had a life-estate only. The agent, or rather Gullion, who was a sub-agent of the local agent, with whom the appellee made the contract, was fully cognizant of all the facts. It is said, however, that this subagent was not employed by the company, but by the local agent, without any authority from the company to appoint him, or to conduct its business in that mode. This is doubtless the fact of the record; but the

appellee, nevertheless, had not imposed on the company by perpetrating an actual fraud, but made his representations to one whom he believed was the agent, and who knew the condition of the title. So neither Davis nor the agent of Davis was imposed on by the appellee; but, the company ignoring the authority of Gullion, the case must be determined on the materiality of the representation made as to the title, and its effect on the company. So we find the appellee the owner of one-fourth of the entire land in fee, and a life-estate in the balance, living on the land, and in a building erected out of his own means, and necessary, and we might say indispensable, as a habitation for himself and family. He is a tenant in common of the whole tract, and the dwelling insured (built at his own expense, or remodeled) was an old one that was valueless, that cost him \$2,000. It is not pretended that the land cannot be divided so as to include the improvement made by the appellee, and allot to him that portion of the land where he has lived since the year 1864. He was the owner in fee of the one-fourth interest, and in good faith believed that he held the fee to the whole tract, but this court held otherwise in the case of *Peak v. Wigginton*, 11 S. W. Rep. 89, (decided at the last term.) It is manifest that in a division of this land the building would have been assigned to the appellee without estimating its value. The old building was worthless, and the entire expense incurred by the appellee in remodeling it, and the fact that the title is not purely legal, is no argument against this recovery. There was no incumbrance on this one-fourth interest, or litigation in regard to it; and, the tenant in common having the right to improve the land, and to erect such buildings as would enable him to live on it, if the other tenants get their part of the land in its unimproved state, without regard to the improvements made by their co-tenant, no one will be heard to complain. The improvements in such a case, as was held in *Nelson's Heirs v. Clay's Heirs*, 7 J. J. Marsh. 139, "will be assigned in the partition to the tenant making them." It certainly would constitute no defense on the part of the appellant if, instead of a conveyance of record, the appellee had only a bond for title, with all the purchase money paid. The representation as to the title to the entire tract was not fraudulent, but made in the best of faith; nor was it material to the risk, because the appellee was entitled to his one-fourth interest in fee, including the dwelling insured. The appellee was the unconditional owner of this dwelling, and the ground upon which it stood, free of any incumbrance; and the fact that he did not own the entire tract, although he may have so stated, could in no manner have affected the rights of the insurance company, or misled its agent when taking the risk; and no court, it seems to us, should hold that the fee was not in the appellee for the reason that partition had not been made.



It is further claimed that the dwelling was not of the value placed upon it by the insured. The testimony on his part shows that the building cost him \$2,000, and the valuation, at best, is a mere matter of opinion, as is evidenced by the conflicting statements of witnesses in this case; and therefore, unless there is proof showing that the insured has purposely fixed a high estimate upon his property, with a view of obtaining that to which he is not entitled, the mere expression of an opinion as to value, in the absence of bad faith, cannot be held to be either defective or fraudulent. Under the statute of February 4, 1874, neither representations nor warranties affect the right of recovery, unless "material to the risk, or fraudulent;" and where the property belongs to the insured, or, if a joint owner, and, between him and his co-tenants, he is entitled to the property insured, the mere fact that there has been no partition, or a partition without a conveyance, if otherwise free of incumbrance or lien, will constitute no defense by the company. The best of faith has been shown in this entire transaction, on the part of the appellee towards the appellant, and there is no reason, upon any principle of law, equity, or justice, for relieving the appellant from its liability. Judgment affirmed.

#### HEAD *et ux.* v. STRAUSS *et al.*

(Court of Appeals of Kentucky. Dec. 5, 1889.)

##### FRAUDULENT CONVEYANCES—HUSBAND AND WIFE.

An answer to a creditor's bill, which, though claiming a homestead, does not allege occupation, or intent to occupy, as such, is good on demurrer, where it shows that the wife, at marriage, owned certain land which was sold on promise of her husband to convey to her other land, and that accordingly he purchased the land in question, and had the same conveyed to her, without fraud, before plaintiff's execution issued.

Appeal from circuit court, Washington county.

"Not to be officially reported."

Action by Strauss & Frank against Head and wife to subject property held in the name of the wife to the payment of judgment obtained by plaintiffs against Head. From an order sustaining a demurrer to the answer of the defendants, they appeal.

J. W. S. Clements, for appellants. W. C. McChord, for appellees.

HOLT, J. The demurrer, in this case, to the answer of Head and wife should have been overruled. The pleading was undoubtedly insufficient, so far as it attempts to assert a homestead right. There is no averment that they had ever occupied the property in contest as a homestead, or that they ever intended to do so. It does aver, however, "that defendant Susie, at the time she married her co-defendant, owned a tract of land, situated in Washington county, worth \$512.50; that her said husband persuaded her to sell the same, and, in consideration thereof, agreed and bound himself to convey other real property to her; that he, on the — day of

—, 1886, bought a tract of land in Mercer county, and had the same deeded so as to convey to her an interest therein of the value of \$512.50; that on the — day of —, 1887, in consideration of her agreeing and consenting to a sale thereof, and signing the deed therefor, her said husband agreed and promised her that he would invest her interest, or the value of same, in other real estate, and have the same conveyed to her, and that on said consideration and in order to carry out the contract made with her, in order to induce her to sell her interest in the Mercer land, her husband purchased the house and lot in the petition named, and had the same conveyed to her." It also denies all fraud, and avers that the conveyance was made to the wife before the execution of the appellees, who were creditors of the husband, came to the officer's hands. All of these averments must upon demurrer be accepted as true. When the deed was made to the wife there was no existing lien in favor of the appellees upon the property. Their debt appears to have been created subsequent to the equity and right of the wife; and, taking the statements of her answer as true, as we must, a state of case is presented where she is entitled to be protected. If her answer states the truth, then her husband had the right to convey, or have conveyed, to her the property. Her claim upon her husband was as meritorious as that of the creditor, and elder in time. We cannot, of course, foresee what state of case may be shown in the future by the testimony. One may be presented showing that the husband, by their acquisition, became entitled absolutely to the wife's means, without any expectation or intention of thereafter securing her in the enjoyment of an equivalent, or that the deed to the property in contest was made for fraudulent purposes. The court must, of course, determine these matters from the evidence that may be produced; but, taking the answer as true, the demurrer to it should not have been sustained. Judgment reversed, and cause remanded, with directions to overrule the demurrer, and for further proceedings consistent with this opinion.

#### ANDERSON v. JETT *et al.*

(Court of Appeals of Kentucky. Dec. 12, 1889.)

##### CARRIERS—POOLING AGREEMENTS—PUBLIC POLICY.

An agreement, between owners of two rival steam-boats on the Kentucky river, that, in order to prevent rivalry and consequent reduction of charges, the net profits of each should be shared in a certain proportion, each bearing its own expenses, and that, if the owners of either boat should sell with a view of going out of the trade, notice should be given to the owners of the other boat, and the owners so selling should not enter the trade again within one year, is void, as against public policy, and the owners so selling may start a new boat within the year.

Appeal from circuit court, Carroll county.  
"To be officially reported."

Masterson & Gaunt, for appellant. J. A.

*Donaldson and Thos. J. McElrath, for appellees.*

**BENNETT, J.** The steam-boats *Blue Wing* and *Hornet* were, prior to the 15th day of September, 1885, rivals in the freight and passenger trade on the Kentucky river; rather, they were rivals as public carriers on said river. On the 15th day of September, 1885, the appellant, George W. Anderson, as the sole owner of the *Blue Wing*, and Silas F. Douthitt, on behalf of the appellees and himself, as the controlling and managing owner of the *Hornet*, entered into a written agreement by which it was agreed that, in order to prevent the rivalry that then existed between said boats in said carrying business, and the consequent reduction of freight and passenger charges below a fair compensation, the said boats should thereafter share in the net profits earned by each in the proportion of  $62\frac{1}{2}$  per cent. to the steam-boat *Hornet* and  $37\frac{1}{2}$  per cent. to the steam-boat *Blue Wing*; that each boat should bear its own running and other expenses, and, in case the owner or owners of either boat should sell the same, such owner or owners should replace the same with another boat, just as good, to be run, and the net profits divided, as before, or, if the owner or owners of either boat should sell it, with a view of going out of the trade, notice thereof should be given to the owner or owners of the other boat, and the owner or owners so selling should not come into the trade again, either directly or indirectly, within one year thereafter; that the steam-boat *Hornet* was sold by the said Douthitt, with the view of going out of the trade; that he gave proper notice of that fact; that the appellant, by reason of said sale and notice, purchased the steam-boat *Kerr*, to take the place of the steam-boat *Hornet*; that with the *Kerr* and *Blue Wing* the appellant was doing a thriving and profitable business, which was interrupted and destroyed by said Douthitt, contrary to the agreement, bringing the *Hornet* into the trade again, as a competitor for freight and passengers, which competition had the effect to destroy the appellant's profitable business, by which he was damaged, etc. The case is here on appeal from the circuit court sustaining a demurrer to the appellant's petition and amended petition.

It is to be observed that the respective owners of these boats entered into no partnership in business. The property rights and responsibilities of the owner or owners of each boat remained as before the arrangement was entered into. Neither assumed any duty or obligation in reference to the other that he was not under before the agreement was entered into, except that of pooling the net profits earned by each, and dividing them in certain proportions; but neither party was under any obligation to the other party to run his boat for as much as a single day. Neither party was under any obligation to the other to keep his boat well manned, or in good and clean

condition. The only tie common to both was that of dividing the net profits of each boat. There was a strong stimulation to increase the net profits by means other than that of popular favor springing out of efficient steam-boat facilities and close attention to the business of shipping for reasonable reasonable charges and courteous attention to passengers at reasonable fare. Also, under this agreement, there was no incentive for each boat to run the trade, if one boat could, perchance, do all the business, though only "after a sort." It was to the interest of each for the other to lie up, thereby saving expenses and increasing the net profits; and another feature detrimental to the public interest, consists in the fact that they were not only deprived of frequent means of shipment and passenger travel, but subjected to extortionate charges. Why so? Because there is no competition in the trade, nor likely to be any; for by this combination there lies another boat at the wharf, ready, according to the written obligation, to appear in the trade, and cut the prices of freights and passage below living prices, as long as such competition could hold out. It is the competition, or fear of competition, that makes these carriers efficient, attentive, polite, and reasonable in charges. Remove competition, or the fear of it, and they become extortionate, inattentive, impolite, and negligent. The writing sued on by the appellant tends to inspire just such state of case. It is said that neither was bound to charge the same as the other. That is true; but either could extort with impunity, and the other would be an equal recipient of the fruit of the extortion. There would be no motive power—rivalry in trade—to circumvent the extortion. On the contrary, self-interest would prompt, not only the encouragement of the extortion, but an imitation of the nefarious example. It is true that their contract did not, in so many words, bind them to any given charges; but it made it to the interest of each, not only to charge, but to encourage and sustain the other in charges that would amount to confiscation. Why? The facts alleged in the petition, doubtless stated as modestly as the draughtsman could, show that the combination was exceedingly profitable, and entirely unfriendly to free and untrammelled competition. This combination was more than that of a combination not to take freight or passengers at less than certain prices. In such case, the combiners have to furnish adequate means of transportation, and efficient and polite officers, and confine themselves as nearly as possible to the sum agreed upon, in order to secure the trade, or a reasonable portion of it; but here, by reason of the agreement, there is no incentive to competition. Inefficient means of transportation, unskilled or inattentive officials, are no drawback to either boat. Its share of the profits come notwithstanding. The coal merchant whose only means of transportation is by the Kentucky river may not be able to compete with his rivals in business, if compelled to

pay exorbitant freight charges; or, if such competition should not exist, the consumer of his coal would be taxed these charges. So with the merchants; and more pitiable than all the rest would be the condition of the agriculturist whose only means of transportation would be by said river. Rivalry is the life of trade. The thrift and welfare of the people depend upon it. Monopoly is opposed to it, all along the line. The accumulation of wealth out of the sweat of honest toilers by means of combinations is opposed to competing trade and enterprise. That public policy that encourages fair dealing, honest thrift, and enterprise among all the citizens of the commonwealth, and is opposed to monopolies and combinations, because unfriendly to such thrift and enterprise, declares all combinations whose object is to destroy or impede free competition between the several lines of business engaged in utterly void. The combination or agreement, whether or not in the particular instance it has the desired effect, is void. The vice is in the combination or agreement. The practical evil effect of the combination only demonstrates its character; but, if its object is to prevent or impede free and fair competition in trade, and may in fact have that tendency, it is void, as being against public policy. For the foregoing reasons the agreement is against public policy, and is therefore void. The judgment is affirmed.

#### BREWER v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 19, 1889.)

##### HOMICIDE—INSTRUCTIONS—REMARKS OF COUNSEL.

1. On a trial for murder an instruction, as to temporary insanity, which assumes that the accused did the killing, when he had pleaded "Not guilty," cannot have prejudiced him, when he himself testified that he did it.

2. In response to remarks of accused's attorney that no case could be found of conviction for killing the abuser of defendant's wife, the prosecuting attorney stated that the accused had on a former trial been convicted to 21 years in the penitentiary, and the jury could see what had been done by looking at the back of the indictment. *Held*, that the statement being promptly rebuked, and the jury instructed not to consider the action of the former jury, the error was cured.

Appeal from circuit court, Henry county.

"Not to be officially reported."

Jas. Andrew Scott, for appellant. P. W. Hardin, Atty. Gen., for the State.

HOLT, J. This appeal does not present a single question that merits discussion. Counsel have doubtless so concluded, as no brief is on file. The record shows but three exceptions. One was taken when the demurrer to the indictment was overruled. It is in the usual form for murder, and contains all the requisites of such a charge. It avers that the crime was committed "unlawfully, feloniously, willfully, and with malice aforethought," at a day named, which was prior to the finding of the indictment; how it was done; with what weapon; and that death re-

sulted. The accused is admittedly the homicide. He so testifies. The defense is that he acted under great provocation and excitement, arising from his learning that prior to his marriage to his wife, which had then recently occurred, the deceased had by force debauched her; and that he was in fact temporarily of unsound mind when the deed was done. Whether the deceased had been so guilty need not be discussed. The circumstances *pro et con.* leave the matter in doubt.

The next exception is to the giving of certain instructions, and the refusal to give some of those asked by the accused. The jury were properly instructed both as to murder and manslaughter. They found the accused guilty of the latter only. The issue as to his sanity was fairly and fully submitted to them by proper instructions, and, indeed, the jury were fully instructed upon the law of the whole case, and as favorably as he had a right to expect or demand. But one instruction appears, to any extent, to be objectionable. It relates to the question of temporary insanity, and is only objectionable in the fact that it assumes the accused did the killing, when his plea of "Not guilty" puts this in issue. He could not, however, have been prejudiced by it, because he himself had already testified that he did it. It was virtually an admitted fact. It was not only proven beyond all question by all the circumstances in the case, and his own declarations to others, but he had already so stated in open court.

Complaint, by exception, is lastly made that the attorney for the state, in his argument to the jury, told them that the accused had upon a former trial of the charge been convicted to the penitentiary for 21 years, and that they could see what had been done by looking at the back of the indictment. It appears this statement was by way of response to that of the attorney for the accused, that no case could be found where a defendant had ever been convicted for killing a man for abusing his wife. It was, nevertheless, improper. The court, however, told the attorney for the state, in the presence of the jury, that he must not make such remarks, and also informed them that they must not consider the action of the former jury, but try the case altogether by the evidence and law as given by the court. This corrected what might otherwise have been a reversible error; and, perceiving none to the appellant's prejudice, the judgment is affirmed.

#### GUINN v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 19, 1889.)

##### MURDER—EVIDENCE.

Where it appears that accused and other lawless men, inflamed or drunken with whisky, began an indiscriminate firing, and that deceased fell from his horse when accused fired, a verdict of guilty of murder, under favorable instructions, will not be disturbed.

Appeal from circuit court, Breathitt county.

"Not to be officially reported."

Indictment of Fletcher Guinn for the murder of Luther Callahan. From a conviction defendant appeals.

*Thos. T. Cope*, for appellant. *P. W. Hardin*, Atty. Gen., for the Commonwealth.

PRYOR, J. The jury were the sole judges of the facts as to the murder of Luther Callahan, and from the testimony before us it is manifest that the life of the deceased was taken by the shot from the gun or pistol in the hands of the accused. The parties were doubtless in no condition to know how the firing emanated, or from whom, but it is certain that the deceased, Callahan, was shot, and that he fell from his horse when the accused fired. A number of lawless men, the accused among the number, seem to have attended a religious meeting on Grapevine creek, in Perry county, with a view of settling their personal quarrels, and, with their passions inflamed by whisky, the most of them drunk, began an indiscriminate firing, endangering the lives of all who were in reach of their pistol shots. The man killed was intoxicated, and doubtless not aware of the danger to which he was exposing himself in riding up and down the road where as many as 30 shots were being fired, and from all directions. It may be that the bullet from some other pistol than that of the accused took the life of Callahan, but the jury, under instructions that are more favorable than they ought to have been, have said that the accused is guilty, and the testimony authorized the finding. Judgment affirmed.

#### DUNCAN v. COMMONWEALTH.

(*Court of Appeals of Kentucky*. Dec. 19, 1889.)

##### HOMICIDE—EVIDENCE.

On trial for murder, evidence that accused, about two hours after the killing, wiped some blood off deceased's body, smelt it, and then gave his finger a jerk, in order to throw the blood off, is admissible, and it is not necessary to instruct the jury to consider it only on the question of malice.

Appeal from circuit court, Christian county.

"Not to be officially reported."

*C. H. Bush*; *Jas. Breathitt*, and *J. W. McPherson*, for appellant. *P. W. Hardin*, Atty. Gen., for the Commonwealth.

BENNETT, J. Walter Duncan was indicted and tried in the Christian circuit court for the murder of — Fleming, and convicted of the crime of manslaughter, and his sentence fixed at eight years in the state penitentiary. The weight of the evidence shows that the jury was authorized to render the verdict that they did. About two hours after Fleming was killed the appellant wiped some blood off of his body with his finger, and then gave his finger a sudden jerk, in order to throw the blood off of it. One witness swears that he thought that the appellant put his finger to

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his nose, and smelt the blood; but several other witnesses, who observed the action, say that the appellant did not smell the blood, and the appellant swears that he did not smell it; that his purpose in wiping the blood away was to relieve the man, if possible. The court allowed this evidence to go to the jury, over the objections of the appellant. The appellant then asked the court to instruct the jury that they could consider this evidence only in reference to the question of malice. The court refused to grant this instruction, and let the evidence go to the jury, for them to make their own inferences from it. It seems to us that the jury needed no telling as to the relevancy of the evidence. The evidence was not introduced to show that the appellant did the killing, for the person was then dead. Therefore it was introduced as a fact or circumstance indicating the condition of the appellant's mind towards the deceased, which purpose the jury, as men of ordinary intelligence, were bound to know. If the appellant had gotten on his knees, and bellowed over the corpse, like a bull, it would have been proper to go to the jury, as showing the condition of the appellant's mind. Then, why is not the smelling of the blood of the deceased a competent fact to go to the jury on the question of malice? The rule seems to be that any unseemly conduct towards the corpse of the person that the party accused has killed, or any indignity offered it by him, may go to the jury on the question of malice; and, when the evidence is of such character as to relate alone to that question, it is not necessary for the court to direct the attention of the jury to that fact. It is only when the fact proven may relate, not only to the question of malice, but to some other fact not germane to the subject of inquiry, that the jury's attention should be called by the court to the purpose of its introduction. The judgment is affirmed.

#### SNOW et al. v. STARR et al.

(*Supreme Court of Texas*. Dec. 18, 1889.)

##### TRESPASS TO TRY TITLE—JURY—EVIDENCE—DEEDS—ADVERSE POSSESSION.

1. Refusal to allow defendant and intervenors, in trespass to try title, each the full number of peremptory challenges, if error, is harmless, when it does not appear that after exhausting the challenges allowed, there was any juror they desired to challenge.

2. In trespass to try title, where plaintiffs claim through an administrator's sale, objection to the admission of the transcript of the probate court proceedings, on the ground that the order of sale, confirmation, and administrator's deed do not sufficiently describe the land, is untenable, where the land has been located, surveyed, and patented, and the description specifies the survey intended to be conveyed.

3. Admission of a deed of partition between an executor and one of the plaintiffs is immaterial, when defendants claim under a different source of title, and the interest of plaintiffs would merely remain undivided if the deed were invalid.

4. Declarations of a grantor in a deed, made before its execution, that he did not claim the land, are admissible against his grantee, and declara-

tions that he owned the land are not admissible in rebuttal.

5. Defendants' witnesses said that a house was built on the land in question by their grantor. A witness for plaintiffs, in reply, said it was built on adjoining land in 1853. *Held*, that the witnesses being numerous, and the court having warned the parties to introduce all testimony in chief except that strictly in rebuttal, it was proper to refuse to allow defendants to call a witness that the house was built in 1849 on the land claimed.

6. Under Rev. St. Tex. art. 1303, providing that the jury may take out "the charges and instructions in the cause, the pleadings, and any written evidence, except the deposition of witnesses," it is not error to refuse to send out a plat of the land in question, made by a witness, and attached to his deposition.

7. Defendants' grantor occupied land near the line of sections 1 and 8 for more than 10 years, supposing it to be unsettled, but there was a conflict as to which section his improvements were on. He testified that he always claimed section 1, but it was shown that previous to the conveyance of that section to defendants he had, by several deeds, conveyed all of section 8. *Held*, that defendants took no title to the portion of section 1 not occupied by his improvements, as Pasch. Dig. Tex. art. 4624, provides that 10 years' peaceable possession, without any evidence of title, shall give to the possessor full property in 640 acres, including his improvements.

Appeal from district court, Kaufman county; ANSON RAINEY, Judge.

*J. S. Woods and J. D. Cunningham*, for appellants. *F. B. Sexton and Wood & Charlton*, for appellees.

GAINES, J. This suit was an action of trespass to try title, brought by appellees, to recover of appellant Snow two quarter sections of a survey of land in Kaufman county, consisting of 640 acres, patented by virtue of a certificate issued to Thomas Toby. The defendant pleaded not guilty, and the statute of limitations of 10 years. Appellant Ruthie Wright, joined by her husband, intervened in the suit, and resisted plaintiffs' recovery, making common cause with the defendant. The defendant claimed title under a deed from one J. M. Kinchen. Kinchen had been married, and his wife had died before the conveyance to Snow. Ruthie Wright, who was a daughter of Kinchen and of his deceased wife, claimed as heir of her mother, alleging that the property was acquired during the existence of the marriage between her parents.

When the case was called for trial, and the parties had announced ready, the defendant and intervenor Ruthie Wright each demanded a separate list of the jury, and the privilege of challenging peremptorily six of the number, by striking their names therefrom. The judge refused to grant the demand, assigning as the ground of his ruling that he knew from a previous trial that the defendant and intervenors had agreed upon a judgment as between themselves, and that they were making common cause as against the plaintiffs. We need not inquire whether the ruling was correct or not. The record shows that the six challenges allowed appellants by the court were exhausted, but it does not appear that the name of any juror remained up-

on the list whom either of them desired to challenge. If there was error, it was immaterial. *Railway Co. v. Terrell*, 69 Tex. 650, 7 S. W. Rep. 670.

The plaintiffs claimed under a chain of title which was as follows: (1) A patent of the survey of 640 acres to W. P. King, assignee; (2) a sale by Nathaniel Amory, as administrator of W. P. King's estate, to plaintiff James H. Starr, by virtue of an order of the probate court of Nacogdoches county; (3) a deed from Starr to Amory to an undivided half interest in the section; and (4) a deed of partition between Starr and William Perkins, as surviving executor of and trustee under the will of Amory, which purported to convey to Starr in severalty the land in controversy. Appellant Mrs. Pope claimed as devisee under the will of her mother, the deceased wife of Starr. Appellants objected to the introduction in evidence of the transcript of the proceedings of the probate court of Nacogdoches county, upon several grounds, none of which, in our opinion, are well taken. The main grounds were that the order of sale, the proceedings confirming the sale, and the administrator's deed did not sufficiently describe the land. The evidence shows that at the time the section which embraces the land in controversy was surveyed three other sections were located, all lying together in a square, and were numbered, 1, 2, 3, and 4, respectively. All were surveyed by virtue of Toby scrip. Nos. 1 and 4 belonged to the estate of W. P. King. The order of sale which was granted upon the prayer of the administrator directs him to make a sale of all the lands belonging to the estate. The four sections last named appear upon the inventory under the following description: "(1 and 4) Two sections of land, 640 acres, numbered one and four, surveyed on the waters of the Trinity river, by virtue of Toby land-scrip standing in the name of W. P. King. (3 and 2) Two sections, Nos. 3 and 2, adjoining above, in name of King & Nelson; King's interest being one-half." In his account of sales the administrator describes the land as follows: "Sold to James H. Starr two sections of land, 640 acres each, numbering 1 and 4, on the waters of Trinity river, surveyed by virtue of the Toby land-scrip, standing in the name of Wm. P. King." The following is the description in the deed from the administrator to Starr: "Situated in the north-western part of said Nacogdoches county, on the waters of the Bois d'Arc fork of the Trinity river, and near the junction of said Bois d'Arc fork with the Trinity river, the same being two sections of land containing each 640 acres, one of which sections is known as number one (1) and the other as number four, (4,) both surveyed by virtue of land-scrip issued by the governor of Texas on the 20th of December, 1886, to Thomas Toby, being two pieces of 640 acres each, which sections or tracts of land are more fully described in the records of the county surveyor's office of said Nacogdoches coun-

ty, on pages 83 and 84 of Book C, where the field-notes of the same are recorded." Under the assignment which complains of the ruling of the court in admitting this evidence it is urged that the field-notes should have been given. This was unnecessary. The rule is that the description must be certain, but the maxim that that is certain which can be made certain applies. When land has been located, surveyed, and patented, the records of the several offices through which the title has been obtained afford a description indisputably certain. It follows that in the conveyance of all of an original survey any description is sufficient which purports to convey the entire survey, and points out with certainty the particular survey intended to be conveyed. *Bowles v. Beal*, 60 Tex. 322. There was no error in admitting the evidence.

It is unnecessary to pass upon the question whether the will of Nathaniel Amory, and the deed of partition between his executor and trustee and plaintiff Starr were correctly admitted or not. If the deed of partition was invalid, the plaintiffs still held each an undivided one-fourth interest in the land in controversy, and they were entitled to recover in this action against the defendant and the intervenor, both of whom claimed solely under a title having its origin in a different source.

Section 1, the land in controversy, and section 3 of the four surveys above named lie contiguous. J. M. Kinchen, under whom defendant and intervenor claimed, settled near the dividing line in 1848 or 1849, without any claim or title to the land so occupied, whatever, and remained in possession until the year 1869 or 1870, when he moved away. The great weight of the testimony shows that his improvements were upon both surveys. His house was probably on section 1, but his inclosure, most likely, extended over on section 3. During the years extending from 1867 to 1879, inclusive, he conveyed all of the latter section, in different parcels, to sundry persons. Plaintiffs introduced testimony to the effect that after he had removed from the land in that locality he said he did not claim section 1. In order to rebut this, appellants offered to prove by two witnesses that after Kinchen's removal, he continued to claim the land in controversy as his own. This testimony was rejected by the court, and in the ruling there was no error. The declarations of a grantor in a deed, made before its execution, in disparagement of his title, are admissible against his grantee; but his self-serving declarations cannot be admitted. The appellants had the right to rebut the evidence of plaintiffs, but the rebutting evidence should have been legal.

There was a great mass of conflicting testimony as to the exact locality of Kinchen's improvements with reference to the dividing line between sections 1 and 3, and especially as to the location of the house in which he dwelt. Appellants introduced a number of

witnesses to show that the house was on section 1. The plaintiffs, in rebuttal, introduced a son of J. M. Kinchen, who testified that the house was built in 1853, on section 3. After plaintiffs had closed their testimony in rebuttal, the appellants offered to prove by a witness that the house was built in 1849, on the land in controversy. This testimony was excluded by the court on the ground that it should have been introduced by appellants in chief, and not in rebuttal of the plaintiffs' rebutting evidence. The witnesses were numerous; and the court, during the trial, announced to the parties that they must introduce all their testimony in chief, except such as was strictly in rebuttal of that of their adversaries. The rule recognized by the weight of authority is, that the plaintiff must introduce in chief all his evidence in support of his case, except such as tends only to rebut some new fact attempted to be proved by the defendant. This court has, however, followed the practice of permitting the plaintiff to rest after having shown a *prima facie* case, and to introduce testimony merely corroborative of that in chief after the defendant has closed. *Markham v. Carothers*, 47 Tex. 21. In the case cited the rule was applied in favor of an intervening defendant who had in his pleadings admitted the plaintiff's *prima facie* title to a lot of land, but claimed that one-half of the property belonged in equity to his ward. After the plaintiff had attacked the intervenor's *prima facie* proof the latter was not allowed by the lower court to introduce testimony merely confirmatory of his original evidence; and this court held that the ruling was erroneous. Whether the rule should apply where the plaintiff's *prima facie* case has not been admitted, and when the defendant has the affirmative upon but one issue, there being more than one, we need not pause to inquire. When the witnesses are numerous, and a vast accumulation of testimony is to be expected, much must be left to the discretion of the trial judge; and where, as in this case, the rule has been announced in advance that merely cumulative evidence will not be admitted in rebuttal, it should not be held error to apply it, unless it should appear that its application has clearly prejudiced the complaining party. The testimony excluded was cumulative upon a matter of fact about which several witnesses had testified for appellants, and upon which their whole defense was based. If rebutting, so was the mass of testimony introduced by appellants in chief. Besides, in view of all the evidence in the case, we are of opinion that the evidence, if admitted, would not have changed the result of the trial.

There was no error in the refusal of the court to allow the jury to take with them, in their retirement, a plat of the land in controversy, made by Kinchen, showing the location of his improvements, which was attached to his deposition. The statute provides that "the jury may take with them, in their retirement, the charges and instructions in the

cause, the pleadings, and any written evidence, except the deposition of witnesses." Rev. St. art. 1303. The map made by the witness in response to interrogatories, and illustrative of his answers, was as much a part of the deposition as the words written down by the officer, and subscribed by him. The letter of the statute, and its obvious policy, both demanded that it should not be placed in possession of the jury while they were considering their verdict.

The appellants' assignments of error from the ninth to the twentieth, inclusive, complain of the charge of the court and of the refusal to give special instructions asked by them. The evidence showed beyond controversy that J. M. Kinchen had occupied land very near, if not across, the dividing line of sections 1 and 3, as a naked possession, at least, from the fall of 1850 to 1869 or 1870, when he moved away. Upon the questions whether his improvements were upon the one section or the other, or upon both, the evidence was conflicting. The preponderance of the evidence, probably, was that the dwelling-house, at least, was upon the land in controversy. The line was not well defined at that point. It required a survey to establish it. The improvements were not only near the dividing line between sections 1 and 3, but also very near the intersection of the lines which divided the four sections from each other. At one time they probably extended over a part of each of the four sections. J. M. Kinchen testified that he settled the land, believing it to be vacant, but always claimed section 1. But it was indisputably proved that from the years 1867 to 1871, inclusive, he conveyed, by warranty deeds, to sundry persons, separate parcels of section 3. The remainder he conveyed to plaintiff in 1879. Appellants complain of so much of the charge as instructed the jury upon this phase of the case. The instruction is as follows: "If you believe from the evidence that J. M. Kinchen took possession of land on or near the line between sections 1 and 3 of the land referred to in evidence, and made improvements thereon, and that such improvements were partly on section 1 and partly on section 3, and held peaceable and adverse possession of the same for a period of ten years, and you further believe that during the time he so held the land he claimed said section No. 3, and acquired title to the same by limitation, and appropriated the same to his own use, then you will find for plaintiff all of section 1, except that part covered by Kinchen's improvements; for, under the law, Kinchen could only acquire title to 640 acres of land by ten years' limitation, by virtue of one and the same possession." The appellants asked counter instructions to the effect that if Kinchen had actual possession of a part of section 1 for the period of 10 years, holding it adversely, he acquired title thereto, and that this title passed by his deed to plaintiff, unaffected by the fact that he had previously conveyed by deeds all of sec-

tion 3. We think the instruction given by the court was proper, and those requested by the appellants upon the issue were correctly refused. The statute<sup>1</sup> which gave to the adverse possessor of land, without color of title, 640 acres, to include his improvements, although the actual possession embraced a less amount, is peculiar. It is said in *Bracken v. Jones*, 63 Tex. 184, to be founded upon the policy of forcing the owners of lands to take possession of them, and of thereby inducing a settlement of the country. It does not seem to be founded upon considerations of natural equity or justice. Other provisions, which give title by limitation to persons holding under color of claim and right, are intended to suppress litigation, and to give repose, and have their justification in the theory that the possession for the periods of time, and under the conditions severally required for the different terms, create a presumption of title in the possessors to the lands so held. The acquisition under the provision under consideration must be deemed, we think, the bounty of the law, given upon the dictates of public policy, and should be strictly confined to the limits in such provision prescribed. To use the language of the charge, the naked possessor should be permitted only "to acquire title to 640 acres of land by ten years' limitation, by virtue of one and the same possession." Kinchen having elected, by virtue of his holding, to claim and dispose of section 3, one claiming under him should not be allowed to assert title to section 1 by virtue of the same occupation. His successive conveyances of parts of section 3, resulting in a disposition of the entire tract, while still occupying his improvements on or near the dividing line between that and section 1, are acts of claim and ownership manifested under the solemnities of law; and, such claim having a foundation in his possession, or supposed possession, of a part of the land so conveyed, and no other right, his testimony, given upon the trial, that he intended to claim and hold another section, however corroborated by mere parol evidence, cannot prevail against his solemn acts. The appellants recovered the land on section 1, of which Kinchen had held actual possession. A verdict, if rendered for appellants for more, should, under the evidence, have been set aside. In such a case, if the verdict for appellees can be disturbed at all, for errors in giving or refusing instructions, it should be for such as are manifestly calculated to mislead the jury. Without entering into a discussion in detail of the objections urged

<sup>1</sup> Pasch. Dig. art. 4624. "Ten years of such peaceable possession and cultivation, use, or enjoyment thereof, without any evidence of title, shall give to such naked possessor full property, precursive of all other claims, in and to six hundred and forty acres of land, including his, her, or their improvement; yet the right of the government is not to be barred, and there is saved to the person or persons having the title and cause of action the duration of disability to sue from nonage, coverture, or insanity."



to the charge of the court, it is sufficient to say that it correctly presented the law of the case, and, though in some particulars it might have been more specific, it was not, in view of the evidence, in any respect misleading. Some of the instructions requested were not correct, as propositions of law; others might with propriety have been given, and, under a different state of facts, should have been given. There was no error prejudicial to appellants in the instructions submitted to the jury at the request of the plaintiffs. The evidence demanded the verdict returned by the jury, and therefore the court did not err in overruling the motion for a new trial based upon the ground that it was contrary to the law and the evidence. The intervenors present in their brief three assignments of error which are substantially the same as similar assignments already passed upon. They need not be separately considered. There is no error in the judgment, and it is affirmed.

### GULF, C. & S. F. RY. CO. v. LEVI.

(*Supreme Court of Texas*. Dec. 17, 1889.)

#### CARRIERS OF GOODS—MOBS.

Under Rev. St. Tex. art. 277, which declares that "the duties and liabilities of carriers in this state shall be the same as are prescribed by the common law," except when otherwise provided, an interstate carrier, in the absence of contract limiting its liability, is liable for goods destroyed by a mob of rioters.

Commissioners' decision. Appeal from district court, Tarrant county. R. E. BECKHAM, Judge.

Rev. St. Tex. art. 277, declares that "the duties and liabilities of carriers in this state shall be the same as are prescribed by the common law, \* \* \* except where otherwise provided by this title."

*Shepard & Miller*, for appellant. *B. P. Ayres*, for appellee.

COLLARD, J. This suit was brought by Will Levi, appellee, against the Gulf, Colorado & Santa Fe Railway Company, to recover the value of a car-load of lemons, shipped by him from New Orleans to Ft. Worth by way of defendant's railroad and its connections. The car was alleged to have been detained an unreasonable time, by reason of which the lemons were spoiled, and became valueless. Defendant alleged that the delay was unavoidable, having been caused at Temple by reason of the seizure of its trains and depots by a mob of rioters, who, by overwhelming force, prevented the company from carrying the freight; that defendant used strenuous and exhausting efforts to recover its property, and appealed to civil authorities, state, county, and city, for assistance and protection, but such authorities were unable to subdue the mob, and compel the restoration of defendant's property, so that defendant could resume its business and deliver the freight. The court below sustained a demurrer to this answer. The trial resulted in a judgment

for the plaintiff for \$650, and defendant appealed, assigning as error the ruling of the court in sustaining the demurrer to the answer.

There was no contract which attempted to limit the common-law liability of the defendant as carriers of freight from another state into this state; hence it is to the common law that we must look for the principles governing the case. Rev. St. art. 277. What, then, are the principles governing the case made by defendant's answer? It seems to be well settled that common carriers are insurers of property received by them for transportation, and at common law are liable for all losses, except such as are caused by the act of God, public enemies, the fault of the party, and inherent defect in the property itself. 3 Wood, Ry. Law, § 424. Can it be said that a mob—an assembly of strikers and rioters—are public enemies? We think not. There have been many definitions given of the phrase "public enemy," and it is universally understood to mean some power with whom the government is at open war. Pirates are included because they are at war with all mankind, but thieves, robbers, and insurgents are not. 2 Abb. Law Dict.; Story, Bailm. 338; Cook v. Gourdin, 2 Nott & McC. 19; Bouv. Law Dict. term, "Public Enemy;" Express Co. v. Womack, 1 Heisk. 256. At an early day our court declared the law upon the subject, as understood in this state, in the case of Chevallier v. Strahan, 2 Tex. 122, from which we extract the following: "What, then," the court asks, "are the responsibilities of a common carrier? He is liable for all losses except such as may arise from the act of God or the enemies of the country or the fault of the party complaining. [Citing *Dusas v. Murgatroyd*, 1 Wash. C. C. 13-17; *Smyrl v. Nolon*, 2 Bailey, 422; 2 Kent. Comm. 597; *Story, Bailm.* 330.] He is an insurer against all losses not embraced in the excepted cases. As is well expressed in the dissenting opinion of Mr. Justice NORTT, in *Cook v. Gourdin*, 2 Nott & McC. 19: 'No force, however great, no accident, however inevitable, no fraud, however beyond his control, will excuse him.' He is liable, not only for losses occasioned by secret theft or embezzlement, but for those inflicted by highway robbery, by the spoliations and outrages of mobs, rioters, and insurgents.' The most resistless and destructive conflagration, if occasioned by human agency, without any negligence whatever on the part of the carrier, will furnish no valid ground of exemption. *Story, Bailm.* 338." In commenting upon the doctrines of the foregoing case in *Philleo v. Sanford*, 17 Tex. 231, our supreme court said: "It is unnecessary to repeat here the doctrines of that opinion. They are as clearly and firmly settled by the uninterrupted current of decisions in the English and American courts as any principles of the law can be. They are not to be overturned or shaken by anything short of legislation." We see no reason why this doctrine should not be upheld

in the present state of affairs. Riots and mobs growing out of "strikes" or other causes may become more common, and may more often interfere with the carrier's business, and on that account the risk of such interference may be more certainly incurred by the carrier; but this can be no reason for changing the principle of liability. The law puts the risk upon the common carrier, and not upon the shipper, and in this state, at least, it must remain there until the legislature relieves against it in favor of the carrier. The character of our legislation, and the tone of our decisions, indicate that the principle and policy of the law as it has been before announced should be sustained, and that the risks of carriage by public carriers should not be transferred from the carrier to the public except in cases already named. Our statute will not allow a contract which is to be wholly performed within this state to relieve the carrier of his common-law liability. Rev. St. art. 278. The courts of some of the states have relaxed the strict common-law principle of liability, so that a strike of the company's employees, who abandon their employment, and by force prevent a railway company from using its road and carrying on its business, will excuse the company for loss by detention of goods so caused. *Geismer v. Railroad Co.*, 102 N. Y. 563, 7 N. E. Rep. 828; *Railway Co. v. Hollowell*, 65 Ind. 188; *Railroad Co. v. Bennett*, (Ind.) 6 Amer. & Eng. R. Cas. 391; *Railroad Co. v. Hazen*, 84 Ill. 36. In this state we are bound to hold to the common-law principle. Our legislature has so declared, (Rev. St. art. 277,) and we are not at liberty to go beyond it. We are not disposed to find fault with the common law, as it has been defined and announced in this state by our courts in reference to this subject; but, if we should desire a modification or a change in favor of carriers, it must come from the legislature, and not from the courts. Finding no error in the ruling of the court below in sustaining the demurrers to defendant's special answer, our conclusion is the judgment of the court should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

#### SMITH v. SMITH *et al.*

(Supreme Court of Texas. Dec. 13, 1889.)

#### JUDGMENT—EQUITABLE RELIEF.

A surety cannot enjoin an assignee from enforcing a judgment recovered by the principal against the surety on the ground that he, as surety, has paid a portion of a smaller judgment against his principal, who is now insolvent, without offering to pay the excess of that judgment over his claim.

Appeal from district court, Camp county; FELIX J. McCORD, Judge.

*King & Eddins*, for appellant. A. S. *Zachery*, for appellees.

STAYTON, C. J. On January 31, 1887, Dean & Holman recovered a judgment against W. L. Morris, J. B. McWaters, and W. M. Smith, appellant, for \$66.30. It does not appear in that judgment that appellant and McWaters were sureties for Morris, but appellant in his petition alleges that this was true, and that since the judgment was rendered he and McWaters have paid it. On October 2, 1888, appellant brought suit against Morris on account to recover \$85, which resulted in a judgment in favor of Morris for \$11, and costs were also adjudged to Morris, which seem to amount to \$175.86, this embracing jury fees amounting to \$90.25. A short time after this judgment was rendered, Morris transferred it to Zachery, who caused an execution to issue for its enforcement, which was levied on a tract of land. This suit was brought to enjoin the enforcement of that judgment. The petition sets out the rendition of the judgment referred to, and alleges the transfer to Zachery, who knew of the insolvency of Morris, and of his indebtedness to appellant, for the fraudulent purpose of preventing appellant from collecting the sum which he had paid as surety for Morris. Zachery moved to dissolve the injunction on the ground that the petition did not show any equity entitling appellant to injunction, and on the further ground that he had filed an answer under oath in which he had denied that there was any fraud in his purchase of the judgment from Morris. The motion was sustained, and the bill dismissed.

In this we think there was no error. The strongest case appellant's pleading makes is that Morris is and has been insolvent; that as surety for Morris he paid some money on the judgment in favor of Dean & Holman,—how much the petition does not say,—but if he paid half of that judgment it would not be more than \$33.15, with interest from January 31, 1887, besides some cost. On the other hand he shows that Morris recovered a judgment against him for \$11, besides costs, which amounted to \$175.86, and asks that the collection of the entire judgment be enjoined, without paying what he shows is justly due, if he be allowed full credit for money paid as surety for Morris. The fact that Zachery may have purchased the judgment against appellant does not defeat his right to have credit thereon equal to the sum he may have paid as surety for Morris, if the costs in fact do not belong to other persons than Morris or his assignee. The costs, however, must be collected through the execution, and appellant seeks, not only to enjoin a sale under that, but also to enjoin the enforcement of the judgment in any manner. This he had no right to do, and if he desired relief should have paid, or offered to pay, so much of the judgment as was in excess of his claim against Morris. The petition does not show what sum appellant paid as surety for Morris, nor does it show what beneficial interest Morris or his assignee has in the

costs incurred in the cause in which judgment was rendered against him. There is no error in the judgment, and it will be affirmed.

### HICKEY *et al.* v. BEHRENS.

(Supreme Court of Texas. Dec. 20, 1889.)

#### HOMESTEAD—ESTOPPEL—DEED OF TRUST—SALE.

1. To a plea of homestead right, in trespass to try title, plaintiff pleaded as an estoppel that the deed to the land was taken in the husband's name as "attorney in fact for" F., and that before and at the time of the execution, by the husband and F., of the trust-deed under which plaintiff bought, defendants represented that they had no interest in the land, and that F. was the owner, which representations were communicated to and believed by plaintiff. Held, that a demurrer was properly overruled, since, if not a good plea of estoppel, it amounted to a denial of defendants' title.

2. The grantee in a deed being described as attorney in fact of F., declarations by him and his wife that they did not own the land, and a recital in a contract by the husband that F. bought the land, are admissible on trial of a right to homestead to show ownership.

3. An instruction, in such case, that declarations by the husband and F., at the time of the execution by them of the trust-deed under which plaintiff claims, that the land was owned by F., would estop defendants to claim a homestead, becomes harmless error, where the jury find that the land belonged to F.

4. Defendant having taken title to land, in which he claims homestead, in his name as attorney in fact for another, in order, as he testified, to place his property beyond the reach of creditors, a reference to his "colossal rascality" by counsel will not necessitate a reversal.<sup>1</sup>

5. Under a deed of trust providing for a sale at the east door of the court-house, a sale at the south door is valid in the absence of proof of injury thereby.

Commissioners' decision. Appeal from district court, Tarrant county; R. E. BROOKHAM, Judge.

*Hunter, Stewart & Dunkley*, for appellants. *Ball & McCart* and *Capps & Canley*, for appellee.

HOBBY, J. This action of trespass to try title was brought in the district court of Tarrant county, on the 19th March, 1886, by the appellee, John Behrens, against J. T. Hickey, and his wife, Nellie Hickey, and Mrs. Eliza Flowers, to recover two lots in the city of Fort Worth, in Daggett's addition to said city; which were covered by a one-story brick building, and for which rents were also claimed. The property was sequestered by the plaintiff below, and replevied by the defendants. Mrs. Eliza Flowers answered on June 19, 1886, disclaiming any interest in the property. J. T. Hickey and wife answered by a general denial, plea of not guilty, and a special plea that plaintiff's claim of title to the lots is based upon a deed of trust executed by J. T. Hickey and Eliza Flowers to G. R. Newton, for the benefit of the City National Bank of Fort Worth, on the 3d day

of July, 1885, to secure a note for \$6,000, executed by said Hickey and said Flowers to said bank for money loaned to Hickey in due course of the business of said bank, and that on said 3d day of July, 1885, and for a long time prior thereto, the said property and lots were and had been in actual occupation and use by the said Hickey as the place to exercise his calling and business, and were and had been his business homestead, and ever since had been; that on said date he was a married man, and the head of a family, consisting of his said wife, Nellie, and eight minor children; that his residence was in the city of Fort Worth, and the lots in controversy, together with the lots upon which their residence stands, and which are used for the purposes of a home, were, at the time they were designated as their homestead, of less value than \$5,000, exclusive of improvements. Plaintiff replied specially to this as follows: That if said premises had ever been used and occupied by defendant as a business homestead, then the same had been abandoned as such by said defendant at the date of the execution of said deed of trust, and for a long time prior thereto; that neither defendant Hickey nor his wife should be permitted to claim title to said premises, either under the homestead exemption laws or otherwise, for that on, to-wit, the 21st day of January, 1883, and before the execution of said deed of trust mentioned in said amended answer, the said Hickey purchased, or pretended to purchase, the said premises from one E. M. Daggett, for and on behalf of his co-defendant Eliza Flowers, acting, or pretending to act, as the attorney in fact for said Eliza Flowers for that purpose; that prior to the date of the said purchase by said Hickey from said Daggett, to-wit, on the 17th day of October, 1882, his said co-defendant Eliza Flowers had executed to said Hickey a certain power of attorney in writing, whereby she had duly appointed said Hickey her lawful attorney, to perform all acts, and execute all instruments in writing, connected with any and all business of whatever nature necessary to control and advance her interests in any matter whatsoever in the state of Texas, or anywhere else, and had delivered the same to said Hickey, and said Hickey, acting, or pretending to act, for and on behalf of said Eliza Flowers, made said purchase from said Daggett as aforesaid, and thereupon caused said Daggett to make his certain deed to said premises to "J. T. Hickey, attorney in fact for Mrs. Eliza Flowers," it being mentioned in said deed that the consideration for said lots in said deed mentioned was paid, and to be paid, by the said Hickey, as attorney in fact for the said Flowers; and the said Hickey, having, before his purchase, procured a lease on said premises from one W. B. Heard, afterwards transferred the same to the said Eliza Flowers, thus causing all the title, both legal and equitable, as well as the right of possession to the said premises, to be vested in her, the said Eliza Flowers; and said

<sup>1</sup> As to when a new trial will be granted on the ground of misconduct of counsel in argument, see *Railway Co. v. Cooper*, (Tex.) 8 S. W. Rep. 63, and note; *Shepard v. Railway Co.*, (Iowa,) 41 N. W. Rep. 564, and note.

Hickey, as well as his wife, the said Nellie, did, at the time of said purchase, and at all times prior and subsequent thereto, up to the time of the purchase by plaintiff at the sale under said deed of trust, represent and declare, both by words and acts, that neither he, said Hickey, nor his said wife, had any right, title, or interest in said premises, either as a homestead or otherwise, but that the same belonged to said defendant Flowers, and was purchased with her money, and that the said Eliza Flowers was the legal and equitable owner of the same; that at the time, and before making said deed of trust mentioned to said city National Bank, and for the purpose of obtaining the money, or a part thereof, which was thereby secured to be paid to said bank, the said Hickey and the said wife, and the said Eliza Flowers, represented and declared to the said bank, and its authorized officers, that said property belonged to said Eliza Flowers, and that neither said Hickey nor his wife had any title therein by way of homestead or otherwise; that the same had been purchased and paid for with the individual money of the said Eliza Flowers, and that the deed hereinbefore mentioned had been made to J. T. Hickey, as attorney in fact for Eliza Flowers, it being intended thereby by said Hickey and wife to have the legal and equitable title thereto vested in her, the said Flowers; that all of said facts were made known to and communicated to plaintiff before he purchased the note to secure the payment of which said deed of trust was given; and that, relying upon the same, and believing the same to be true, and relying upon and believing to be true divers and sundry other acts and declarations of the said Hickey and wife and Flowers, theretofore made and done to the same purport and effect, to-wit, that the said property was owned by the said Flowers, and not by the said Hickey or his wife, plaintiff was induced to believe, and did believe, that the said Flowers owned the same, and so believing, did, in good faith, and without any knowledge that the said property would or could be claimed as a homestead by said Hickey and wife, purchase said note, and pay to said bank the sum of, to-wit, \$8,000 therefor, and did thereafter become the purchaser thereof at the foreclosure sale under said deed of trust. He avers that the said Hickey and wife are now, and were at all times mentioned, insolvent.

General and special exceptions were filed by Hickey and wife to that part of the plea of plaintiff setting up an estoppel, "because it was indefinite and insufficient, etc.; it did not specify acts or declarations of the defendants; the averments as to defendant Eliza Flowers were irrelevant and impertinent, because she had disclaimed herein, and no issue exists between her and plaintiff, and her acts cannot affect defendants." The judgment does not show that these exceptions were acted on at the trial. There was a verdict of a jury on June 2, 1887, for plaintiff,

with rents at \$320. Judgment for the lots, and the brick house thereon. Defendants appealed.

The title of appellants was shown by the evidence to consist of a deed executed in January, 1885, by E. M. Daggett to appellant J. T. Hickey, conveying the property in controversy to him as "attorney in fact" for Eliza Flowers. There was conflicting evidence upon the following issues: *First*. Whether appellant Eliza Flowers was the real owner of the property, and had paid for it with her own money. *Second*. Whether she and appellant Hickey, at the time they procured the loan from the bank, represented and stated to the officers of the bank that said Flowers owned the property, and Hickey had no interest therein. *Third*. Whether Hickey had always represented to appellee that he had no interest in the property. *Fourth*. Whether, at the time of the execution of the deed of trust, Hickey was carrying on business of any kind on the premises, using and occupying it with his family as a homestead. Appellants proved by several witnesses such occupation in 1885, and this was denied by others. The evidence of appellee may be epitomized as follows: That on the 25th day of January, 1883, defendant Hickey entered into a written contract with the plaintiff (the said Hickey purporting to act therein as agent and attorney in fact for Eliza Flowers, widow) wherein it is recited that Eliza Flowers owned the property in controversy, the agreement being predicated upon the fact that Hickey "had full power to do all manner of business for Mrs. Flowers;" that the deed under which Hickey alone claims title was made to him as "attorney in fact for Eliza Flowers;" that the release of the vendor's lien was made in the same manner; that the lease on the house situated on the lot was made to Hickey as "agent for Eliza Flowers;" that Hickey as attorney in fact for Eliza Flowers, had previously incumbered the property by putting a deed of trust on the same in her own name; that the rent was collected by Hickey as her agent; that on the 3d day of July, 1885, Hickey, being indebted to the City National Bank, did borrow an additional sum, and did, for the purpose of securing said bank in said money, in conjunction with said Eliza Flowers, execute a deed of trust thereon in due form; that afterwards, and before the maturity of the note secured by said deed of trust, the plaintiff, for a valuable consideration, viz., \$6,000, purchased the said note, and the same was duly assigned to him; that the deed of trust was afterwards foreclosed by the trustee, and the property was purchased by the plaintiff at the sale. Appellant Hickey testified that the deed from Daggett was executed to him as attorney in fact for Mrs. Flowers, and her name was used therein "in order to shield himself and property from creditors." He "did not then know that the place of business was a part of the homestead, nor that, if so used, it would be exempt."

The first error assigned is that the court erred in overruling defendants' demurrers and special exceptions to plaintiff's plea of estoppel, because said plea shows on its face that the title to the property claimed by Hickey and wife as homestead is in J. T. Hickey, and the statements and declarations of Hickey and wife tending to defeat their homestead right in said property, while they are occupying and using the same for home purposes, are incompetent, irrelevant, and insufficient for the purpose; and because the plea does not show that the City National Bank or its officers believed and relied on said statements and declarations, or were thereby induced to advance the money and accept said deed of trust on the faith thereof, and because said plea does not show that said defendants made any statements and declarations to the plaintiff, John Behrens, or intended that they should be communicated to him. The fact is not disclosed by the record that these exceptions were overruled at the trial, nor does the attention of the court appear, from the judgment, to have been directed to them; consequently the well-known rule, that they are deemed to have been waived, would apply. Rule D. C. 26. To this, however, it is replied that they were in fact overruled by the court, and that this fact is shown by the appellants' bill of exceptions, taken to the refusal of the court to allow them to make proof of that fact at a subsequent term,—January term, 1888,—in support of their motion to reform the judgment rendered in the case at the June term, 1887. The bill of exceptions mentioned, recites, in substance, that at the February term, 1888, appellants moved to enter, *nunc pro tunc*, the court's ruling on the exceptions, and to reform the judgment, which rulings were made at a previous term; that they offered to prove that the exceptions and motion were each presented to the court at the proper time, and were not waived; that they were overruled, and appellants excepted thereto, and inadvertently the order was not entered on the judge's docket; that the court had personal remembrance of the action by the court as alleged, but, there being no memorandum in writing of said ruling, refused to hear proof, or grant the order to reform said judgment, and refused, also, because an appeal had been perfected in the cause. It is well settled that the right to amend a judgment is not limited to the term at which it was rendered. The power to correct the records exists in the court, not by reason of its continued jurisdiction over the subject-matter, but by virtue of its continuing power over its records. *Blum v. Neilson*, 59 Tex. 380. In *Ramsey v. McCauley*, 9 Tex. 106, a judgment rendered at the spring term, 1850, was amended at the fall term, 1852, and it was there said that an amendment might be made at any time before final judgment in the supreme court. The difficulty arising out of the question presented relates to the character of proof proffered as a

basis for the amendment. The current of authority is that the evidence authorizing the amendment must consist of something in the record. *Freem. Judgm. § 72*. The memoranda of the presiding judge are regarded as such parts of the record as will afford data for the reformation of the decree. *Ximenes v. Ximenes*, 43 Tex. 458; *Blum v. Neilson*, *supra*.

Without, however, determining whether the personal recollection of the judge, or any other evidence inferior to some written memorandum connected with the record, would afford the basis for the amendment of a judgment, and conceding that the proof offered to be made (the personal recollection of the judge that the exceptions were overruled) was sufficient, and treating them as having been so overruled, the question recurs, upon the assignment, that the court erred in overruling them. The exceptions were that the plea which we have set out in full showed on its face that the title to the land claimed by appellants as a homestead was in appellant J. T. Hickey, and his declarations, tending to defeat their homestead rights, while they were occupying it as such, were incompetent, irrelevant, and insufficient, and that the plea does not show that the officers of the bank relied on them, and they were not made to appellee. The plea excepted to alleged such statements and declarations as having emanated from appellants, to the effect that the property in controversy was not their homestead at the time of the execution of the trust-deed to Newton, the president of the bank upon which the money was obtained by appellants, which, if true, would, under the authority of the following cases, have estopped them from subsequently denying the same. *Schwarz v. Bank*, 67 Tex. 218, 2 S. W. Rep. 865, and cases there cited, particularly the case of *Bank v. Bank*, 50 N. Y. 580; *Tobin v. Allen*, 53 Miss. 563. See, also, *Ranney v. Miller*, 51 Tex. 269; *Hurt v. Cooper*, 63 Tex. 362. If, however, this plea did not contain all of the elements of a technical estoppel, the averments amounted to a complete denial of the claim that the property was owned by appellants, and set forth affirmatively that it belonged to Mrs. Flowers, as a predicate for the proof subsequently made in support of such averments. The exceptions, we think, should have been overruled.

The second, third, fifth, and sixth, ninth, and eleventh assignments, as they relate to the admission of evidence in support of the plea referred to, may be grouped together, and appropriately considered as one.

The second and third are that "the court erred in admitting the evidence of A. M. Britton and John W. Wray, to the effect that J. T. Hickey and Mrs. Eliza Flowers told them, at the time the deed of trust was signed and acknowledged, that the lots in controversy did not belong to Hickey, but belonged to Eliza Flowers, and Eliza Flowers' money paid for them, and that the same was not his homestead, and erred in admitting the evi-

dence of Deitz to the same effect; and the deed of trust made by J. T. Hickey, as attorney in fact for Eliza Flowers, to Schutler, for the purpose of placing before the jury the recital in the copartnership contract, to the effect that Eliza Flowers owned a valuable lease on the property, and had bought the lots in controversy out and out, when it is not shown that said recitals and instruments were made and executed for the purpose of influencing the bank to loan Hickey the money, and accept the deed of trust from Mrs. Flowers, and it was not shown that the bank knew of such instrument at the time of the acceptance of the deed of trust, or was in any manner influenced thereby to accept said deed of trust." The objection made to the evidence of Britton and Wray was that "it was incompetent," etc., "where the issue is whether the deed of trust is valid upon a homestead in actual use and occupation at the time it was given." The evidence was admissible to show that it was not the property of appellant Hickey, and therefore not his homestead. The contract of partnership between appellant J. T. Hickey and appellee recited that "Eliza Flowers owned a valuable lease on the property in controversy, and bought it out and out." So, too, the deed of trust was one executed by Hickey as attorney in fact for Mrs. Eliza Flowers in January, 1885, to George Schutler and T. N. Edgel, to secure the payment of \$1,200. All of this evidence, with more of a similar character, was introduced for the purpose of establishing the fact that there could be no homestead claim asserted to the property by Hickey and wife, because it belonged to Mrs. Flowers.

The fifth and sixth assignments relate to the same kind of testimony.

The seventh assignment is that the court erred in allowing counsel for appellee in the court below to denounce the acts and conduct of appellant Hickey as "colossal rascality." It appears from the record that the plaintiff's counsel on the trial, in addressing the jury, used this language: "Gentlemen of the jury, I regret that my time is so limited that I cannot speak to you longer of the colossal rascality of this man Hickey." Counsel for appellant refers to this as a "powerful arraignment of J. T. Hickey for his conduct in the effort to hide the property from creditors, as Hickey in his own testimony admitted." There was evidence that appellant Hickey did endeavor, in his embarrassment financially, to place his property beyond the reach of his creditors. We are not willing to hold that under such a state of facts the language used in commenting on them is such as would authorize a reversal.

It is claimed that the court erred in refusing to instruct the jury, as requested by defendant, to the effect that inasmuch as no evidence had been offered to prove that the trustee had advertised the sale of the lots, or had sold the same in the manner, and at the place, provided in the deed of trust, they should find for the defendants. There was

a provision in the trust-deed that the sale should be at the east door of the court-house. The trustee's deed recites that it was sold "at the usual and customary place of making such sales,—at the south door of said court-house." In the first place it may be said in reply to this assignment that there was no objection whatever made to the introduction of the deed of the trustee to appellee when it was offered, and the title specially pleaded by appellants was that the property constituted the homestead of J. T. Hickey and wife. No attack was made upon appellee's title, because it was not consistent with the deed of trust. In addition to these reasons why the assignment is not, we think, well founded, the deed of trust provided that "the recitals of the trustee's deed made by virtue of these presents shall be full evidence of all the recitals therein contained, and shall be a perpetual bar to the said grantors." While it is a familiar principle that the directions and terms prescribed in a deed of trust should be carefully observed in making a sale, we cannot think that so slight a deviation (a sale at the south door instead of the east door of the same building) would affect the purchaser's title, in the absence of some proof of injury occasioned the appellants thereby. This disposes of the assignment complaining of the court's refusal to charge that there was no evidence of a compliance with the recitals in the trust-deed as to place of sale.

In the ninth, tenth, and twelfth assignments complaint is made of the court's refusal to instruct the jury, as requested by the defendants in the third paragraph of their special charges, to the effect that, in determining the question whether the property was the homestead of Hickey or not, they should pay no attention to the declarations of either Hickey or Mrs. Eliza Flowers, if the property was, at the time of making the deed of trust, in fact occupied by Hickey, and was then being used by him as his place of business. Also that the court erred in refusing to charge the jury, as requested by defendants in their special charge No. 4, to the effect that if the property was, at the time the deed of trust was given, the business homestead of defendants, then the deed of trust would be void, and it would make no difference if Hickey afterwards ceased to do business; and erred in giving instead thereof the charge that if the property was purchased by Hickey with his own means, and not with the means of Eliza Flowers, and if he was using the property as his place of business at the time the deed of trust was made, then it would be void; and in not instructing the jury that, if the legal title was in Hickey, and at the time the trust-deed was executed he was occupying the lots as his place of business, and had paid for them with his own means, the bank took the deed of trust at its own peril, and it would be void although the defendants may have said the property belonged to Mrs. Flowers; and in charging, in effect, that the declarations and statements

of the husband concerning his homestead, and his opinion as to the title thereof, where the evidence of the title is in writing, and at the time shown, though false, will defeat the homestead rights of the wife and children, though they be innocent, and in occupation and use of the premises at the time, and that, too, in a case where a creditor takes a deed of trust principally to secure an old debt. The evidence in the case, as we have said, was conflicting. It showed that Hickey's title to the property in controversy consisted of the deed from E. M. Daggett to J. T. Hickey, as attorney in fact for Mrs. Eliza Flowers. There was much evidence in behalf of appellants to the effect that Hickey occupied and used the lots in 1885 as a place of business. There was evidence, also, that Hickey paid for the property with his own means, and that no declarations were made by appellants that the property was bought with the means of Mrs. Flowers, and belonged to her. On the other hand, there was evidence of the execution of the deed of trust by Hickey, in which Eliza Flowers joined; that he declared that the lots belonged to her, her money having paid for them; and that he could not therefore convey one-half interest to appellee. There was testimony that in January, 1885, an attachment was levied on the property by Casey & Stewart, who held it as the property of Mrs. Flowers. She was made a party to the suit, and Casey & Stewart's debt was paid off with a part of the money received by Hickey from the bank when the deed of trust was executed. Hickey borrowed money from Schutler and Edgel on the property, executing a deed of trust on it in Mrs. Eliza Flowers' name, in January, 1885. There was evidence that Hickey and Mrs. Flowers both told Britton, the president of the bank, that Mrs. Flowers owned the property, and her money paid for it, and that Hickey had only a lease on it from Heard. One room in the building on the lots was rented to Woodrow in 1884 and 1885 by Hickey, who collected the rents as Mrs. Flowers' agent, and gave receipts for the same in that capacity. The contract of partnership between Hickey and appellee recited that the former was Mrs. Flowers' agent with respect to this property. The release of the vendor's (Daggett's) lien on the property was made to Hickey as her agent. Mrs. Eliza Flowers was the appellant Hickey's mother-in-law. As we have before stated, the issues which were developed by this evidence were: (1) Whether Mrs. Flowers or Hickey was the real owner of the property. (2) Whether, at the time of the execution of the deed of trust, Hickey was occupying it as a place of business and his homestead. (3) Whether, at the time the loan was obtained from the bank, Hickey and Mrs. Flowers represented that she owned it, and that Hickey had no interest in it. (4) Whether Hickey represented to appellee that the property belonged to her, and he had no interest in it. Upon these issues the court charged the jury, in substance,

that the deed from E. M. Daggett to Hickey, as attorney in fact for Eliza Flowers, placed the legal title in Hickey, and "if you believe from the evidence that, at the time the deed of trust from him and Eliza Flowers to G. R. Newton, trustee, was executed, said Hickey \* \* \* was carrying on the business of buying and selling wool, hides, or other merchandise, on his own account, or for others on commission, on the lots in controversy, and that said lots were then being used by him as a place for carrying on said business, \* \* \* you should find for the defendants. If the lots were purchased with the means of Eliza Flowers, the deed of trust executed by her and Hickey, the sale thereunder would entitle plaintiff to recover. If they were purchased with the means of Hickey, and at the time of executing the deed of trust they were used by him as his place of business, the deed of trust and sale would be void absolutely, and conveyed no title, though Hickey subsequently ceased to use the property as a homestead." Upon the issue made by the conflicting evidence as to the representations of Hickey and Mrs. Flowers, the instructions were, substantially, that if, at the time of the execution of the trust-deed by them, they represented to A. M. Britton, president of the bank, that the property in fact belonged to Eliza Flowers, and not to Hickey, and Britton believed these representations to be true, and, relying upon the truth thereof, the money was loaned to Hickey, and in good faith the trust-deed to secure it was taken, they would find for plaintiff; but, unless Britton believed and acted on such representations, if any were made, such representations, though false, would not estop defendants from denying the truth of the representations. And if the jury believed that Britton or Newton, the officers of the bank, knew or were informed that the property belonged to Hickey, then no declarations of either of the defendants would affect the homestead rights of Hickey and wife, though false, and made to secure the loan, if Hickey was occupying the property as his place of business.

The leading error pervading appellants' argument, and upon which their assignments are predicated, is that they treat the facts as uncontrovertibly established that Hickey owned the property; that he occupied it as his place of business; that his money paid for it; and that he never represented it to be Mrs. Flowers'. These facts were disputed, as shown by the evidence. The jury were told, in effect, that the deed of trust was void if the property was the homestead when they were instructed that "the legal title was in Hickey, and if it was, at the time the trust-deed was executed, used as his place of business, they would find for appellants." There was conflicting evidence as to whether the property was a part of the homestead,—that is, used as a place of business. There was testimony, as we have seen, that it was not. The jury believed this. Unquestionably, if the legal title



was in Hickey, and it was not his homestead, the trust-deed executed by him in this case was valid, and appellee was entitled to recover. Under the charge appellants were allowed to recover, if the property was purchased by Hickey, with his own means, and it was used as his homestead. There was evidence in support of this. So, too, there was evidence to the contrary. The jury believed the latter. Unquestionably, if the property was bought by Hickey with his own means,—in other words, was his property,—and it was not so used, the deed of trust was valid, and appellee could recover. Again, the jury were told in effect that if the lots were bought with Mrs. Flowers' means, and for her, although the legal title was in Hickey, the superior equitable title was in Mrs. Flowers, and she executed the trust-deed, appellee was entitled to recover. As we have seen, there was evidence fully authorizing the jury to believe that the property belonged to Mrs. Flowers. That she executed the trust-deed is not disputed. If so, and the jury so found, there was no question of homestead rights in the case. If the property belonged to Hickey, and was used and occupied by him as a homestead, the declarations might not estop appellants, whether Britton or Newton knew the fact or not, and the latter part of the charge is therefore not correct. But we do not think, under the facts of this case, that it operated to the injury or prejudice of appellants. The charge, as a whole, we think was more favorable to them than they were entitled to. The deed from E. M. Daggett to J. T. Hickey, as attorney in fact for Eliza Flowers, vested the title in her. *Paschal v. Acklin*, 27 Tex. 192; *Smith v. Brown*, 66 Tex. 544, 1 S. W. Rep. 573; *Giddens v. Byers*, 12 Tex. 79, 80. If, notwithstanding the authorities cited, such was not its effect, and the legal title was in Hickey, still there was abundant evidence to show that the superior equitable title was in Mrs. Eliza Flowers, and that no homestead rights vested in the appellants to this property. Such was the effect of the jury's finding. If that part of the charge last referred to was erroneous, as contended, it could not, we think, have affected the verdict, which was, eliminating this from the case, amply supported by the facts. We think the judgment should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

#### GLOVER v. THOMAS *et al.*

(*Supreme Court of Texas*. Dec. 20, 1889.)

#### DEEDS—EVIDENCE—COMMON SOURCE OF TITLE—TRANSACTIONS WITH DECEDENTS.

1. Error in admitting a copy of a deed in evidence is cured by the introduction by the opposite party of the original deed.

2. A deed executed by an attorney in fact is admissible in trespass to try title, though the authority of the attorney is not shown, where it is

the common source of title, under which both parties claim.

8. The grantees in a deed, the common source of title, being dead, a party cannot testify that it was given in satisfaction of a partnership debt which, on a division of the firm assets, had been given to witness' father, who gave it to him, and that the deed was made by mistake to the firm, instead of to witness.

4. One claiming under a deed cannot deny its validity to convey the legal title to the grantees named therein, though it was delivered to him, and not to them.

Appeal from district court, Clay county; P. M. STINE, Judge.

J. E. Bomar and Meade & Bomar, for appellant. W. G. Eustis, for appellees.

GAINES, J. This was an action of trespass to try title, brought by appellees against the appellant and the Carroll Land & Cattle Company, to recover a tract of land consisting of 640 acres. The defendant the Carroll Land & Cattle Company disclaimed as to the west half of the tract, and as to the other half pleaded not guilty, and the statute of limitations. Upon the trial the court gave judgment in its favor for the east half, and the plaintiffs have not appealed. The appellant disclaimed as to the east half, and as to the west half pleaded not guilty. He here appeals from a judgment against him for the latter half.

During the trial, in order to show a common source of title between the plaintiffs and defendants, the plaintiffs offered in evidence a certified copy of a deed purporting to have been made by J. I. Thompkins and C. L. McMurphy, by M. C. McLemore, their attorney in fact, and to convey to R. D. Glover, T. J. Jennings, and W. M. Thomas the land in controversy. The defendants objected to the evidence offered on, substantially, two grounds: (1) Because the original deed was the best evidence, and no reason was shown why it was not produced; and (2) because the authority of the person by whom it was executed to make the conveyance was not shown. The certified copy of the deed was admitted, and defendant excepted, and now assigns the ruling as error. In regard to the first ground, it is sufficient to say that if there was error in admitting the certified copy the error was cured by the act of appellant himself. When he came to adduce his evidence, he introduced the original deed. Having the deed in his own possession, if plaintiffs had given him notice to produce it, and he had failed to do so, the copy would have been admissible. He was evidently not prejudiced by the ruling. Ought the deed to have been excluded upon the second ground of objection? The rule as to deraigning titles from a common source in suits for the recovery of land is founded upon the principle that a defendant in such action, by claiming under a certain title, affirms its validity. If, therefore, the plaintiff show a superior right under that title, he ought, *prima facie*, at least, to prevail in the suit. It need not be a good title. It is sufficient that it is appearance of title, and that both parties claim under it.

It is also claimed that the court erred in excluding the testimony of appellant. The deed above mentioned, if it conveyed any title at all, placed the apparent legal title to the land in suit in R. D. Glover, T. J. Jennings, and W. M. Thomas. The evidence showed that they were all dead. The defendant A. C. Glover was a son and heir of R. D. Glover. The plaintiff Jackson sued as executor of the will of Jennings, and plaintiff Mrs. Thomas as sole heir of her husband, W. M. Thomas. Counsel for appellant, Glover, offered to prove by his own deposition that R. D. Glover, Jennings, and Thomas, the grantees in the deed, had been partners in business, and that Thompkins and McMurphy, the purported grantors, owed the firm a debt; that upon a division of the assets of the firm this debt was transferred to R. D. Glover, who gave it to the appellant; that Thompkins agreed with plaintiff to convey the land in controversy in satisfaction of the debt; that in pursuance of the agreement he caused the deed in evidence to be executed; that the names of the grantees therein were inserted by mistake; and that he received the deed, knowing of the mistake, believing that the grantees would convey to him the land. The testimony was objected to, and excluded, "because it was evidence of a transaction defendant A. C. Glover had with the ancestors of plaintiffs or W. M. Thomas and T. J. Jennings, who were deceased, and because it was attempting to vary by parol the terms of a written instrument." The court sustained the objection. We think the first ground of objection was well taken. We need not determine whether the appellant could testify as to the circumstances attending the execution of the deed or not. The relevancy of these facts depended upon the question whether or not he was the owner of the claim the satisfaction of which constituted the consideration for the conveyance. As to the transaction between the partners by which, as appellant claims, his father became the owner of the claim against Thompkins and McMurphy, we have not been able to distinguish the testimony of appellant, which was offered, from that which was held to be inadmissible in the case of *Parks v. Caudle*, 58 Tex. 221. The other testimony depended upon this, and the whole was properly excluded.

The last assignment is that the court erred in finding that plaintiff had any interest in the land in controversy. This assignment is based upon the proposition that because the evidence showed that the purported conveyance was never delivered to the grantees named therein, but was delivered to appellant, as his deed, it conveyed no title to them. The appellant showed no claim to the land, except under the deed, and he did set up a claim under it by attempting to show that it was delivered to him as a conveyance to himself; that the consideration passed from him; and that it inured to his benefit. Claiming solely under the deed, he cannot deny its

validity as a conveyance of the legal title to the grantees named therein, and he has failed to show equity under it. It was proved on the trial that appellant had conveyed the east half of the land, both in his own right and as attorney in fact of his father, Jennings, and Thomas, but that the constituents in the power of attorney were all dead when the conveyance was made. This disposes of all the assignments of error. Under the deed, plaintiffs and appellant owned each an undivided one-third interest in the entire tract. The plaintiff recovered the whole of one-half. We presume this was permitted, because it was shown that he had conveyed the other half. Whether the evidence was sufficient to warrant such a judgment we need not decide, because there is no assignment of error which presents the question. There is no error pointed out by the assignments, and therefore the judgment is affirmed.

#### INTERNATIONAL & G. N. RY. CO. v. STATE.

(Supreme Court of Texas. Dec. 10, 1889.)

#### RAILROAD COMPANIES—EXEMPTION FROM TAXATION—FORFEITURE—APPEAL.

1. Immunity from taxation is not a corporate franchise or "right and privilege," within the meaning of the Texas statute authorizing proceedings by *quo warranto* "in case any person shall usurp \* \* \* or unlawfully hold \* \* \* any office or franchise, \* \* \* or any incorporation does or omits any act which amounts to a surrender or forfeiture of its rights and privileges as a corporation;" and an appeal from a decree withdrawing such exemption, in such a proceeding seeking forfeiture of charter and such withdrawal, need not be prosecuted within the time required in *quo warranto* proceedings.

2. Defendant having appealed from a decree forfeiting its exemption, the refusal of a decree forfeiting the charter cannot be reviewed, though both parties assigned errors, where the appeal is not prosecuted "to the term of court in session, at either branch, or the first term to be held," as is prescribed in *quo warranto* proceedings.

3. Exemption from taxation by act of legislature for good consideration, of property owned or to be owned by a railroad company or its successors, attaches to the property, and cannot be withdrawn for failure to faithfully exercise corporate powers, in the absence of provision for forfeiture.

Appeal from district court, Travis county; JOHN C. TOWNES, Judge.

*Baker, Botte & Baker*, and *S. R. Fisher*, for appellant. *Jas. S. Hogg*, Atty. Gen., for the State.

STAYTON, C. J. This proceeding was brought by the state, through the attorney general, under the act regulating proceedings in *quo warranto*, and the purpose of the proceeding was: (1) To have declared a forfeiture of the company's charter, and wind up its business; (2) to have a decree withdrawing from the company's property the immunity from taxation given by the act of March 10, 1875. On hearing, the court below found that the facts proved did not justify a forfeiture of the company's charter, but that the facts relied upon for that purpose were sufficiently shown to authorize a decree declaring the company's property no longer exempt

from taxation. A judgment was entered accordingly by the district court for Travis county on June 21, 1888. Appellant gave notice of and perfected an appeal in proper time, and both parties filed assignments of error, but the record was not filed at any branch of this court until April 8, 1889, when a motion to dismiss the appeal was filed by the state. This court was in session at Austin when the judgment was rendered, and on the first Monday in October following convened at Tyler, where a term was held, and then convened at Galveston, where a term was held, after which it convened at Austin again, on the first Monday in April, 1889. The ground of the state's motion to dismiss was that the appeal was not prosecuted to the term pending when the judgment was rendered, nor to the succeeding term, held at Tyler. The motion was overruled, but without any written opinion; and the state now seeks a revision of so much of the action of the court below as refused to forfeit the charter of the company, and to sustain the other part of the judgment.

The statute regulating appeals from judgments rendered in proceedings on information, in the nature of *quo warranto*, provides "that all such appeals shall be prosecuted to the term of the court in session, at either branch, or to the first term to be held, if not in session, after judgment has been rendered in the district court;" and it has been held, in accordance with this and other provisions of the statute showing a legislative intention that such causes should be speedily disposed of, that there must be a substantial compliance with the statute. The act prescribes the cases in which informations under it may be prosecuted, and its other provisions must be held to apply only to such proceedings as are contemplated by it. So much of the act as it will be necessary to consider is as follows: "In case any person shall usurp, intrude into, or unlawfully hold or execute, or is now intruded into, or now unlawfully holds or executes, any office or franchise, or any office in any corporation created by the authority of this state, or any public officer shall have done or suffered any act which by the provisions of law works a forfeiture of his office, or any association of numbers of persons shall act within this state as a corporation, without being legally incorporated, or any incorporation does or omits any act which amounts to a surrender or a forfeiture of its rights and privileges as a corporation, or exercises powers not conferred by law, \* \* \* the attorney general or district or county attorney of the proper county or district, either of his own accord or at the instance of any individual relator, may present a petition," etc. There are but two parts of this statute which can have any application to the question raised by the motion to dismiss, and to the state's right now to have revised so much of the decree as refused a forfeiture of the charter of the company. If the state attempted to do something through this proceeding not con-

templated by the statute, then its provisions regulating appeals, as to such a matter, can have no application; but, in so far as the proceeding was contemplated by and in pursuance of the statute, its provisions regulating appeals must be applied. That part of the statute which declares that an information may be filed and heard "in case \* \* \* any incorporation does or omits any act which amounts to a surrender or a forfeiture of its rights and privileges as a corporation," and that in case the corporation be adjudged guilty the court shall declare a forfeiture of the corporate franchise, is that on which the proceeding was based, and properly based, in so far as the forfeiture of the charter of the company was concerned, and, if the state desired to appeal from the judgment in so far as adverse to it, then it should have complied substantially with the statute; and, not having done so, we are of opinion that it cannot now have a revision of any matter permitted by the statute to be adjudicated under the terms and restrictions therein found. We will notice the grounds upon which the motion to dismiss the appeal was overruled, for it is intimately connected with the main question involved in this appeal. It was not believed that the statute on which the proceeding is based authorized so much of it as sought to have a decree declaring that the exemptions of appellant's property given by the act of March 10, 1875, and compliance therewith, should cease to exist; and that for this reason the provisions in regard to appeals could not affect appellant's right to prosecute its appeals under the general laws applicable thereto. It would hardly be contended, if the state's officer, in a proceeding properly instituted under the statute to forfeit the charter of the company, had joined with that a proceeding to try the company's title to its lands, railway, rolling stock, and other property, that the latter would be governed by the statute in question as to time and mode of prosecuting an appeal. To be governed by the particular statute the proceeding must be one authorized and contemplated by it; for it is only because it was thought that the best interests of all, in reference to such matters, would be subserved by most speedy determination of the litigation that a different rule to that applied in other cases, as to time within which appeals should be prosecuted, was prescribed. The "rights and privileges" contemplated by the clause of the statute before referred to are evidently such as result from the fact of incorporation, the right and privilege to be a corporation, and to exercise the powers necessary to the consummation of the purposes for which corporate existence is given,—“rights and privileges as a corporation,” and not such rights and privileges in relation to property as may be vested in a corporation or an individual by contract or legislation. *Morgan v. Louisiana*, 93 U. S. 223; *Railway Co. v. Miller*, 114 U. S. 185, 5 Sup. Ct. Rep. 813. The character of right conferred by the act of March 10, 1875, in so far

as it exempted appellant's property from taxation for a fixed period, will be considered in another connection, and it is sufficient now to say that it is not embraced in the terms "rights and privileges as a corporation." That part of the statute which declares that information may be filed "in case any person shall usurp, intrude into, or unlawfully hold or execute, or is now intruded into, or now unlawfully holds or executes, any office or franchise, or any office in any corporation created by authority of this state," is the only part not considered which, with any show of reason, could be claimed to authorize a proceeding under the statute to withdraw appellant's right to exemption from taxation; but it is too clear that this language does not apply to such a right or immunity, even though, in a general sense, it may be termed a "franchise," and that it applies only to usurpation of or intrusion into an office, or a franchise pertaining thereto. A much more restrictive meaning has constantly been given to the statute of Anne from which this part of the statute is taken. *State v. Smith*, 55 Tex. 451.

Appellant's claim to exemption from taxation is based on the act of March 10, 1875, so much of which as has application to the question before us is as follows: "An act for the relief of the International Railroad Company, now consolidated with the Houston & Great Northern Railroad Company, under the name of the 'International & Great Northern Railroad Company'; whereas, on the fifth day of August, 1870, the legislature of the state of Texas passed an act entitled 'An act to incorporate the International Railroad Company, and to provide for the aid of the state of Texas in constructing the same;' and whereas, by the 9th section of said act, it is claimed the state of Texas obligated itself to donate and grant to the said company the bonds of the state of Texas to the extent and amount of ten thousand dollars per mile for each mile of railroad constructed under said charter; and whereas, the said railroad company has already constructed about two hundred miles of railroad, in accordance with the provisions of its charter; and whereas, the said International Railroad Company has been consolidated with the Houston & Great Northern Railroad Company, under the name of the 'International & Great Northern Railroad Company;' and whereas, questions have arisen between the state of Texas and the said company as to the legal liability of the state to deliver said bonds to the said company; and whereas, it is important both to the state and said company that these questions should be definitely settled by a just and reasonable compromise; therefore, for that purpose,—Section 1. Be it enacted by the legislature of the state of Texas, that, in full settlement and satisfaction of all claims of the said the International Railroad Company, and of the said International & Great Northern Railroad Company against the state for bonds, under the provisions of

the ninth section of the aforesaid act of August 5, A. D. 1870, there is hereby granted to the said last-named company, its successors and assigns, twenty sections, of six hundred and forty acres each, of the unappropriated public lands of the state, for each mile of railroad which has been and which may hereafter be constructed pursuant to the authority conferred by the said act of August 5, A. D. 1870. And the said company, its successors and assigns, shall have the right to locate the said lands as headright certificates were formerly located, without being under obligation to locate alternate sections for the state; and the said lands, and the certificates issued therefor, are hereby exempted and released from all state, county, town, city, municipal, and other taxes for the period of twenty-five years from the date of the respective certificates issued therefor. And the said railroad company and its successors, and its and their capital stock, rights, franchises, railroads constructed and to be constructed, pursuant to the said act of August 5, A. D. 1870, and this act, rolling stock, and all other property which now is, or hereafter may be, owned or possessed by said company, or its successors, in virtue of the said act of August 5, A. D. 1870, is hereby exempted and released from all state, county, town, city, municipal, and other taxes, for a period of twenty-five years from the 5th day of August, A. D. 1875, except county and municipal taxes, in such counties, cities, and towns as have donated their bonds to aid in the construction of said railroad; but this exception shall not remain in force in favor of any county, city, or town, which, having thus donated bonds, shall make default in the payment of either the interest or principal thereof: provided, that this exemption from taxation shall not be held or construed to include or apply to the lands or railroads which at the time of the consolidation hereinbefore recited belonged to the Houston & Great Northern Railroad Company, or which has since been, or hereafter may be, constructed or acquired under its charter: provided, nothing in this act contained shall be so construed as to exempt from taxation any lands to which the company may be entitled by virtue of the charter of the Great Northern Railroad Company, or the franchise, road-bed, rolling stock, or any property acquired, or hereafter to be acquired, by virtue of the charter of the Great Northern Railroad Company." "Sec. 7. That a majority in amount of all the stockholders of the said the International & Great Northern Railroad Company shall in person or by proxy, at a meeting of the said stockholders held for that purpose, vote in favor of accepting the provisions of this act, and a certificate certifying that fact, under the common seal of said company, attested by its secretary, shall be filed in the office of the secretary of state within forty-five days after the approval of this act by the governor of the state; this act shall thereupon be and become obligatory upon said company and its

successors; and, its provisions being complied with by the state, it shall be and constitute a full, final, and conclusive settlement of all the claims and demands of said company against the state for bonds, under the ninth section of said act of August 5, A. D. 1870; and this act shall also be held to constitute an irrevocable contract and agreement between the state and the said company, its successors and assigns."

The information alleges that the "state of Texas, by said last-named special act, granted to it, (the railway company,) and it now enjoys, the said extraordinary exemptions, special privileges, immunities, and franchises from all state, county, city, town, municipal, and other taxes on its said road-bed, rolling stock, and other property, in and from its said eastern terminus at Longview, Gregg county, in and through the aforesaid intermediate counties, and all the towns and cities thereof, to its western terminus at Laredo, in Webb county, and still claims the right to continue to enjoy said exemption until August, 1900." This contains a clear recognition of the fact that all the requirements of section 7 of the act have been complied with, and that the exemption existed at the time the information was filed. The grounds on which the forfeiture of the company's charter, and its right to immunity from taxation, were asked, are thus summarized in brief filed for the state: "*First*, that the respondent had willfully permitted its road-bed and rolling stock to get out of repair, so as to endanger the lives of its passengers, and to delay and retard, rather than to promote and facilitate, travel,—giving particulars; *second*, that it had failed to keep and maintain passenger and freight depots sufficient to accommodate the demands of the public, and that such as it did keep were low, flat, indecent buildings, totally unfit for railway purposes; *third*, that it had willfully diverted its corporate funds to other and different purposes, and was so incumbered by fictitious liabilities as to render itself unable to perform its public functions; *fourth*, that it failed to operate continuous and regular trains over its road from its eastern to its western termini, as it had agreed to do; *fifth*, that it had abandoned the use of its road, over which it had never run any trains of its own for a number of years, from Taylor westward,—a distance of several hundred miles,—which part of the road was exclusively used by other and different railway companies; *sixth*, that it had leased and sold out its whole corporate property and franchises to a parallel and competing railway company, and to a foreign corporation, in violation of its charter; *seventh*, that it had removed its general offices, domicile, and managing officers all out of this state into the city of New York, where they were maintained, not by itself, but by a foreign railway company; *eighth*, that it was operating in and under the control of the Texas Traffic Association, a combination of competing railways, for the purpose and ef-

fect of preventing competition between itself and others; *ninth*, that the officers of other competing railway companies controlled and managed the affairs of respondent exclusively; *tenth*, that it was without a *bona fide* organization at all in the state of Texas." Thus it is seen that the state bases its right to withdraw the immunity from taxation on no other ground than the failure of the company faithfully to exercise the powers conferred on it by its charter, in accordance with the laws of this state. The court below held that the failure of the corporation in this respect was not such as to justify the forfeiture of its charter, but that it was such as required a judgment declaring that its property should not have the immunity from taxation given by the act of March 10, 1875. The first conclusion of the court below, for reasons before given, we cannot revise; and, if the immunity from taxation could be termed a "corporate franchise," we do not see how it could be withdrawn, until the term for which it was given expires, so long as the existence of the corporation continues, in the absence of something in the statute authorizing a partial forfeiture. There is nothing in the statute which authorizes this partial forfeiture. We cannot now enter into an inquiry as to the inducement which may have led to the grant of the original charter to the International Railroad Company, nor into the validity of any claim appellant may have asserted against the state, which led to the compromise act passed March 10, 1875. All such questions were, no doubt, considered by the legislature, and the rights of the parties settled by the act referred to, and the acceptance of its provisions by appellant. The validity of the exemption from taxation has been considered in former cases, and need not now be again discussed. *Railroad Co. v. Anderson Co.*, 59 Tex. 654; *Railroad Co. v. Smith Co.*, 65 Tex. 21. Looking to the provisions of the act of March 10, 1875, we think there can be no doubt that the exemption from taxation given by it, instead of being a right vesting only in appellant, is a right which inheres in the property to which it applies, and follows it into the hands of whomsoever may become its owner. The exemption is not given to a company named alone, but to its assigns and successors as well; thus evidencing an intention that the exemption from taxation should adhere to the property exempted, and follow it into the hands of whomsoever may become its owner. No such state of facts is shown in the following cases, to which counsel for the state refers, and on which it relies. *Morgan v. Louisiana*, 98 U. S. 217; *Railroad Co. v. Georgia*, 98 U. S. 359; *Railway Co. v. Berry*, 113 U. S. 465, 5 Sup. Ct. Rep. 529; *Railway Co. v. Miller*, 114 U. S. 176, 5 Sup. Ct. Rep. 813; *Pickard v. Railway Co.*, 9 Sup. Ct. Rep. 640. These cases hold that exemption from taxation given to a named corporation will not inure to the benefit of another that may buy the property, or to a corporation formed from the consolidation of the one

holding the exemption and another, in the absence of something showing an intention to fix the exemption on the property into the hands of whomsoever it may go. These decisions, however, are fatal to the proposition that exemption from taxation in such cases is, within the meaning of the law, a corporate franchise, though it may be a franchise owned by a corporation. The act in question, and its acceptance by the company, constitutes, as declared by the legislature, "an irrevocable contract and agreement between the state and the said company, its successors and assigns," based on consideration deemed by the legislature sufficient; and, under it, the right to the exemption would continue, in favor of persons or corporations who may become the owners of the property to which the exemption applies, even though the appellant corporation should be dissolved by a decree declaring the forfeiture of its charter. The existence of this right enhances the value of the property to which it applies. Shareholders and creditors must be presumed to have dealt with the corporation on the faith of the contract which gave the exemption, and it cannot be taken away by legislation, by dissolution of the corporation, or in any other manner not sufficient to pass title to any other property from one person to another. The right to exemption from taxation is secured by the same guaranty which secures titles to those owning lands granted under the act, and, though the corporation may be dissolved, will continue to exist in favor of persons owning the property to which the immunity applies. Lawful dissolution of a corporation will destroy all its corporate franchises or privileges vested by the act of incorporation; but, if it holds rights, privileges, and franchises having the nature of property, secured by contract based on valuable consideration, these will survive the dissolution of the corporation, for the benefit of those who may have right to or just claim upon its assets. The court below erred in adjudging a forfeiture of appellant's immunity from taxation; and in so far its judgment will be reversed, and so much of the action as sought such relief will be dismissed, as ought to have been done by the court below, on demurrer. It is so ordered.

#### FERRIS v. KEMBLE *et al.*

(Supreme Court of Texas. Dec. 10, 1889.)

##### TAXATION—PROPERTY SUBJECT TO—ASSESSMENT.

1. An assessment is not invalidated by the fact that the property was added by the assessor to the inventory of the tax-payer's estate at the direction of the board of equalization.

2. Acts of two members of a board of equalization are valid, without co-operation of the third.

3. Credits are taxable at the place of residence of the owner, and not at the place where they may be deposited.

Appeal from district court, Ellis county; ANSON RAINEY, Judge.

A. A. Kemble and J. W. Ferris, for appellant. Grace & Templeton, for appellees.

v. 12s. w. no. 23—44

HENRY, J. This is a suit brought by appellant, to enjoin the collection of \$75 taxes by the city collector of Waxahachie, under a levy and sale, which sum is claimed to have been legally assessed against appellant. The petition avers that the plaintiff is a non-resident of the city, and that the said sum of \$75 is for taxes on the credits of plaintiff, which were non-taxable within the city, and that it was otherwise illegally assessed against him. A preliminary injunction was ordered, and the sale enjoined. On the final hearing by the court, without a jury, judgment was rendered against the plaintiff, and the injunction dissolved, to which plaintiff excepted, and now prosecutes this appeal. An inventory of all property, real and personal, owned and held by appellant in the city on January 1, 1888, was made out by him under oath, and was agreed upon, and accepted by the assessor. Afterwards, Dechman and Pickett, acting as a board of equalization, directed said assessor to add to said inventory an item of credits, valued at \$10,000, which he did; and upon the margin of appellant's inventory he made the following entry, viz.: "This amount of ten thousand dollars credits is put upon this inventory by order of A. M. Dechman and C. D. Pickett, of the board of equalization, made June 26th, '88." Appellant is a non-resident of the city of Waxahachie, and has been ever since 1880. His residence is just outside the city limits in Ellis county. He is and was a practicing attorney at law, and has been for many years, keeping his office in the city, which is his principal place of business. The item of credits here in question, valued at \$10,000, consisted of notes against different persons, who were almost entirely non-residents of the city. They were taken, part for money loaned, part for sales of real estate, and some for attorney's fees. Some were real-estate notes, discounted. They were taken payable to his order at the bank of Waxahachie, using the printed forms of the bank; and they were unindorsed by appellant. He did not do a general loaning business, but kept an account in the bank, and made loans only as he had the means to spare. He kept his said notes in a portfolio, with other papers, in the bank vault, for protection against fire. No one was permitted to go to his papers but himself. Occasionally, he took said credits to his residence, and kept them there for a day or two; and he sometimes, though rarely, transacted business at his residence.

The first error assigned is that "the court erred in holding that it is immaterial that the assessor was induced to list the item of credits by order of the board of equalization, and, in effect, holding that the assessment of the same was legally made." Admitting that the board of equalization had no authority to add additional items of property to the inventory, we think that the court correctly held the assessment not invalid for that reason. When the property was listed by the assessor, it was valid, and became his own,

without regard to the fact that he listed it by direction of the board. Nor do we think that the court erred in holding that the acts of two members of the board of equalization were valid when they acted without the co-operation of a third member. *Cooley v. O'Connor*, 12 Wall. 898.

It is further urged that, appellant being a non-resident of the city, credits owned by him were not taxable by authority of the city. The rule is stated to be, in *Cooley on Taxation*: "A tax assessed against the person for personal estate is to be assessed to him at the place of his residence, because, in contemplation of law, his movable property accompanies him wherever he goes. This is the general rule, though, as has been shown elsewhere, tangible personal property may be taxed where it is, irrespective of ownership, if the statute shall so provide." Page 269. In *Desty on Taxation*, the rule is stated to be: "Property in notes must be [taxed] at the place where the owner resides, and not at the place of deposit of the evidences of debt." Page 66. The supreme court of Iowa decided, in the case of *Barber v. Farr*, 54 Iowa, 58, 6 N. W. Rep. 134, that "moneys and credits were assessable and taxable at the place of his [the owner's] residence. An assessment at any other place was illegal and void." In the case of *Smith v. Bettger*, the supreme court of Indiana decided—*First*, that all debts, of every kind and nature, due to persons having a domicile in the state of Indiana, are taxable to the creditor where such creditor has his domicile; *second*, that all debts, of every kind and nature, due from persons having a domicile in Indiana to persons not having a domicile in Indiana, unless in the hands of an agent doing business in said state, from which said debts have sprung, have no *situs* in the state of Indiana, and are not taxable there. 68 Ind. 254. City Council of Augusta v. Dunbar, 50 Ga. 387; *Hunter v. Board*, 38 Iowa, 376; *People v. Whartenby*, 38 Cal. 461; *State Tax on Foreign-Held Bonds*, 15 Wall. 300. In Illinois, it has been decided that "if the owner is absent, but the credits are in fact here, in the hands of an agent, for renewal or collection, with the view of reloading the money by the agent, as a permanent business, they have a *situs* here for the purpose of taxation." *Goldgart v. People*, 106 Ill. 28. See *Finch v. York Co.*, 19 Neb. 50, 26 N. W. Rep. 589. Article 4676 of our Revised Statutes, having reference to state and county taxes, provides that "all property, real and personal, except such as is required to be listed and assessed otherwise, shall be listed and assessed in the county where it is situated." Article 4671, relating to the same subject, makes personal property include "all goods, chattels, and effects, and all moneys, credits, bonds, and other evidences of debt owned by citizens of the state, whether the same be in or out of the state." The property subject to taxation by town and city corporations is defined in article 425 of our Revised Statutes to be "all real and per-

sonal estate and property in the city not exempt from taxation by the constitution and laws of the state."

From the authorities quoted, we conclude that the following rules are in force in this state, with regard to residents of this state: *First*, personal property, except where it is otherwise provided, is situated where its owner resides, and is taxable only there; *second*, tangible personal property, situated in any town or city of this state, is subject to taxation at the place where it is situated; *third*, intangible personal property, such as credits, are taxable only at the place of residence of the owner, without regard to where they are kept or deposited, and equally without regard to how they were earned, or to the place of residence of the debtor. We think the court erred in rendering judgment for the defendant. It is ordered that the judgment of the district court be reversed, and judgment here rendered in favor of plaintiff, for the perpetuation of the writ of injunction, and for all costs of this court, and of the court below.

#### EAST LINE & RED RIVER R. CO. v. STATE ex rel. HOGG.

(Supreme Court of Texas. Dec. 17, 1889.)

#### RAILROAD COMPANIES—SALE AND CONSOLIDATION —FORFEITURE OF FRANCHISE.

1. The fact that a railroad company, empowered by its charter "to join stock or consolidate with any other railway company running in the same general direction," is forbidden to "rent, sell, lease, or consolidate with any parallel or competing railroad," does not impliedly authorize it to sell its road and franchises to a company whose road, though not a parallel or competing line, does not run in the same general direction.

2. A railway company authorized "to purchase, sell, lease, join stocks, unite, or consolidate with any connecting railroad company" has no power to purchase a road which does not connect with that the company is authorized to construct, though it may have built or purchased a line connecting therewith.

3. A railroad, by its relations to other roads, may be a competing line with a road with which it is not parallel, and does not connect, within the meaning of an act forbidding it to consolidate with a competing road.

4. Under Const. Tex. art. 10, § 8, providing that no railroad company in existence at its adoption "shall have the benefit of any future legislation, except on condition of complete acceptance of all the provisions of this constitution," an admission by a company in pleading, that it is subject to the general laws and constitution now in force, is an admission of the acceptance of the benefits of subsequent legislation, such as subjects it to the provision (article 10, § 6) forbidding a sale to a railroad company organized in another state.

5. As Rev. St. Tex. art. 2805, makes it the duty of the attorney general, unless otherwise expressly directed by law, to seek the forfeiture of the charter of a corporation which has, by any act or omission, misuser or non-user, forfeited the same, the right of the state to demand a forfeiture of the charter of a railroad company which has sold its road and franchises to a foreign company in violation of the constitution, failed to keep up its organization, and allowed its road to become unsafe, is not waived by the provisions of *Sayles*, Civil St. Tex. art. 4247a, § 2, which provides for *quo warranto* against a corporation carrying on business in violation of Const. Tex. art. 10, §§ 5, 6, (forbidding sale to or consolidation with a competing or foreign



company,) to enforce the penalties therefor, and an injunction against future violation, and appointment of a receiver.

6. Acts Tex. 1887, p. 120, § 3, providing for the appointment of a receiver where a corporation has been dissolved or has forfeited its corporate rights, is not unconstitutional, and the stockholders and lienholders need not be before the court.

Appeal from district court, Travis county; W. M. KEY, Judge.

*Baker, Botts & Baker, and Fisher & Townes*, for appellant. *J. S. Hogg, Atty. Gen.*, for appellee.

STAYTON, C. J. This is a *quo warranto* proceeding by the state, upon the relation of the attorney general, seeking a forfeiture of the charter rights and franchises of the respondent, upon the following alleged grounds: (1) Permitting its road-bed, rolling stock, and general equipments to so get out of repair as to retard travel and commerce, and to render the transportation of passengers over its road hazardous, dangerous, and extremely uncomfortable; thereby rendering itself unable to perform its duties to the public, or to carry out its objects and purposes of its creation. (2) Failure to keep a public office in the state, and on the line of its road, and the removal of the same beyond the limits of the state. (3) Failure of its stockholders and directors to hold annual meetings on the line of its road for more than five years. (4) The sale of all its franchises, rights, and privileges, together with all its stock, road-bed, buildings, depots, tools, bonds, grants, and other property, to the Missouri, Kansas & Texas Railway Company, a railroad corporation chartered under the laws of Kansas, and controlling and operating a competing and parallel line of railway. (5) That the president, managers, superintendent, and other officers and employees of said parallel and competing line of railway are in control of, manage, and operate respondent's railway and corporate affairs exclusively at and from the state of Missouri, in violation of the laws and constitution of this state; and that under said foreign and unlawful management its franchises have been so abused as to bankrupt and render insolvent respondent's railway. (6) That its bonds and stocks have been increased far beyond the value of its entire corporate property and franchises, and not for money paid, but to increase the burdens of said railway, and to form an excuse for heavier and more unreasonable charges on freight and passenger traffic. (7) That it has entered into a contract and conspiracy with other railway companies for the purpose of stifling and preventing competition in passenger and freight rates; that instead of exercising its own franchises, and regulating and fixing its own tolls of passenger and freight traffic, and time-tables, and regulations of its trains, over its own line, it has by the contract, sale, and combination left all such matters to the control of the other railways, and to an organization known as the "International Traffic Associa-

tion." (8) That, by said sale of all its property and franchises, respondent has committed self-destruction, violated its public duty to maintain and operate its road, suspended the exercise of its franchises as a railroad company, and wholly rendered itself unable to resume its obligations or to perform its duties to the public.

The respondent filed a general demurrer to the state's bill, and especially excepted to each of the averments therein, which, on preliminary hearing, was overruled, upon the ground that while some of these allegations, considered separately, might not justify a forfeiture, yet there were good grounds for a forfeiture stated, especially those concerning the run-down and bad condition of the road, and the sale of franchises, and, in determining whether or not the judgment sought should be rendered, all the charges in the bill should, upon the question of intent, be inquired into. The respondent also filed a general denial, but admitted the sale of its properties and franchises to the Missouri, Kansas & Texas Railway Company, reserving its right to remain a corporation; and claims that said sale was not unlawful. It also admits that it is subject to the constitution and general laws of the state, and that the Missouri, Kansas & Texas Railway Company is chartered and organized under the laws of the states of Kansas and Missouri. The cause was tried without a jury.

Respondent is a railway corporation chartered, organized, and acting under and by virtue of the special laws passed by the legislature of the state on the 22d day of March, A. D. 1871, and amendments thereof passed, respectively, May 17, A. D. 1873, and March 6, A. D. 1875, authorizing it to construct, own, and maintain a line of railway, with either a single or double track, from the city of Jefferson, in Marion county, to the town of Greenville, in Hunt county, via Mt. Pleasant, in Titus county, and Sulphur Springs, in Hopkins county; thence, in a westwardly or north-westwardly direction, to the western limits of the state. The duration of the charter is fixed at 60 years from the date of the completion of the railroad; and it further provides that the company shall be entitled to 16 sections, of 640 acres each, of land for each mile of road completed. The act of March 22, 1871, contained the following provision: "Said company is authorized, and the right is hereby granted them, to cross or connect with any other railway, to join stocks or consolidate with any other railway company, running in the same general direction." And the act of May 17, 1873, the following: "That the state reserves the right to regulate, by general law, the rates, \* \* \* as well as the management and control, of said railroad, its officers and employees," etc. "That said company shall not have the right to rent, sell, lease, or consolidate with any parallel or competing railroad in this state." Appellant specially pleaded the acts from which the foregoing quotations are

made, and no other. The right to grants of land was given by the act last named, which authorized the construction of a single or double track, of the gauge of four feet eight and one-half inches; but by act of March 6, 1875, the company was authorized to adopt any gauge, not less than three feet. The only law of this state having special relation to the Missouri, Kansas & Texas Railway Company, brought to the attention of the court below or this court, is the act of August 2, 1870, which contains the following provisions: "The Missouri, Kansas & Texas Railway Company, a corporation authorized by congress, \* \* \* shall have the right to extend its railroad, with its present gauge, together with its telegraph lines, from some convenient point on Red river, between Preston and Doaksville, where its road shall cross from the Indian Territory, into and through the state of Texas, in the general direction of Waco and Austin, to the Rio Grande, with a view of extending the same to Camargo and the city of Mexico; and also the right to construct a branch road from a point at or near its crossing of Red river, westwardly," etc. "That the said company, in constructing, extending, and operating its railroad and branches, shall have and exercise, and are hereby vested with, all the rights, powers, privileges, and immunities granted by its acts of incorporation and amendments thereto, so far as the same may be applicable to this state, and not inconsistent with the constitution thereof," etc. "That the said company shall have the right to purchase, sell, lease, join stocks, unite, or consolidate with any connecting railroad company," etc.

The court below made findings of fact, which are sustained by the evidence, and we do not understand appellant seriously to controvert their general correctness. These, so far as necessary to a correct understanding of the case, will be here given:

"(2) That, as such railway company, respondent constructed and built a narrow-gauge railroad from said city of Jefferson, via Greenville, in Hunt county, to McKinney, in Collin county, Tex., a distance of one hundred and fifty-five miles, and received from the state for so doing land certificates at the rate of sixteen sections (640 acres each) per mile.

"(3) That on the 28th day of November, 1881, respondent sold and delivered all its corporate franchises, rights, and privileges, together with all its stock, road-bed, buildings, depots, rolling stock, engines, tools, etc., to the Missouri, Kansas & Texas Railway Company, a corporation chartered under the laws of Kansas and Missouri. That by said sale and the deed of conveyance respondent reserved the right to be and remain a corporation until such time as might be agreed upon for its dissolution, and provided that its power to carry out its contracts should remain unimpaired; and it obligated the said Missouri, Kansas & Texas

Railway Company to fulfill all of respondent's charter obligations to the state, and to the public; and the conveyance contains this recital: 'The object and intent of this contract, conveyance, and agreement being to so merge the rights, powers, and privileges of the party of the first part into the party of the second part, under its own charter, corporate name, and organization, that it shall, without impairing any existing right, exercise, in addition thereto, all powers, rights, privileges, and franchises, and own and control all properties, that the party of the first part now exercises, owns, or by its charter or the laws it has the right to exercise, own, or control.'" The last quotation is from the contract between the two corporations.

"(5) It is shown that a majority in interest of the stockholders of both respondent and the Missouri, Kansas & Texas Railway Company, in proper form, consented to, authorized, and approved the aforesaid sale.

"(6) In accordance with said act of the legislature of August 22, 1870, the Missouri, Kansas & Texas Railway Company constructed its road across Red river into Texas, in a southward direction, and in the general direction of Waco and Austin, via Denison, Whitesboro, Fort Worth, and to the city of Waco; thence, in the general direction of the city of Austin, southward to Taylor, in Williamson county, and a branch road from Whitesboro west to Henrietta, Tex. At the time of the aforesaid sale from respondent to it, said Missouri, Kansas & Texas Railway Company was operating a railroad from Denison to Greenville, and extending thence, in a southeasterly direction, to Mineola, where it connects with the International & Great Northern Railroad and the Texas & Pacific Railroad. With the former it makes a continuous line to Galveston. From Denison, the Missouri, Kansas & Texas runs north to Sedalia, Mo., where it forms connection with other lines leading to St. Louis. The East Line & Red River Railroad, at time of said sale, connected with water transportation to New Orleans, and with the Texas & Pacific Railroad, running, with its connecting lines, to St. Louis, at Jefferson. The Houston & Texas Central Railroad runs from Dallas north to Denison, via McKinney, and was so running at the time of said sale and consolidation, and it extended south to Houston, crossing the Cotton Belt Railroad at Corsicana, and the International & Great Northern Railroad at Hearne.

"(7) The Missouri, Kansas & Texas Railroad, as constructed and operated from Denison, via Whitesboro, Fort Worth, and Waco, to Taylor, runs practically north and south, and the East Line & Red River Railroad, from Jefferson, runs a little north of west to McKinney. The branch of the Missouri, Kansas & Texas from Denison to Mineola, via Greenville, runs in a south-east direction, but not parallel with the East Line & Red River road, and not in the same general direction. Greenville and Mineola are

east of south from Denison, in the direction of the Sabine river, and not in the direction of the Rio Grande.

"(8) The East Line & Red River road crosses the Denison & Mineola branch of the Missouri, Kansas & Texas at Greenville, and did so when said sale was made, but it does not, and never has, reached or connected with the main line of said road from Denison to Taylor, via Fort Worth and Waco,—McKinney, the western terminus of the East Line & Red River road, being about twenty-five miles east of said main line; nor do the said main lines of the Missouri, Kansas & Texas Railroad and the East Line & Red River run in the same general direction.

"(9) That since the time of said sale respondent has failed and neglected to keep and maintain a public office in this state, and along the line of its road, for the transaction of its business, and the said Missouri, Kansas & Texas Railroad Company keeps its principal office in Sedalia, state of Missouri. That prior to said sale respondent kept such an office at Jefferson, Tex.

"(10) That since the time of said sale the stockholders and directors of said East Line & Red River Railroad Company have not in good faith held annual or any other meetings at any place on the line of said road. That nominally the stockholders have held annual meetings and elected directors, but these meetings were not held for the purpose of transacting any business concerning the management of the East Line & Red River Railroad by respondent, but for the purpose of technically complying with the law, in the interest of the Missouri, Kansas & Texas Railroad.

"(11) Since the time of said sale respondent has not operated or controlled any portion of its railroad from Jefferson to McKinney, and the same has been managed, controlled, and operated by the Missouri, Kansas & Texas Railroad, and the Missouri Pacific Railway Company, and no officer of respondent, elected in either good or bad faith, resides upon the line of its road, and no such officer or employe, acting in good faith for it, has taken any interest in or supervision over the management of said road since said sale to the Missouri, Kansas & Texas Railway Company."

"(13) That since said sale, and while operating and controlling the East Line & Red River road, the Missouri, Kansas & Texas Railway Company became a member of the International Traffic Association, the purpose of which was to make uniform rates for railway traffic, and to prevent competition among and between its members. This association was recently dissolved at New Orleans, where, I presume, its head-quarters were. Respondent's road was affected by and included in the Missouri, Kansas & Texas Railway Company's membership of said association.

"(14) Of the last board of directors so nominally elected for respondent, as hereinbefore

stated, one member is a director of the Missouri, Kansas & Texas Railway Company, another is an employe of said company, one is a local treasurer of, and two are attorneys for, the Missouri Pacific Railway system, which includes the roads of the Missouri, Kansas & Texas in Texas, and most of the others are either officers, directors, or employes of other railroads.

"(15) There is evidence that prior to said sale to the Missouri, Kansas & Texas Railroad, and while respondent's road was being constructed, it issued stock and bonds that were not for money, labor, or property actually received and applied to the purposes for which it was organized; and the testimony indicates that the bonded indebtedness, secured by mortgage on respondent's road, has been greatly increased since then, without any corresponding benefit to this road.

"(15a) Disregarding their connections with other railroads and lines of transportation, the East Line & Red River and the Missouri, Kansas & Texas Railroads were not competing roads when said sale was made. Considered with reference to such connections, they were competing roads.

"(16) The respondent's road was constructed from Jefferson to Greenville, reaching the latter place in 1880, and after the aforesaid sale the 32 miles of the road from Greenville to McKinney, which was under contract at the time of the sale, was completed, reaching McKinney in 1881 or early part of 1882. The entire line was constructed as a narrow-gauge road, using ordinary narrow-gauge rails."

The court then gives a statement, somewhat in detail, as to the manner of construction of that part of the road between Greenville and McKinney, and as to its condition, and upon this matter concludes as follows: "This road passes through a very rich and productive country, having a large population tributary to it, and McKinney and Greenville are large and flourishing interior towns, and Farmersville, midway between them, is a town of about 2,500 inhabitants; and because of the bad condition of this road, as above stated, the travel on it is very little, and the public are put to great inconvenience, persons sometimes having to go from Greenville to McKinney by way of Dallas or Denison, more than double the distance, and witnesses under process having to walk from Farmersville to McKinney to attend court. Wherefore it is held that for the past two years the condition of this portion of respondent's road has been such as to very considerably and at times entirely prevent it from performing its duties to the public, and from carrying out the objects and purposes of its creation."

No authority whatever is shown under which the Missouri, Kansas & Texas Railway Company can lawfully own or operate the line of railway from Denison to Mineola, which crosses respondent's line at Greenville. The judgment of the court below is

based on the propositions: (1) That the attempted sale of the railway was unlawful, and that since its date respondent has failed to exercise the franchise conferred upon it by its charter; (2) that the condition of its road has not been such as to enable it to discharge to the public the duties assumed.

That respondent undertook, on November 28, 1881, to convey to the Missouri, Kansas & Texas Railway Company all its property and corporate franchises, of every character whatever, necessary to the conduct of the business for which it was created, except the mere franchise to be a corporation, until such time as, by agreement of the parties, this might be taken away by dissolution, is not denied; but, on the contrary, it is claimed that this was done in the lawful exercise of power conferred on the two corporations. To authorize such a transaction, it must appear that the one corporation had power to sell and the other to buy. *Railway v. Rushing*, 69 Tex. 306, 6 S. W. Rep. 834. Has respondent the power to sell by reason of anything appearing in its charter, or by reason of any law in force in the state? By the terms of its charter, given by special act of March 22, 1871, respondent was empowered "to join stocks or consolidate with any other railway company running in the same general direction." It was authorized by its charter to construct, own, and operate a railway from the city of Jefferson to the town of Greenville, and thence westwardly and north-westwardly, to the western limits of this state; in effect, a road across the northern part of the state whose general course would be westward. In view of this fact, as the power given was to join stocks or consolidate with a railway company running in the same general direction, the only fair construction to be given to so much of the charter is that it was thereby intended to confer power to make such an association with another railway company having a road which might constitute a part of the line of railway respondent was empowered to construct, own, and operate. That the company to whom the sale was made owned, or could own, a line of railway running in the same general direction, cannot be claimed; but, if this were otherwise, it could not well be held that the power conferred on respondent was a power to sell. The prohibition to "rent, sell, lease, or consolidate with any parallel or competing railroad in this state" does not confer a power to sell to another railway company owning a road not parallel or competing. The power to rent, sell, or lease to or consolidate with another railway company does not exist in the absence of legislation permitting these things to be done, and it cannot be implied from a prohibition extending only to parallel or competing roads. We further concur with the court below in the holding that railways, by reason of their relations, control, or management of other lines than their own, may become, within the meaning of the law, competing lines, though the railways owned by

them may not in fact connect. Respondent had not power, under the terms of its charter or any other law in force in this state, to sell its road or any franchise conferred by its charter. The Missouri, Kansas & Texas Railway Company was as clearly without power to buy the road owned by respondent as was it to sell. It was given power "to purchase, sell, lease, join stocks, unite, or consolidate with any connecting railroad company;" but in determining what, within the meaning of the act, was to be deemed a "connecting railroad," we must look to the act through which alone it was empowered to own or operate a railway in this state. It is not to be presumed that the legislature ever contemplated that this corporation would assume, without legislative permission, the right to construct, own, or operate a railway within the limits of this state whenever it might seem advantageous to do so. The act, doubtless, was passed at the solicitation of the corporation, and for the purpose of conferring on it the power, which otherwise it had not, to construct, own, and operate a railway whose lines were fixed by the act, and with reference to which its power to "purchase, sell, lease, join stocks, unite, or consolidate with any connecting railroad company" must be construed. That the Missouri, Kansas & Texas Railway Company had constructed, or could construct, a railway, under the act from which it derives all its power in this state to construct, own, or operate a railway, which connected with respondent's road as it was at the time the sale was made, cannot be claimed. We are of opinion that, within the meaning of the act, —the source of all the power that corporation has, in reference to matters now under consideration,—a company whose road did not connect with that which that corporation, under the power conferred upon it, had constructed or purchased, was not a connecting railroad company. That the Missouri, Kansas & Texas Railway Company may have operated a line of railway from Denison to Mineola, which crossed respondent's road at Greenville, cannot affect the question, for that was not a line contemplated by the act of August 2, 1870. If it had been shown that the line from Denison to Mineola had been built or purchased by that company, the result would be the same; for the act does not look to connections made through roads not built under it, though they may have been built by that corporation, nor does it look to connections made through lines which may be purchased by that company by reason of the fact that they connect with the road the company was authorized to construct. Any other conclusion would lead to a holding that by extending its connections that corporation could make, through such connections, every road in the state one connecting with that contemplated by the legislature at the time the act was passed.

So stands the question, if we look only to the charter of respondent, and the law under

which the other corporation has power to construct, own, and operate a railway in this state. It seems, however, from the admissions in the answer of respondent, that the power of the one corporation to buy, and of the other to sell, is to be tested by the laws in force in this state at the time of the trial; which renders it necessary to consider whether the laws before referred to conferred such rights as might not be taken away by subsequent legislation at any time before the powers therein given were exercised and rights thus acquired. The first two paragraphs of respondent's answer are as follows:

"(1) It denies especially each and every allegation in said petition contained, except as hereinafter admitted, or confessed and avoided. (2) It admits its incorporation by special law of the state legislature of Texas, as mentioned in the state's bill, except that of 22d March, 1873, and of the last-named act defendant requires proof. It also admits that it is subject to such special laws as have been enacted, and to the constitution and general laws of the state now in force." There is nothing in the answer which withdraws this, but it seeks to show, if the acts complained of are in violation of the constitution and other laws, that under existing laws the acts charged against it do not authorize a forfeiture of its charter. The state alleged that the company was subject to the provisions of the constitution and general laws in force when the proceeding was instituted, and the admission in the answer must be deemed an admission, if this were necessary to give full application to the provisions of the constitution, that the corporation had taken benefit of legislation subsequent to its adoption, and, in accordance with its provisions, thus became subject to all its provisions. Such an admission rendered it unnecessary for the state to make proof as to the reception of such benefits. Article 10, § 5, of the constitution, provides that "no railroad or other corporation, or the lessees, purchasers, or managers of any railroad corporation, shall consolidate the stock, property, or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line." The court below found, on evidence that justified it, that respondent and the corporation to whom it sold were competing lines. The constitution forbade the sale. Since the sale, the road of respondent has been operated, controlled, and its franchises exercised by the officers of another corporation in whose selection its stockholders had no choice. It stripped itself of all property necessary to enable it to discharge its duty to the public, and to this its stockholders consented by a ratification of a contract which reserved to respondent no other right or franchise than "to be and re-

main a corporation until such time as may hereafter be agreed upon for its dissolution, [which] shall not be impaired or infringed upon by anything contained in this contract." The terms of the contract are suggestive of the fact that both corporations, or rather their officers and stockholders, were conscious that the contract between them was in clear excess of their powers, and in violation of the laws of this state. The Missouri, Kansas & Texas Railway Company is a corporation organized under the laws of another state, and respondent held its corporate existence and was organized under the laws of this state. Article 10, § 6, of the constitution, provides that "no railroad company organized under the laws of this state shall consolidate, by private or judicial sale, or otherwise, with any railroad company organized under the laws of any other state, or of the United States." Section 8 of same article provides that "no railroad corporation, in existence at the time of the adoption of this constitution, shall have the benefit of any future legislation, except on condition of complete acceptance of all the provisions of this constitution applicable to railroads." The contract in question having been made since the adoption of the constitution now in force, under the admissions in the answer, it must be held that it is in clear violation of section 6, before quoted.

In view of the facts proved to be true, it must be held that respondent, for nearly seven years before the information was filed, had ceased to exercise its corporate franchises, had parted with its property necessary to that end as far as it could, and had not even in good faith kept up its corporate organization; its highest officer resident at or attending to the business at its principal office being really but a claim agent for the purchasing company. In addition to this, as found by the court below, the road had been so far permitted to run down that it ceased to be able to carry out the objects and purposes for which the corporation was created. Sufficient cause was shown to justify a forfeiture of respondent's charter, if we look only to common-law grounds for such action. But it is contended that the legislation in this state shows that it is not intended such a penalty shall be imposed for such neglects of duty as are evidenced by the record before us. Article 10, § 3, of the constitution, provides that railroad companies organized under the laws of this state shall therein maintain a public office at which named business shall be transacted; that the directors shall hold within this state, annually, one meeting, and that reports shall be made of its acts and doings to the governor or comptroller, as may be prescribed by law; and that "the legislature shall pass laws enforcing, by suitable penalties, the provisions of this section." For failure in these respects the legislature has prescribed penalties other than the dissolution of the corporation. 2 Sayles, Civil St. arts. 4115a, 4250. It is unnecessary, how-

ever, to consider in this case whether the mere imposition of a penalty will amount to a waiver of the right of the state to demand a forfeiture of the charter of a corporation for long and persistent non-user or misuser of its franchise; for the court below did not base its judgment on the failure of respondent to do any act for the doing of which the legislature has imposed a lighter penalty. The constitution and statutes of this state contain the following provisions: The attorney general shall, "whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law." Const. art. 4, § 22. Unless expressly otherwise directed by law, it is his duty to seek a judicial forfeiture of the charter of a private corporation which has, by non-performance of its chartered conditions, or the violations of its charter, or by any act or omission, misuser, or non-user, forfeited its charter, or any rights thereunder. Rev. St. art. 2805. "In case any corporation does or omits any act which amounts to a surrender or a forfeiture of its rights and privileges as a corporation, or exercises any power not conferred by law," information in nature of *quo warranto* may be filed. Acts 1879, p. 43. The Acts of 1879 contain the further direction that, "in case any person or corporation against whom any such [information] is filed shall be adjudged guilty, as charged in the information, the court shall give judgment of ouster against such person or corporation from the office or franchise, and may fine," etc. The second section of the act of March 28, 1885, provides that "if, upon investigation, the attorney general shall find that there is reason to believe, or that it is probable, that any railway or other corporation is now carrying on business within this state, in violation of sections 5, 6, art. 10, of the constitution, he shall at once institute proceedings, by *quo warranto* or otherwise, in the court having jurisdiction of the cause or causes, against any corporation violating said sections and article of the constitution, and to enforce the penalties therefor." 2 Sayles, Civil St. art. 4247a, § 2. The fourth section of the act is: "If it shall be determined, by the court or jury trying any cause instituted under the provisions of this act, that the said sections and article of the constitution are being violated, then the court shall enter such decree as will perpetually enjoin such violation; and, to the end of carrying into effect such constitutional provisions, may appoint a receiver to take charge of the affairs of the defendant corporation, until such time as the said corporation shall be reorganized, and in condition to be operated, within said provisions of the constitution." Id. art. 4247a, § 4.

It is insisted that this statute is applicable to the case before us, and that the only relief which can be given under it is an injunction to restrain the illegal act and the appointment of a receiver. To say the least, it is very doubtful if the statute last referred to has any application to the case before us; for

it refers to corporations carrying on business in this state in violation of the sections of the constitution referred to, and might properly reach the case of the Missouri, Kansas & Texas Railway Company, which, under the findings, is carrying on a business in this state in clear violation of the spirit, if not the letter, of the constitution. The courts of this state would have no power to declare a forfeiture of the charter of that corporation granted by the laws of the state where it was created, but would have power to withdraw the franchise here granted, whenever the facts justified it, and, by injunction or otherwise, to prevent its carrying on business in this state in violation of its laws. They would also have power to place property controlled by it, and situated in this state, in the hands of a receiver, and to adjust the rights of such persons as might be shown to have valid claims against it, or even to await a valid incorporation in this state by those interested in property acquired by it in any lawful manner. If, however, the act had application to respondent, we see nothing in it which evidences an intention, on the part of the state, to waive the forfeiture of the charter of a corporation which has misused its franchise, or has failed to carry out the purpose for which it was created. That respondent's abuse of its franchise is evidenced by an act violative of the constitution, and that its non-user of its franchises may be attributable to that act, in this proceeding, becomes important as an aggravating fact indicating the willfulness of the act; but still the fact remains that respondent used its powers for a forbidden purpose, which is a misuser of its franchise, and the further fact that it failed for a long time to exercise its corporate franchises to carry out the purposes for which they were given, such abuse and non-use of the corporate franchise gives common-law grounds for a forfeiture of respondent's charter, and there is nothing in the statute which indicates that the state intended to waive its right to a forfeiture, and the court below correctly so held. No question was made in the trial court as to the necessity to join the purchasing railway company as a defendant; but had there been we do not see that it was a necessary party.

The last assignment of error is that "the court erred in holding that it had authority to appoint a receiver to take charge of the property and effects heretofore belonging to the respondent, but which, upon its dissolution by judgment of forfeiture, at once go to the stockholders of the concern, subject to the rights of creditors, especially those holding liens on the property; said stockholders or lienholders not being before the court, and not having been impleaded or cited in this case, so much of the act of July 9, 1879, as directs the rendering of such judgment, being contrary to the constitution of the United States, and of this state, and therefore null and void." Statutes in force in this state, regulating the appointment of receivers in

such cases, provide that, "upon the dissolution of any corporation already created, \* \* \* unless a receiver is appointed, \* \* \* the president and directors or managers \* \* \* shall be trustees of its property." Rev. St. art. 606. Court "may appoint a receiver to take charge of the affairs of the defendant corporation until such time as the said corporation shall be reorganized and in condition to be operated." Acts 1885, p. 66, § 4. Receiver may be appointed in cases where a corporation has been dissolved, or is insolvent, or on imminent danger of insolvency, or has forfeited its corporate rights. Acts 1887, p. 120, § 1, subd. 3. And his powers and duties are therein fully defined. There is nothing in this legislation violative of the right of any person or corporation. The property will go into the hands of such person as may be appointed receiver, subject to all just claims to it or upon it, and these may be adjusted in accordance with the well-settled rules applicable thereto. There is no error in the judgment, and it will be affirmed.

### SELMAN v. ORR et al.

(Supreme Court of Texas. Dec. 20, 1889.)

#### GARNISHMENT—JUDGMENT—*IDEM SONANS*.

1. "Lindale" and "Lindsey" are not *idem sonans*, and a judgment in the latter name in garnishment proceedings conducted in the former cannot be sustained.

2. Where third persons are not interested, the absence of citation to a garnishee, and return thereon, is not fatal to the judgment, as the appearance may have been voluntary.

3. Judgment by default is proper against a garnishee who, instead of answering questions propounded in the commission, makes a general denial of indebtedness; and it is not necessary, in such case, that the officer should certify failure to answer as required by Rev. St. Tex. arts. 203, 204.

Commissioners' decision. Error from district court, Tarrant county; R. E. BECKHAM, Judge.

Writ of error prosecuted by B. G. Selman, executor of R. W. Watson, against Orr & Lindsey, defendants in error.

*Hyde Jennings*, for plaintiff in error. *W. L. Husbands*, for defendants in error.

COLLARD, J. All the proceedings for garnishment in this case were in the name of "Orr & Lindsley v. R. W. Watson," except the judgment, which was for Orr & Lindsey. We do not think Lindsley and Lindsey are *idem sonans*, consequently, the judgment cannot stand. *Roberts v. State*, 2 Tex. App. 4; *Whart. Crim. Ev.* (9th Ed.) § 96; *Shields v. Hunt*, 45 Tex. 425; *McRee v. Brown*, Id. 503; *Faver v. Robinson*, 46 Tex. 204.

Watson living in a different county from the one in which the writ of garnishment issued, a commission issued to the clerk of the district court of the county of his residence in the usual form, and was returned by the clerk as follows: "Orr & Lindsley (No. 4044) v. B. P. Hatcher. Suit in district court of Tarrant county. In obedience to the attach-

ed order, I caused R. W. Watson to appear before me July 26th, 1887, at my office in Weston, in obedience to the order to take his depositions as garnishee in the above-entitled cause, and who, after being by me duly sworn, deposes and says that there is a settlement to be made between himself and B. P. Hatcher before he can tell whether he is indebted to B. P. Hatcher or not, and, if indebted to him, how much. There is an outstanding indebtedness due the said firm of R. W. Watson, in which the said B. P. Hatcher is interested, and it will be utterly out of the question to make a correct settlement with said Hatcher until those outstanding claims are disposed of in some way satisfactory to the parties to whom they are owing. R. W. WATSON. The foregoing statement of R. W. Watson was by me reduced to writing at the time and place aforesaid, and were then and there sworn to and subscribed by said Watson. To certify which I hereunto set my hand and affix my seal of office, in the town of Weston, Collin county, Texas, this 26th day of July, 1887. A. T. ROBERTSON, [Seal.] J. P. *Ex officio* Notary Public, C. C., Texas." Plaintiffs Orr & Lindsley excepted to the answer, and the court, on motion, gave judgment by default against the garnishee for the full amount of the judgment previously rendered in the original suit, \$786.35, interest and costs. All the errors assigned by plaintiff in error were before the court in the case of *Freeman v. Miller*, 51 Tex. 444,—a case similar to this one in all respects. The answer made by the garnishee was but a general denial of indebtedness; and, as in this case there was no pretense of answering all the questions, the return and certificate of the officer executing the commission were substantially as in this case. There was no citation to the garnishee and sheriff's return, showing service, returned with the commission, and there was no certificate of the officer showing failure or refusal of the garnishee to answer. It was held that judgment by default was properly rendered. The court did not discuss all the assignments of error; but it was held that in a case where third persons were not interested the appearance of the garnishee might be voluntary, and, if he did so appear without process and answer, it was sufficient. The law then, as now, required the officer executing the commission to certify to the fact, if the garnishee failed or refused to appear and answer. *Pasch. Dig.* art. 167; *Rev. St. arts.* 203, 204. The court did not discuss the point arising from the want of such certificate. It did not demand discussion. The answer made evidenced the failure to answer all the questions; and no certificate was needed, except to show what answer was made. We think all the questions raised as to the court's authority, in this case, to enter the judgment by default were decided adversely to plaintiff in error in the case above referred to; but, because of the discrepancy in the affidavit and proceedings for the writ, and the judgment before no-



ticed, the judgment must be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment is reversed, and cause remanded.

KIMMARLE *et al.* v. HOUSTON & T. C. RY. Co. *et al.*

(Supreme Court of Texas. Dec. 20, 1889.)

PUBLIC LANDS—SURVEYS—DEEDS—ACKNOWLEDGMENT—PLEADING—SERVICE BY CITATION—APPEAL—PRACTICE.

1. Jurisdiction, for surveying purposes, over land which is not within any county, but which was included in the land district of a county that has become disorganized, is conferred by an act attaching the disorganized county to an adjoining county for "judicial and other purposes."

2. Admission of a copy of a judgment in a contest over the office of surveyor, to show that the surveyor of the land in question was a *de facto* surveyor, is immaterial, where the only objection is that the land was not in the land district.

3. Rev. St. Tex. art. 600, making acknowledgment or proof of execution of a deed by a corporation necessary before record, does not make such deed invalid and inadmissible in evidence, though not acknowledged or proved as therein required.

4. Under a plea stating that defendants hold under a warranty deed, and asking that the warrantors be cited to appear and answer, and, in case plaintiff recovers, for such judgment over against "them as the law authorizes in such cases," a judgment by default against the warrantors for a sum certain cannot be sustained.

5. Service, out of the state, on a citizen and resident of another state, will not sustain a personal judgment against him. *York v. State*, 11 S. W. Rep. 869, followed.

6. The bill of exceptions controls the assignment of errors; and only the grounds of objection stated in the bill will be considered, though the assignment may be upon other grounds.

Commissioners' decision. Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

Jas. C. Scott, for appellants. T. D. Cobbs and N. A. Stedman, for appellees.

AKER, P. J. The Houston & Texas Central Railway Company brought this suit against Kimmarle & Hirsh to recover possession of, and to remove clouds from the title to, 14 surveys of land, of 640 acres each, in Childress county, claimed by plaintiff under locations and surveys made in June, 1873, by virtue of certificates issued to the Waco & Northwestern Railway Company. Defendants claimed 11 of the surveys, under patents issued in 1876, on locations and surveys made in 1875, by virtue of certificates issued to Beatty, Seale, and Forward, and answered by pleading their title to the 11 surveys, and disclaimed as to the balance of the surveys sued for. Kimmarle & Hirsh impleaded their warrantors, A. F. Truitt and S. H. Truitt. Citations issued, and were returned served on A. F. Truitt, in Tarrant county, Tex., and on S. H. Truitt, in Troupe county,

Ga., where he was alleged to reside. Neither of the Truitts appealed. The trial was without a jury, and resulted in judgment for plaintiff for the lands sued for, describing them by metes and bounds, and canceling the patents under which defendants claimed, "so far as any or all of said patents include any part of, all or either of, plaintiff's surveys, as above set out," and judgment by default in favor of Kimmarle & Hirsh, against A. F. and S. H. Truitt, for \$10,000, with interest from judgment, and for all costs. Kimmarle & Hirsh assigned errors, and perfected their appeal. The Truitts also assigned errors, as against both the plaintiff and defendants.

We will consider first the assignments presented by appellants, the first of which is as follows: "The court erred in permitting the plaintiff to introduce in evidence certified copies of the field-notes from the general land-office, made for the Waco & Northwestern Railway Company, as evidence of a prior right or title to the lands in suit, so far as the same conflicts with the lands owned by defendants, for that the land owned by Kimmarle & Hirsh had been patented to Z. C. Collier, assignee, and defendants held under him by regular chain of title, and it devolved upon the plaintiff to show a prior appropriation of the same lands, by valid surveys theretofore made, upon valid land certificates, by a duly authorized surveyor; and the copies of the field-notes in evidence show that a part of the lands was surveyed by the deputy-surveyor of Montague land district, and that a part of the lands was surveyed by the deputy-surveyor of Jack land district; that such surveys for the Waco & Northwestern Railway Company were made in June, 1873, and all within what is now defined as Childress county, and no authority for either of said district surveyors to survey in that county, or section of country, was shown by plaintiff, and defendants deny that plaintiff acquired any right by reason of such surveys." This evidence was objected to upon the ground that "the surveys were not made by any duly authorized surveyor, authorized to make surveys of land at the date plaintiff's surveys were made." All of the 14 surveys sued for by plaintiff were located and surveyed by the surveyor of Jack land district, except one of them, (survey No. 581,) which, it appears, does not conflict with either of the 11 surveys claimed by defendants. The question, then, for our decision under this assignment is: Did the surveyor of Jack land district have authority to make the surveys under which plaintiff claimed? The surveys in controversy are situated in Childress county, which was created in 1876, out of territory which was originally included in Young county land district. The county of Young was created, and its boundaries defined, by acts of the legislature of February 2d, and August the 19th, 1856. The last-named act provides: "That for judicial purposes the territory north, from the north-east corner of said

county, to Red river; thence west, with said stream, to the United States territory; thence south, to a point west from the southern source of the clear fork of the Brazos; thence east, to the source of such stream, and down the same to the main Brazos; and thence, in a direct line, to the south-east corner of said county; thence north, to the place of beginning,—shall be under the jurisdiction of said county; and when said county is created into a land district it shall embrace the above-described territory." Acts Sp. Sess. 1856, p. 41. The record does not disclose the date of the organization of Young county; but it must have been prior to the 12th day of February, 1858, as two acts of the legislature of that date refer to the Young county land district as then existing, (Gen. Laws 1858, pp. 190, 191;) and, under the provisions of the act of March 20, 1848, (Gen. Laws, 153; Sayles' Early Laws, art. 1878,) and the act of January 26, 1858, (Gen. Laws, 66, and Sayles' Early Laws, art. 2690,) each organized county became a separate land district. So that when Young county organized its county government, by virtue of the foregoing statutes, it became a separate land district, and its county surveyor became the district surveyor of Young county land district, which embraced the vast territory included in the boundaries defined by the act of August 19, 1856, *supra*. By virtue of this last-mentioned act, the county of Young, during the continuance of the organization of its county government, had dominion and jurisdiction, for judicial and surveying purposes, over the entire territory of Young county land district. Young county became disorganized in 1861 or 1862; and there seems to have been no provision made by the legislature for the exercise of jurisdiction, for either judicial or surveying purposes, over the territory, or the territory of Young county land district, until 1866, when the two acts of November the 6th were passed. One of these acts provided that all counties that had been legally organized, and had lost their county organizations, for judicial and registration purposes should be "attached to the organized county whose county-seat is nearest the county-seat of such disorganized county." Sayles' Early Laws, art. 3303. It seems that under this statute the county of Young would have been attached to Jack county for the purposes named in the act. The other act of 1866 attached Young county to the county of Jack "for judicial and other purposes." Sayles' Early Laws, art. 3308. Under these statutes, Young county remained attached to the county of Jack until April, 1874. The territory of the Young land district, as defined by the act of 1856, *supra*, included Hardeman and other unorganized counties, as well as territory not included in the boundaries of any created county, and, unless this territory not included in the created counties, in which the surveys in controversy are situated, was placed by the acts of 1866, with Young county, under the jurisdiction of Jack county, for

surveying purposes, then the surveyor of Jack district had no authority to make the surveys under which the plaintiff claimed the lands; and from the time of the disorganization of Young county, in 1861 or 1862, until its reorganization, such territory was not subject to the jurisdiction of any county for judicial, surveying, or any other purpose. We cannot believe the legislature intended to leave any part of the territory of the state without government, and not subject to the jurisdiction of the established machinery of government. At the time of its disorganization, the county of Young had jurisdiction of this territory for judicial and surveying purposes; and we think this jurisdiction was transferred to Jack county by the act of 1866, which attached Young county to the county of Jack for judicial and other purposes. By that act, Jack county succeeded to all the jurisdiction and powers which attached or were incident to the county government of Young county at the time of its disorganization, except in so far as that jurisdiction and those powers had been specially vested in other counties, as illustrated in the case of *Cox v. Railway Co.*, 68 Tex. 228, 4 S. W. Rep. 455; *Alford v. Jones*, 71 Tex. 522, 9 S. W. Rep. 470. We think the court did not err in holding that the surveyor of Jack land district had authority to make the surveys under which plaintiff claimed.

The second assignment of error is: "The court erred in admitting in evidence a certified copy of a trust-deed of the Waco & Northwestern Railway Company to Gray and Botts, offered by plaintiff as a link in its chain of title, because it purports to convey lands, as well as other property, real and personal, and it was not acknowledged by the grantor, or proven up for record, nor was any evidence tendered of its execution." It appears from the bill of exception to the ruling upon which this assignment is predicated that the plaintiff "offered in evidence a deed in trust," not a certified copy, and that it was objected to "because the same had not been acknowledged or proven up for record, as required by law in conveyances of this character." We must look to the bill of exceptions to see what the instrument offered was, and also for the grounds of objection to it. The bill of exceptions controls the assignment of error, and only the grounds of objection stated in the bill can be considered, although the assignment may be upon other grounds. The question raised by the bill of exceptions and presented under the second assignment of error will be considered in connection with the third assignment of error, which is as follows: "The court erred in admitting in evidence a certified copy of a deed of conveyance from the general land-office, signed by John T. Flint, as president of the Waco & Northwestern Railway Company, conveying to plaintiff all the land-scrip issued to the Waco & Northwestern Railway Company, and especially such certificates numbered from 1 to 752, such conveyance being dated June 24, 1874.

and more than a year after said certificates had been located such conveyance had not been acknowledged by the grantor, or proven up for record, nor had it been recorded, nor was there any evidence whatever of its execution offered on the part of plaintiff, so as to bring the copy of such purported conveyance within the rules of evidence." It appears from the bill of exceptions that this evidence was objected to, "because the lands in controversy had been surveyed for the Waco & Northwestern Railway, and the scrip located before the date of such conveyance, and the conveyance did not conform to the law in regard to real estate, and it was not acknowledged or proven up for record, as required by law." This assignment, as the preceding one, contains grounds of objection to the evidence not shown by the bill of exceptions. Only the grounds stated in the bill will be considered. The only ground of objection to the admission of the deed of trust, to which the second assignment relates, as appears from the bill of exceptions, was that it had not been acknowledged or proven for record; and the same ground of objection was urged against the admission of the instrument referred to in the third assignment of error. The acknowledgment or proof of execution was not necessary to give effect to these instruments. By the thirty-fifth section of the act of December, 1871, which was re-enacted in April, 1874, (Pasch. Dig. art. 5966; Rev. St. art. 600,) the acknowledgment or proof of execution of a conveyance by a corporation was made necessary before such conveyance could be admitted to record, just as such acknowledgment or proof of execution is required before a conveyance of a natural person can be recorded; but this does not affect the validity of the conveyance, the execution of which may be proven otherwise than by the officer's certificate that the grantor has acknowledged its execution, or that its execution has been proven by a subscribing witness, in the manner prescribed by statute. While the surveys under which plaintiff claimed had been made before the instrument referred to in the third assignment was executed, the patents had not issued. The instrument was not only a conveyance of the land certificates, but of "all and singular the several sections of square miles of land, amounting to sixteen sections for each mile of railroad built, to which said Waco & Northwestern Railway Company has, or may be hereafter entitled, by virtue of its construction under the terms of its charter, and the laws of the state of Texas." We think the instrument was properly filed in the general land-office, that the state authorities might be informed that the patents for the lands should issue to plaintiff, as assignee of the original grantee, the Waco & Northwestern Railway Company. Being properly filed in the general land-office, a certified copy of it, under the seal of that department, was admissible. Rev. St. art. 2253. The instruments now under discussion were considered by this court in the case of Shir-

ley v. Railroad Co., 10 S. W. Rep. 543. We there held that the deed from the trustees named in the deed of trust, referred to in the second assignment, and in which deed the property conveyed was described just as it is in the deed of trust, did not convey to the Houston & Texas Central Railway Company the lands donated by the state to the Waco & Northwestern Railway Company. We also held in that case that the instrument referred to in the third assignment of error did vest in the plaintiff, in this case, the title to the lands donated to the Waco & Northwestern Railway Company. We conclude that the court did not err in admitting in evidence the instruments referred to in the second and third assignments, over the objections urged against them; and, if there was error in the ruling first complained of here, it would profit appellants nothing, as it has been determined in the Shirley Case, supra, that the instrument referred to in the third assignment vested title to the lands in appellee, the Houston & Texas Central Railway Company.

The fourth assignment of error is: "The court erred in admitting in evidence the certified copy of a judgment of Jack county district court, the judgment dated October 20, 1878, between W. A. Benson and L. A. Valentine, in a contest over the office of district surveyor of Jack land district, as well as all the pleadings in said cause, because that plaintiff sought to show that Benson was at least a *de facto* surveyor; \* \* \* and that cause did not show any authority in Benson to make surveys in Childress county in June, 1878. The defendants were not a party to such suit." We understand appellants' contention to be, not that Benson was not the legal surveyor of Jack land district at the time the surveys were made for plaintiff, but that at that time the land on which the surveys were made was not within the jurisdiction of Jack land district, and the surveys made by Benson, under which the plaintiff claimed, were made without authority in Benson to make them, and therefore void. We therefore think that the ruling here complained of was immaterial, and, in view of what we have said in disposing of the first assignment of error, could not affect the rights of appellants. What has been said, we think, disposes of the other assignments presented by appellants, and all of the assignments presented by appellees A. F. and S. H. Truitt, as against the Houston & Texas Central Railway Company, all of which relate to the authority of the surveyor of Jack land district to make the surveys under which the plaintiff claimed.

The first assignment of error by appellees A. F. and S. H. Truitt against appellants Kimmarle & Hirsh is as follows: "The court erred in rendering judgment against these appellees, in favor of Henry Kimmarle and Jacob Hirsh, for the sum of ten thousand dollars, with 8 per cent. interest per annum from the date of the judgment, for the reason that there were no pleadings in the record

authorizing the rendition of such judgment." The pleading on which the judgment was rendered is as follows: "And now come defendants in the above-entitled cause, and say that they hold and own the lands in controversy by and under a warranty deed dated April 25, 1883, from A. F. Truitt, who resides in Tarrant county, Tex., and Shorter H. Truitt, who resides in Troupe county, Ga. Wherefore these defendants pray their warrantors in title be cited to appear and answer herein, and, in case the plaintiff recover of these defendants, that they have such judgment over against their warrantors as the law authorizes in such cases, and for all relief, both general and special." The judgment against the Truitts was by default. In determining the sufficiency of a pleading to support a judgment by default, the averments of the pleading are to be taken as proven or confessed; and, if the pleading does not inform the court what judgment to render, that is, if it does not, with sufficient certainty, set forth the cause of action as to names of parties, dates, amounts, etc., to enable the court to render judgment without information *aliunde*, it is not sufficient, and the judgment cannot be sustained. Applying the test to this case, we think the insufficiency of the pleading too apparent to require discussion. It does not appear from the pleading that appellants ever paid the Truitts any consideration for the land. The court was compelled to get information outside of the averments of the pleading as to the amount for which the judgment was rendered. We think this assignment is well taken. *Hall v. Jackson*, 3 Tex. 305; *Parker v. Beavers*, 19 Tex. 410; *Ricks v. Pinson*, 21 Tex. 508. Appellee S. H. Truitt, who was alleged to be a non-resident of this state, and who was served with process in the state of Georgia, as provided by articles 1230-1233, Rev. St., under proper assignment of error, contends that such service was insufficient to give the court jurisdiction of his person, and that the judgment against him is void. The judgment is strictly personal. That service of process without this state against a defendant who is a citizen of, and residing in, another state, will not sustain a strictly personal judgment, is now settled by the decision in the case of *York v. State*, 11 S. W. Rep. 869, following *Pennoyer v. Neff*, 95 U. S. 723. We are of opinion that the judgment of the court below in favor of the Houston & Texas Central Railway Company should be affirmed; that the judgment in favor of *Kimmarle & Hirsh* against A. F. and S. H. Truitt should be reversed; that appellants' suit against A. F. Truitt be remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment in favor of Houston & Texas Central Railway Company is affirmed. Judgment in favor of *Kimmarle & Hirsh* against A. F. and S. H. Truitt is reversed. Appellants' suit against A. F. Truitt is remanded.

## JACKSON v. STATE.

(Court of Appeals of Texas. Nov. 6, 1889.)

## OBJECTIONS TO EVIDENCE—BURGLARY—RECENT POSSESSION OF STOLEN GOODS—INSTRUCTIONS.

1. A bill of exceptions is insufficient which merely recites that the testimony objected to was offered, and fails to show that it went to the jury.

2. To warrant an inference of guilt from the fact that some of the stolen property was found in defendant's possession recently after a burglary, his possession must be personal and exclusive, must be unexplained, and must involve a distinct and conscious assertion of property by defendant; and, where the evidence shows that some of the stolen property was soon thereafter found in defendant's possession, the court should so instruct.

3. On a trial for burglary, proof that some of the stolen property was found in the house of a third person cannot be considered against defendant, unless it is proved that the two acted together in the commission of the burglary, and that the third person had personal and exclusive possession, unexplained, and under a claim of ownership.

4. Where there is no evidence that defendant made any explanation of his possession of the stolen property, it is improper to instruct as to the rule relating to such explanations.

Appeal from district court, Parker county; J. W. PATTERSON, Judge.

G. A. McCall and J. M. Richards, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. We are not called upon to determine the admissibility of the testimony objected to by defendant, as the bills of exception fail to show that said testimony was admitted; said bills merely stating that it was offered by the state, objected to by defendant, and that defendant's objections thereto were overruled. It should have been distinctly stated in the bills that the testimony was admitted, and went before the jury. *Burke's Case*, 25 Tex. App. 172, 7 S. W. Rep. 873; *Willson*, Crim. St. § 2368.

It was proved that one of the sacks stolen at the time of the burglary was recently thereafter found in defendant's house. This evidence having been admitted, it was the duty of the court to instruct the jury, as a part of the law of the case, that, to warrant an inference of guilt from the circumstance of possession of recently stolen property, such possession must be personal and exclusive, must be unexplained, and must involve a distinct and conscious assertion of property by defendant. *Field's Case*, 24 Tex. App. 422, 6 S. W. Rep. 200. No such instruction was given.

Again, it was proved that some of the stolen sacks were found in the house of one Kilby, recently after the burglary. With respect to this testimony, the court should have instructed the jury that it could not be considered against defendant, unless it was further proved that said Kilby and defendant acted together in the commission of the burglary. (*Pierson v. State*, 18 Tex. App. 524;) and not then, unless it was shown that Kilby had personal and exclusive possession of said sacks, unexplained, etc. In the particulars mentioned we think the charge of the court

is fundamentally erroneous, and we must therefore reverse the judgment.

In another particular the charge is erroneous, but it is not such error as is reversible, in the absence of an exception, and we find no exception in the record. In the ninth paragraph the rule relating to explanation of possession of stolen property is given. There was no evidence that defendant made any explanation whatever, and no evidence calling for or warranting the said paragraph of the charge. We call attention to this error, in view of another trial of the cause. The judgment is reversed, and the cause is remanded.

**BLOOM et al. v. VALLEY MUT. INS. ASS'N.**  
(Supreme Court of Arkansas. Dec. 14, 1889.)

**SUPERSEDEAS BOND—PENALTY.**

No judgment having been rendered against the appellants for the recovery of money in the lower court or in the supreme court, the sureties on the *supersedeas* bond are not liable to pay the penalty prescribed by Mansf. Dig. Ark. § 1811, which provides that, upon the affirmance of a judgment order or decree for the payment of money, the collection of which in whole or in part has been superseded, 10 per cent. damages shall be awarded.

On motion to assess 10 per cent. damages against the sureties on the *supersedeas* bond, under Mansf. Dig. Ark. §§ 1811, 1812, which provide that upon the affirmance of any judgment order or decree which has been wholly or in part superseded judgment shall be entered up against the sureties on the *supersedeas* bond, and, when the judgment is for the payment of money, 10 per centum damages on the amount superseded shall be awarded against the appellant. For opinion on the merits, see ante, 477.

*N. W. Norton*, for appellee.

**PER CURIAM.** No judgment was rendered against the appellants for the recovery of money in the circuit court or here. The sureties are not liable, therefore, to pay the penalty prescribed by the statute. *Stephens v. Shannon*, 44 Ark. 178; *Worth v. Smith*, 5 B. Mon. 504; *Graham v. Swigert*, 12 B. Mon. 527. Motion denied.

**COLLIER v. COWGER.**

(Supreme Court of Arkansas. Dec. 21, 1889.)

**COVENANT OF WARRANTY—ACTION FOR BREACH—INTEREST.**

1. A judgment against a covenantor in possession, upon foreclosure of a lien created prior to the covenant, rendered after notice to the warrantor to appear and defend, is conclusive of the existence of an outstanding paramount incumbrance. It is a constructive eviction, and entitles him to bring his action on the covenant.

2. Where the covenantor buys in the outstanding incumbrance to protect his estate, he is entitled to recover the sum so expended, provided it does not exceed the amount paid to the warrantor for the property, with legal interest on such sum from the date of the extinguishment of such incumbrance.

3. When paramount title is asserted, and maintained by judgment in ejectment, the recovery of

interest, prior to eviction, upon the sum paid the warrantor, will depend upon whether or not there has been a recovery of mesne profits by the plaintiff in ejectment.

**Appeal from circuit court, Yell county; G. S. CUNNINGHAM, Judge.**

This was a suit by E. H. Cowger, as administrator of the estate of J. H. Cowger, deceased, and as guardian of J. W. Cowger, C. H. Cowger, M. C. Cowger, M. F. Cowger, and N. A. Cowger, minors, against E. G. Collier. The suit was founded upon a deed, exhibited with the complaint, which complaint sets up, in substance, the following averments: That on the 29th day of November, 1884, in consideration of the sum of \$274.69 cash, paid by plaintiff to defendant for said minors, defendant executed and delivered to said plaintiffs a deed conveying to them certain described lands; that he warranted the title against all lawful claims, and that the premises were free from incumbrances, and that he had a good right to sell and convey the same; that at that time the lands were incumbered by a vendor's lien in favor of I. C. Jones, who brought suit, in which a decree was rendered for such lien, in the sum of \$307, and the land was sold under this decree, and E. H. Cowger, the plaintiff, bought it in, and the sale was confirmed, and deed made to her; that defendant was notified of the pendency of this suit by her, but failed to defend; that, at her own expense, she defended the suit. The deed of Collier, which was duly acknowledged and recorded, with the decree in the Jones Case, were exhibited with the complaint. Defendant's answer put in issue every material allegation of the complaint. There was a decree in favor of plaintiff for \$274.69, the amount paid defendant, with 6 per cent. interest per annum from November 29, 1884, the date of payment. Defendant appeals.

*S. W. Williams* and *W. N. May*, for appellant. *Davis & Bullock*, for appellee.

**PER CURIAM.** A judgment against a covenantor in possession, upon foreclosure of a lien created prior to the covenant, rendered after notice to the warrantor to appear and defend, is conclusive of the existence of an outstanding paramount incumbrance. It is a constructive eviction, and he is entitled to his action upon the covenant. Where the covenantor buys in the outstanding incumbrance to protect his estate, he is entitled to recover the sum expended in so doing, provided such sum does not exceed the amount paid to the warrantor for the property, with the legal interest on such sum from the date of the extinguishment of such incumbrance. *Boyd v. Whitfield*, 19 Ark. 447; *Rawle, Cov.* §§ 143-146.

When paramount title is asserted and maintained by judgment in ejectment, the recovery of interest, prior to eviction, upon the sum paid the warrantor will depend upon whether or not there has been a recovery of mesne profits by the plaintiff in ejectment. Interest on the money and mesne profits are

regarded as the equivalent of each other. Rawle, Cov. § 195 et seq., and cases cited. In this cause, plaintiffs, through their mother, purchased the land, at a sale under I. C. Jones' decree, on January 14, 1886, and are entitled to recover the \$274.69 of purchase money paid Collier, with interest at 6 per cent. from January 14, 1886, to this date, amounting to \$64.82. The decree of the circuit court, in so far as it awarded interest from November 29, 1884, is reversed. In all other things it is affirmed, and judgment will be entered here in accordance with this opinion. It is so ordered.

#### APEL v. KELSEY.

(Supreme Court of Arkansas. Dec. 21, 1889.)

##### ADMINISTRATORS—PRIVATE SALE OF LAND.

In Arkansas, a private sale of land by an administrator, upon order of the probate court, is not void when confirmed.

Appeal from circuit court, Arkansas county; JOHN A. WILLIAMS, Judge.

This was a suit in ejectment, brought by Charles L. Kelsey against John J. Apel. The probate court of Pulaski county made an order, in 1876, authorizing the administrators of Shall's estate to sell the lands in controversy, at private sale, to pay the debts of said estate; the lands being in Arkansas county. Accordingly, the lands were sold by Peay and Worthen, the administrators, at private sale, to one Mills, and came by regular conveyances to the plaintiff, Kelsey, who brought ejectment against Apel, who was in possession. In the trial below, defendant excepted to the muniments of title of plaintiff, Kelsey, mainly to the administration deed, because the record did not show the confirmation and approval of the sale. The exceptions were overruled, and judgment went for Kelsey; and Apel appealed. The supreme court reversed the judgment of the court below because the plaintiff's administrator's deed did not show a confirmation of the sale, and remanded the case for a new trial, with instructions to permit plaintiff to show by written evidence the confirmation of the probate sale. 47 Ark. 413, 2 S. W. Rep. 102. Upon the trial anew, the defendant raised the question of the validity of a private sale by administrators to pay debts. The defendant objected to the administrator's deed, which objection was overruled, and he excepted. Defendant also, in his third, fourth, fifth, and sixth declarations of law, directly raised the question of the validity of a private sale of land; but these declarations were overruled by the court, and he excepted. Defendant made these errors and exception grounds for his motion for new trial; and, his motion for new trial being overruled, he appealed. Since the trial, Apel died, and the case was revived in the name of his heirs.

*Bell & Bridges*, for appellant. *P. C. Dooley*, for appellee.

SANDELS, J. The jurisdiction of probate courts in the matter of sales of lands of deceased persons has often been the subject of investigation and decision by this court. It has often been held that the court is one of superior jurisdiction; that as such its judgments are proof against collateral attack; and that all irregularities in the exercise of a jurisdiction once rightfully acquired are cured by its final judgment. It is held that the court acquires jurisdiction of the *res* by the grant of administration, and that upon the filing of a proper petition the power to order a sale is absolute. It is in the exercise of this power that gross and palpable violations of the statute, courteously called "irregularities," most frequently occur. The court being of superior jurisdiction, all presumptions are in favor of the propriety of its action, and ordinarily no relief is attainable against its judgments and orders, except by appeal. But no one can appeal except he have himself made a party to the proceeding in the probate court. When an administrator desires to sell land, he is required to give notice, by publication, of his intended application. This is to enable persons interested to make themselves parties, contest the application, if they see proper, and appeal from the order, if adverse to them. Yet it is held that failure to give such notice is but an irregular step in the exercise of jurisdiction, and is cured by confirmation. So it is required that publication be made of the time, place, and terms of such sale when ordered; but failure to give such notice is held to be an irregularity which is cured by confirmation. Want of notice being but an irregularity, we are unable to see what additional "sanctity doth hedge about" a sale. The advantage of a public sale when no one save the administrator knows the time when or place where it will transpire is not evident. It is impossible, upon principle, to distinguish the question here presented from those so often decided heretofore; and, in obedience to the settled doctrine of this court fixing the character of the probate court, and the effect of its judgments, we hold that a private sale of land by an administrator, upon order of that court, is not void when confirmed. In this particular case there were no bad results to the estate of Shall from this method of sale. The land brought a good price, and the administrators appear in all things to have acted capably and in good faith. But, upon the occasion of holding this manifest violation of the law legalized by a subsequent order of confirmation, we think it proper to submit the following suggestions: The construction put upon the constitutional and statutory powers of the probate court has gone, we think, far beyond the intention of the framers of either constitution or statute. The accretions of power now far outweigh the original nucleus. But little further aggression is necessary to make the action of that court, in legal contemplation, infallible. This should not be. The specific powers granted

these courts by law, pursued in the statutory method, are ample to accomplish the object of their being. The probate judges are not required to be, and usually are not, lawyers. In many instances they act without knowledge or consideration of the far-reaching effects of what they do. The most important interests, the guardianship of widows, children, and estates, are committed to their superintending care. Some, possibly, are dishonest. Many are not wise, or discriminating. Taking into account the magnitude of the property interests which they have in charge, these courts should be required to proceed in exact conformity to law, instead of being panoplied by the presumptions which attend the exercise of superior jurisdiction by other courts. When we see, day after day, the inheritance of infants squandered by the dishonesty or frittered away by the incompetency of administrators, and see these actions irrevocably legitimated by the approval of facile courts, we submit that it is time to call a halt. The courts are now powerless. Former interpretations of the law have become rules of property, and cannot be overturned without uprooting the titles to one-fourth of the property of the state. But, as to future transactions, it is in the power of the legislature to place its prohibition upon the sins of omission and commission in administration which now bankrupt the estates of the dead and send dependent widows to the work-house. We earnestly commend the subject to the attention of the law-making power. Affirmed.

#### JONES v. STATE.

(Supreme Court of Arkansas. Dec. 21, 1889.)

##### HOMICIDE—INSTRUCTIONS—DYING DECLARATIONS.

1. Where, on a trial for murder, the evidence establishes conclusively and solely that the killing was assassination of deceased, at night, by his fireside, by some one, who fired through a crack from without, it is not error for the court to confine its charge to the law applicable to murder in the first degree. *HEMINGWAY* and *HUGHES, JJ.*, dissenting.

2. It being impossible for the deceased to see who fired the shot, a mere expression of opinion by him, some hours after the shooting, as to who shot him, is inadmissible as a dying declaration.

Appeal from circuit court, Benton county; *J. M. PITTMAN*, Judge.

Samuel D. Jones was convicted of the murder of Henry W. Keltner, and appeals.

*Marshall & Coffman*, for appellant. *Atty. Gen. Atkinson* and *T. D. Crawford*, for the State.

**PER CURIAM.** The first, second, and third grounds of appellant's motion for new trial are that the verdict is contrary to the law and evidence. The fourth is that the court neglected to properly instruct the jury as to all the different degrees of homicide. The fifth, that the court erred in refusing to give instructions asked by defendant, numbered from 1 to 5, inclusive. The sixth, because

of newly-discovered evidence. Many matters not presented by the record have been argued by counsel and considered by the court. As to the first, second, and third grounds of the motion, we think the verdict warranted by the evidence and the law as given by the court. Nor was it error to refuse the first, fourth, and fifth instructions asked by defendant, in view of the charge actually given. The sixth ground for new trial was matter resting in the sound discretion of the court, and no abuse of such discretion appears. The fourth ground of the motion challenges the correctness of the charge, in that it failed to state the law applicable to the lower degrees of homicide. The charge should be based upon the evidence, and it is difficult to imagine how instructions as to murder in the second degree or manslaughter could have been given, when the evidence established conclusively and solely that the killing was assassination of Keltner, at night, by his fireside, by some one who fired through a crack from without. The trial court, in no case, indicate an opinion as to what the facts established; but, in properly giving the law, the court must, of necessity, determine whether there be any evidence at all justifying a particular instruction. See *Fagg v. State*, 50 Ark. 506, 8 S. W. Rep. 829, and cases cited.

One of the matters argued, though not raised in proper form, is the alleged error of the court in excluding the testimony offered as the dying declaration of Keltner. The witness says that, some hours after the shooting, Keltner said that Samuel Hall shot him. A mere expression of opinion by the dying man is not admissible as a dying declaration; and it is immaterial whether the fact that the declaration is mere opinion appears from the statement itself, or from other undisputed evidence showing that it was impossible for the declarant to have known the fact stated. If, upon any view of the evidence, it is possible for the declarant to know the truth of what he states, his declarations, being otherwise competent, should be received and considered by the jury, in the light of all the evidence. In the case at bar, it was a physical impossibility for Keltner to have seen who shot him; and the consciousness of wrong done in the killing of Hall's father made him swift to suspect him of the commission of this crime. The facts in the case of *Walker v. State*, 39 Ark. 225, were very similar to those now before the court, and the declarations in that case were held to be properly admitted. The court divided, however, upon the question as to whether it was possible for the declarant to have seen Walker, and a majority sustained the trial court in the view that it was possible. Affirmed.

*COCKRILL, C. J.*, and *BATTLE* and *SANDELS, JJ.*, concurring.

*HEMINGWAY, J.*, (dissenting.) I am unable to concur in the opinion of the court in



this case, but think that the judgment should be reversed, and a new trial awarded. The charge of the court was entire; not, as is usual, divided into a number of instructions. It contained reference alone to the law applicable to murder in the first degree. It announced that the defendant was charged with murder in the first degree, and instructed the jury that if they found him guilty as charged they would return a verdict of guilty of murder in the first degree. No jury of good intelligence could have understood the charge in any other way than as directing a conviction for murder in the first degree, or an acquittal. True, there was no language expressly prohibiting a conviction for a lower grade of homicide; but, substantially, the direction to convict of murder in the first degree or acquit implied a prohibition against a conviction of a lower grade of offense. In my opinion, this court should treat a charge as saying what it fairly imports, and will naturally be received, by an honest and intelligent jury, as meaning. We should not endeavor to find a meaning different from that, and impress this meaning upon the charge, although, if so interpreted, it might properly declare the law. The force of the charge rests in its interpretation by the jury. It should not only properly declare the law, but also declare it in a manner to be properly understood. I am unable to reconcile this charge with the law as declared in the case of *Flynn v. State*, 43 Ark. 289. In that case the circuit judge, in concluding his charge, "instructed the jury that if they found the appellant guilty they should assess his punishment at not less than three nor more than twenty-one years in the penitentiary; and that in this case the defendant was guilty of an assault with intent to kill, or that he was guilty of nothing." This court says: "The charge in the case at bar left the jury no room to infer anything in regard to the degree of the offense, or of the nature of the penalty, but cut them off from finding the prisoner guilty of any of the lower grades of assault, as they might have otherwise done. Under an indictment such as we have here, a prisoner may be convicted of any one of several very grave offenses, an assault with intent to murder being the highest in degree, and he has the right to have the judgment of the jury upon the facts uninfluenced by any direction from the court as to the weight of evidence." The judgment was reversed. Now, under the indictment in the case at bar, the jury might have convicted the appellant "of any one of several very grave offenses," murder in the first degree being the highest; and he had a right to have the judgment of the jury "uninfluenced by any direction from the court as to the weight of evidence." Was the right accorded him? Was the jury permitted to act uninfluenced by any direction of the court? The court said, "the defendant is charged with murder in the first degree;" then follows a lengthy instruction as to the law applicable to murder in the first degree.

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There is nowhere an intimation that the indictment contained a charge of the lower grades of homicide or that the jury could convict therefor. It concludes by saying: "If you find the defendant guilty as charged, you will say, 'We, the jury, find the defendant guilty of murder in the first degree.'" If the jury was uninfluenced by this charge, and was not restrained from convicting for a lower grade of offense, I am of opinion that the charge had an effect different from that intended by the learned judge. In a proper case, I think, such an instruction ought to be given; but I am satisfied that this court has not so ruled, and I am not willing to change the rule by refinement of language and confusing distinctions. In a later case, this court, discussing the same question, says: "But the court cannot direct a verdict for the higher offense, nor restrain the jury from returning it for the lower grade." *Fagg v. State*, 50 Ark. 506-508, 8 S. W. Rep. 829.

It may be said that no exception was properly saved to the charge. The exception to the charge was *in solido*. As the charge was not divided, but given as an entirety, it may well be contended that the exception was sufficient. Be that as it may, the law denounces the penalty of death against the murderer, and not against the unskillful or unwary. I cannot concur in a judgment which, because a defendant has not conformed to a technical rule in preparing a bill of exceptions, dooms him to the gallows. I esteem fixed rules, intended to secure orderly procedure in the courts, but think all such technical rules should yield, when necessary to protect the life of a human being.

HUGHES, J. I concur in this opinion, except that I think, upon the whole case, the judgment should be affirmed.

#### PORTER v. NAVIN.

(Supreme Court of Arkansas. Dec. 4, 1899.)

#### GARNISHMENT—EXEMPTION—WAGES—AFFIDAVIT.

As Mansf. Dig. Ark. §3244, in relation to the exemption of laborers' wages from seizure by garnishment, which requires of the defendant a sworn statement to the effect that the wages claimed as exempt are less than the value of the personal property exempt to him under the constitution, manifests an intent to limit the right of exemption to those entitled to exemption under the constitution, and as only residents are entitled to the privilege, the sworn statement of defendant in garnishment proceedings is defective which fails to state that he is a resident of the state.

Appeal from circuit court, Desha county; J. A. WILLIAMS, Judge.

This was an action by D. O. Porter against P. M. Navin, on open account, with garnishment. Judgment for defendant, and plaintiff appeals.

D. A. Gates, for appellant.

PER CURIAM. Section 3244, Mansf. Dig. in relation to the exemption of laborers' wages from seizure by garnishment, requires of the

defendant a sworn statement to the effect that the wages claimed as exempt are less than the value of the personal property exempt to him under the constitution. The statute thus manifests the intent to limit the right of exemption to those entitled to exemption under the constitution. But only residents are entitled to the privilege under the constitution. The sworn statement of the defendant was therefore defective in failing to state that the defendant was a resident of this state. *Guise v. State*, 41 Ark. 249; *Donnelly v. Wheeler*, 84 Ark. 111. Reverse and remand for further proceedings.

#### HECHT v. DRAKE *et al.*

(*Supreme Court of Arkansas*. Dec. 4, 1889.)

##### ADMINISTRATORS—BOND—ACTIONS ON.

Where a settlement of a deceased administrator's accounts, which is relied upon as a basis of the breach of his bond, is made before the appointment of his administrator, neither the principal nor his administrator is legally before the probate court at the time of the settlement, and the judgment of the court is not binding upon the sureties in the bond.

Appeal from circuit court, Randolph county; J. W. BUTLER, Judge.

This suit was commenced on the 16th day of February, 1886. The complaint alleges: That on the 31st day of November, 1870, Clayburn Spears and Phœba Dodd were, by the Randolph probate court, appointed administrators of the estate of John S. Dodd, deceased, and, as such, entered into bond, as required by law, in the penal sum of \$3,000, with Oscar Drake, A. W. James, and one J. C. Essleman, who is not sued, as sureties; which bond was conditioned, among other things, that the said Spears and Dodd would well and truly administer according to law, and pay the debts of the deceased, as far as the assets would extend or the law direct, and would make, or cause to be made, just and true accounts of their administration, and make due and proper settlements thereof from time to time according to law, or the lawful order of any court having jurisdiction. That, by reason of the said Spears having been appointed and confirmed as administrator of the said John S. Dodd, deceased, a large amount of assets came to his hands, to be administered, and afterwards, on the 24th day of July, 1872, he filed his second annual settlement, from which it appears that he had in his hands the sum of \$608. Prior to filing his second settlement, Phœba A. Dodd relinquished her interest in the assets of her intestate to her co-administrator, and resigned, or was removed, as such administratrix. On the 31st day of May, 1871, the party for whose benefit the suit was commenced recovered a judgment in the probate court of Randolph county against the administrators of Dodd for \$969, and that \$369 of the same remained unpaid. On the 30th day of October, 1872, Spears died intestate, and at the January term, 1886, of the Randolph probate court, A. J. Witt was ap-

pointed administrator of his estate, and at the same term of court he was, as such administrator, ordered to pay off and discharge the claim of said Hecht. That said Spears, as administrator of John S. Dodd, deceased, wasted the sum of \$369 of the assets of his intestate; and that his legal representatives fall to keep and perform the covenants and conditions in the said bond; and assigned, as a breach thereof, that by the terms and conditions of the same it was the duty of Spears, and his legal representatives, to pay off and discharge the indebtedness of the estate, when so ordered to do by the Randolph probate court; and that the said Spears did not, as administrator of the estate of John S. Dodd, deceased, leave unadministered any sum with which to pay off and discharge the debts. Defendants demurred; and from an order sustaining the demurrer, plaintiff appeals.

J. C. Hawthorne, for appellant.

PER CURIAM. The probate court's settlement of the deceased administrator's accounts, which is relied upon as the basis of the breach of the bond sued on, was made before the appointment of an administrator of the deceased administrator. As neither the principal nor his administrator was legally before the probate court at the time of the settlement, the judgment of the court was not binding upon the sureties in the bond. No breach is therefore alleged in the complaint, and the judgment sustaining the demurrer is right. *Wycough v. State*, 50 Ark. 102, 6 S. W. Rep. 598, and cases cited. Affirmed.

#### STANLEY v. BONHAM *et al.*

(*Supreme Court of Arkansas*. Dec. 4, 1889.)

##### EXECUTION—CURTESY—INJUNCTION—DAMAGES.

1. In Arkansas, the husband's right of curtesy in his deceased wife's statutory separate estate is subject to execution for the payment of his debts.

2. An injunction preventing the sale on execution of particular property does not prevent the execution of the judgment, within the meaning of *Manst. Dig.* § 8763, which authorizes an assessment of damages on dissolution of an injunction where the proceedings upon a judgment have been stayed.

Appeal from circuit court, Drew county; C. D. WOOD, Judge.

This is a suit by J. P. Stanley against A. K. Bonham & Co. for an injunction to restrain a sale under execution of plaintiff's curtesy estate in his deceased wife's land. The original bill was filed by appellant, James P. Stanley, as administrator of his wife, M. E. Stanley, deceased. The amended bill is filed by James P. Stanley in his own right, and as administrator of his wife. Demurrer to original complaint was confessed. The defendants filed an answer to which the complainants demurred. The court overruled the demurrer. The chancellor dissolved the temporary injunction, and awarded defendants damages. Complainant appeals.

J. M. & J. G. Taylor, for appellant. Wells & Williamson and W. S. McCain, for appellees.

**PER CURIAM.** The husband's right of curtesy in the deceased wife's statutory separate estate is subject to execution for the payment of his debts, just as the estate was at common law in lands held by the wife to her separate use, and free from the husband's debts. That is the logical deduction from the decision of *Neelly v. Lancaster*, 47 Ark. 175, 1 S. W. Rep. 66. Whether the husband takes an estate freed from the rights of the wife's creditors to subject the property to the payment of her debts is not determined.

As to the assessment of damages on dissolution of an injunction, the statute does not authorize an assessment except in cases where the proceedings upon a judgment have been stayed,—that is, when the enforcement of the judgment has been enjoined. Section 3763. An injunction preventing the sale of particular property does not prevent the execution of the judgment within the meaning of the statute. *Marshall v. Green*, 24 Ark. 410. Sections 3763-3765, Mansf. Dig., were enacted as one section. The first clause (section 3763) authorizes the assessment of damages, and the other two fix the measure of the assessment in the only cases in which the statute contemplates that damages shall be assessed upon the dissolution of an injunction. *Greer v. Stewart*, 48 Ark. 23, 2 S. W. Rep. 251. In other cases the remedy is by suit on the injunction bond. The judgment assessing damages upon the dissolution of the injunction is vacated; otherwise it is affirmed.

#### MURPHY v. SHEPPARD.

(*Supreme Court of Arkansas*. Dec. 4, 1889.)

##### ASSESSOR—OATH OF OFFICE.

An assessor who fails to take the general oath of office required by the law is an officer *de facto*, and his acts are valid when questioned collaterally. *Stell v. Watson*, 11 S. W. Rep. 822, followed.

Appeal from circuit court, Desha county; JOHN A. WILLIAMS, Judge.

This is an action to enforce the collection of a levee tax, assessed upon the lands of defendant's intestate, under Pamphlet Acts Ark. 1879, p. 117. Defendant appeals from the decree.

*Jas. Murphy*, for appellant. *X. J. Purdall*, for appellee.

**PER CURIAM.** An assessor who fails to take the general oath of office required by the law is an officer *de facto*, and his acts are valid when questioned collaterally. *Moore v. Turner*, 48 Ark. 243; *Twombly v. Kimbrough*, 24 Ark. 474; *Board v. Land Owners*, 51 Ark. 516, 11 S. W. Rep. 822; *Cooley, Tax'n*, (2d Ed.) 253-256. Affirmed.

#### WEBB et al. v. ARNOLD.

(*Supreme Court of Arkansas*. Jan. 4, 1890.)

##### LANDLORD AND TENANT—RENT—ATTACHMENT.

1. The consent of the landlord to the removal and sale of the tenant's crop is a valid defense to a landlord's attachment.

2. Where the tenant is authorized to make the sale for the purpose of paying a debt for which the landlord is surety, the failure on the part of the tenant to devote the excess of the proceeds of the sale to the payment of the rent is not a ground for attachment.

Appeal from circuit court, Sebastian county; JOHN S. LITTLE, Judge.

The plaintiffs Webb and others brought landlords' attachment against the defendant Arnold, who was their tenant, for \$350 rent, and had the crops sold under the attachment. The defendant answered, admitting the rental, but denying the grounds of attachment, and claimed \$250 damages. There was a verdict for rent in favor of the landlords, and for damages in favor of the tenant; and the landlords filed their motion for a new trial, which being overruled, they excepted, and appealed.

*Cook, Luce & Hill*, for appellants.

**PER CURIAM.** There was evidence to justify the jury in finding that the landlord consented to the removal of the cotton from the premises where it was grown, and it was in proof that the tenant was authorized by the landlord to sell two or three bales of cotton to pay the Harwood debt, for which the landlord was surety. He sold two bales for \$81, and out of the proceeds paid the Harwood debt, of something over \$50, and devoted the residue to the payment of his creditors.

The consent of the landlord to the removal and sale of the cotton was the gist of the defense to the attachment; and when that was proved the ground of the attachment failed. The failure to devote the excess of the proceeds of sale made by consent of the landlord to the payment of rent was not a ground for attachment. The appellant has pointed out no error for which the judgment should be reversed. Affirmed.

#### CRAWFORD v. NORRIS.

(*Supreme Court of Arkansas*. Nov. 16, 1889.)

##### ACCOUNTING—BURDEN OF PROOF.

In a suit to compel defendant to account for and turn over certain funds collected under a certain contract and unaccounted for, defendant, in a cross-complaint, alleged that plaintiff was indebted to him for commissions upon moneys collected by plaintiff under the same contract, and never turned over to him. Held, that the burden of proof was upon plaintiff in the bill, and upon defendant in the cross-complaint, and, neither being sustained by satisfactory proof, both should be dismissed.

Appeal from circuit court, Union county; H. G. BUNN, Special Judge.

The plaintiff was sheriff of Union county, and, in consideration of certain citizens of said county, among whom was the defendant, becoming sureties on his bond as collector for the revenue of 1885, he entered into a written contract with them by which he agreed to take into his employ the defendant as deputy-collector, and to pay him one-half of the net proceeds of his commissions in kind collected by law. It was further agreed in said contract that a correct account should

be kept of all the disbursements and reimbursements necessary in performing the duties of said office; that, in case defendant became disabled to perform the functions of his office, the other sureties named should select some one to fill the vacancy of deputy-collector; that defendant should take possession of all the funds collected each day, and deposit same in some fire-proof safe in the county; and that after all the taxes should have been collected for the year 1885 the plaintiff should, in the presence of defendant, turn over all funds collected by him in said year to the proper authorities, and take receipt for same. This suit was brought by plaintiff to compel defendant to account for and turn over to him certain funds collected under said contract, and unaccounted for. The special master to whom the matter was referred made a statement of the account, finding that the defendant was indebted to the plaintiff in the sum of \$373.09, of which \$266.09 was in currency and \$107 was in the new county scrip of said county. Defendant filed exceptions to this report of the master; and the whole matter was submitted to the chancellor, who reduced his findings and decree to writing, wherein he determined defendant's indebtedness to plaintiff to be \$223, for which sum judgment was rendered. Under the issue formed by the pleadings, and under the evidence, the chancellor determined that "the only point in controversy is as to the amounts the plaintiff and defendant paid into the state treasury, in the plaintiff's settlement with the state treasurer, on or about the 8th of May, 1886." Defendant appealed.

*U. M. & G. B. Rose*, for appellant. *Dan W. Jones*, for appellee.

**PER CURIAM.** Norris alleged that he had paid money in settlements which Crawford should have paid out of moneys received by him as deputy. The burden was upon Norris to prove these facts, and he has not satisfactorily done so. The difficulty which the chancellor experienced in arriving at a satisfactory conclusion upon the evidence in this cause is intensified here by the absence of many circumstances arising during the trial which probably influenced him. He appears to be correct in holding that the inquiry is narrowed to the amounts paid into the state treasury by Crawford and Norris, respectively, on May 8, 1886. The amount due the state was about \$4,700. Of this, we know that Norris paid the amount of the assessor's receipt, \$473, and the liquor licenses, \$400. Crawford, consequently, could not have paid \$4,500, as claimed by him. Norris swears that Crawford paid to the state \$3,500 currency and \$139 scrip, making \$3,639. Crawford and others swear that Norris claimed to have paid about \$1,000. The sum which Norris says Crawford paid, and the amount which he admitted at the time was paid by himself, make the sum due the state, approximately. Crawford alleges that Norris is indebted to him for commissions upon moneys

collected by Norris, and never turned over to him. The burden was upon Crawford to prove this. The evidence relied upon is too unsatisfactory and indefinite to warrant us in holding that the allegation is sustained. The result makes it unnecessary to inquire whether the contract between the parties was not wholly void, as against public policy. Reverse, and dismiss the bill and cross-complaint.

**BLANKENBAKER et al. v. BLANKENBAKER et al., (two cases.) FOREE v. SAME. DOWNING et al. v. SAME. GARR v. SAME.**

(Court of Appeals of Kentucky. Dec. 17, 1889.)

#### SALE OF INFANT'S LANDS.

Where unproductive land devised for life, remainder over to the issue of the life-tenants, is sold for reinvestment, in proceedings instituted under Civil Code Ky. (Carroll's) § 491, which provides that, in an equitable action by the owner of a particular estate of freehold, in possession, against the owner of the reversion or remainder, though he be an infant, real property may be sold for investment of the proceeds in other real property, it is proper for the chancellor to permit the life-tenants to bid therefor.

Appeals from Louisville chancery court.

"Not to be officially reported."

*L. L. Parks*, for appellants. *G. W. Milburn*, for appellees.

**PRYOR, J.** These five cases are submitted on the appeal of the purchasers of certain land near the city of Louisville, under a decretal sale. In response to a rule to show cause why they should not pay the purchase money, they question the validity of the title. David Blankenbaker, the ancestor of the appellants, left a last will, by which he devised this land, containing a fraction over 100 acres, to his wife, for life, remainder to his grandchildren, (naming them,) for life, and, at their death, to their issue. The purpose of the testator seems to have been to keep this land in the possession of his descendants as long as practicable, and provides, in effect, that it is not to be sold unless the income from the land should be less than the state and county burdens upon it, in the form of taxes. The widow is now dead, and the land has been partitioned between the life-tenants, and is divided into small lots, of seven or eight acres each. The land is swampy, with a white crawfish soil, and unproductive, and is not yielding any income, but burdened with taxation that must consume it when the life-tenants are unable to pay the burdens. In other words, these life-tenants are left to hold the land, pay the taxes, and discharge other burdens, without receiving any income whatever; and it clearly appears that the land is valuable only by reason of its proximity to the city, and can be held only by those whose pecuniary condition enables them to hold it for purposes of speculation. The children of the life-tenants in being are all before the court, as well as all the parties in interest, and represented by a guardian *ad litem*, and all proper steps were taken necessary

to pass the title to the purchaser. The life-tenants, who have instituted these proceedings, were permitted by the chancellor to bid for the land, on the idea, no doubt, of preventing a sacrifice of the property, or to vest the title in them so that they might dispose of it, and relieve the burdens upon it. The land seems to have been sold for a fair value,—fully as much as it is worth; and we perceive no reason why the title did not pass as well to them as if purchased by a stranger. The land is only sold for the purposes of reinvestment, and this reinvestment is under the control of the chancellor. He will see that it is made, and the interests of those in remainder are secured, in the same manner, and upon the same conditions, provided by the will of Blankenbaker. This sale is made under section 491,<sup>1</sup> Civil Code, (Carroll's); and, as the title is perfect, and the proceeds of sale under the control of the chancellor, we see no reason why the rule to pay the purchase money should not be made absolute. The judgment in each of the five cases is affirmed.

**MUSGRAVE et ux. v. PARRISH.**

(Court of Appeals of Kentucky. Dec. 12, 1889.)

**JUDICIAL SALE.**

Where a sale is confirmed after decision, on appeal, reversing the judgment, and directing that appellant's interest be protected in the sale, and the sale has been made, without securing appellant's rights, on 6 months' credit, instead of 12, as directed by the judgment, the order of confirmation will be set aside.

Appeal from circuit court, Webster county.  
"Not to be officially reported."

Suit by S. A. Parrish against Charles Musgrave and wife, to subject a house and lot to the payment of plaintiff's judgment debt. A judgment for plaintiff was reversed, and a part of the property held to be the separate property of the wife, and exempt from the judgment, and it was directed that she should be secured in the sale for her interest. The wife now appeals from an order confirming the sale. For former report, see 11 S. W. Rep. 464.

*John D. Hill* and *G. H. Towry*, for appellant.

**PRYOR, J.** This case had been reversed before the order confirming the sale had been made; and while this, of itself, would not be sufficient to set aside the sale, no bond was required of the purchaser that the rights of this appellant might be secured, and a sale of the property was made on a credit of 6 months, when the judgment directed the sale to be made on a credit of 12 months. The entire matter of this controversy should be settled in this litigation. Judgment reversed

<sup>1</sup> Civil Code Ky. (Carroll's) § 491, provides that in an equitable action by the owner of a particular estate of freehold, in possession, against the owner of the reversion or remainder, though he be an infant, real property may be sold for investment of the proceeds in other real property.

and remanded, with directions to set aside the sale, and for proceedings consistent with this opinion.

**RUSSELL v. RUSSELL et al.**

(Court of Appeals of Kentucky. Dec. 12, 1889.)

**RESULTING TRUSTS—CURTESY—IMPROVEMENTS—SPECIAL JUDGE.**

1. A husband verbally purchased land from his father-in-law, and had paid part of the purchase money when the father-in-law died intestate, leaving seven children. There was no administration on the estate, but all of the children, except the wife, conveyed their interest in the land to the husband; the wife being present and consenting. She died a few years after, and the husband continued in possession of the land as owner for 30 years. Held that, as there had been a complete reduction to possession and conversion by the husband of the six-sevenths conveyed to him, no trust therein resulted to the wife's heirs, though the land was estimated against the wife in the division of the father-in-law's estate.

2. On the death of some of his children, a husband, tenant by the curtesy of his deceased wife's land, has his life-estate enlarged to an absolute interest by inheritance from them; and therefore any enhanced value arising from improvements made by him should be deducted before allotting a surviving child his share in the land.

3. Where an affidavit to compel the regular judge to vacate the bench fails to state any fact upon which affiant founds his belief that the judge would not afford him a fair trial, and is not presented until after answer, an order reciting that the regular judge could not properly preside, but gave way to a special judge, does not prevent the regular judge thereafter, before the special judge has acted, from again assuming jurisdiction.

Appeal from circuit court, Marion county.  
"Not to be officially reported."

*Rites & Spalding*, for appellant. *Avritt & Russell*, for appellees.

**HOLT, J.** Benjamin Mattingly, by verbal contract, let his son-in-law, John M. Russell, have a farm at what it had cost him, less an advancement of \$1,000. Russell had paid about \$500 of the purchase money when Mattingly died intestate, in April, 1854, leaving seven children. They settled up the estate without any administration. All of the heirs save the wife of John M. Russell conveyed to him their interest in the land which their father had verbally sold to him. It does not clearly appear whether this was done by reason of the verbal purchase, or merely as a part of Mrs. Russell's share of the estate. It is reasonably certain, however, that it was estimated against her in the division of the estate. The conveyance was made to the husband in July, 1854. The wife was present, and made no objection to it. While no express consent thereto by her is proven, yet she knew of it, and by conduct, if not in words, consented to it. The wife died within a few years. The husband married again, had children by the second marriage, and resided upon the land until his death, in January, 1888. Their children, save the appellant, Wallace Russell, died after their mother, and without issue. This suit was brought to settle the father's estate.

It is clear that the wife owned her one-seventh of the land. It is insisted, however,

by the appellant, that the father held the remaining six-sevenths, which had been conveyed to him by the other six heirs, not as his own, but in trust for her. Upon the other side this is denied. Our statute provides that when a deed is made to one person, and the consideration paid by another, no trust shall result in favor of the latter; but this does not apply where the deed is so made without the consent of the person furnishing the consideration, or where the grantee, in violation of a trust, uses the funds of another person. The circumstances of this case show, however, a complete reduction to possession and conversion by the husband of so much of her interest in her father's estate as may have been charged up to her, by reason of its going in satisfaction of the six-sevenths of the land deeded to her husband, by her consent, by the other six heirs. The transaction divested her and invested him with the right. Moreover, it does not appear that after the conveyance to the husband it was ever claimed that he held the six-sevenths of the land in trust, or that he ever in any way admitted or recognized it. The transaction occurred more than 30 years before any such trust was asserted; and, in the absence of the statute, we should be slow to recognize it.

The husband had a life-estate as tenant by the curtesy in the one-seventh interest belonging to his wife. He made valuable improvements upon the entire tract. It is urged that, as he was a life-tenant of the one-seventh, the remainder interest of the appellant therein must be allotted without regard to the improvements having been made by his father. The latter, however, inherited from his dead children, and thus became the absolute owner of an interest in this one-seventh. He was not a mere life-tenant, and it was proper, therefore, to deduct any enhanced value arising from the improvements before making a division between the appellant and his father's estate, the latter thus getting the benefit of them.

The affidavit filed for the purpose of compelling the regular judge to vacate the bench failed to state any fact upon which the appellant founded his belief that the judge would not afford him a fair trial. It was therefore insufficient. Moreover, it was not presented until after an answer had been filed. *Insurance Co. v. Landram*, 11 S. W. Rep. 367, 592. The facts that upon its presentation an order was made reciting that the regular judge could not properly preside; that he declined to do so, and gave way to the special judge, who had been elected for that term of court,—did not prevent the regular judge from thereafter, and before the special judge had acted, assuming jurisdiction of the case. The order was made at one term, and at the succeeding one the regular judge took jurisdiction of the case. He had in the mean time concluded, doubtless, that he had not been properly displaced. This was true, and he properly resumed control of the action. Judgment affirmed.

## ON PETITION FOR REHEARING.

(Jan. 9, 1890.)

HOLT, J. Counsel express fear that the opinion in this case will produce confusion of property rights. It was not intended to, nor does it, decide that the wife can be divested of the title to her land, and it be invested in the husband, by her mere silence or failure to assert her right in his presence; or that his coming into possession of it makes him the owner of it, as in case of a conversion of the wife's personalty by the husband. The alarm we think is utterly unfounded. The trouble is, counsel assume certain matters as shown by the record which do not appear. The rules of law must be applied, of course, according to the state of case presented. It is not shown how Benjamin Mattingly's estate was divided or settled. The long lapse of time seems to have blotted out the recollection of it. It does not appear that this land was ever allotted to Mrs. Russell. It had been verbally sold by her father to her husband. A portion of the purchase money had been paid by the latter before the death of the father. All of the heirs, except the wife, conveyed to the husband. Doubtless, the balance owing of the purchase money was estimated against Mrs. Russell in the settlement of the estate. Upon what score, however, does not appear. There was other estate besides land to be divided. The six-sevenths of the land was deeded by the other six heirs to her husband, by her consent, and, although she may have been and probably was charged in the division of the estate in some way with the balance owing for the land, or six-sevenths of it, yet the state of case shown by the evidence does not authorize a court to declare that her husband held the interest so conveyed in trust for her. Nor does the record show, as counsel suppose, that the improvements were made upon the land by John M. Russell when he was a mere life-tenant of his wife's one-seventh, and before he had become the absolute owner of a portion of it by reason of the death of some of his children.

Upon the record before us, the conclusion heretofore reached accords with the recognized rules of law, and the petition for a rehearing is therefore overruled.

## LOUISVILLE INDUSTRIAL SCHOOL OF REFORM v. CITY OF LOUISVILLE.

(Court of Appeals of Kentucky. Dec. 12, 1889.)

## REFORMATORIES—ELECTION OF BOARD OF MANAGERS.

Act Ky. 1886, amending Act March 9, 1889, provided for the election by the general council of the city of Louisville of a board of nine managers for the Louisville Industrial School of Reform, who were to divide themselves into three classes, to hold, respectively, one, two, and three years. Three new managers were to be elected annually thereafter. The original act provided that on failure to elect at the regular time the managers should hold over "until a new election." The general council, as a condition of the grant of land to the institution, which is entirely supported by

municipal taxation, was also given a supervisory power over it. Held that where, by reason of a failure to hold an election for four years, the terms of all the managers have expired, and all are holding over, the general council has the right to elect an entirely new board.

Appeal from Louisville law and equity court.

"Not to be officially reported."

In suit for injunction against the city of Louisville, instituted by the outgoing board of the Louisville Industrial School of Reform. The new board ordered the suit dismissed, which the old board opposed, urging that the new board had not been duly elected. The decision was adverse to the old board, which appeals.

*John Roberts, Muir & Heyman, Brown, Humphrey & Davie*, for the old board. *O'Neal, Jackson & Phelps, T. L. Burnett, and Helm & Bruce*, for the new board. *H. S. Barker*, for the City.

PRYOR, J. The general council of the city of Louisville having elected Thomas L. Barrett, Atilla Cox, Zach Phelps, Julius Bamberger, W. W. Hite, Fred H. Walkup, James A. Leach, Charles H. Pettit, and H. M. Benford as the board of managers of the Louisville Industrial School of Reform, those gentlemen, on the 4th of May, 1889, took the oath required by law, and entered upon the discharge of their duties. Prior to and at the time this election was held, the corporation had an action pending in the Louisville law and equity court, instituted at the instance of the then existing president and board of managers, in which they sought an injunction against the city of Louisville and its engineer, R. T. Scowden, preventing them from extending Third street, in the city, through and over the grounds of the corporation, and from tearing down certain parts of the corporate buildings that were occupied by the inmates of the institution. The injunction obtained by the board of managers was dissolved by the vice-chancellor, and reinstated by one of the judges of this court. After the injunction had been reinstated the new board was elected by the general council; and that board, deeming the litigation between the corporation and the city unnecessary, and claiming the right to control the corporate property, directed counsel to dismiss the action. The old board, consisting of D. P. Faulds and others, who had instituted the proceeding against the city, insisting that the election of the new board was invalid, and that they still constituted the legal board of managers, instructed their counsel, by whom the action was filed, to resist the motion to dismiss. The vice-chancellor, on the hearing, dismissed the action, on the ground that the old board had been superseded by the election of the new board, and denying the right of appeal to the old board. This court, on the application of their counsel, directed the court below to allow the appeal, in order that it might be determined who were the managers of the

corporation; and the validity of the election held by the new board is the sole question presented for our consideration.

An act approved on the 9th of March, in the year 1859, incorporated the board of managers; the third section of which provided "that the board of managers shall have power to fill all vacancies that may occur from the death or resignation or removal of any of its members until the time of the regular biennial election; and, if the election shall fail to take place at the regular time, the corporation shall not thereby be dissolved, but the members of said board shall continue in office until a new election." In the year 1866 this biennial election was dispensed with by a legislative enactment that provided for the election of nine managers, to be elected in May, 1866; and these managers were to divide themselves into three classes, of three each, the term of one class to expire in one year; the second class, in two years; and the third class, in three years,—and in each year thereafter three managers should be elected. This mode of election continued until May, 1885, and from that time until these last managers were elected, on the 2d of May, 1889, no election was held. The general council failed to elect for the years 1886, 1887, and 1888; and when the present appellees were elected the term of office of all the old managers had expired, and all were holding over. So, at the election held on the 2d of May, 1889, the general council had to determine whether an election of all nine managers should be had, or an election of only three, following with an election of three members each year. The law not having been complied with, each member of the old board was holding over, and could hold only until his successor was elected and qualified. It was made the duty of the nine managers, under the act of 1866, when elected to divide themselves into three classes of three each, the council having nothing to do with this division, and no election having been held by the council from May, 1885, until 2d of May, 1889, a new election was proper of the entire board; and, when elected, the classification should be made by the managers, as provided by the act of 1866.

It is argued that a change of a part of the board each year always left a majority of the members in office who were familiar with the affairs and interests of the corporation, and for that reason this mode of selecting the board was adopted. Although the entire board may be changed in the period of three years, the argument advanced has some force, and, no doubt, prompted the mode of election provided by the statute. Still we find no provision for such an election, where the term of each member has expired; and the right to classify not belonging to the council, nor the duty of continuing one in office under the circumstances being imposed on that body, a resort to the act of 1854 is proper, which provides that the corporation shall not be dissolved by reason of the failure to elect,



but the members of the board shall continue in office until a new election. The new election means an election to fill the place of each and every member of the board holding over; and, regardless of the act of 1854, where there was a failure to elect, and each member only entitled to the office until his successor is qualified, it seems clear that the council had the right to elect the entire body, and that body proceed to classify itself as provided in the act of incorporation. Besides, in a case of less doubtful construction than is found in the statute before us, this court would be reluctant to interfere with the action of the governing body, where it failed to comply with the strict letter of a statute in the conduct of an election held merely to fill a vacancy in the managers of a corporation, or in the election of members to fill the places of those who are merely holding over. The general council of the city of Louisville has not only the power to elect the managers, but, as a condition to the grant of the land to the corporation, the right is reserved to the council "to pass all such ordinances as they may deem necessary for the good government of the house of refuge," now called the "Louisville Industrial School of Reform." The general council is also authorized, by the act of 1866, to levy and collect a tax of not exceeding 5 cents on the \$100 on all real and personal estate in said city, in each year, which is the subject of municipal taxation. It is apparent, therefore, that the intent of these several amendments was to place this institution under the control of the city government; and, without its aid, (and it seems to have no other,) one of the greatest charities in the state would soon cease to have an existence. It is maintained solely by taxation from the inhabitants of the city; and, while no diversion of the fund belonging to the corporation can be made by the council, or its lands appropriated for public use, without compensation, it is but just and proper that the city government should have a supervisory power over the institution, with the right to elect those who control and dispose of the finances of the city, collected from its people, and applied to sustaining this charity. The members of the old board have served the institution faithfully for many years,—their fidelity to this important trust has not been questioned; and, if the action of the general council in holding the election involved a question of mere policy, instead of the exercise of a power conferred by the corporate charter, there would be little hesitation in continuing them as managers of the institution. It may be that the bringing of this action caused the difference between the old board and the council; and, conceding such to be the case, we have no right to assume that the mayor and council were influenced by improper motive in selecting the new board; but, on the contrary, looking to the differences existing between the two bodies, the general council, in the

exercise of its power, doubtless supposed that the welfare of the institution required a change of managers, and, the new board being composed of men whose integrity is in no manner questioned, there can be no reason for supposing that the interests of the institution will be sacrificed in their hands, or made subordinate to individual interests.

This new board, after its election, passed the following resolution: "Resolved that, in the opinion of this board, the action now pending in the Louisville law and equity court, of the Louisville Industrial School of Reform vs. The City of Louisville, is unnecessary, as this board can settle said matter with the city of Louisville; and the attorneys who instituted this suit for the Louisville Industrial School of Reform be, and they are hereby, directed to dismiss and discontinue said action." This would indicate a purpose on the part of the new board to settle the matter in dispute without further litigation, and to adjudge that the object of the new board, in conjunction with the mayor, is to destroy this home of the friendless, or to appropriate the property of the corporation for the purpose of enlarging or extending the streets of the city, without adequate compensation, is not warranted by the facts of the record. The commonwealth could and would intervene to prevent such an unlawful appropriation by the managers of the institution; but, until that board proposes or attempts to violate the rights of the corporation, or fails, if the deprivation of the property, or its use, has already occurred, to seek redress through the courts, or by an amicable adjustment with those committing the wrong, there can be no necessity for any action against the new board or the city of Louisville. If the mayor and council, under a mistake of law, regarding this property as belonging to the city, (and in this he was sustained by the vice-chancellor,) appropriated any part of the property to the use of the city, full compensation will, no doubt, be made for the injury sustained. It is a part of the contract between the corporation and the city of Louisville that the latter has the right to change entirely the location of the institution; but this gives to the city government no right to run a street over or through its lands, and, if such a use is or has been made, the injury sustained must be accounted for, by the city, to the corporation. The city of Louisville is sustaining this charity without individual aid, or the aid of the state government; and, the city council being invested by the legislature with such plenary power over the institution, we are not disposed to disturb municipal legislation on the subject, when not in violation of the provisions of the corporate charter. As this litigation has originated from the neglect of the city council to hold the election as the law provided, it is but right that the city of Louisville should pay the costs. Judgment affirmed.

TAPP *et al.* v. NOCK.

(Court of Appeals of Kentucky. Dec. 19, 1889.)

## VENDOR AND VENDEE—THE CONTRACT—PERFORMANCE.

Where a contract for the sale of land stipulates that the vendor is "to make a good title and give a general warranty deed," but fails to "make time of the essence" of the contract, a delay of two months in tendering the general warranty deed is not unreasonable and unnecessary, where the vendor did not have the legal title at the time of the contract.

Appeal from Louisville chancery court.

"Not to be officially reported."

Action for specific performance of a contract to purchase a lot, brought by Samuel L. Nock against William J. Tapp and L. S. Parsons. Judgment for plaintiff, and defendants appeal.

*Brown, Humphrey & Davis*, for appellants.  
*John Roberts*, for appellee.

BENNETT, J. The appellants having seen the real estate in controversy advertised in the Courier-Journal for sale by Stratton & Co., real-estate agents, on the 28th day of March, 1887, applied to them for the purpose of purchasing it. The application resulted in the following agreement: "Louisville, Ky., March 28th, 1887. Mr. Samuel L. Nock: We will give you \$6,720.00, payable one-third cash, balance in 1 & 2 years, six per cent., and lien, for your property, 96 by 200 feet, situated on the east side of First street, the south line of which is 96 feet north of Caldwell street; you to make a good title and give a general warranty deed. [Signed] W. J. TAPP. L. S. PARSONS." To which offer the appellee, in writing, replied very soon, on the same day, as follows: "Louisville, Ky., March 28th, 1887. Messrs. W. J. Tapp and L. S. Parsons: I will take \$6,720.00 for my property situated on the east side of First street, the south line of which is 96 feet north of Caldwell street. The above amount payable one-third cash, balance in one and two years, with six per cent., and lien. Will make you a good title, and give general warranty deed. [Signed] SAMUEL L. NOCK." These two writings—the one an offer to buy the specific property at a specified price, and the other an unqualified acceptance of the offer—constituted a valid and enforceable executory sale of the lot. These writings also obliged the appellee to convey to the appellants a good title to said lot by a general warranty deed, and also bound the appellants to accept such conveyance and deed. But the writings were silent as to the time in which such conveyance and deed should be made. Hence equity, as well as law, allowed a reasonable time in which to make the conveyance and deed. On the 6th day of April, 1887, the appellants wrote to Stratton & Co. that the original and new deeds had not been furnished them according to the understanding that they should be furnished them, in order that they might have the title investigated, and that the memorandum of title furnished them, to enable them to have the

title investigated, was not sufficient for that purpose; that they therefore receded from the offer made on the 28th day of March, preceding. The appellants, on the same day, received a reply, to the effect that there was no agreement to furnish the appellants with old and new deed, and that it was not customary for agents to do so; that the memorandum was sufficient; that, unless by special agreement, the seller was not bound to furnish abstract of title; that appellants would be held to the performance of the contract, etc. On the 28th day of May, following, the appellee tendered to the appellants a general warranty deed to this property, which the appellants refused to accept, upon the ground that they had theretofore receded from the proposition to purchase the property, which they had the right to do, because of the fact that the appellee had unreasonably delayed to make a clear title to said land; time being of the essence of the contract.

As the question presented by this record is well settled by this court, any extended legal argument is unnecessary. In *Cotton v. Ward*, 3 T. B. Mon. 313, it is said: "Where a contract for the conveyance is merely executory, and a time fixed for the conveyance to be made, if there be a delay beyond that time in completing the title, which has been occasioned by the fault of the vendor, the purchaser will not, in general, be compelled to accept of the title. Even in such a case, however, where the delay has been occasioned by the state of the title, and not by the negligence of the vendor, a court of equity, considering the time of performance not of the essence of the contract, unless expressly made so by the stipulation of the parties, will compel the purchaser to accept the title. The invariable inquiry of a court of equity, when about to pronounce a decree in such case, is not whether the vendor was able at the time when he entered into the contract, but whether he is able to do so; and a purchaser cannot, it is said, insist upon being discharged from his purchase upon the master's report of a defective title, if the same is capable of being made good, in a reasonable time." In *Woodson's Adm'rs v. Scott*, 1 Dana, 471, it is said: "In determining [referring to the discretion of the chancellor] that question, whilst he must ever feel it his duty to discountenance all unnecessary delay of the party seeking his aid, and especially where it has been prejudicial to the other party, yet he cannot but discriminate between that species of delay which has been the result of mere indolence or neglect, unaccompanied, as here, by any injury to the party complaining of it, and that other, which is willful and designed, or at all indicative of a vacillation of purpose as to a *bona fide* fulfillment of the contract. A knowledge of the want of that active vigilance and strict punctuality in fulfilling such contracts on the part of the community, generally, must compel him to overlook the delay in the one case, whilst his anxiety to discountenance fraud, or any sem-

blance of bad faith, will cause him to refuse his aid in the other." The proof is that at the time of sale the appellee had no deed to the property; that he owned it by executory purchase from Shouse; that a part of the purchase price remained unpaid; that he perfected his title as soon as he could; that there was no unnecessary delay in doing so; that the recital in the deed from Shouse that the land was incumbered with a lien for a part of the unpaid purchase money was not prejudicial to the rights of the appellants, for the reasons—*First*, that the incumbrance had in fact been discharged; *second*, because the appellants owed on the land a sum sufficient to discharge said incumbrance, which they could not only have withheld from the appellee, but have discharged the incumbrance, by paying the money to the proper parties. Also, there is no proof tending to show that the appellee or agent represented or even intimated to the appellants that he owned, at the time of the sale, the legal title to said land. He did, however, have such title as he could make a valid and binding sale of; and this was all that was required. Also, there is not as much as a *scintilla* of proof in the case that time was to be of the essence of the contract, nor does the written agreement even intimate such a thing; nor is there any proof that the appellee knew, or had reason to believe, that the appellants were purchasing said property for the purpose of an immediate speculation, or of any speculation at all. The direction to Stratton & Co. to sell the property at \$80 per foot was given after the purchase, and had the effect to retain said company as their agents; therefore, it carried no implied knowledge home to appellee. Besides, if it be true that the appellants did purchase the property for immediate speculation, and the appellee knew it, the written agreement, nevertheless, does not show that time was to be of the essence of the contract. On the contrary, it shows that the appellee was to have a reasonable time in which to make the deed, etc. Also, as just intimated, according to the proof, the appellee used all reasonable dispatch in perfecting his title, and making the stipulated conveyance. Also, there is no substance in the contention that the appellee did not furnish an abstract of his title; for he, in the first place, did not agree to do so; in the second place, he had no legal title, nor did he covenant or agree that he had such title. His agreement was that he would thereafter convey such a title by general warranty deed; and he did convey it, and, as we think, as soon as he could procure it. Nor, at the time of the conveyance, was there even an implied understanding that he had the legal title; for there are many—indeed, a great many—sales of mere equitable titles in this state, and the parties thereafter procuring the legal title, and then conveying the same by deed. There is nothing in this case tending to show that the parties intended to, or did, adopt a different course of dealing. The delay in getting the

deed, certainly, was within contemplation; else the parties would have stipulated differently. The fact that the property declined in value does not relieve the appellants from taking it, unless it was shown that the appellee unnecessarily delayed to make the deed, and thereby the loss was sustained. It was very easy to make time the essence of the contract, by inserting it in the writing, if the parties had desired it; but they did not so insert it. Therefore, it must be presumed that they did not desire it. In the case of *Smith v. Cansler*, 83 Ky. 367, a time was fixed in which to make a deed, and Smith neglected to make the deed within the agreed time; and between the agreed time of making the deed and the time that it was tendered the stable burned down. The court held that time, in that case, was of the essence of the contract; and, Smith having negligently failed to comply with the contract within the time agreed, and the property, after such failure, having been destroyed by fire, the vendee was not bound to accept the title. The expression, as quoted from Story, in said case, to the effect that the party insisting on a specific performance must "be ready, desirous, prompt, and eager to perform the contract," simply means that such party must not only be willing to perform it, but he must use, without unnecessary delay, all the means practically at his command to perform it. The judgment is affirmed.

#### BROWNING v. FICKLIN'S ADM'RS *et al.*

(Court of Appeals of Kentucky. Dec. 19, 1889.)

##### TRUST FOR EMANCIPATED SLAVES—SALE OF PROPERTY.

1. A will, made in 1849, devising lands in trust for emancipated slaves, expressly provided that said lands should never be sold, unless it should be unlawful for "free persons of color" to remain in the state. *Held*, that under existing laws, giving the rights of citizenship to negroes, the necessity for the trust ceases to exist, and it is proper to order a sale, where all the parties interested are before the court, and it appears that a sale would be beneficial.

2. Where all the beneficiaries of a trust are before the court, and consent to a sale, the purchaser, upon being invested with title, must pay purchase money.

Appeal from circuit court, Fayette county.  
"Not to be officially reported."

This was an action brought by Polly Ficklin's administrator and the beneficiaries of a trust created by said Polly Ficklin by a will, in 1849, wherein she provided that the lands given in trust for her emancipated slaves should never be sold, unless it should be unlawful for free persons of color to remain in the state. The court ordered a sale of the lands, and J. Wood Browning became the purchaser, but now appeals from the order compelling compliance with the terms of sale.

*J. D. Hunt, R. A. Thornton, Chas. Kerr, C. Suydam Scott, Nelms Bros., and Matt Walton*, for appellees.

PRYOR, J. In the year 1849, Mrs. Polly Ficklin, of the city of Lexington, by her last

will, made certain devises of her lands, in trust, for the benefit of certain slaves that had been emancipated, the same to be applied to their use and support, and, by an express provision of the will, no sale of the realty could be made, unless it should become unlawful for free persons of color to remain in the state. The execution of the trust was confided to the late M. C. Johnson, who controlled the property until his death; and since his death an administrator with the will annexed has been appointed. This trust has been continuing for a long period of time, and was created for the reason that the emancipated negroes were in no condition to hold it, and, by reason of their helplessness, unable to manage it. It is alleged, and so appears, that all the parties interested are before the court, and some of the beneficiaries are the plaintiffs, and others the defendants, seeking a sale of this property, and the extinguishment of the trust, by reason of the changed condition of the negro race, and the necessity existing for the conversion of the property into money that is now yielding but little, if any, income. The aged and infirm negroes are dead, and the purposes of the trust subserved; but, if this trust is to be perpetuated, as if the condition of the beneficiaries had never changed, then the judgment to sell this property, or a part of it, is erroneous. The will of Mrs. Ficklin was made in view of the inability of the negroes who were the object of her bounty to protect their persons or property; and, for that reason, she confided that right to the trustees named in her will. We think, under existing laws, the enactment of which was not foreseen by the testatrix, with the helpless condition of the negro removed, and all the rights of citizenship given him, the necessity for the trust ceases to exist; and, if not, under the circumstances of this case, we perceive no reason why the chancellor could not sell the land; and, if any of the remaindermen are too young to take their portion of the proceeds, the chancellor will secure it for them. At any rate, the purchaser, who is the only party complaining,—he having refused to pay the purchase money,—being invested with title, must comply with the terms of sale. His exceptions were properly overruled. The judgment is affirmed. *Thomas v. Harkness*, 13 Bush, 23.

#### SADLER v. HUFFHINES et al.

(Court of Appeals of Kentucky. Dec. 17, 1889.)

##### ADVANCEMENTS.

1. An intestate, in the year 1870, divided a tract of land, conveying a portion to one of his sons, and the balance to his son-in-law, and took their notes for \$500 and \$700, respectively, but never made any demand for payment, though strict in such matters as to his other sons, and at his death the notes were barred by the statute of limitations. *Held*, that the son-in-law and his wife must account for said \$700 as an advancement, no interest being charged thereon.

2. The recitation in the deed as to the consideration or execution of the note is not conclusive

that the transaction was a sale, and not an advancement.

Appeal from circuit court, Simpson county. "Not to be officially reported."

This was an action brought by C. L. Huffhines and others, heirs at law of David Huffhines, to require Joseph Sadler, a son-in-law of said David Huffhines, to account for an advancement of land valued at \$700, which said David Huffhines sold to said Sadler without ever demanding payment therefor. Judgment for plaintiffs, and Sadler appeals.

*C. W. Milliken and W. W. Bush*, for appellant. *Geo. C. Harris and Edward W. Hines*, for appellees.

PRYOR, J. David Huffhines, as appears from this record, being possessed of a small estate, died leaving several children, to whom the estate passed by operation of law, and in its distribution a question has arisen in regard to advancements made by the intestate in his life-time to his children. The intestate was an illiterate man, could neither read nor write, but was prompt in his business affairs, and vigilant in the collection of his debts. He gave to several of his children a horse each, and other articles of personal property, not exceeding in value to any one child \$200. In the year 1870 he owned a tract of land that he divided, conveying one part of it to his son, Joseph Huffhines, in consideration of \$500, and took his note therefor. He conveyed another parcel to his son-in-law, Joseph Sadler, and took his note for \$700. The son and son-in-law were both insolvent,—had nothing subject to execution, then or now, as appears from the record; took possession of the land in the year 1870, and have held it ever since; and from the proof as to the son-in-law no demand was ever made of payment from the date of the conveyance to the death of the testator. The intestate, as we infer, was in the habit of loaning money, and, as the evidence shows, kept the two notes on his son and son-in-law separate from his other notes. This was no doubt the method resorted to by the intestate for advancing to his son-in-law and son, retaining the notes as evidence only of what he had given them, and we think that the facts show such an intent. The recitation in the deed as to the consideration or the execution of the note is not conclusive that the transaction was a sale, and not an advancement, nor can it matter that the deed was made to the husband. The wife and children of Sadler have had the use and benefit of the land for nearly 20 years, and to allow the husband to plead the statute of limitation to the note, and retain the possession of the land, without accounting for its value, would be unjust to the other children, and contrary to the intention of the testator. The son is willing that the note he executed should be charged to him, but the son-in-law and his wife are not willing to account, and claim that time has satisfied the obligation of the husband. There is proof showing that the

intestate said the two notes had run out of date, and he could do no better than to tear them up, and charge the obligors with the amount. The widow says that he loaned John and Fayette, two of his sons, money to pay for their farms, and required them to pay the money back, and they did so, and she thinks he did not mean to give this money to his son-in-law, but her husband wanted all "to come in equal." Now, it is a little remarkable that the intestate would be more exacting with his sons than his son-in-law, and the fact that he never proposed to collect from his son-in-law shows the intent of the intestate never to collect this money. In *Shawhan v. Shawhan*, 10 Bush, 600, the intestate charged the advancements made, and in those charges some of his children were charged with rents, but against one of his children he made no charge. This court held that this one should also be charged with the rent as an advancement. Besides, the declaration of the father that the child is not to account will not destroy the character of the gift; if an advancement in law, when looking to equality in the distribution, the distributee must account. It seems to us the facts and circumstances in this case show an advancement, and we are satisfied that, if the note executed had run only 14 years at the death of the intestate, the appellant would have conceded the advancement so as to stop the interest. The judgment below is affirmed. We understand the judgment only requires the appellant to account for the \$700, without interest.

#### PEOPLE'S BANK v. FRANKLIN BANK.

(*Supreme Court of Tennessee*. Dec. 31, 1889.)

##### BANKS AND BANKING—FORGED CHECK.

When a bank pays a forged check without requiring identification or preserving any evidence of the identity of the person to whom it is paid, and indorses it, and sends it for payment to the bank upon which it is drawn, the latter bank, upon discovering the forgery after having paid the check, can recover the amount thereof from the former.

Appeal from chancery court, Montgomery county; GEORGE E. SEAY, Chancellor.

*Stark & Stark*, for appellant. *Leech & Savage*, for appellee.

FOLKES, J. Young was a depositor of the complainant bank. His name was forged to a check drawn on the complainant, payable to the order of one Morgan. Morgan's name was also forged as an indorser on the check. This check, with the forged name of Young, the maker, and of Morgan, the indorser, was presented to the defendant, the Franklin bank, and was cashed, or purchased by the defendant, and transmitted, after indorsement, by the defendant to the complainant bank by mail. The complainant bank had and kept an account with the defendant bank, and upon the receipt of the check passed the amount thereof to the credit of the defendant bank. The complainant bank was

located and did business at Springfield, in the county of Robertson; the defendant bank was located and did business at Clarksville, in Montgomery county. The check which had been received by the complainant bank and passed to the credit of defendant bank, as above stated, on December 8, 1888, was ascertained 19 days thereafter to be a forgery; this discovery being made by the depositor, Young, when he came to examine his pass-book, together with the checks returned therewith. Thereupon the complainant bank canceled the charge against Young, the depositor, and at once notified the defendant bank of the forgery, and demanded that the same be made good by the defendant bank. Upon refusal, complainant filed this bill to recover the amount of the check, as having been paid by it through mistake upon the forged check, charging in the bill the facts above stated, and also the further fact that when presented the check bore the indorsement of the defendant bank, and that upon the faith of such indorsement the complainant's teller accepted the check, and gave credit to the defendant bank, with less careful scrutiny of the genuineness of the drawer's signature, by reason of the confidence reposed in the genuineness of the paper, as evidenced by the indorsement of the defendant bank. The defendant answered the bill, admitted that it had received and cashed the check as charged, and stating that it was unable to furnish the names of the party or parties by whom the check had been presented, and to whom it had been paid by it, but presumed that it had required identification; but of this they do not remember. The allegations of the bill were sustained by the proof; but the chancellor, being of opinion that the plaintiff should, at its peril, know the genuineness of the signature of its depositor, refused the relief prayed for, and dismissed complainant's bill, from which complainant has appealed, assigning errors.

The general rule undoubtedly is that the bank has, at its peril, to know the genuineness of the signature of its depositor; and if it pays a forged check, the loss must fall upon the bank, and not upon the depositor, except in cases where the negligence of the depositor has induced or brought about the payment by the bank. This duty with reference to the bank may be said to be an exception to the general rule that money paid by mistake can be recovered, and to the general statement of another equally well-settled rule, that payment of a forged paper conveys no title; for it is well settled that the deposit of a forged paper conveys no title, for it is well settled that the deposit of a forged bill or base coin created no indebtedness, although credited to the depositor's account, for the reason that payment in such material could not discharge a debt, and cannot create one. The bank is not only responsible to the depositor where the check, with the depositor's signature forged, is paid by the bank, except where the depositor has

been guilty of negligence sufficient to mislead the bank, but the bank is precluded from recovering from a party to whom the forged check has been paid, where such party, being without fault, would be prejudiced by being required to refund to the bank, upon whom rests the duty of determining the genuineness of the depositor's signature. Notwithstanding some conflict of authority upon the subject, a careful investigation of the adjudged cases and the text-books leads us to the conclusion that the bank can recover of a party to whom payment is made on a forged check, indorsed by the party to whom paid, where the party to whom paid has been guilty of negligence in receiving and indorsing the check; for, notwithstanding the negligence to some degree that the paying bank has been guilty of in paying the forged check without detecting the forgery of its depositor's signature, it often happens, or may happen, that the party to whom payment is made has been guilty of the first negligence in purchasing and indorsing the forged paper. The bank upon whom the check is drawn, in the practical administration of banking business, may well be lulled to a less careful scrutiny of its depositor's signature of a check, where the same is indorsed by another bank with which it is in correspondence or interchange of business, than it would exercise in accepting and paying the same check, not so indorsed, to a stranger. The indorsement of the check by the payee may be said ordinarily to be a guaranty of the genuineness of the indorsements theretofore on the paper, and also of the genuineness of the drawer's signature; subject, perhaps, to some exception in particular cases, as, for instance, where the indorsement is made after the genuineness of the preceding signature has been approved by the paying bank.

Applying these principles to the case at bar, we are of opinion, and so adjudge, that the first fault was with the defendant bank. This bank accepted and cashed a check drawn on a bank in another county, to which the name of the drawer and the payee had both been forged, and, so far as the record discloses, without requiring any identification of the parties to whom such payment was made; certainly without preserving any evidence of the identity of such parties for the benefit of itself or of others who might be injured by such forgery. The complainant bank, upon receiving such check in due course of mail for deposit to the credit of defendant, might well rely upon the exercise of due prudence and diligence on the part of its depositor, the defendant bank, and might well regard the latter's indorsement of the check as significant of the fact that such prudence had been exercised, and, if not, that the indorsement would stand as a guaranty to the paying bank from loss that might otherwise fall upon it by reason of its passing the amount of the check to the credit of such indorser. Such would not only seem to be sound in theory, and supported by authority,

but is in accordance with the proof in this case; and it is a matter of such general information that perhaps the court might be warranted in taking judicial knowledge of it, that, in dealings between banks, and especially with reference to clearings and clearing-houses, banks will adjust and pay differences between each other or between itself and the clearing-house, upon the faith of the indorsement by other banks of the checks involved in such settlement, before they examine the signature to the check involved or embraced in the settlement, relying on such indorsements as protecting it in such payment, should a subsequent and more careful scrutiny of the signatures disclose forgeries in the making and indorsing of the checks so paid. Mr. Daniel, in his work on *Negotiable Instruments*, after discussing and criticising the cases that are supposed to hold a bank liable at all hazard, and to the last extremity, where it pays the check with the signature of its depositor forged, lays down the rule substantially as we have stated it. 2 Daniel, *Neg. Inst.* §§ 1655, 1657, with cases cited in the notes. And the rule is stated by the learned contributor to the article on forged checks in 3 *Amer. & Eng. Cyclop. Law*, 223, as follows: "Where, however, the loss has been traced to the fault or negligence of the drawer or holder, it will be fixed upon him." See cases cited in note 1. And on page 225 of 3 *Amer. & Eng. Cyclop. Law* it is said: "Also the holder by indorsing a check warrants the genuineness of all prior indorsements." See note 1, citing numerous cases, among which is the case of *Harris v. Bradley*, 7 *Yerg.* 310, where Judge GREEN lays down the doctrine as to the effect of an indorsement in guarantying the genuineness of prior indorsements, in the language as quoted. It is true that in the Tennessee case the language was used with reference to a note, and not a check, and such may also be the case with other of the authorities cited in said note which we have not examined.

Now, while we concede there is quite a difference between this rule, as applicable to indorsers on commercial paper, and as applied to checks, so far as the liability of the drawer is concerned, yet we see no reason why the bank should not have the benefit of such rule where the indorsement is made under circumstances which establish or impute negligence to the indorser. The case of *Levy v. Bank*, 4 *Dall.* 234, and *Bank of U. S. v. Bank of Georgia*, 10 *Wheat.* 333, are relied on as authority for the judgment of the chancellor in the case at bar. The facts of the case in 4 *Dall.* are so briefly stated as to leave us uninformed as to the manner in which the question was presented. The case of *Bank of U. S. v. Bank of Georgia*, 10 *Wheat.* 333, was where a forgery was by raising the notes of the defendant bank. The notes, coming in due course to the United States Bank, were presented to the Bank of Georgia, and passed to the credit of the United States Bank. Nineteen days thereafter the forgery was dis-

covered, and notice given. Upon refusal of the United States Bank to make good the loss, the credit was, by the Georgia Bank, withdrawn from the account, and the United States Bank brought suit for money had and received. It was held that the plaintiff could recover. While the reasoning of the learned judge, and much of the argument, tends to sustain the contention of the defendant here, still the court put its judgment in that case distinctly upon the ground that the defendants were bound to know their own notes, and having received them without objection, they cannot recall their assent. While these two cases are criticised by Mr. Daniel as unsound, that criticism, so far as the latter case is concerned, may be well confined to the argument contained in the opinion; for the point decided is in no manner hostile, as we understand it, to the principle announced by Mr. Daniel, and adopted by us in the disposition of the case at bar; for there is nothing to show that there had been any negligence on the part of the United States Bank in receiving the notes of the Georgia Bank; and we can well understand how there could and ought to be a higher obligation upon the bank to know the genuineness of its notes of issue, passing current as money, than rests upon it to know the signature of the depositor, on a check indorsed by a solvent correspondent. But, putting them both on the same footing, there is wanting in the report of the case in 10 Wheat. any evidence of negligence on the part of the United States Bank.

The views we have expressed, and the principle upon which we reverse the chancellor, and award judgment here for the complainant, are not only sustained by Mr. Daniel, but also by Mr. Chitty, Mr. Parsons, and Mr. Bolles, who fortify their conclusions by ample authority. See Chit. Bills, (13th Amer. Ed.) \*431, \*485; 2 Pars. Notes & B. 80; Bolles, Banks, § 189; Hardy v. Bank, 51 Md. 585; Bank v. Morgan, 117 U.S. 96, 112, 6 Sup. Ct. Rep. 657; Ellis v. Insurance Co., 4 Ohio St. 628; McKleroy v. Bank, 14 Ia. Ann. 458; Bank v. Bangs, 106 Mass. 441; Rouvant v. Bank, 63 Tex. 610; Bank v. Ricker, 71 Ill. 439. It results, therefore, that the decree of the chancellor must be reversed, and judgment rendered here for the amount of the check, with interest and cost.

SNODGRASS, J., (*dissenting*.) I concur in the result reached on account of the negligence of the indorsing bank; but I do not agree to what may be implied from the argument of the opinion, that this bank would have been liable had it not been negligent, but had taken the check from a known and good-faith indorser. This is the point determined in the case in 4 Dall., referred to. I am of opinion that the view is a sound one. As between itself and good-faith indorsers, the paying bank should be the place of final settlement, where all prior mistakes and forgeries should be corrected, and, if not then correct-

ed, the action of acceptance and payment should be treated as final. There must be a time and place to adjust and end these things as to innocent indorsers, and, if the paying bank and date of payment is not that time and place, I do not see what can be or should be. Certainly there are no better or more appropriate ones. It is the last time and last place the check is presented. It is to the paying bank, after it has gone through every hand it can, when all opportunity for mistake and forgery is over. It is to the depository of the signature as well as the funds of the drawer. It is the place selected by him, and trusted by all to correct any mistakes and reject forgeries. Every interest and duty to itself, to its depositor, and to all indorsers and parties interested, require that the paying bank should settle any questions which could arise on it. If it fail to do this, it should take the consequences. See 3 Amer. & Eng. Cyclop. Law, 222, and cases cited. It will not do to say that this bank does not injure the indorsing bank by payment and delay. Days are of great moment in transactions of this kind; any delay may, and much delay must, be injurious. Nor does the clearing-house arrangement affect this question. Banks are represented there, as well as at their own counters, in an arrangement satisfactory to them. If not safe, they should change it, but not escape liability for failure to exercise the usual care to detect errors and forgeries in consequence of exercising one more desirable to them, but less safe.

HANNA v. CHATTANOOGA & N. RY. Co.  
(*Supreme Court of Tennessee*. Dec. 31, 1889.)

#### MASTER AND SERVANT—NEGLIGENCE.

Plaintiff was employed by a firm to load cars, the use of which was offered by the railroad company, if the firm would have them moved down from the next station where they were standing, and whence they could be moved by allowing them to run down the grade. He, with other employees of the firm, went after the cars, acting under the firm's orders, and, in attempting to run them down the grade, his associates failed to apply the brakes properly, whereby he was injured. Held, that the railroad company was not liable for his injuries, as he was not in its employ.

Appeal from circuit court, Sumner county;  
A. H. MUMFORD, Judge.

S. F. Wilson and Geo. W. Boddie, for appellant. J. J. Turner, for appellee.

FOLKES, J. This was an action brought by the plaintiff to recover damages for a personal injury. The declaration contains two counts: The *first*, for negligence of the company through the superior of the plaintiff, and in not notifying the plaintiff of the dangers incident to the employment; *second*, for negligence in associating the plaintiff with other employees known to the defendant to be incompetent, and injury resulting therefrom. There was a verdict and judgment for the defendant, and plaintiff has appealed in error.

The record discloses the following facts: The plaintiff was employed by Settle & Link,



who were dealers in cross-ties, wood, etc., to accompany Link and other hands employed by him, to bring empty cars from another station by grade, for the purpose of being loaded, preparatory to being turned over to the railroad company for shipment. The plaintiff was to be paid by Settle & Link for loading the cars at the rate of 40 cents per car, it requiring five men to properly load the car with wood or cross-ties, each of whom received 40 cents, making \$2 for loading a car. Link, one of the firm of Settle & Link, was also railroad or station agent, and the store of his firm was used as a station or depot. Neither plaintiff nor those associated with him were experienced as railroad hands, and were not instructed or warned, but were known to each other to be without such instruction and experience. The plaintiff, in his own testimony, states that he was employed by Settle & Link, and was to be paid by them, and not by the railroad company. When Settle & Link asked for cars to move their cross-ties and wood, they were told that the company had some flat-cars up at another station, a few miles distant, and that if they would go up, and bring them down, (which they could do, on account of the grade, by merely handling the brakes, without any motive power other than that of gravity,) they could have the cars for the purpose of moving their freight, and that after they had brought them down, and loaded them, the defendant would then take charge of and move the cars in regular trains to the desired destination. Under the arrangements with Settle & Link, the railroad company carried Link and his crew of hands on a passenger train, without charge, up to the station from which the cars were to be brought. Link and his crew brought the cars to the station at which they were to be loaded. Just before reaching the station, Link instructed the plaintiff, with two of his associates, who were upon the front car, to disconnect that car, and run it on a side track, where it was to be loaded by the plaintiff and others with wood. Plaintiff, sitting on the front of the car, after it had been detached from the other cars, relying on his two associate laborers to properly handle the brakes, jumped off in front of the moving car, (or after the car was stopped, as some of the testimony tends to show,) when, by the negligence of his two associates at the brakes, the cars were allowed to move forward, and ran upon him, inflicting the injury complained of.

The plaintiff, in his assignment of error, insists that it was the duty of the railroad company to move its cars from one station to another, and that it could not devolve this duty upon another, so as to escape liability. This is a very correct rule, so far as applicable to a stranger who might have been injured by the cars, or to a passenger, on other cars, injured by the negligence of the persons thus permitted to take charge of the cars of the defendant company, upon the principle, well established, that a company owes a

duty to the public, by reason of its franchises, from which it cannot absolve itself by turning over its road, or the management of its trains thereon, to others, whether corporations or individuals, without legislative sanction and exemption. But this rule does not apply in favor of the parties themselves who receive from the company their cars with the understanding and agreement that they are personally to move or operate them for themselves or for their employer. In such case, the company assumes no duty and no contract relation towards the parties so put in possession of the cars, except the duty to furnish sound and safe cars. So far as this plaintiff is concerned, he had undertaken, in connection with others equally inexperienced with himself, to move these cars, not for the company, but for Settle & Link, to whom alone they looked for compensation for their services, and he was injured by a fellow-servant in the employ of Settle & Link. We are wholly at a loss to discover any principle upon which the railroad can be held liable for an injury so inflicted. The company's liability for an injury to a servant must rest upon some wrong or negligence as the occasion of the injury, and there is nothing in the record to show any negligence or wrong on the part of the company which can be said to be the prime or proximate cause of such injury. Certainly the mere turning over of its empty cars to a shipper, at such shipper's request, to be handled by the shipper, cannot be said to be the occasion of the injury complained of. The injury resulted from the negligence of the two men at the brakes, and these two men were not in the employ of the railroad company, but, like the plaintiff, were under the employment of Settle & Link, and were known to the plaintiff to be as ignorant and inexperienced as the plaintiff himself was; the fact being that the plaintiff and his associates were countrymen, living in the neighborhood of the depot, who had been in the habit of loading cars. Indeed, under the proof in this case, it might well be doubted whether the plaintiff could recover for the incompetency of his fellow-servants, even if they had all been in the employ of the defendant, where, as shown in this record, the plaintiff was acquainted with the inexperience and want of skill on the part of his associates; unless, perhaps, he had been instructed, under some special emergency, to act with such incompetent associates. See *Railroad Co. v. Handman*, 13 Lea, 423, where the true rule is stated to be that an employee working knowingly with defective machinery or tools, or with incompetent associates, takes the risk thereof, and, both being in fault, the plaintiff cannot recover. Under the views above expressed, it is unnecessary for us to consider in detail each of the special charges given or refused. There is nothing in the charge of which plaintiff can complain; for, as we have already seen, under his own statement of his case, the company were not liable for the injury received by him, as

the result of the negligence of his associates. We deem it therefore unnecessary to consider the several criticisms in the assignment of errors, passed upon the charge, which contains more of error against the defendant than against the plaintiff, in a case where, under a proper charge, the trial must necessarily result in a verdict for defendant. Let the judgment be affirmed.

**LOUISVILLE & N. R. Co. v. WILSON.**

(*Supreme Court of Tennessee.* Jan. 1, 1890.)

**MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.**

When the rules of a railroad company require baggage-masters not to leave their car except when necessary, and then only for as short a time as possible, and forbid their riding on the engine, the company is not liable for injuries sustained by a baggage-master while riding on the engine, though the injury was caused by the negligence of an employe of the company.

Appeal from circuit court, Maury county; E. D. PATTERSON, Judge.

*Hughes & Hatcher*, for appellant. *Taylor & Fowler* and *Figures & Padgett*, for appellee.

TURNER, C. J. M. W. Wilson, baggage-man on the Louisville & Nashville Railroad, was killed in a collision of an accommodation train, going south, with a single engine, going north. The accident resulted from the negligence of the engineer on the single engine, in failing to take the side track at Godwin and await the coming of the accommodation. His orders were that he should so run as to keep out of the way of all regular trains, clearing all trains at least 10 minutes. Wilson had been in the service of the company for about three years, part of the time as special conductor. At the time of the accident, he and another, besides the engineer and fireman, were riding on the engine, and just before the accident was seen sitting on the fireman's seat.

As baggage-master, the deceased was a trainman. It is a rule of the company "that the duties of the conductor or trainmen do not require them to ride or remain on the engine, and they are prohibited from doing so." "When on duty, the baggage-master must not leave his car, unless it be securely locked, and then only for as short a time as possible." The deceased had a book of rules. The proof is, and the fact is necessarily that way, that the engine is the most dangerous part of a train, in case of collision. Trainmen, including the baggage-master, are employed for certain defined duties; and it is, whether expressed or not, a part of their undertaking that they will attend to those duties, and observe the rules of the company made for their execution. It is the duty of the company to make the best and safest regulations for the protection of the employes. The purpose and good sense of the rules cited are apparent on a bare statement. The obligation of the employe to obey reasonable rules, intended for

his safety, may not be disregarded with impunity. It is reasonably certain that if the deceased had been in the duty assigned him on the train, and in the position required by the rules, he would have escaped, as it appears that one in his seat in the baggage-car escaped, unhurt. There is no pretense of a call by duty to the engine, nor is the presence of Wilson there attempted to be explained. We must, therefore, conclude that he was out of his line of duty. His negligence was, at the least, equal to that of the engineer on the special engine. Both were disobeying orders of equally vital importance to them. The court should have charged, as requested: "If the jury find that the intestate, M. W. Wilson, was employed as baggage-man on the train of defendant, that his post of duty, as such, was in the baggage-car; and that, if said intestate voluntarily left his post of duty, and sought a position on the engine, where he was forbidden to be by the rules of the company, and where he was exposed to a greater danger than he would have been had he remained in the baggage-car; and if the jury find that, whilst in that position, he was killed by the negligence of the engineer on the special engine, and they further find that he would not have been injured if he had been at his post of duty,—then the plaintiff cannot recover." While railroad companies ought, by reason of the very dangerous character of the duties to be performed, be held to the strictest accountability for the consequences of negligence, they can only operate through agents, who must also be held to strict account for their conduct, especially to their employes. We know that men, by constant exposure to danger, become almost indifferent to it, and often take desperate risks; a good reason why courts should remind them that such risks are their own, and not their employers'. Enforce the mutual duties of employer and employe, and accidents will diminish. Reverse the judgment.

**GALLATIN & N. TURNPIKE Co. v. FRY.**

(*Supreme Court of Tennessee.* Dec. 19, 1890.)

**TORTS—PARTIES—CHATTEL MORTGAGE.**

1. A mortgagor of a chattel, retaining possession, has a right to sue a turnpike company for damages to the chattel by its defective road.

2. An action for damages for injuries to personalty belonging jointly to two must be brought in the names of both, though after the injuries an arrangement is made between the owners whereby one becomes sole owner.

Appeal from circuit court, Sumner county; MUMFORD, Judge.

This was action for damages by Hense Fry against the Gallatin & Nashville Turnpike Company. Judgment for plaintiff, and defendant appeals.

*James W. Blackmore* and *J. J. Turner*, for appellant. *Charles F. Head*, *S. F. Wilson*, and *W. C. Dismukes*, for appellee.

SNODGRASS, J. The defendant in error sued the turnpike company for \$2,000 damages, for

injuries to horses, resulting in the death of one of them, and destruction of a separator, alleged to have been occasioned by defective and improperly constructed road. The defense was "not guilty" and want of property in plaintiff. There was a verdict and judgment against the company, and it appealed.

On the trial it appeared that the horse killed and the one injured belonged at the time of the accident to plaintiff, but that the separator had been bought by plaintiff and John W. Parker from the Aultman-Taylor Company, and these parties had given their notes for it. It also appeared that in May, 1887, the accident being in July following, plaintiff and Parker had mortgaged the separator to the Aultman-Taylor Company. It was intended, on a fair construction of the mortgage, that the mortgagors were to retain possession and use the property. While so doing, it was destroyed, or so wrecked as to be entirely ruined, in this accident. Upon these facts the defendant insisted that the legal title was in the Aultman-Taylor Company, and it alone could sue. We think this contention not well founded, the mortgagor being lawfully in possession until default. Jones, Mortg. § 440; Orser v. Storms, 18 Amer. Dec. 547-552, cases cited in notes.

The defendant next objected that the right of action was in Parker and Fry, and that there was no evidence to sustain a finding in favor of Fry. To meet this objection below, and which is now repeated here, plaintiff undertook to show that, while nominally the title was in himself and Parker, by an arrangement between themselves it was really in plaintiff alone. But plaintiff distinctly swears this arrangement was after the accident. There was no evidence to the contrary. It therefore follows that there was no evidence to sustain the claim of plaintiff to sole ownership when the injury occurred, and the judgment must be reversed, and case remanded for new trial.

**STATE ex rel. PALMER et al. v. WAGONER et al.**

(Supreme Court of Tennessee. Dec. 19, 1889.)

**RIGHT TO APPEAL.**

Where in *quo warranto* proceedings the chancellor decrees against defendants, and rules the election under which they claim title to their offices void upon all the grounds alleged in the bill, except the voting of non-residents, and the defendants do not appeal, the complainants cannot appeal, and have the right of said voters adjudged, because the question may arise at some future election.

Appeal from chancery court, Humphreys county; H. J. LIVINGSTON, Chancellor.

This was a bill filed by the state of Tennessee ex rel. Junius M. Palmer et al. against Allen Wagoner, M. F. Wagoner, W. G. Crockett, George Lee, Joseph Lancaster, George Story, and W. O. Martin, citizens of Humphreys county, Tenn., to have their election as mayor and aldermen of Johnsonville declared void. The chancellor decreed against

defendants, but plaintiffs appeal, because he reserved the question of invalidity as to one of the grounds alleged.

*Mr. Lanier*, for appellants. *Mr. McAdoo*, for appellees.

SNODGRASS, J. The bill alleges that the foregoing named persons, who are all the defendants thereto, are assuming to be the mayor and aldermen of Johnsonville, and are unlawfully holding and exercising these offices, and seeks to prevent such usurpation. It sets forth various reasons why their election was illegal and invalid, which need not be recited or commented upon here, for the reason that the chancellor decreed against defendants, and held the election under which they claimed title to their offices void, upon all the grounds alleged in the bill except one, and he reserved that question, and defendants did not appeal. The question reserved arises upon an allegation that there were 28 non-resident conveyees of a small lot of land in Johnsonville, made such a few days before the election, to constitute them voters; that 25 of them voted for defendants. From this decree, as before stated, defendants did not appeal. The relators, for complainant, excepted to the decree on this point, because the election was not for this reason, also, adjudged void, and were allowed to appeal.

Waiving, for the present, the question whether the exception and appeal could have been lawfully taken by any one but the attorney general for the state, as he alone can bring the suit, (although authorized to do so, and having in this case done so, at the instance of the relators,) it is sufficient to say that complainant, having obtained a decree declaring the election void upon certain grounds, and defendants acquiescing, has obtained all the relief to which it was entitled in the result, and cannot (the result being obtained below) pursue the controversy further for the settlement of abstract questions, no longer involved. This conclusion the counsel of relators recognize, but they claim that inasmuch as a future election may be held, and these persons may vote therein, they are entitled to have the question settled. This is an incorrect view of the case. This court cannot settle abstract questions, however important, or however simple they may be, upon the supposition that they may hereafter arise. They may never do so. No other election may be held, or, if it is, none of these conveyees may vote, or offer to do so. But should that result be a certainty, instead of a probability, for the reasons stated we are not authorized to adjudge that merely abstract question; and, finally, if we could adjudge it, it would not affect the right of these conveyees, not before the court. As a precedent, of course, it could not be relied on, unless the questions were really involved.

Other questions were made in the bill, and these the chancellor adjudged against the state, to which there was the same exception

and appeal. They were that Johnsonville was not really incorporated, and, if so, it had lost its franchise by abuse or non-user. It is not necessary to recite the reasons which the chancellor gave for this. There were several which he did not give that would have been conclusive: *First*. Neither the corporation of Johnsonville, as such, was made defendant, nor the inhabitants thereof. *Second*. The court neither had nor could have any jurisdiction to annul its corporation, because the statute under which this action is brought (section 4146 et seq. of the Code) relates alone to private and business corporations, and not to municipalities. The state had no need to provide for proceedings against them for dissolution, and did not do so. It can repeal at pleasure the charter of any municipal corporation, and the legislature is the judge of such necessity of repeal, whenever it arises. It was not the purpose of the legislature to make these arms of the state government objects of litigation for existence with itself, when it had the undoubted power to terminate their existence by an act, whenever it saw fit to do so. A careful reading of the chapter containing the sections referred to shows this clearly. The relief provided against "any persons acting as a corporation within this state, without being authorized by law," is that it be dissolved, and also that the corporation, its directors or managers, as the case may be, pay the cost. Section 4162. These terms, totally inapplicable to a municipal corporation, cover and include private and quasi public corporations for which alone they were intended. It does not result from this that there is no remedy for the alleged private grievances as to the unlawful sale of liquor in the limits of Johnsonville. It has been held that the corporation in which such sale is protected is an active, vital organization, and if in fact a corporation exists, but is not sustained and kept in organized, good-faith operation, such sale, within four miles of an incorporated institution of learning, is unlawful. If, therefore, such sale is made, there or elsewhere, and the state assumes it to be unlawful, and institutes a prosecution against the party making it, two questions are open in such case on this point: *First*, was the original incorporation void? and, *second*, if valid, is an active organization, and one operated in good faith and for corporate purposes, maintained? If the charter is absolutely void, of course it can be so treated in any collateral attack. If not void, but there is no organization and operation under it in good faith, this can be shown in proof. It is sufficient to say here that no decree respecting it can be rendered in this cause. The state has all the relief it is authorized to seek in this proceeding, and defendants have not appealed, so as to bring the question of the validity of the charter collaterally in issue with others which would have on such appeal been directly involved. The decree must be affirmed, with cost.

SANDERS v. LOGUE et al.

(Supreme Court of Tennessee. Jan. 10, 1890.)

FRAUDULENT CONVEYANCES—GIFTS—ADVERSE POSSESSION.

1. In determining whether a gift of land was void as against creditors, on the ground that, at the time of making the conveyance, the grantor did not retain sufficient property to pay his liabilities, he will not be considered to have been a debtor to a person who at that time was his judgment debtor, but who afterwards instituted suit against him, and recovered judgment for money paid for lands under false representations.

2. Adverse possession of inclosed land by a donee before deed may be coupled with possession after deed, to make out the seven-years adverse possession necessary under Act Tenn. 1819, § 2, to constitute a possessory defense.

Appeal from chancery court, Wilson county; GEORGE E. SEAY, Chancellor.

A. S. Marks and Tarter & Golladay, for appellants. James S. Gribble and John C. Sanders, for appellee.

SNODGRASS, J. This is a bill to set aside certain conveyances of John Logue to his children as voluntary and fraudulent, and to subject the property to satisfaction of a decree for \$2,787.61 and cost, which complainant obtained against John Logue in the chancery court of Wilson county on the 5th November, 1886. The bill under which this decree was had was filed March 9, 1885. There were several conveyances attacked in the present suit, but the validity of only four of them is now in controversy; the decree not being complained of in respect to two of the six included in the bill, and which the chancellor held could not be affected in this proceeding. The defendants, claiming the four first mentioned, put, by proper denial, the questions of voluntary conveyance and fraud in issue, and relied upon the statute of limitations of seven years, claiming to have had seven years' possession of the lands conveyed to them. It appeared in evidence that defendants Bell and Northcut had been for more than seven years in possession of their lands, but prior to 10th of October, 1883, and 25th January, 1884, had been holding under verbal gifts, with promise of deeds by John Logue, not in fact executed until the dates stated. But the lands claimed by them were, and had been during their possession and occupancy, inclosed, and they established their holding for themselves by the preponderance of the evidence, and insisted that as to these lands complainant was entitled to no relief, even had their deeds been fraudulent or voluntary. No such possession of the lands deeded to Alice Logue and N. G. Omohundro was shown prior to their deeds of 10th October, 1883, and as to them the only question is the validity of the deeds. The chancellor held these four deeds voluntary and void as to complainant, and the defendants, claiming them, appealed, and assigned errors.

There was no reasonable pretense that these conveyances were fraudulent in fact, and the chancellor did not commit the error of so finding. He concluded and decreed that

they were voluntary because defendant Logue "did not retain sufficient property at the time he made them to pay his liabilities." In this estimate of liabilities he necessarily included that of complainant, because without including it there is no reason for such assumption. On any theory, the property he retained was ample to satisfy his other debts. It is therefore necessary to determine whether complainant's present claim was such a debt as required the reservation of property to pay before a voluntary conveyance would be valid. At the date of the conveyance the complainant was in fact the judgment debtor of defendant Logue under decree of chancery court of Wilson county pronounced at its March term, 1881, for \$1,455.95, with interest from date of the decree. A part of this recovery, however, had been upon notes executed by Sanders to Logue in consideration for certain lands bought of him in 1873, and for the conveyance of which by quitclaim deed Logue had bound himself to Sanders in a title-bond. In 1879, J. M. Horn having cut and removed timber from a part of this land, Logue, who still held the legal title, filed a bill against him and others, including Sanders, to enjoin him, restrain waste, and have Horn's title declared a cloud on his own. He obtained a decree in the chancery court at Lebanon on the 25th of October, 1880, in accordance with the prayer of his bill. From this decree Horn appealed. The commission of referees heard the case, and reported December 15, 1883, in favor of reversing the decree and dismissing the bill, basing their conclusion and report upon the reasoning that Horn's claim was under a judgment execution and sale of the land as the property of one Drennan, and Logue was the fraudulent vendee of Drennan, and therefore a court of equity should repel him. This report was confirmed by the supreme court on December 5, 1884. In the decree of confirmation entered it is, among other things, recited that Logue, "in procuring title to said lands, was guilty of actual and positive fraud in attempting to aid Drennan in concealing his effects from his creditors, and in violating his obligation with Drennan, and his title to the land is declared fraudulent and void." It adds: "He is therefore entitled to no relief under his said bills, and the same are therefore dismissed, at his cost."

We have quoted this decree, because much stress had been laid upon it, as extinguishing Logue's title. It did nothing of the kind, and, while the decree is flush of terms strong enough to effect such a result, it could not be or have been done in any terms upon such a bill. An ejectment bill, or bill to restrain waste, or to remove a cloud, cannot operate as a boomerang, and destroy for all purposes the title of the complainant, however sounding the phraseology in which it may be inaptly expressed, in decrees whose precise verbiage cannot always be noticed or shaped by any court, in the very nature of things, under our practice. But the decree meant no

more than that his title was void as to defendants, and was such an one as, against defendants, the court would not enforce. However, that question is no longer of any importance, because after this decree Sanders filed a bill against Logue, alleging that Logue had fraudulently represented to him he had a title to the land in controversy when he foreclosed, and it was upon the faith of such representations he bought, and took a quitclaim deed; that he had paid Logue much money, and Logue's decree in 1881, before mentioned, was based on his purchase. He alleged that his title had been declared fraudulent and void, and sought to set aside that decree, and recover of Logue the amounts he had paid him since his purchase, in 1873, with interest; and it was in this case, and under these allegations, that his decree was obtained for the collection of which he filed this bill, the decree, as before stated, being obtained on the 5th November, 1886.

It appears from this statement of facts that Sanders neither had any recovery for the fraud alleged to have been committed in taking his money upon false representations as to title, nor did he have any action pending, when these conveyances were made, but that instead he was the judgment debtor of Logue in a decree in no wise complained of. But he insists that, inasmuch as he had a right of action for the money received of him in consequence of the fraudulent representations of Logue, his was an existing demand at the time, and such an one as must be considered in determining the validity of the conveyances. It is, of course, true that a conveyance of property to defeat an expected recovery in an action of tort already commenced is fraudulent in fact, and void. *Farnsworth v. Bell*, 5 Sneed, 531; *Patrick v. Ford*, Id. 532. And we may add that we think it equally clear that a voluntary conveyance pending an action of tort, whether actually intended to defeat it or not, might be void if, upon estimating the amount of property retained, there was a deficiency to pay the amount claimed. It may be true, also, that a conveyance for the fraudulent purpose of defeating a recovery in an action of tort anticipated would be void. But, as we have said, we are not now dealing with any question of actual fraud. We are discussing the question whether a deed made in good faith, in the absence of any debt known or asserted, makes a deed fraudulent in law, and we have no hesitation in holding that it does not.

In the case we are now considering, whether we treat the complainant as repudiating his contract because he was fraudulently induced to make it, and suing for the money as for money had and received to his use, or whether we treat the action as one for damages incurred in consequence of the fraud and deceit practiced upon him, measured by the money paid and interest, the result is the same. In the first aspect he would have had no action until he disaffirmed the trade and demanded his money, (*Arendale v. Morgan*, 5 Sneed,

703,) and in the second his action would have been *ex delicto*, and not upon a specific fixed or asserted liability, within the meaning of the rule stated in respect to voluntary conveyances. Such a claim, it is obvious, might or might not ever be asserted, and it is too uncertain and remote to be taken into consideration in estimating the debts or liabilities of a debtor for which he must provide by retention of property. This is made obvious if we look at the state of affairs then existing, not as now developed.

Suppose Sanders had never in fact sued. His right, whatever it is, would exist, of course, and would have been existing, when these deeds were made. Now, assume that one of the other creditors of Logue had filed a bill to set these deeds aside as voluntary, and had endeavored to show that Logue's liabilities exceeded his assets retained. To make this appear he attempts to show that Logue owes Sanders a large debt. Logue produces his decree against Sanders, and shows that Sanders is then indebted to him, but the creditor insists that, notwithstanding the appearance of the fact, in reality it was to the contrary, and Logue was largely indebted to Sanders on account of his fraudulent misrepresentations. Logue insists, too, that Sanders has preferred no claim, and seeks to establish none against him. But the creditor answers: "That makes no difference. He may do so hereafter, and, if I can show a state of facts which will justify a suit, I must count it, or whatever I can prove ought to be the amount of his recovery, as one of the liabilities for which you must provide by retention of property, or your deed is fraudulent." This is just the result to which we must come if we hold the decree correct.

It must not be forgotten that we are dealing altogether with the theory and principle involved. These must determine the validity of the deed, and not the subsequent results. In deciding whether this non-established liability should have been then provided for, we must look to the condition of things when we could have been first asked to do it, when these deeds were made. We are not dealing with the question as to Sanders' present established demand. We are determining whether it was then in such situation as to be accounted a debt for which the voluntary vendor must have provided. Another view shows still more strongly the absurdity of holding that unestablished, uncertain equities or rights of action are the debts contemplated under the rule. If a right of action for fraud or misrepresentation or unasserted breach of warranty was contemplated as among the liabilities for which a voluntary vendor must provide before he can make a valid conveyance, whenever this question arose creditors could show any conveyance he might have made, and insist if, as in this case, it was a bond for a quitclaim deed, or, in fact, a quitclaim deed, that he owed that alleged creditor, because there was a fraudulent imposition on

him; if the conveyance was executed with covenants, he would allege indebtedness arising to that vendee from breach of covenant already made or anticipated. Each case would be a lawsuit in itself, to see if a debt existed which no one claimed, and the result would be endless strife and confusion. So, too, the inquiry would be open whether he had killed or injured any person, or committed assault and battery, or committed any wrong about which no claim was made, and had not reserved property to meet their demands, if they made demands. It would be an object of further inquiry if he had defrauded any person in any way, and might be sued on this account. It is clear that the rule of which we are treating, which practically provides for the taking of an account of the property and debts of the voluntary vendee to ascertain whether he has reserved ample property for the payment of his debts, has in contemplation no such possible claims as the one we are considering and those referred to by way of illustration. The debts contemplated are specific, and asserted liabilities susceptible of accurate ascertainment, those of which an account might be taken, and which might be definitely determined.

It is true, as we have already seen, that a plaintiff in an action of tort commenced is a creditor, within the meaning of our statute prohibiting conveyances with fraudulent intent to defeat creditors, (5 Sneed, *supra*;) and so of one in that relation, that he is secured in a deed of trust which includes "all creditors," (Vance v. Smith, 2 Heisk. 343, 350.) But even in respect to such "creditor," after suit brought, it is held that his claim is not a "debt," within the meaning of our constitution prohibiting impairment of validity of debts, and hence that the homestead which could be subjected to the payment of debts, created before the homestead law, could not be sold to pay a judgment recovered in such action after the law, although the action was commenced before. This case reviews the several cases cited on the subject of "creditors" in actions against fraudulent conveyances, and leads logically to the position now taken by the court, except that in this case it is not necessary to go so far as was done in that. Here it is only held that the right of action for tort or damages for fraudulent misrepresentations is not a debt before suit brought; there it was held not to be a debt after suit brought.

In addition to the validity of their deeds insisted upon by Bell and Northcut, they also relied, as before stated, upon the statute of limitations of seven years, as protecting them in their possession, and this defense they made out in evidence. We hold that they are protected by such possession, and that possession by a donee, before deed, of inclosed land, may be coupled with possession of same land after deed, to make out the seven years required to give him a possessory right under the second section of the act of 1819. It does not, of course, matter that they held in ex-

pectation of a deed, or afterwards took a deed. Neither the holding and claiming in expectation, nor the acceptance of the deed, was inconsistent with their claim and possession as donees. Either a vendee or donee may take and continue such possession until his deed is executed, and then accept it in furtherance of his contract and claim, and not in destruction of it. The recital in such deed that the vendor is owner is but the recital of a fact which no one denied, and which it is not an inconsistency to admit. The donee or vendee claims the land, but says: "The vendor, while he has transferred it to me, has not yet given me the evidence of my title. The legal title, therefore, remains in him, but I have an arrangement with him by which I claim to be the owner and have the right of possession." We are not now treating of title under the first section of the act referred to. A claim under that has to be under title or color of title. Here it need not be. It is sufficient if the donee be in possession of inclosed lands for seven years, claiming it, no matter how or by how many different means. It is the operation of his right, coupled with adverse possession for seven years, which protects him from suit after that time. The decree as to the appellants claiming the lands is reversed, and as to them the bill is dismissed, with cost.

#### OUTLAW v. CHERRY.

(*Supreme Court of Tennessee. Jan. 10, 1890.*)

##### JUDGMENT—SCIRE FACIAS.

Where defendant appeals from a judgment, and pending the appeal he dies, and the judgment is affirmed without the court's having notice of his death, the supreme court will not revive the action, on *scire facias*, after it is barred by the statute of limitations (Mill. & V. Code Tenn. § 381); against the deceased's administrator, the judgment not being void on its face, and the case having ceased to be pending since the rendering of the judgment.

##### On *scire facias*.

*Scarborough & Martin*, for plaintiff. *J. W. Stout*, for defendant.

SNODGRASS, J. A judgment was recovered by plaintiff in the circuit court, and defendant appealed. The defendant died in 1880, after the appeal; but no notice was taken of his death in the record, and the judgment was affirmed by this court in 1886. In 1888, plaintiff suggested his death, and had *scire facias* issued against his administrator, who now appears and resists the application to revive, and pleads the statute of limitations of two years,<sup>1</sup> showing that more than two years and six months had elapsed since his appointment, which was made in 1880. It is insisted by plaintiff that this is an application to revive a pending suit, and that

the plea of the statute is not a good defense, under the case of *Erwin v. Foster*, 6 Lea, 187, where this court so held. It is further insisted that the judgment rendered in 1886 was void, because defendant was dead, and therefore the case must be treated as though no judgment had been rendered, and the case was still pending. This is not correct. The judgment is not void on its face, and can only be made to appear so by evidence outside the record, which we, having no original jurisdiction, are unauthorized to take. It was a judgment which the court could properly render, when it did so, upon the record, as it was presented to it; and since the judgment was rendered the case has not been pending. The plaintiff has therefore no right to revive it as a pending suit, and the application to do so is refused, and *scire facias* quashed.

#### NEISER v. THOMAS et al.

(*Supreme Court of Missouri. Dec. 21, 1889.*)

##### ELECTION CONTESTS—INJUNCTION.

1. A court of equity has no jurisdiction to enjoin the issuing of a certificate of election to, and the assumption of office by, a newly-elected city marshal, on petition of the present marshal, alleging disqualification under the city charter of the newly-elected officer.

2. Rev. St. Mo. § 2722, which declares that the remedy by injunction shall exist in all cases to prevent a legal wrong, when an adequate remedy at law cannot be afforded by an action for damages, does not enlarge the equity jurisdiction.

BARCLAY, J., dissenting.

Appeal from St. Louis circuit court; *L. E. VALLIANT*, Judge.

The petition alleges that the plaintiff is now the regularly elected and duly qualified marshal of the city of St. Louis, and has been such for the last four years, having been elected to such position at the city election in 1885 for a term of four years, and possessing all the qualifications prescribed by law therefor. That by the provisions of section 1, art. 4, of the charter of the city of St. Louis, he is entitled to hold said office for four years from the date of said election, and until his successor shall be duly elected and qualified. That at the election for city officers held on April 2, 1889, the defendant Emil Thomas was a candidate for the office of marshal of the city of St. Louis. That he claims to have been elected at said time to said office. That by the provisions of section 10, art. 4, of the charter of the city of St. Louis, it is provided that "all elected and appointed officers shall possess the following qualifications: They shall have been citizens of the United States and of the city of St. Louis for at least two years previous to their election or appointment, and shall be able to read and write the English language. They shall not at the time of their election be in arrear to the city for taxes, or indebted to the city in any way," etc. That at the time of the said election, held on the 2d day of April, 1889, said defendant Emil Thomas did not possess the qualifications prescribed by said charter of the city

<sup>1</sup> Mill. & V. Code Tenn. § 3431, provides that actions against the personal representatives of a deceased shall be commenced by a resident of the state, within two years after the qualification of the personal representative, if the cause of action accrued in the life-time of the deceased, or otherwise from the time the cause of action accrued.



of St. Louis, in this: that he was in arrears to the city for taxes, and was indebted to the city for, to-wit, the taxes which were regularly, legally, and properly assessed against him for the year 1885, on \$500 of property; 1886, on \$500 of property; 1887, on \$400 of property; 1888, on \$1,000 of property. That the taxes for the year 1888 amounted to \$23, for the year 1887 to \$10, for the year 1886 to \$12.75, for the year 1885 to \$12.75. That all of said taxes were at said time payable and past due, and were at the time of said election on April 2, 1889, and at the time of the filing of the petition, still unpaid. That at the time of said election defendant Thomas did not possess the qualifications for said office of marshal prescribed by said charter, in this: that on or about the 10th day of August, 1885, said defendant became indebted to the city of St. Louis for and on account of a license to keep a saloon in the city of St. Louis, to-wit, in the alley between Olive and Pine and Seventh and Eighth streets, of said city, for, to-wit, the sum of \$279.50. Said defendant opened a saloon, and did business as a saloon-keeper in said city at said place from, to-wit, the 10th day of August, 1885, until, to-wit, the 1st of April, 1886, and which license for said saloon became due and payable to the city of St. Louis on, to-wit, the 10th day of August, 1885, according to the provisions of chapter 37, art. 2, §§ 1-7, inclusive, of the Revised Ordinances of the City of St. Louis, (1881.) That at the time of the said election said Thomas did not possess the qualifications prescribed by said charter for said office, in this: that at the time of said election Thomas had not been a citizen of the city of St. Louis for at least two years previous to said election. That the defendant Williams is the duly appointed and qualified recorder of voters of the city of St. Louis, and as such is charged, empowered, and authorized by law to issue certificates of election to all persons elected to any city office, the office of marshal included. That said Williams is about to issue to said Thomas a certificate of election to the office of marshal of the city of St. Louis. The prayer of the petition is for an injunction perpetually restraining the defendant Thomas from receiving such certificate of election, and defendant Williams, said recorder of voters, from issuing to said Thomas any certificate of election as marshal of the city of St. Louis in pursuance of said election of April 2, 1889, and for a temporary restraining order. The circuit court granted a temporary restraining order on the 4th of April, 1889. Thereafter defendant Williams demurred to the petition on the following grounds: *First.* The court has no jurisdiction in the premises. *Second.* There is no equity in the petition. *Third.* The petition states no cause of action, nor does it allege any ground entitling plaintiff to relief. *Fourth.* The petition shows on its face that plaintiff is not entitled to the relief sought. Defendant Thomas demurred to the petition on the following grounds: *First.* The peti-

tion fails to state facts sufficient to constitute a cause of action. *Second.* There is no equity in the petition. *Third.* Upon the facts alleged the plaintiff is not entitled to the relief prayed, nor to any relief. The demurrers coming on to be heard, the petition was adjudged insufficient, and, the plaintiff declining to plead further, the petition was dismissed, the temporary injunction dissolved, and the cause was appealed to this court.

*W. C. Marshall, Geo. W. Lubke, and E. J. White, for appellant.*

The circuit court had jurisdiction to hear and determine this case, and to grant the injunction. *Rev. St. Mo. § 2722; Overall v. Ruenzi, 67 Mo. 207; Damschroeder v. Thias, 51 Mo. 104; Miller v. Lowry, 5 Phila. 202; Kerr v. Trego, 47 Pa. St. 292; Ewing v. Thompson, 43 Pa. St. 372; State v. Funck, 17 Iowa, 365; State v. Board, 36 Wis. 498; O'Farrell v. Colby, 2 Minn. 180, (Gil. 148); People v. Nordheim, 99 Ill. 553; State v. University, 57 Mo. 178; Hitchcock v. St. Louis, 49 Mo. 484.* The injury to the public would be irreparable, in a legal sense, if this injunction is not sustained, and in such cases injunction is the proper remedy. A public right and a public duty is involved in this case. *McPike v. West, 71 Mo. 199; Harris v. Board, 22 Mo. App. 462; State v. Francis, 95 Mo. 48, 8 S. W. Rep. 1.* Even where a statute creates a board for the purpose of determining election contests, and confers upon such board exclusive jurisdiction, in such cases the courts may compel such board to organize and proceed according to law in the discharge of its official duties. *McCrary, Elect. § 844; State v. Garesche, 65 Mo. 485.* Courts have power to control ministerial officers in the discharge of their duties, either by *mandamus*, to compel them to do a certain act, or by injunction, to prevent their abusing their powers and going outside of the law. *Francis v. Blair, 89 Mo. 291, 1 S. W. Rep. 297; State v. Francis, 95 Mo. 44, 8 S. W. Rep. 1; State v. Hoblitzelle, 85 Mo. 620; State v. Railroad Co., 86 Mo. 13; State v. Garesche, 65 Mo. 485.* By the provisions of section 2722, *Rev. St. Mo.*, injunction is allowed "to prevent the doing of any legal wrong whatever."

*Raspstier & Schurmacher and Thomas C. Fletcher, for respondent Thomas.*

There is no equity in the bill. Equity has no jurisdiction to try an election contest for office. *High, Inj. §§ 1250, 1312, 1313; Cochran v. McCleary, 22 Iowa, 75; Hagner v. Heyberger, 7 Watts & S. 104; Moulton v. Reid, 54 Ala. 320; Markle v. Wright, 13 Ind. 548; Hinckley v. Breen, 55 Conn. 119; Attorney Gen. v. Insurance Co., 2 Johns. Ch. 371; Boren v. Smith, 47 Ill. 482; Moore v. Hoisington, 31 Ill. 243; Frey v. Michie, (Mich.) 36 N. W. Rep. 184.* And the fact that there is no provision made by statute for a contest will not confer jurisdiction. *Moore v. Hoisington, 31 Ill. 243; Moulton v. Reid, 54 Ala. 320; Rink*

v. Barr, 14 Phila. 154. A court of chancery will not enjoin the issue of a commission, nor its acceptance, nor will it restrain the performance of official acts. High, Inj. § 1250; Thompson v. Ewing, 1 Brewst. 67; Smith v. Myers, 109 Ind. 1, 9 N. E. Rep. 692; Weil v. Calhoun, 25 Fed. Rep. 865; Kemp v. Ventulett, 58 Ga. 419; Beal v. Ray, 17 Ind. 554; Sanders v. Metcalf, 1 Tenn. Ch. 419; Dickey v. Reed, 78 Ill. 261; Delaware Co.'s Appeal, 119 Pa. St. 159, 13 Atl. Rep. 62; Railroad Co. v. Mayor, 39 La. Ann. 127, 1 South. Rep. 434; Peck v. Weddell, 17 Ohio St. 271. Equity leaves the determination of such contests to the courts of law. The right to a public office should be settled by *quo warranto*. High, Extr. Rem. § 623; Bowen v. Hixon, 45 Mo. 340; Newsom v. Cocke, 44 Miss. 352; People v. Galesburg, 48 Ill. 485; Com. v. Commissioners, 5 Rawle, 75; Frey v. Michie, (Mich.) 36 N. W. Rep. 184; Detroit v. Board, 23 Mich. 546. Equity will only interfere by injunction in election cases, involving such questions as the removal of a county-seat, elections concerning the capital stock of a corporation, and the like. Boren v. Smith, 47 Ill. 482; People v. Wiant, 48 Ill. 263; Shaw v. Hill, 67 Ill. 455; Leigh v. State, 69 Ala. 261; Caruthers v. Harnett, 67 Tex. 127, 2 S. W. Rep. 523. A certificate of election or commission gives only a *prima facie* title, and does not preclude an investigation of the right to the office by another claimant. Respondent Thomas is entitled to the certificate, even though his eligibility to the office may subsequently be questioned. People v. Miller, 16 Mich. 56; Marshall v. Kerns, 2 Swan, 68; Magee v. Supervisors, 10 Cal. 376; State v. Jackson, 27 La. Ann. 541; People v. Thacher, 7 Lans. 274; Ewing v. Filley, 43 Pa. St. 384.

SHERWOOD, J., (after stating the facts as above.) The correctness of the action of the lower court in dissolving the injunction and dismissing the petition is thus brought in question; and the whole cause turns upon the jurisdiction of the court, as a court of equity, to hear and determine, and to hear and determine finally, the matters and things alleged in the petition, and admitted by the demurrers to be true. The uniform rule is that equity will not act in cases of contested elections, even in a collateral or indirect proceeding, as in a bill to enjoin. The authorities on this point are extensively cited in the brief of counsel. This results in denying the jurisdiction of the circuit court in the case at bar. And it is very clear that there exists no necessity, in the present instance, for the interposition of a court of equity. This is sufficient to forbid such interposition where an adequate remedy exists at law, unless where equity and law have concurrent jurisdiction. If plaintiff had been proceeded against by Thomas by *quo warranto*, he could have successfully defended himself by alleging and proving such facts as are set forth in the petition; and this is true whether the

proceedings be instituted by the proper officer *ex officio*, or at the instance of a private party. State v. Vail, 53 Mo. 97, and cases cited. It is strenuously insisted that this is not a contested election case, and therefore the authorities cited by adversary counsel do not apply. To this contention it may be said that, though not actually a contest for the office of marshal, this proceeding is such a contest in effect, and it would require, before a final decree were entered in plaintiff's behalf, as prayed by him, that the defendants should stand upon their demurrers, or that an investigation should be had into the facts, and the eligibility of Thomas to the office of marshal should be determined. If this could occur, it would, to all intents and purposes, transform this proceeding into one possessing all the attributes of a proceeding by *quo warranto* and of a contested election case. We do not see that section 2722<sup>1</sup> enlarges the jurisdiction of a court of equity in so far as concerns this case, or, for that matter, of any case where the remedy at law is adequate and ample. But, while making the foregoing remarks, we are not to be understood as intimating that a court of equity has not power, even in an election case, contested or otherwise, to take such steps and to issue such process, if need be, as will prevent some flagrant fraud on the public from being successful. To deny the power to grant such preventive relief in a case the exigency of which demands it would be to admit a most serious defect in the form and structure of our government,—an admission we are not prepared to make. As this case presents no such features of exigency, we shall affirm the judgment.

All concur, but BARCLAY, J., who dissents.

#### CHAMBERLAIN v. BOON.

(Supreme Court of Texas. Nov. 1, 1889.)

##### LIMITATION OF ACTIONS—EVIDENCE—RECORD.

1. Plaintiff in trespass to try title claimed under a duly-recorded writing, dated more than 10 years before the action was brought, which recited that there was due from defendant's predecessor in title to plaintiff an interest in land of which the land in controversy was part. Defendant pleaded stale demand and the statute of limitations, which pleas plaintiff sought to avoid by showing that after the death of defendant's predecessor in title, which occurred more than 10 years before the action was brought, the administrator set up no hostile claim to plaintiff, and that he (plaintiff) could not ascertain who were decedent's heirs. *Held*, under Rev. St. Tex. art. 8209, providing that "any action for the specific performance of a contract for the conveyance of real estate shall be commenced within 10 years next after the cause of action shall have accrued," that plaintiff's claim was barred; matters which before the adoption of article 8209 would have avoided the defense of stale demand not being applicable to the statutory defense of limitation.

2. Where plaintiff in trespass to try title claims

<sup>1</sup>Section 2722: "The remedy by writ of injunction or prohibition shall exist in all cases \* \* \* to prevent the doing of any legal wrong whatever, whenever, in the opinion of the court, an adequate remedy cannot be afforded by an action for damages."

under a duly-recorded contract for the land in controversy, signed by defendant's predecessor in title, it is proper to permit him to testify as to the making of a former contract which was accidentally destroyed, and in lieu of which the contract in question was given.

8. A writing, authenticated as a deed, which recites that "there is due E. Boon from me an interest in" certain lands, is entitled to record in Texas.

Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

*Fields & Jennings and Harris & Harris*, for appellant. *Hunter, Stewart & Dunklin*, for appellee.

HENRY, J. This is an action of trespass to try title to an undivided one-half interest in 213½ acres of land, part of the Thomas B. Taylor 640-acre survey in Tarrant county, instituted on the 6th day of January, 1887, by appellee. By a supplemental petition plaintiff charged that one Harris, being the owner of the 640-acre certificate, by virtue of which the location of the land was made, contracted with J. M. Clark to give him a third interest in the land located, for his services in making the location, and in consideration of his paying the surveying fees, and that Clark agreed to give plaintiff one-half of his interest if he would make the location and pay all surveying fees. It is alleged that, plaintiff having performed his part of the contract, Clark, on the 18th day of September, 1860, made to him an instrument in writing, showing said interest, and intending and attempting to invest plaintiff with all the title thereto, which instrument was duly recorded in Tarrant county. Plaintiff charges that Clark, up to the date of his death, which occurred in 1866, always recognized plaintiff's title, and that after his death his administrator informed plaintiff that no title to the interest had been made to said Clark; that the administrator and heirs of Clark recognized plaintiff's claim as valid, and neither of them set up a hostile claim until the 31st day of March, 1882, at which time the heirs conveyed the whole of the land to defendant's vendor; that notice of said conveyance was fraudulently withheld from plaintiff until the year 1884, when it first came to plaintiff's knowledge; that the lands were unoccupied until 1886, and taxes were not assessed upon them until 1880; that plaintiff did not know who were the heirs of Clark, nor where they resided, until 1884, and, though he made diligent inquiry, he could not until that date ascertain who the owner of the certificate was, and he did not learn before then that any title had been made to Clark, his administrators or heirs. Defendant pleaded stale demand, and the statutes of limitation of three, five, and ten years. It was agreed that a patent for the survey was issued on the 13th day of September, 1867, to J. G. Harris, assignee of Thomas B. Taylor, and that the heirs of Harris conveyed 213½ acres of the land to the estate of J. M. Clark. This deed was made to J. W. Greer, administrator of the estate of J. M. Clark, deceased, and

was recorded in Tarrant county on 24th July, 1871. The deed records of Tarrant county were destroyed by fire, March 29, 1876, and this deed was not re-recorded. The evidence shows a deed from the heirs of J. M. Clark to J. J. Jarvis, dated March 31, 1882, for the land in dispute, and that it was recorded the 15th day of May, 1882; a bond for title from Jarvis to defendant dated September 12, 1883, which was never recorded; a deed from Jarvis to defendant dated March 17, 1886, recorded 14th day of April, 1886. Plaintiff read in evidence, over the defendant's objection, the following instrument: "Denton, September 18, 1860. There is due E. Boon from me an interest in the following lands, to-wit: One-half of 1,280 acres; my locative interest in the league and labor claim located in Jack and Tarrant; also half of my locative interest in the following claims: Headright of Thomas B. Taylor, located in Tarrant county, 640; heirs of James Bradley, in Parker county, one-third league; heirs of A. M. Patton, in Denton and Parker counties, 820; headright of W. J. Smith, Jack county, one-third league; headright of B. F. Terry, and bounty of same, in Jack county; league and labor headright of Allen Hines, located in Young and Baylor counties. J. M. CLARK. Attest: J. W. GREER, S. F. MAURIE,"—which, having been authenticated as a deed, was recorded in Tarrant county on the 4th day of May, 1877. Plaintiff testified that he had, with J. M. Clark, a written contract for locating land certificates, including the T. B. Taylor certificate, by the terms of which he was to pay the surveying fees and locate the land, and Clark was to furnish the certificates, and pay the patent-office fees, and plaintiff was to have half of Clark's locative interest. This contract was dated in 1857, and was burned in 1860. Plaintiff located the Taylor certificate in 1857 or 1858 on the land in controversy, and paid the surveying fees. After the contract was burned Clark sent plaintiff the instrument set out above. Plaintiff first heard of Clark's death in 1866. Upon Greer's appointment as administrator of Clark, in 1866, plaintiff inquired of him with regard to the land, and was informed by him that no papers had come to his hands, showing that Clark had an interest in the land.

Plaintiff testified that he did not know that a patent had been issued for the Taylor survey until 1884; that he did not know before that date that the Clark heirs had received a deed, or who owned the Taylor certificate; that between 1870 and 1884 he inquired of the county clerk of Tarrant county if any papers had been filed in his office showing that anybody was claiming the Taylor survey; that the clerk replied that no papers had been filed relating to said land; that he first knew that Clark's heirs had conveyed the land to Jarvis in 1884; that in the last-named year he procured an abstract of the survey, and from it first learned who Clark's heirs were, and that they had conveyed the

land to Jarvis. Defendant put in evidence a written contract from Harris, the owner of the certificate, to convey to Clark a one-third interest for locating it as alleged. The administrator of Clark, to whom the land was conveyed in his own name, did not convey it to the heirs of Clark, but, as he testifies, "it was turned over to the heirs of the estate." The heirs of J. M. Clark were proved to have lived, after his death, in the counties of Raines, Hopkins, and Upshur, state of Texas. The administrator was himself a brother of Clark's first wife. He testified that he did not remember having made to Boon the statements testified to by him. W. A. Clark, a son of J. M. Clark, testified that when he sold to Jarvis he had never heard of plaintiff's claim to the land, and had never admitted that he had any interest. Plaintiff stated that he did not know that he ever paid any taxes on the land, and that on one occasion, when he was in Quitman, Wood county, after J. M. Clark's death, he was shown two little girls, "who they said was Clark's children by his first wife." Plaintiff stated that he once inquired of J. J. Jarvis for information about the Clark heirs; that he never inquired of any other person, and of him only once; that he never wrote to his old acquaintances, nor to any one else in Quitman, inquiring who the Clark heirs were; that he never examined the records himself, or employed any one else to examine them; he only asked the clerk, and does not know that he looked through the records; that he does not remember asking the clerk but once, and that was in 1877 or 1878; that he never asked about the taxes but once, and did not look at the assessor's books himself; that Maddox, who he was told was the sheriff, was the person of whom he made the inquiry about the taxes; that he never saw the land in controversy; and that he never wrote to Austin to learn whether or not the land was patented. The defendant proved that he had occupied the land since his purchase from Jarvis, and made valuable improvements on it. The land was proved to be worth from \$50 to \$75 per acre, and to have increased greatly in value recently.

On the issue of title the court charged the jury to find for plaintiff. There was a verdict and decree for plaintiff for the recovery of the land, and for the defendant for the value of improvements. The defendant appeals, and contends that his plea of stale demand ought to have been sustained; the facts pleaded and proved to account for and excuse plaintiff's delay in bringing suit being insufficient.

With this view of the case we entirely concur. If there had been no change in our laws in this respect, and the defense of stale demand to actions for specific performance of contracts for the sale of land stood now as it did before the adoption of our Revised Statutes, the excuses for his long delay in bringing his suit urged by defendant would be utterly insufficient, and his pleading set-

ting them up ought to have been held defective on defendant's exceptions. Plaintiff's cause of action falls clearly within the provisions of article 8209 of our Revised Statutes, reading: "Any action for the specific performance of a contract for the conveyance of real estate shall be commenced within ten years next after the cause of action shall have accrued, and not afterwards." In such cases, instead of the equitable defense of stale demand, the legal defense of limitation is now applicable. With this change of the law comes also the requirement that instead of answering the plea with the assertion of such excuses for delay as would heretofore have been held by the courts of equity a sufficient replication to the defense of stale demand, the reply must now be confined to a statement of the causes that are mentioned in the statutes as suspending the running of limitation, and such other matters as have been held applicable to the defense of limitation. Rev. St. c. 8, tit. 62.

We think the instrument of writing from Clark to Boon was entitled to record, and that there was no error committed in permitting Boon to testify to the making of the first contract between himself and Clark. The court erred in charging the jury to find for plaintiff. The cause is reversed and remanded.

#### CLARK v. STATE.

(Court of Appeals of Texas. Nov. 9, 1889.)

#### ROBBERY—INDICTMENT—ACTS OF CONSPIRATORS—TRIAL.

1. An indictment for robbery may properly charge in the same count the robbery of several persons of different articles, if the acts be all one transaction.

2. The rule that the acts, conduct, and declarations of one co-conspirator, after the consummation of the conspiracy, are inadmissible as evidence against another conspirator, cannot be extended to exclude evidence of the subsequent finding of the fruits of the crime in the possession of one of the conspirators whose complicity in the perpetration of the crime has been fully established.

3. Testimony by a witness that, two days after the robbery, he examined certain foot-prints at the place of the robbery, which foot-prints he described, and that, upon inspecting the boots and shoes worn by defendant and his alleged co-conspirator at their examining trial, it was his opinion that the tracks at the place of the robbery were made by their said boots and shoes, is competent.

4. Testimony of a witness that, three or four hours before the robbery, he paid to one of the parties robbed the sum of \$125, and that the co-conspirator of the defendant was within six or eight feet of him and could have seen the transaction, was admissible.

5. The Texas statute prescribing no particular form for the certificate of a justice of the peace authenticating written testimony, a justice's certificate to the deposition of a deceased witness, reading, "the foregoing testimony was sworn to and subscribed before me this 16th day of October, 1888. J. T. WASHINGTON, J. P.," etc., is sufficient.

6. Under Code Crim. Proc. art. 697, which provides that, after the retirement, if the jury disagrees as to a particular matter of testimony, the witness may be recalled, and required to detail again his testimony as to the point of disagreement, it is proper to permit the rereading of a dep-

osition, when the jury disagrees as to its contents.

7. As by article 701 it is left to the discretion of the trial judge to discharge a jury or not, after they have been kept together such a length of time as to render it altogether improbable that they will agree upon a verdict, his action will be revised only when that discretion has been manifestly abused.

Appeal from district court, Comanche county; T. H. CONNOR, Judge.

W. A. Clark was indicted and convicted of robbery, and appeals. The indictment charged, as a single transaction, an assault, etc., upon one Churchwell and one Taylor, and the taking from Churchwell of a certain pistol, and from Taylor of certain moneys.

*Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. 1. Appellant's motion in arrest of judgment, based on the supposed insufficiency of the indictment, was properly overruled. It sufficiently charges the crime of robbery under our statutes and decisions. Pen. Code, art. 722; Willson, Crim. St. § 1248.

2. Appellant was alone indicted in this prosecution for the robbery, but the evidence disclosed most fully, as we think, that his brother, one A. A. Clark, was a joint and principal offender with him, prior to, at the time of, and subsequent to, the commission of the crime. Both parties were arrested and tried before an examining court for the crime. The defendant's first bill of exceptions, taken at his final trial before the district court, from which this appeal was taken, shows that the prosecution proposed to prove by one Prewitt that, about 10 days after the robbery, he (Prewitt) arrested the defendant's brother, the said A. A. Clark, and found upon and took from the person of the latter a pistol, which Churchwell, one of the parties robbed, identified on the examining trial as the pistol taken from him by the robbers. A pistol was, by the indictment, alleged to have been taken from the injured parties, together with other property, at the time of the robbery. Defendant's objection to this testimony was that, at the time the pistol was found upon A. A. Clark, the conspiracy, if any, and the crime, had been consummated. While it is a well-established rule that the acts, conduct, and declarations of one co-conspirator, subsequent to the consummation of the conspiracy, are inadmissible as evidence against another conspirator, such rule has never been extended so as to exclude evidence of the subsequent finding of the fruits of the crime in the possession of one of the conspirators whose complicity in the perpetration of the crime has been fully established. It is a circumstance of the most potent character in the identification of the parties, and "any factor or circumstance, which would tend to prove the guilt of the co-defendant, would also tend to prove the guilt of the defendant, and would be admissible against him." *Pierson's Case*, 18 Tex. App. 524, is directly in point upon the question as here presented. See, also, *Jackson v. State*, ante, 701, from Parker county, (decided at the present term.) This

testimony was legal and admissible, but defendant's bill of exceptions shows that his objection to the evidence was sustained by the court, and the witness was not permitted to testify to the fact. Under such circumstances, we are at a loss to know why defendant's counsel have preserved the bill, and of what they can complain with reference to the matter.

3. The same may be said of defendant's second bill of exceptions,—an objection of defendant to the proposed testimony of Satterwhite, as to matters told him by the witness Charley Clark, because hearsay. The objection was promptly sustained, and Satterwhite was not allowed to testify. As to the witness Charley Clark, he denied most positively that his brothers, at their examining trial, had told him of the whereabouts of the pistol, and denied that he had gone to the place of its concealment, found it, and carried it away. If the prosecution had reason to believe that defendant had so informed Charley Clark, and had induced him to go and get the pistol and take it away, the state's counsel had the right to question him upon the subject. If the weapon had been found by the witness at the place, and upon information derived from defendants,—it being fruits of the crime,—the evidence was admissible, though defendants were in arrest at the time they gave him the information. The prosecution had the right, and it was proper, to question the witness upon the matter; and even if the court, upon the objection of defendant's counsel, had erroneously refused to allow the questions to be asked, the refusal would not be subject to criticism in this court. *McDonel v. State*, 90 Ind. 321.

4. The state's witness Williams was permitted to testify, over objections by defendant, that two days after the robbery he went to the scene of the crime with Taylor, one of the parties robbed, and others, and there examined the foot-prints or tracks around and about the spot, which tracks he described; that afterwards he (the witness) was present, attending the examining trial of defendant, and noticed the boots of defendant, and the shoes of his brother A. A. Clark, then also on trial; and that, in his opinion, the tracks made at the place of the robbery were made by and corresponded with the boots and shoes of the defendant and A. A. Clark. This testimony was objected to as inadmissible, because it was merely the opinion of the witness, and that opinion is not admissible as evidence. In his standard work on Criminal Evidence, that eminent law writer, Mr. Wharton, says the true line of distinction is this: "An inference necessarily involving certain facts may be stated without the facts, the inference being an equivalent to a specification of the facts; but, when the facts are not necessarily involved in the inference (*e. g.*, when the inference may be sustained upon any one of several distinct phases of fact, none of which it necessarily involves,) then the facts must be stated. In other words, when the

opinion is the mere short-hand rendering of the facts, then the opinion can be given subject to cross-examination as to the facts upon which it is based. Opinion, so far as it consists of a statement of an effect produced on the mind, becomes primary evidence, and hence admissible whenever a condition of things is such that it cannot be reproduced and made palpable in the concrete to the jury." Whart. Crim. Ev. (9th Ed.) §§ 458, 459; Powers' Case, 23 Tex. App. 43, 5 S. W. Rep. 153. In *State v. Reitz*, 88 N. C. 633, it was held that opinion as to correspondence of foot-prints with shoes is admissible. The almost identical question here raised came before this court in the case of *Thompson v. State*, 19 Tex. App. 594: "A state's witness, having described the peculiarity of a certain track seen by him at the place of the homicide, was permitted, over objection, to testify that thereafter, at the examining trial, he saw on the foot of one of the defendant's alleged accomplices a boot which would have made such a track as the one he saw at said place;" and the evidence was held admissible.

5. In our opinion, there is no merit in defendant's bills of exception Nos. 3 and 4, relative to the reproduction of the testimony of C. W. Churchwell, which had been reduced to writing upon the examining trial, the said witness having subsequently died. The justice of the peace was properly permitted to state the circumstances attendant upon the taking of the deceased witness' testimony, and to identify the same. As to the objection that the justice's certificate attached to said written testimony is insufficient, it seems that no particular form for such certificate is prescribed by law, and, in our opinion, the certificate of the justice in this instance, as shown in the record before us, is sufficient. *Willson*, Crim. St. § 2535; *Code Crim. Proc. arts. 267, 774*; *O'Connell v. State*, 10 Tex. App. 567; *Kerry v. State*, 17 Tex. App. 178; *Golden's Case*, 22 Tex. App. 2, 2 S. W. Rep. 531; *Kirby's Case*, 23 Tex. App. 13, 5 S. W. Rep. 165. The testimony of the deceased witness, Churchwell, as taken and reduced to writing, was properly admitted as legal evidence in the case.

6. Defendant's sixth bill of exceptions relates to supposed defects and omissions in the charge of the court. None of these objections are maintainable. "Robbery" was defined literally in the language of the Code, (Pen. Code, art. 722;) and as for the punishment, the learned trial judge might well, in view of the facts proved on the trial, have added to the definition the latter clause of said article 722, and thereby emphasized the crime denounced when two or more persons are acting together, using and exhibiting fire-arms and deadly weapons in the accomplishment of their purpose. Correct rules with regard to circumstantial evidence were clearly announced. But it is insisted that "the court failed to charge the jury that if the proof showed that the pistol was taken

from the person and possession of Churchwell alone, and that the money was taken from the person and possession of Taylor alone, and that Taylor had no interest or property in the pistol, and Churchwell had no property or interest in the money, (and this was the uncontroverted proof in the case,) then the jury would acquit the defendant, because such proof would not sustain the allegation in the indictment that said property was taken from both Churchwell and Taylor." The allegation in the indictment was that the pistol was the property of, and was taken from the person and possession of, Churchwell, and the money was alleged to be the property of and taken from the possession of Taylor. These allegations as to ownership and possession were specifically proved as alleged, and the charge of the court conformed the law to the allegations and proof. In robbery "the indictment may charge the defendant, in the same count, with felonious acts with respect to several persons; as in robbery, with having assaulted A. and B., and stolen from A. one shilling, and from B. two shillings, if it was all one transaction." 1 Bish. Crim. Proc. (8d Ed.) § 437; 2 Bish. Crim. Proc. § 60.

7. After the jury had been out a day and night considering of their verdict, they sent word to the court by the officer in charge of them that they could not agree. The presiding judge had them brought into the courtroom, and stated to them that he did not intend to discharge them, and that he did not think they had sufficiently considered of the case. The statute makes it a matter of discretion with the court as to whether it will discharge a jury because they have been kept together such a time as to render it altogether improbable that they can agree. *Code Crim. Proc. art. 701*; *Willson*, Crim. St. § 2390. Such discretion is not revisable in this court, unless it has been abused.

8. Defendant's eighth bill of exceptions complains that the court permitted the testimony of the deceased witness, Churchwell, taken at the examining trial, to be reread for the third time to the jury after they had been in retirement considering of their verdict two days and nights. Explaining this bill, the learned judge says: "The reading of Churchwell's testimony was upon the request of the jury to the court, their statement being that they differed as to what Churchwell testified. The court thereupon caused the reading, as above stated, it having once before, upon a similar request, been read after charging the jury." We have no statute expressly providing for the reading of the written testimony or deposition of a witness when the jury have disagreed as to such testimony. When the witness has testified orally he can be recalled to the stand, and directed to detail his testimony again to the jury as to the particular point of disagreement, and no other. *Code Crim. Proc. art. 697*. Where the evidence is by deposition in writing, taken on examining trial, we can see no good reason

why, if the jury so desire, they cannot have it reread to them when they have disagreed about it. Such written testimony cannot be easily altered, and, at all events, it is to be presumed that it has not been altered until the contrary is shown, and where this is not done we cannot see how its being reread in the same identical language could mislead the jury or unjustly prejudice the defendant. We are unable to see that any error has been committed, or any wrong done the defendant in this regard, as the same appears in the bill of exceptions.

9. Defendant's eleventh bill of exceptions complains that the court permitted one Utterbeck to testify, over objection, that three or four hours before the robbery, while he (the witness) was paying to the prosecuting witness, Taylor, at a desk in witness' store, \$125, A. A. Clark, defendant's brother, and the one who was implicated with him in the robbery, was present in the store, within seven or eight feet of Taylor, and could have seen the money paid. Objection to this testimony was that, at the time of the money transaction between Utterbeck and Taylor, defendant was not present, and there was no conspiracy or common design at that time, between defendant and A. A. Clark, to commit the robbery; and that no circumstance connected with, or act or conduct of A. A. Clark before, the conspiracy was entered into between him and defendant was or should be admitted as competent evidence against the defendant. "When two or more persons combine or associate together for the prosecution of some fraudulent or illegal purpose, the acts and declarations of any one of them, made in furtherance of the common purpose, and forming a part of the *res gestæ*, are admissible as evidence against the others; otherwise, however, as to subsequent acts, admissions, or declarations. \* \* \* In regard to the admission of acts and declarations of one conspirator as original evidence against each member of the conspiracy, substantially the same rule applies in criminal as in civil cases. The principle on which the acts and declarations of other conspirators, and acts done at different times, are admitted in evidence against the person prosecuted, is that by the act of conspiring together the conspirators have jointly assumed to themselves, as a body, the attributes of individuality, so far as regards the prosecution of the common design; thus rendering whatever is said or done by any one in furtherance of that design a part of the *res gestæ*, and therefore the acts of all." 4 Amer. & Eng. Cyclop. Law, 681, 682. As between conspirators, antecedent acts and declarations of each, pending and in pursuance of the common design, and tending to throw light upon its execution, or upon the motive or intent of its perpetrators, are competent evidence against each and all of them. *Cox v. State*, 8 Tex. App. 256. And, when a conspiracy has been proved, (as we think was most clearly done in this case,) sayings and movements of other

conspirators, before the perpetration of the crime, are admissible against the defendant, though occurring in his absence. *Williams' Case*, 24 Tex. App. 17, 5 S. W. Rep. 655; *Anarchists' Case*, (Ill.) 12 N. E. Rep. 865; *McKee v. State*, (Ind.) 12 N. E. Rep. 510.

In this case the fact that A. A. Clark saw Taylor receive the money is a strong circumstance tending to show that if he was not there to ascertain that very fact, in furtherance of a conspiracy already formed to rob him, the defendant did know of the receipt of the money by Taylor, and that knowledge induced him to enter into the plan already determined upon by his brother, A. A. Clark, to rob Taylor. But, as intimated above, the evidence tended to show that a conspiracy already existed between the brothers to rob Taylor, and A. A. Clark, as part of the plan, might have entered the store to assure himself that Taylor had received the money. It was a circumstance going to show motive for the conspiracy. It was a circumstance that the jury had the right to consider in connection with the other facts, and the court did not err in admitting said evidence.

We have considered all the questions raised in this case, and have been constrained to decide each and every one adversely to appellant. We are of opinion that the record does not disclose any error prejudicial to his rights; wherefore the judgment is affirmed.

#### GREGG v. STATE.

(Court of Appeals of Texas. Nov. 20, 1899.)

Appeal from district court, Gregg county; T. M. CAMPBELL, Special Judge.

R. B. Levy, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. This is a companion case to *Sweet v. State*, ante, 590, (just decided.) The record shows the same errors discussed in our opinion in that case, which opinion is referred to, and adopted as our opinion in this case. The judgment is reversed, and the cause remanded.

#### SCHNAUBERT v. STATE.

(Court of Appeals of Texas. Nov. 20, 1899.)

##### LARCENY—EVIDENCE.

On indictment for stealing an animal, evidence that the brand on the animal had been changed, so as to make it resemble a brand claimed by defendant, without any evidence to show that defendant was concerned in altering the brand, or that he was connected in any way with the stolen animal, is insufficient to justify a conviction.

Appeal from district court, Coleman county; J. W. TIMMINS, Judge.

Sims & Snodgrass, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. This conviction is not warranted by the evidence. It was not proved that defendant ever had possession of or claimed as his property the alleged stolen



animal. The only evidence which tends in the slightest degree to connect him with the theft of said animal is that a brand upon the same had been altered so as to make it resemble a brand claimed by defendant. But there is no evidence that defendant altered, or was in any way concerned in the altering of, said brand. If the statement of facts before us contains all the evidence adduced on the trial,—and we must presume that it does,—we cannot conceive upon what basis the jury founded their conclusion of the defendant's guilt, or what reason influenced the trial judge in refusing the defendant a new trial. Other questions presented are not passed upon, as they are not likely to occur on another trial. The judgment is reversed, and the cause remanded.

#### SCHNAUBERT v. STATE.

(Court of Appeals of Texas. Nov. 20, 1889.)

##### LARCENY—EVIDENCE.

On indictment for stealing a calf, which was alleged to belong to one M., there was evidence that the calf was running with a cow belonging to M., and that, on being separated, the cow and calf made efforts to remain together. There was also evidence that motherless calves would take up with strange cows, and that the cows would act as mothers to them. Defendant took the calf openly, declaring it to be his, and his claim of ownership was not disproved. The brands of the calf and the cow were different. *Held*, that the evidence did not justify a conviction.

Appeal from district court, Coleman county; J. W. TIMMINS, Judge.

*Sims & Snodgrass*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

**WILLSON, J.** There is not sufficient evidence to sustain this conviction. It was not satisfactorily proved that the alleged stolen calf was the property of McAuley, as averred in the indictment. It was proved that said calf was running with and following a cow supposed to be McAuley's cow. Conceding that the cow belonged to McAuley; there is no evidence showing that said cow was the mother of said calf, except the fact that the two animals were together, and made efforts to remain together when being separated, and after being separated. Several witnesses testified that within their knowledge motherless calves would take up with cows, and follow and act towards them as if said cows were their mothers, and said cows would act as mothers to said calves. Defendant took the calf openly, claiming it as his own, and saying at the time that it was not the calf of the said cow it was following, but was a motherless calf; and there was some evidence tending to show that it was a motherless calf. He did not claim the said cow. The said cow and calf were branded in different brands. Defendant's claim of ownership of said calf was not disproved by the state, and we regard the evidence as wholly insufficient to support the conviction. We do not deem it necessary to pass upon the other questions in the case. The judgment is reversed, and the cause remanded.

#### GONZALES v. STATE.

(Court of Appeals of Texas. Nov. 2, 1889.)

##### HOMICIDE—EXPRESS MALICE—SELF-DEFENSE—EVIDENCE—DECLARATIONS.

1. On a trial for murder, an instruction defining "express malice" as "when a man with a cool and sedate mind, in pursuance of a formed design to kill another, or to inflict on him some serious bodily injury which would probably end in depriving him of life, does kill such person," is insufficient, as it embraces excusable and justifiable homicide. Following *Crook v. State*, 11 S. W. Rep. 444; *Cahn v. State*, Id. 723.

2. An instruction that to justify the killing it must have taken place after some act by deceased showing "evidently" an intention to commit murder or mayhem is good, as the word "evidently" is used in Pen. Code Tex. art. 570, subd. 2, defining justifiable homicide.

3. An instruction that if the jury believe "that deceased was attacking defendant at the time, and that said attack produced in defendant a reasonable expectation or fear of death, or some serious bodily injury, then defendant would be justifiable in the killing; and it would make no difference whether such danger was real or imaginary, if it have the appearance of being real, and if he acted upon such belief of apparent danger,"—is defective, as it does not distinctly direct the jury that the danger must be judged of from defendant's standpoint, and no other, and from all the circumstances proved.

4. An instruction that, to constitute a justification of the killing by reason of threats previously made, the deceased, at the time of the homicide, must have manifested an intent then and there, by words or gesture, to execute the threat so made, is insufficient. If the deceased did some act which was reasonably calculated to produce a belief in defendant's mind that the deceased was about to execute the threat, defendant would be justified in acting on such appearance of danger.

5. An instruction that defendant was not bound to retreat to avoid the necessity of killing his assailant should be made applicable to all phases of the law of self-defense, and it is improper to restrict it to the law of threats.

6. Where there is evidence that the quarrel between deceased and defendant preceding the killing began by defendant's insinuation that deceased had stolen some cattle, it is improper to instruct that "if, by his own wrongful act, defendant brought about the necessity of taking the life of deceased, to prevent being killed himself, such killing will be murder in one of its degrees." If the wrongful act was unaccompanied by any intent on defendant's part to kill or inflict serious bodily injury on deceased, or to commit any felony, such wrongful act would not deprive defendant entirely of the right of self-defense, and would not necessarily render the homicide murder.

7. Where there is evidence that deceased applied a vulgar epithet to defendant, and made a contemptuous remark about him, an instruction that if "defendant voluntarily engaged in a combat with deceased, with deadly weapons, knowing that it might, or probably would, produce the death of deceased or himself, \* \* \* the killing will be murder in one of its degrees," is insufficient, as it does not state that if defendant voluntarily engaged in the combat, under the influence of sudden passion arising from adequate cause, the killing would not be murder, but manslaughter.

8. The fact that the statute now permits a defendant to testify in his own behalf does not render admissible his declarations that are not a part of the *res gestæ*.

Appeal from district court, Webb county; J. C. RUSSELL, Judge.

Indictment of Bernardino Gonzales for murder in the first degree, for the killing of one Vidami. Defendant was convicted, a life-term in the penitentiary being the pen-

alty assessed. The homicide occurred in Bruni's pasture, in Webb county, Tex. The defendant, at the time of the homicide, was an employe of Bruni, and also one of the *posse* of Messrs. Morel and Grimes, custom house officers, who were then in the pasture for the purpose of seizing certain horses, and to arrest the person in charge of them for violation of the custom laws. The defendant, the deceased, Mr. Garza, Mr. Grimes, Mr. Rodriguez, and a boy were the persons present at the killing. Grimes and the boy testified as state witnesses. Morel was not present when the party met deceased in the pasture, but witness asked deceased, through an interpreter, who owned the horses under suspicion. Through the interpreter, the deceased replied that he did. Witness then demanded his papers. He replied that he had no papers with him, but that the man from whom he purchased the stock had gone after the papers. Defendant then addressed the deceased in Spanish,—an unintelligible language to witness. In the conversation which ensued the deceased (witness judging by his manner) became angry, and spoke angrily to defendant. He had no weapons that witness saw, either on his person or on his horse. Defendant suddenly spurred his horse, drew his pistol, and, disregarding witness' appeal not to shoot, fired, and killed deceased. Witness saw no demonstration made by deceased at the time of the shooting. Corroborating Grimes as to what transpired between Grimes and deceased, the boy testified, for the state, that at the conclusion of the conversation between Grimes and deceased the defendant asked the deceased why he (deceased) had branded certain calves some time before. Deceased replied that he branded them because they belonged to him. Defendant replied: "They were not yours." Deceased replied: "All right. We will see about it according to law." Defendant retorted: "There is no law for you." Deceased replied: "All right. We will see about it." Thereupon the defendant, exclaiming, "There is no law!" drew his pistol suddenly, and fired the fatal shot. Nothing else occurred, and deceased made no demonstrations whatever. According to the witnesses for the defense, when Grimes asked deceased who owned the horses, the deceased replied, in Spanish, that he did not understand English. Grimes thereupon ordered Garza to interpret the question. Garza replied to Grimes that deceased could both speak and write English fluently. Grimes, however, ordered him to interpret. The conversation between Grimes and deceased, through Garza as interpreter, then ensued, substantially as stated by the witnesses for the state. Defendant then asked deceased why, if he held the stock honestly, he put them in the pasture without permission. Deceased replied, applying a vulgar epithet to defendant, that defendant was not in command of the pasture. Defendant then asked him what right he had to brand two of Bruni's certain calves. He replied: "I will

put my brand on top of Bruni's; and, if you and Bruni will turn into calves, I will brand you, too." Deceased—all the parties being on horseback—then threw his right hand across his breast, towards his left side. Defendant at once drew his pistol, and fired. Deceased fell from his horse, which fled into the brush. It was presently brought back; and the witnesses, for the first time, observed an empty carbine scabbard attached to the saddle, on the left side. A witness for the defense, who did not see the shooting, testified that he was about 100 yards distant when the shot was fired. Deceased's horse, almost immediately, passed to his right, at which time he saw a carbine protruding from a scabbard attached to the saddle, on the left side. When the horse was brought back, a short while later, by deceased's brother, the scabbard was empty. Two or more witnesses for the defense testified that deceased had threatened to kill or to "get defendant out the way;" the defendant being a witness against him, for theft of Bruni's cattle. One of said witnesses testified that, in his presence, the deceased threatened the defendant to his (defendant's) face. The court gave the jury the following, among other instructions: "If you believe from the evidence that defendant killed deceased, but also believe that deceased was attacking defendant at the time, and that said attack produced in defendant a reasonable expectation or fear of death, or some serious bodily injury, the defendant would be justifiable in the killing; and it would make no difference whether such danger was real or imaginary, if it have the appearance of being real, and if he acted upon such belief of apparent danger; and it is immaterial, in such case, whether deceased was armed or not." Also, the following: "If you believe from the evidence that deceased had threatened to kill defendant, such threats will afford no justification for the killing, unless it be shown that at the time of such killing the deceased manifested an intention then and there to execute the threat so made by words or gestures; and, if you find that deceased was about to execute such threats, it was not necessary for the defendant to retreat before killing his adversary, to justify the act of killing."

*Nicholson & Dodd*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. 1. In the charge of the court, express malice is defined as follows: "Express malice is when a man, with a cool and sedate mind, in pursuance of a formed design to kill another, or to inflict upon him some serious bodily injury which would probably end in depriving him of life, does kill such person." This definition is incomplete, and materially insufficient. It would embrace excusable and justifiable homicide. *Cahn's Case*, 27 Tex. App. 709, 11 S. W. Rep. 723; *Crook's Case*, 27 Tex. App. 198, 11 S. W. Rep. 444.

2. Upon the issue of self-defense, in para-

graph 8 of the charge, the jury are told that, to justify the killing, it must have taken place while the deceased was in the act of committing murder or maiming, or after some act done by him showing evidently an intention to commit such offense. Counsel objected to the use of the word "evidently" in this paragraph. It is the word used in the statute, and the objection is not maintainable. Pen. Code, art. 570, subd. 2. But there are objections to the charge on self-defense, which, in our opinion, are sound ones. Upon this issue the charge, to our minds, is not as clear, comprehensive, and complete as it should have been. In explaining the rule as to apparent danger it does not distinctly direct the jury that the danger must be judged of from the defendant's stand-point, and no other, and from all the circumstances proved. While the charge undertakes to present this principle of the law, it falls short, we think, of presenting it clearly, affirmatively, and accurately. Minds uneducated in the nice distinctions of the law would not be likely to discover in the charge the well-established rules relating to apparent danger. These rules should have been presented so plainly and appositely to the evidence as that the jury could not reasonably have overlooked or misunderstood them. The jury should have been told that if, at the time the defendant fired the fatal shot, it reasonably appeared to him, from the circumstances of the case, viewed from his stand-point, that the deceased was then about to shoot him with a gun or pistol, he was justified in killing the deceased, although, in fact, they might believe from the evidence that the defendant was in no danger at the time of being shot by the deceased. Again, we think the charge on self-defense is not sufficiently full and accurate, with respect to threats, as bearing upon that issue. Counsel for the defendant requested an instruction upon this phase of the case which, in our judgment, should have been given. It presents the law as to threats fully, affirmatively, and correctly. In the charge as given, in relation to threats, it is required, in order to constitute justification, that the deceased, at the time of the homicide, manifested an intention then and there, by words or gestures, to execute the threats so made. The instruction should have gone further, and stated that if the deceased, at the time of the homicide, did some act which was reasonably calculated, in view of all the circumstances of the case, to produce in the mind of the defendant the belief that the deceased was then about to execute the threat, the defendant would be justified in acting upon such appearance of danger. Again, as a part of the law of self-defense, and applicable to all phases of it, the jury should have been told that the defendant was not bound to retreat, in order to avoid the necessity of killing his assailant. This instruction is in the charge, but it is in the paragraph relating to the law of threats, and is apparently restricted to that issue.

8. In the charge given to the jury is the following: "If you find from the evidence that the defendant voluntarily engaged in a combat with the deceased, with deadly weapons, knowing that it might, or probably would, produce the death either of the deceased or himself, or if, by his own wrongful act, he brought about the necessity of taking the life of deceased, to prevent being killed himself, such killing will be murder, in one of its degrees." This instruction is in accordance with the doctrine announced in *Gilleland's Case*, 44 Tex. 356; and *Logan's Case*, 17 Tex. App. 50, and is correct, when considered with reference to the facts of those cases. In the case before us, we think the charge is erroneous. It deprives the defendant of self-defense entirely, if the killing was brought about by his wrongful act, without reference to his intent in the commission of the wrongful act. If the wrongful act was unaccompanied by any intent on the part of defendant to kill or inflict serious bodily injury upon the deceased, or to commit any felony, such wrongful act would not deprive the defendant entirely of the right of self-defense, and would not necessarily render the homicide murder. It might be reduced to manslaughter, notwithstanding such wrongful act. *Meuly's Case*, 26 Tex. App. 274, 9 S. W. Rep. 563; *Johnson's Case*, 26 Tex. App. 631, 10 S. W. Rep. 235; *Bonnard's Case*, 25 Tex. App. 173, 7 S. W. Rep. 862; *Alexander's Case*, 25 Tex. App. 260, 7 S. W. Rep. 867; *King v. State*, 13 Tex. App. 277. Furthermore, conceding that the evidence justified a charge on the law of mutual combat, and that the instruction above quoted is, as far as it goes upon that issue, correct, still, under the facts of this case, it should have gone further, and stated that, although the defendant engaged voluntarily in the combat, yet, if he did so under the influence of sudden passion, arising from an adequate cause, it would not be murder, but manslaughter. *Crist v. State*, 21 Tex. App. 361; *Spearman's Case*, 23 Tex. App. 224, 4 S. W. Rep. 586. In other respects than those we have specified, we think the charge of the court is not objectionable, and that there was no error in refusing special instructions requested.

4. It was not error to reject the proposed evidence of statements made by defendant to the witness Morel after the homicide. These statements were not *res gesta*, but were self-serving declarations, and therefore inadmissible. The fact that, under the law as it now is, a defendant may testify in his own behalf, does not render his declarations admissible in evidence. The rules relating to declarations made by a defendant have not been abrogated, or in any manner changed, by the statute allowing a defendant to testify in his own behalf.

Other questions presented are not discussed or determined, as they are of a nature which may not occur on another trial. For the errors discussed the judgment is reversed, and the cause remanded.

## LEWIS v. STATE.

(Court of Appeals of Texas. Nov. 6, 1889.)

OFFICERS—FRAUDULENT APPROPRIATION—INDICTMENT—"MONEY."

1. The term "money," as used in Pen. Code Tex. art. 103, which provides for the punishment of any county officer who shall fraudulently take or misapply any "money" belonging to the county, means legal-tender metallic coins or legal-tender currency of the United States; the definition of the term in articles 789 and 792 being confined to the offenses of embezzlement and swindling.

2. An indictment for the misapplication of county funds which describes the property as "five thousand five hundred dollars in money, the same being then and there current money of the United States, and of the value of five thousand five hundred dollars, which said money was then and there the property of Palo Pinto county," is sufficient under Code Crim. Proc. Tex. art. 427, which provides that in an indictment a general description of property by name, kind, quantity, number, and ownership shall be sufficient.

Appeal from district court, Palo Pinto county; J. S. STRAUGHAN, Special Judge.

Indictment of George C. Lewis under Pen. Code Tex. art. 103, which provides: "If any officer of any county \* \* \* shall fraudulently take, misapply, or convert to his own use any money \* \* \* that may have come into his custody or possession by virtue of his office, \* \* \* he shall be punished," etc. There was a conviction, and defendant appeals.

A. T. Watts, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. In the indictment the property is described as follows: "Five thousand five hundred dollars in money, the same being then and there current money of the United States, and of the value of five thousand five hundred dollars, which said money was then and there the property of said Palo Pinto county." We are of opinion that the description is sufficient. A general description of property by name, kind, quantity, number, and ownership is sufficient. Code Crim. Proc. art. 427. Here the property is described by name, that is, money; by kind, that is, current money of the United States; by quantity and number, that is, \$5,500; and by ownership, that is, the property of Palo Pinto county. "Money" is property within the meaning of article 427, above cited. Bryant v. State, 16 Tex. App. 144. As to sufficiency of description, see State v. Brooks, 42 Tex. 68; Bravo v. State, 20 Tex. App. 177; Crump's Case, 23 Tex. App. 616, 5 S. W. Rep. 182.

There is no general definition of the term "money" in our Code. It is defined with reference to the offense of embezzlement, (Pen. Code, art. 789,) and also with reference to swindling, (Id. art. 792;) but those definitions are applicable only to those offenses, and cannot be invoked in a prosecution under article 103 of the Penal Code, (Block's Case, 44 Tex. 620.) We must, therefore, in this case, be governed by the general definition of the term "money," found in the text-books of the law, and in the adjudications of the courts.

In Block's Case, supra, our supreme court say that, in legal acceptance, "money" means current metallic coin,—means that only which is legal tender. It does not include bank-bills, though they pass as current, nor does it include United States warrants. Mr. Bishop says: "The word 'money' means \* \* \* only what is legal tender. It was even adjudged in Texas to extend simply to metallic coin, and not to include our national greenbacks, [citing Block's Case, supra.] Therefore, it does not comprehend bank-bills, though they pass current, or United States treasury warrants, or county claims, or orders of a railroad company on its treasurer, or mere promissory notes, or bills of exchange, or bank-checks, or ordinarily anything which is a mere representative of money." Bish. St. Crimes, § 846. We do not construe the decision in Block's Case, supra, as restricting the meaning of "money" to metallic coins, but as restricting it, as does the text of Mr. Bishop, "to that which is legal tender," as legal-tender coins, or legal-tender treasury notes of the United States. Sansbury v. State, 4 Tex. App. 99. This meaning of the term is, we think, its meaning as used in article 103 of the Penal Code; and by such meaning this case must be adjudicated. It was, therefore, essential to a legal conviction that the state should prove the fraudulent conversion or misapplication by defendant of legal-tender metallic coins, or of legal-tender currency of the United States. We will not stop to determine the sufficiency of the evidence in this respect, as our view of the case renders it unnecessary that we should do so.

The court charged the jury that they must believe, from the evidence, that the money in question was "current money of the United States," and that a bank-check was not current money. We think the legal significance of "money" was a part of the law of the case, and that the court was bound to explain that meaning to the jury correctly. As we have seen, this was not done. The jury should have been instructed that, to warrant a conviction of the defendant, they must believe, from the evidence, that the property in question was legal-tender metallic coins, or legal-tender currency of the United States. Special instructions, defining "money," were requested by defendant's counsel, which, we think, were properly refused, because incorrect; but they were sufficient to call the attention of the court to the subject, and should have elicited from the court a correct instruction as to the meaning of the term "money." In other respects, the charge of the court is unobjectionable. We find no error in the rulings of the court complained of in admitting evidence. We think all the evidence admitted was competent. Because the charge of the court is incorrect and insufficient in explaining the meaning of the word "money," the judgment is reversed, and the cause remanded.

## HUNT v. STATE.

(Court of Appeals of Texas. Nov. 6, 1889.)

## FAILURE OF ACCUSED TO TESTIFY—REMARKS OF COUNSEL.

Under Act Tex. April 4, 1889, § 1, repealing Code Crim. Proc. art. 730, subd. 4, and providing that "hereafter any defendant in a criminal action shall be permitted to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause," any allusion by the prosecuting attorney to defendant's failure to testify in his own behalf is ground for a new trial, though the allusion was called forth by remarks of defendant's attorney, and the court admonished him that he could not read or comment on the law.

Appeal from district court, Jones county;  
J. V. COCKRELL, Judge.

*Davis & Woodruff*, for appellant. *Ast. Atty. Gen. Davidson*, for the State.

WHITE, P. J. By the first section of the act of the legislature approved April 4, 1889, with regard to evidence in criminal actions, and repealing the fourth subdivision of article 730 of the Code of Criminal Procedure, it is provided that "hereafter any defendant in a criminal action shall be permitted to testify in his own behalf therein; but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause." Defendant's third bill of exceptions shows that in his closing argument the district attorney proceeded to comment on the failure of defendant to testify in this case, and proposed to, and attempted to, read to the jury the law, as we have above quoted it, empowering him to do so; and that, though he was stopped, and admonished from the bench that he had no right to read and comment upon said law, said attorney claimed he had such right. This bill of exceptions is qualified by the trial judge with the explanation that the "attorney for the defendant, alluding to what the witness Stevens had stated in reference to defendant's admissions, that [said?] 'You have not yet heard the defendant's statements.' The district attorney, in his closing argument, stated that 'it was the same old story. The defendant's mouth is closed,'—and picked up the acts of the last legislature, and commenced to read the act allowing a defendant to testify, when the court called him to order of his [its] own motion, and [he] was told by the court that he could not read that law in the hearing of the jury; when, in answer to the admonition of the court, [said prosecuting attorney?] wanted to know 'if the court would allow defendant's counsel to sing that same old song, and not allow the state to reply.' When the court told him that he could neither read nor comment on the law referred to." The language of our statute prohibits any allusion to, as well as comment on, a defendant's failure to testify in his own behalf. No argument made by defendant's counsel could or would justify the prosecuting attorney in alluding to or commenting upon the

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fact, in violation of the plain letter of the law. Upon a statute substantially in effect with ours, the supreme court of Indiana held that "an allusion by counsel for the state, in a criminal prosecution, made during his argument of the cause before the jury, to the fact that the defendant had failed to testify as a witness on the trial of such cause, is sufficient ground for a new trial, and is not cured by the facts that the court admonished the counsel that such allusion was improper, and instructed the jury that no attention should be paid by them to the same." In the opinion it is said: "We construe the statute to mean that when a defendant in a criminal cause declines to testify in his own behalf, absolute silence on the subject is enjoined on counsel, in their argument on the trial." *Long v. State*, 56 Ind. 182. In *Com. v. Scott* the supreme court of Massachusetts say: "The absolute exemption, secured to the defendants by the constitution and laws, from being compelled to testify, and from having their omission to do so used in any way to their detriment, could not be affected by superfluous or irregular suggestions of their counsel, in the heat of argument. That exemption could only be waived by each defendant's own election to avail himself of the statute, and to go upon the stand as a witness." 128 Mass. 289, citing *Com. v. Nichols*, 114 Mass. 285. In a case involving the same question, the supreme court of Illinois say: "The statute has, in unmistakable terms, declared, in effect, the omission of the accused to testify shall not be used to his prejudice, or taken as an evidence of guilt; and, in such case, court and counsel should studiously avoid all allusions to the subject." *Baker v. People*, 105 Ill. 452. See, also, *Whart. Crim. Ev.* (9th Ed.) § 435a.

We do not propose to discuss any other of the several questions raised on this appeal. Some of them cannot, and others may or may not, arise or be presented in the same form. Because the prosecuting officer violated the statute with reference to the defendant's failure to testify, the judgment is reversed, and the cause remanded.

## BOYD v. STATE.

(Court of Appeals of Texas. Nov. 2, 1889.)

## HOMICIDE—MANSLAUGHTER—IMPLIED MALICE—INSTRUCTIONS.

1. On a trial for murder, defendant testified that he and deceased, his partner, got into an altercation, and called each other liars; that deceased advanced on him, and, just as he stooped to pass under a beam to where defendant was, defendant seized a stick, and struck him over the head, knocking him down. Seeing that he had struck deceased much harder than he intended, he went to his aid and called for help. He testified that he did not intend to strike so hard, and did not intend to kill him. Other witnesses testified that immediately after the blow defendant said that he did not intend to strike so hard. *Held*, that the evidence presented the issue of manslaughter, and that instructions should have been given on that grade of homicide.

2. In view of the evidence as to whether the

blow was inflicted with intent to kill, the court should have charged the law as declared in Pen. Code Tex. art. 612, which provides that the instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending; if the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless, from the manner in which it was used, such intention evidently appears; and article 614, which provides that where a homicide occurs under the influence of sudden passion, but by the use of means not in their nature calculated to produce death, the person killing is not deemed guilty of the homicide, unless it appear that there was an intention to kill, but the party from whose act the death resulted may be prosecuted for and convicted of any grade of assault and battery.

3. Under Pen. Code Tex. arts. 593, 595, defining "manslaughter" and "adequate cause,"—the former being voluntary homicide committed under the immediate influence of sudden passion arising from an adequate cause, the latter being such as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection,—an explanation of implied malice is erroneous which requires, in order to reduce the homicide to a lower grade than murder in the second degree, that the homicide should have been committed under such circumstances as fail to show that it was committed under the immediate influence of sudden passion arising from a sudden and powerful provocation, as a violent blow on the head, etc.

4. Under Pen. Code Tex. art. 574, providing that the attack upon the person of an individual, in order to justify homicide, must be such as produces a reasonable expectation or fear of death, or some serious bodily harm, the evidence did not demand an instruction on the law of self-defense.

5. A definition of "malice aforethought" is essential in the charge in a murder case, and a definition of "express" and "implied" malice does not cure the omission. Following *Crook v. State*, 11 S. W. Rep. 444.

Appeal from district court, Harrison county; A. J. BOOTH, Judge.

The conviction was in the second degree, for the murder of Jordan Childs. It was based upon the defendant's voluntary statement, which was admitted in evidence upon a sufficient predicate and without objection. It was to the effect that he and deceased were partners in a cane-mill. That on the fatal day, while a quantity of deceased's cane was being ground, a Mr. McFarland, being present, asked: "Whose cane is that?" referring to certain cane. Witness replied: "It belongs to Mr. ———, and he had better come and get it or it will spoil." Deceased remarked: "Never you mind about that cane; it will be ground." To this witness replied: "It looks like you, having all the molasses you want, don't intend to help any more." Deceased replied: "You are a liar." Witness passed the epithet back, and about that time McFarland left. Deceased then advanced upon witness, calling him a liar. Witness replied to the same effect. Deceased continued to advance until he stooped to pass under a beam to where witness was, when witness seized a stick, and struck him over the head, knocking him down. Seeing at once that he had struck deceased a much harder blow than he intended, he went to deceased's aid, calling for help. Witness closed his statement protesting that he did not intend to strike as hard

a blow as he did, and did not intend to kill him. This same declaration, *i. e.*, that he did not intend to strike so hard, was, according to two witnesses, made by defendant immediately after the blow was struck.

Crim. Code Tex. art. 612, provides that "the instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending. If the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless, from the manner in which it was used, such intention evidently appears." Article 614: "Where a homicide occurs under the influence of sudden passion, but by the use of means not in their nature calculated to produce death, the person killing is not deemed guilty of the homicide, unless it appear that there was an intention to kill, but the party from whose act the death resulted may be prosecuted for and convicted of any grade of assault and battery." Article 593: "Manslaughter is voluntary homicide, committed under the immediate influence of sudden passion arising from an adequate cause, but neither justified or excused by law." Article 595: "By the expression 'adequate cause' is meant such as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection." Article 574: "The attack upon the person of an individual, in order to justify homicide, must be such as produces a reasonable expectation or fear of death, or some serious bodily injury."

A. Pope, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. While the charge of the court explains "express" and "implied" malice, it fails to define "malice aforethought," and is therefore fundamentally erroneous. *Babb v. State*, 12 Tex. App. 491; *Holmes v. State*, 11 Tex. App. 223; *Garza v. State*, Id. 345; *Crook's Case*, 27 Tex. App. 198, 11 S. W. Rep. 444. An important issue in the case was whether or not the mortal blow was inflicted by defendant with intent to kill deceased. His declarations, made immediately after the blow was inflicted, are to the effect that he did not intend to kill deceased. In view of the evidence presenting this issue, we think the court should have charged the law as declared in articles 612 and 614 of the Penal Code. Special instructions calling attention to this phase of the case were requested by defendant's counsel, and, while such special instructions did not present the law accurately, they were sufficient to direct the mind of the court to the issue, and the omission from the charge of that issue. We are of the opinion that the evidence presented the issue of manslaughter, and that appropriate instructions should have been given the jury upon that grade of homicide.

We think the objections urged to the explanation of implied malice given in the

charge are sound. It requires, in order to reduce the homicide to a lower grade than murder in the second degree, that the homicide should have been committed under such circumstances as fail to show that it was committed under the immediate influence of sudden passion arising from a sudden and powerful provocation, as a violent blow on the head, etc.; whereas the law is that if it was committed under the immediate influence of sudden passion, arising on adequate cause,—that is, such cause as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection,—the homicide would be manslaughter, and not murder. Pen. Code, arts. 593–595; *Morgan v. State*, 16 Tex. App. 593. In this case a proper explanation of “implied malice” would have been: “‘Implied malice’ is that which the law infers from or imputes to certain acts. Thus when the fact of an unlawful killing is established, and there are no circumstances in evidence which tend to establish the existence of express malice, nor which tend to mitigate, excuse, or justify the act, then the law implies malice. If, therefore, you believe from the evidence the defendant unlawfully killed the deceased, and in doing so did not act under the immediate influence of sudden anger, rage, resentment, or terror, arising from an adequate cause,—that is, such cause as would commonly produce such passion in a degree that would, in a person of ordinary temper, render the mind incapable of cool reflection,—the killing would be upon implied malice, and he would be guilty of murder in the second degree.” We do not think the evidence demanded any instructions upon the law of self-defense. While it tended to show an unlawful attack by deceased upon defendant, it does not show that such attack was of that character which would produce a reasonable expectation or fear of death or serious bodily injury to the defendant. Pen. Code, art. 574. For the error and omissions in the charge of the court which we have specified the judgment is reversed and the cause remanded.

#### HALL v. STATE.

(Court of Appeals of Texas. Nov. 6, 1889.)

HOMICIDE—INDICTMENT—REASONABLE DOUBT—JURY—SPECIAL VENIRE.

1. An indictment which alleges that the murder was committed with “malice aforethought” is sufficient, without an allegation that the killing was “unlawful;” the latter being included in the former.

2. A charge is not objectionable for failure to instruct that reasonable doubt should be applied as between the several degrees of homicide charged upon, where the court applies the reasonable doubt to the whole case, and no additional instructions on the subject were requested.

3. Under Code Crim. Proc. Tex. art. 605, defining a “special venire” as a writ issued by order of the court for any number of not less than 36 nor more than 60, in the discretion of the court, to serve as a jury in the particular case, the fact that only 59 names instead of 60, as asked for by defendant,

were upon the list attached to the original writ, neither invalidates the writ, nor the venire summoned under it.

4. Until a special venire has been exhausted or discharged with defendant’s consent, it is error for the court to order the issuance and execution of another venire. Following *Sharpe v. State*, 17 Tex. App. 487.

Appeal from district court, Tyler county; W. H. Ford, Judge.

Will Hall was convicted of murder in the second degree, and appeals. Code Crim. Proc. Tex. art. 605, defines a “special venire” as a writ issued by order of the district court in a capital case, commanding the sheriff to summon a certain number of men, not less than 36 nor more than 60, to appear before the court on a day named in the writ, from whom the jury for the trial of such case is to be selected.

Cooper, West & Chester, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. An indictment for murder need not allege that the killing was “unlawfully” done. A murder committed with “malice aforethought” is necessarily unlawful. *Stephens v. State*, 20 Tex. App. 255; *Jackson’s Case*, 25 Tex. App. 315, 7 S. W. Rep. 872. The indictment was sufficient, (*Willson*, Crim. Forms, No. 388,) and the court did not err in overruling defendant’s motion in arrest of judgment, based upon this supposed defect.

Defendant made a motion to quash the service of the special venire which had been made upon him. He did not make any motion to quash the special venire itself, but, when his motion to quash the service was submitted, it was discovered that defendant had, on verbal motion, applied for a special venire of 60 men, but that by inadvertence only 59 names had been drawn or placed upon the list attached to the writ. The court asked defendant if he waived his right to a venire of 60 men, or if he desired to make an application under oath for a special venire, as provided by article 607, Code Crim. Proc. Defendant replied that he did not waive any of his rights, but that he did not wish to make oath in writing for another special venire. Thereupon the district attorney made his oral motion, as provided by article 606, and upon his motion a new special venire for 60 men was ordered. When the case was called for trial the defendant objected to this new special venire, because he had never moved to quash or vacate the original special venire, and that in fact it had never been quashed or vacated, there being no order of the court to that effect, and that the order for and summoning the second special venire was unauthorized and void, and that he should not be compelled to select a jury therefrom. It appears that, though the court did order the second venire on motion of the district attorney, no order was made and entered discharging the first venire. The fact that only 59 names, instead of 60, as asked for by defendant, were upon the list



attached to the original writ, neither invalidated the writ nor the *venire* summoned under it. A special *venire* is a writ issued by order of the court for any number of persons not less than 36, in the discretion of the court, to serve as a jury in the particular case. Code Crim. Proc. art. 605. Any number over 36 is within the discretion of the court to order. It rarely happens that all of those ordered are summoned, and this fact, even if the number summoned be less than 36, would not invalidate the special *venire*, or constitute any valid objection to the return. Willson, Crim. St. § 2252. By the copy served on the defendant, 57 of the 59 persons whose names were on the original list had been actually summoned. It was within the discretion of the court to have the trial jury selected from these persons, notwithstanding the order had called for 60 persons. But, as stated above, the court did not discharge the original *venire*, but ordered a second one, and required defendant to select his trial jury from the latter, over his exceptions and objections to the same. In Sharpe's Case it was held that until a special *venire* has been exhausted or discharged, with the appellant's consent, the court below had no power to order the issuance and execution of another *venire*. 17 Tex. App. 487.

The charge of the court is made the subject of several objections which are claimed for error. It is objected that the court did not instruct the jury to apply the reasonable doubt as between the several degrees charged upon. Such omission has never been held reversible error, when the court applies the reasonable doubt to the whole case, except in those cases where such additional instructions have been specially requested and refused by the court. McCall v. State, 14 Tex. App. 363.

Exception is taken to paragraphs 23 and 24 of the charge, and specially to the use and repeated use of the words "honest belief," in connection with defendant's right of defense against demonstrations of danger where there have been antecedent threats. These two paragraphs, in the main, are almost literally copied from the first special requested instruction asked for the defendant, and refused because substantially given in the general charge. The words "honest belief" are used in said special instruction in the same connection as given in the general charge. A defendant has no ground to complain that the court gives instructions which he himself has requested. We will further remark, in this connection, that we have searched the statement of facts in vain for any evidence of such threats, and an endeavor to execute the same by the deceased, as called for any instructions whatsoever on that particular branch of the law. True, the parties had engaged in one or more drunken quarrels on the evening of and just before the homicide, and doubtless deceased, in his then maudlin condition, was willing to fight defendant in a mutual fistic combat; but all the testimony

shows that he was unarmed, and does not show any serious threats on his part. But we do not deem it necessary to further discuss this matter, nor, in fact, any of the other errors assigned.

We are of opinion that the defendant, under the peculiar facts stated above, had the right to select his trial jury from the list of the original special *venire*; and, because this right was denied him, the judgment is reversed, and the cause remanded.

#### CARTER v. STATE.

(Court of Appeals of Texas. Nov. 6, 1889.)

##### THEFT—INSTRUCTIONS.

On a trial for theft, where there is evidence that defendant, in explanation of his ownership and possession of the alleged stolen animal, claimed that he had won it at a game with cards, a refusal by the trial judge to submit this as an issue to be passed upon by the jury is error.

Appeal from district court, Burleson county; C. C. GARRETT, Judge.

Indictment for larceny of an animal. Defendant appeals.

W. K. Homan and H. G. King, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. Defendant had claimed, on more than one occasion, as the evidence shows, in explanation of his ownership and possession of the alleged stolen animal, that he had won her at a game with cards. In his charge to the jury the learned trial judge did not submit this as an issue to be passed upon. Defendant's third special requested instruction sought to correct this omission in the charge, but the court refused to give the same; and for this error the judgment is reversed, and the cause remanded.

#### LYONS v. STATE.

(Court of Appeals of Texas. Nov. 27, 1889.)

##### NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

It is error to refuse defendant's motion for a new trial, after conviction for the theft of a cow, where he shows, by newly-discovered evidence, that since the beginning of the prosecution, and since his trial and conviction, different persons have seen the alleged stolen cow alive, and in her accustomed range; which showing the state does not controvert, as it might, under Code Crim. Proc. Tex. art. 781.<sup>1</sup>

Appeal from district court, Smith county; F. J. MCCOED, Judge.

J. M. Logan, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. On a motion for new trial, defendant showed, by the affidavits of two persons, that they were acquainted with the

<sup>1</sup> As to when a new trial will be granted on the ground of newly-discovered evidence, see *State v. Woodward*, (Mo.) 8 S. W. Rep. 220, and note; *Gilmore v. People*, (Ill.) 15 N. E. Rep. 758, and note; *Gilmore v. Brost*, (Minn.) 89 N. W. Rep. 139, and note; *Wimpy v. Gaskill*, (Ga.) 7 S. E. Rep. 156, and note.

alleged stolen cow, and had seen said cow, in her accustomed range, alive, since the commencement of this prosecution; and one of said persons stated in his affidavit that he had seen said cow, in her accustomed range, since the trial and conviction in this case. This was shown to be newly-discovered evidence; and the state did not controvert the truth of this ground of the motion for a new trial, as might have been done. Code Crim. Proc. art. 781. Said newly-discovered evidence is competent and material to the issue, and, on another trial, would probably produce another result. We think the court erred in not granting defendant a new trial upon this ground; and, for this error alone, the judgment will be reversed, and the cause remanded,—none of the other matters complained of by defendant showing reversible error.

#### SHAW v. STATE.

(Court of Appeals of Texas. Nov. 27, 1889.)

#### SLANDER—CRIMINAL PROSECUTION—INSTRUCTION—EVIDENCE.

1. On a prosecution for slander by imputing want of chastity to a female, where there is evidence that the general reputation for chastity of the female alleged to have been slandered is bad, it is error, under Pen. Code Tex. art. 646, which provides that "the general reputation for chastity of the female alleged to have been slandered may be inquired into," to refuse an instruction that if the jury believed this evidence they should acquit.

2. Evidence that defendant's friend had said that defendant and the female alleged to have been slandered had been carnally intimate and that defendant made the alleged slanderous statement, in corroboration of his friend's statement, to save him from threatened violence, is inadmissible, as it has no tendency to rebut the inference of malice in defendant, or that he made the imputation wantonly.

Appeal from Kaufman county court; JOHN VESLEY, Judge.

W. H. Allen, for appellant. Asst. Atty. Gen. Davidson, for the State.

HURT, J. This is a conviction for slander. Quite a number of witnesses swear that the general reputation for chastity of Miss Ellen Goodman, the party charged to have been slandered, was bad. Counsel for appellant requested the court to charge the jury that if they believed, from the evidence, that her reputation for chastity was bad, they should acquit. This charge was refused, and counsel excepted, reserving his bill. The statutes upon which this prosecution is based, (Pen. Code, arts. 645, 646,) read: "If any person shall, orally or otherwise, falsely and maliciously, \* \* \* impute to any female in this state, married or unmarried, a want of chastity, he shall be deemed guilty of slander, and, upon conviction, shall be fined not less than one hundred nor more than one thousand dollars, and the jury may, in addition thereto, find a verdict for the imprisonment of the defendant, in the county jail, not exceeding one year." "In any prosecution under this chapter it shall not be necessary for the state to show that such imputation was

false, but the defendant may, in justification, show the truth of the imputation, and the general reputation for chastity of the female alleged to have been slandered may be inquired into." It is seen that, while the state is not required to prove the imputation false, still the accused may justify, by showing that the imputation is true. Thus far, there is no trouble; but the statute further provides: "But the defendant may, in justification, show the truth of the imputation, and the general reputation for chastity of the female alleged to have been slandered may be inquired into." Let us suppose that the inquiry is made, and that the result of the investigation is that her general reputation for chastity is bad, and that the jury is satisfied of this. What effect should this fact (bad reputation for chastity) have upon the case? Must the jury acquit? We think so. *Patterson v. State*, 12 Tex. App. 458; *McMahan v. State*, 13 Tex. App. 220.

Appellant proposed to prove, by several witnesses, that Thomas Taylor had said that defendant and Ellen Goodman had been carnally intimate, and that Taylor was being threatened with violence, and that appellant made the slanderous statement in defense of Taylor. These facts were offered in evidence for the purpose of rebutting the inference of malice, or that the imputation was made wantonly. These facts were rejected by the court, and a bill of exceptions was reserved by appellant. Let us look back of this matter. The court instructed the jury that if they believed, from the evidence, that the imputation was true, then to acquit appellant. This verdict of guilty, in legal effect, determines this issue against the appellant. By their verdict, the jury must have found the imputation false; and, if false, this appellant knew it to be false. Now, then, we have this state of case: The appellant, to protect his friend Taylor, imputed to an innocent lady a want of chastity, knowing her to be innocent of the particular charge made by him,—a charge more fatal than any other in the catalogue of crimes committed by woman. This is done, knowingly and deliberately, to protect his friend, and we are told that there is no malice in this, or that the charge was not wantonly made. Concede the purpose or reason for the slander to be that claimed by appellant, and we are forced to the conclusion that, instead of refuting the inference of malice, they (his reasons) demonstrate that the imputation was deliberately, maliciously, wantonly, and knowingly made; that it was a calmly-determined effort to protect a friend, by making an innocent girl a victim of his scheme. Her character must be blackened, destroyed forever, not by her own lewd and dissolute acts, but by the appellant, for the purpose of protecting Taylor, who had been engaged in proclaiming the slander evidently put adrift by the appellant. The evidence was properly rejected. We do not desire to be understood as expressing an opinion as to the truth of the imputation.

It may have been true. We have dismissed the competency of the proposed evidence upon the assumption that the imputation was false; assuming this from the verdict of the jury.

Other questions presented will not be discussed, as they will not likely arise on another trial. Because the court refused to charge the jury that if they should believe from the evidence that the general reputation of Ellen Goodman for chastity was bad, then to acquit defendant, the judgment is reversed, and the cause remanded.

#### TIEMAN v. STATE.

(Court of Appeals of Texas. Nov. 6, 1889.)

INDICTMENT AND INFORMATION—TRIAL—SEVERANCE.

An agreement between three persons, jointly indicted, that two of them should be tried first, which is signed only by the one whose trial is postponed, is not binding on the other two so as to deprive them of their right conferred by Code Crim. Proc. Tex. arts. 669, 670, to a severance as between themselves, and to indicate the order in which they wish to be tried.

Appeal from district court, Lavaca county; GEORGE MCCORMICK, Judge.

Patton & Allen, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. Appellant and Houston Taylor and Joe Norman were jointly indicted for arson. At a former term of court defendants were, upon their own motion, granted a severance, and Taylor was put upon trial, but, on account of the failure of the jury to agree, a mistrial was had. At the next succeeding term Taylor made application, under article 669, Code Crim. Proc., for a continuance until his co-defendants, Tieman and Norman, had been tried, in order that he might avail of their testimony, when he should be put again upon trial; and this motion was granted, and the case continued as to Taylor. In the affidavit of Taylor for the continuance it is recited: "And it is further agreed by all the defendants in this case that Jim Tieman and Joe Norman be first put upon trial." When the case was called as to Tieman and Norman, they asked for a severance, but the court, holding that this recitation or agreement in Taylor's motion for continuance, (though the motion was only signed by Taylor,) and because all the defendants had throughout been represented by the same counsel, was binding upon Tieman and Norman, refused to grant the severance.

Not having signed said agreement, we are of opinion that these parties were not bound by it, and, even if bound, the language used is not limited to the construction that the parties intended to bind themselves that they should be tried together. Nor does the fact that they were all represented by the same counsel, in our opinion, render such construction conclusive. Under the law as it now is, defendants, jointly indicted and prosecuted, have not only the right to sever, but, by

agreement, they have the right to indicate and fix the order in which they are to be tried. Code Crim. Proc. arts. 669, 670. Such severance is matter of right. Willey's Case, 22 Tex. App. 408, 8 S. W. Rep. 570. The judgment is reversed, and cause remanded.

#### FORT WORTH & DENVER C. R. Co. v. THOMPSON.

(Supreme Court of Texas. June 23, 1889.)

##### INJURIES TO EMPLOYEES—EVIDENCE.

1. In an action by an engineer against a railroad company for personal injuries received by the derailment of his engine, the complaint charged that the derailment was caused by the failure of defendant to keep the track in proper repair, and by neglecting to properly inspect and guard it; that at the point where the accident occurred the ties were old and rotten, and the rails insufficiently fastened, so that they spread. Held, that evidence as to whether a low joint was calculated to cause derailment of the engine was admissible under the allegations.

2. It was reversible error to permit plaintiff to ask his own witness if he did not observe a low joint where the accident occurred, and if he did not call the road-master's attention to it at the time of the accident as the cause of the derailment, and make a certain remark to him, though the road-master had testified, on cross-examination, that he did not remember that the witness called his attention to the joint, or what was said, as the question was leading, and no proper predicate was laid for impeaching the road-master. HENRY, J., dissenting.

3. The evidence of a witness who was a fireman on the engine at the time of the accident, and who helped to construct the road, was admissible to show the liability of the track to "get out of line" at that point by reason of rain.

4. The opinion of a brakeman who had been doing such work 10 years was admissible to show the cause of derailment, it appearing that he was on the train and investigated the accident at the time it occurred.

5. It is not error to permit an expert to state his conclusions from facts which are undisputed.

Appeal from district court, Tarrant county. J. M. O'Neill, for appellant. Ball & McCart, for appellee.

HENRY, J. Appellee brought this suit to recover damages for personal injuries received by him while employed as an engineer by the defendant. Plaintiff's petition charges that while he was engaged in running an engine on defendant's railroad it ran off the track, falling on top of him, and inflicting the injuries of which he complains. He charges that the derailment was caused by defendant's failing to keep its track, at the place where it occurred, in proper repair, and failing to cause the same to be properly guarded and inspected, and by permitting its road-bed at said place to become and remain out of repair; that the ties upon which the rails rested were old, rotten, and worthless; that the rails were insufficiently and improperly laid and fastened, so that they spread when the engine ran on them; and that defendant had failed to have its track inspected. Defendant insists that its track was in good condition, and that plaintiff's injuries were caused by his own unskillfulness in running the engine backwards at an unusual and dan-

gerous rate of speed. Judgment was rendered in favor of plaintiff, upon the verdict of a jury, for \$10,000, and the case is before us upon assignments of error relating exclusively to rulings made during the progress of the trial upon the admission of evidence.

Plaintiff asked one of his witnesses the question, "What did you say about the track spreading?" to which he answered, "I say I thought that was what caused the wreck." In reply to another question, the same witness answered that he thought the derailment was caused by a low joint. The defendant objected to the answers, on the ground that they were conclusions of the witness. It is insisted that, there being two theories as to the cause of the derailment,—one on the part of the plaintiff, that it was caused by a defective track, and the other on the part of the defendant, that it was occasioned by plaintiff's running the engine backward at too high a rate of speed,—these expressions of opinion by the witness were invasions of the province of the jury. The evidence was admitted on the ground that the witness had qualified himself to testify as an expert. This witness was a brakeman on the train at the time of the accident, and testified that he had been doing such work for about 10 years, and had investigated this derailment at the time, and the causes of others. The witness also stated the facts connected with the accident in controversy, and those upon which his conclusions were predicated. The rule, as stated in *Lawson, on Expert Evidence*, is that every employment which has a particular class devoted to its pursuit is an art or trade, and persons instructed therein, by study or experience, may give their opinion. We think the business of railroading comes sufficiently within the rule to make opinions of those who are engaged in it admissible, and we do not think that such evidence as was given in this case could have had any tendency to prevent a fair trial, or mislead the jury.

Plaintiff asked the same witness the following question: "If the engine had been running at a speed of twenty-five or thirty miles an hour, would it have been possible for the other cars to have remained on the track?" Defendant objected to the question, on the ground that it sought a conclusion of the witness upon a state of facts not in evidence. Defendant's counsel having stated to the court that he intended to offer evidence that just previous to the occurrence of the accident the train was being run at that rate of speed, the court overruled the objection. It is insisted that it appeared from the evidence, subsequently introduced, that there were many facts which, had they been submitted to the witness, would have modified his conclusion, or led to a different one. Wharton, in his *Law of Evidence*, says: "The better opinion is that an expert cannot be asked his opinion as to the evidence in the case as rendered, not only because it puts the expert in the place of the jury, in determining as to the

credibility of the facts in evidence, but because the relief thus afforded is in many trials only illusory, experts being often in conflict, and the duty devolving on court and jury of supervising such conclusions of experts being one which can be rarely escaped. When, however, certain facts are undisputed, the opinion of an expert can be asked as to the conclusions to be drawn from them." Section 452.

Another witness for plaintiff was asked by him to state "how the road was constructed at the place of the accident, with regard to the track getting out of condition after a rain, and over the low ground and all;" to which defendant objected, because plaintiff had not in his pleadings charged the improper construction of the road, and, as the evidence showed three years had elapsed between the time the road was constructed and the occurrence of the accident, the evidence could not support the charge of negligence in not keeping the track in repair." The court overruled the objection, and the witness testified as follows: "In that place, there in the valley, always after a rain that track would get out of line. The boss would stop us nearly every rain, to throw the track in line through the valley over that bridge." This witness was a fireman on defendant's engine at the time of the accident, and had also helped to construct the road at that point three years before. We think, under the circumstances, his answer was admissible.

Plaintiff asked a witness the following question: "State whether or not the sectionmen had been removed from that part of the road down to another part." The defendant objected to the question, because leading. The court overruled the objection, and the witness answered: "Well, the sectionmen, as far as I know, had been taken from that section to one south of it to repair damages to the track caused by washouts. There might have been other sectionmen right on the section, but I don't know of it." The only aspect of the question affecting the issues on trial was that with reference to the removal of the hands from the portion of the road where the accident occurred. For the purposes of this cause it was immaterial where they were removed to. In its connection with this case, we do not think the objection well taken, nor do we think that either the question or answer ought to have been excluded.

Williams, a witness for plaintiff, was asked the question: "State whether or not a low joint was calculated to cause a derailment of the engine;" to which defendant objected, because plaintiff's petition charged the derailment to a different cause. The court overruled the objection, and the witness answered as follows: "I could not say that it would necessarily follow that it would." We think the allegations in the pleadings are broad enough to admit the evidence, and, if they were not, the answer was not of a character to prejudice defendant.

This same witness was asked by plaintiff the following question: "I will ask you if you called Goodenough's attention to the low joint, telling him that, in your opinion, that was the cause of the derailment, and whether you stated to him that 'You and I are old enough railroad men to see plainly that was what had derailed us,' or words to that effect." Goodenough was a witness for defendant, and on his cross-examination by plaintiff had testified that he did not "state to Mr. Williams that the low joint caused the derailment, and did not remember that Williams called his attention to said joint, nor what was said between Mr. Williams and himself at the time." The defendant objected to the question to Williams, both because it was leading, and because the testimony was inadmissible for the purpose of impeachment. The court overruled the objection, and the witness answered: "My remark to Goodenough was that he and I were old enough railroad men not to search any further for the cause of the accident." The witness was then asked by plaintiff the further question: "What did you mean when you said to Goodenough, 'We are good enough railroad men to know what caused this derailment?'" The answer was: "I meant that I thought in my own mind that the cause of the accident had been discovered." This witness further testified: "Of course, I was not positive what threw the engine from the track, but I decided in my own mind that was the cause of it. I could not see anything else that could do it." "Goodenough, defendant's road-master, was with me there at the time, and he and I both observed the same joint at the same time." We think it is too clear for controversy that the evidence objected to was inadmissible in any point of view, and it ought to have been excluded when objected to. It was not admissible for the purpose of contradicting Goodenough, because no proper predicate was laid. The evidence seems to have been admitted on the theory that a predicate was laid for it in the examination of Goodenough. But to so hold would be an entire misapplication of the rule, unless it had been Goodenough's declaration, and not that of the witness, that was in issue. We see nothing in the matter but the statement of a witness of what he thought and said on another occasion, made in reply to a leading question asked by the party producing him, over the objection of the opposite party. We all concur in the opinion that the evidence ought to have been excluded. A majority of the court is of the opinion that the improperly admitted evidence was material, and that the cause must be reversed for the error committed in allowing it. As the witness during the trial testified to the same facts, independently of his improper statements of what he thought and said on the first occasion, I do not think the objectionable evidence was material, or of a character to influence the verdict, and do not concur in the conclusion of the majority of the court as to the disposi-

tion of the cause. The judgment is reversed, and the cause remanded.

Motion for rehearing overruled, December 20, 1889.

#### PULLMAN PALACE CAR CO. v. MATTHEWS.

(Supreme Court of Texas. Nov. 1, 1889.)

##### SLEEPING-CAR COMPANIES—LOSS OF POCKET-BOOK.

A passenger on defendant's sleeping-car, being told he would have to change cars on account of a wreck, started forward with all the other passengers, but, upon missing his pocket-book, returned to his berth, where he had left it. No one was in the car after the passenger left, except the conductor, porter, and a train brakeman who passed through without stopping. The conductor, porter, and passengers were searched, but the pocket-book could not be found. *Held*, that a verdict against the sleeping-car company would not be disturbed.

Appeal from district court, Morris county; JOHN L. SHEPARD, Judge.

This was an action by J. H. Matthews against the Pullman Palace Car Company, for the recovery of money lost in defendant's car. Judgment for plaintiff, and defendant appeals.

*Todd & Hudgins*, for appellant. *Moore & Hart*, for appellee.

HENRY, J. This cause originated in a justice's court. Plaintiff testified that, being a passenger on a Pullman sleeping-car, he was awakened by the conductor, about 5 o'clock in the morning, and informed that on account of a wreck ahead he would have to change cars; that, having partially dressed himself, he left his pocket-book, containing \$165, lying upon the bedding of his berth, and went to the wash-room, from where, having finished dressing, he went out of the car, and forward to the wrecked train, some 60 and 70 yards distant; that immediately on arriving there he missed his pocket-book, and went back to recover it. He found the conductor and porter in the smoking-room, and informed them of his loss. They immediately made search for the missing pocket-book, without finding it. There were four other passengers in the car, who all returned to it soon after plaintiff did, and all of whom, with the conductor and porter, were searched without finding the money. When plaintiff paid his fare, he was handed a check upon which were printed the words: "Baggage, wearing apparel, money, jewelry, and other valuables taken into the car will be entirely at owner's risk, and employees of the company are forbidden to take charge of the same." Plaintiff further testified that when he went to the wash-room he found the four other passengers there, all of whom passed out of the car from the washing-room without going back to or by the berth on which he left his pocket-book, and that they did not return to the car until after he did. He testified that the place was in the woods, and he was not absent from the car more than three or four minutes; and that when he left the car no one remained in it, except the conductor and the porter, who

was a colored boy. Defendant proved by the conductor of the train that it was engaged in the business of manufacturing sleeping-cars, and hiring them to the railroads, reserving the right to collect fares for the use of berths, and that defendant only charges for the use of its berths; that each Pullman car has its own conductor and porter; that witness (the conductor) sat, during the plaintiff's entire absence, in the smoking-car department, in a position that commanded the rear door of the car, so that no one could enter or go out there without his seeing it; and that no one came to that door during the plaintiff's absence except the train brakeman, who was employed by the railroad company, and not by the Pullman Company; that the brakemen and other trainmen are, by the rules of the Pullman Company, permitted to have ingress and egress to and from the Pullman cars; that this brakeman passed through the car, and out onto its rear platform, to take in the train signals during plaintiff's absence from the car; that no one else was in the car in the mean time, except witness and the porter; that witness did not take plaintiff's pocket-book, and did not know what became of it. The porter testified, for defendant, that he was in the forward end of the car while plaintiff was absent, and that no one could enter that end of the car without his seeing it; that no one entered that end during plaintiff's absence, except the train brakeman, who went through to take in the signals. He testified that he did not take the pocket-book, and did not know what became of it. This witness testified that the train brakeman, as he passed through the car, did not stop. Plaintiff, in rebuttal, testified that when he returned to the car the conductor and porter were both in the smoking-room. One of the passengers testified that he followed plaintiff on his return to the car, and that they found both the porter and conductor in the smoking-room. Plaintiff recovered, and the defendant appeals, and assigns errors as follows: *First*, because there was no evidence that defendant was negligent; *second*, because defendant was not a common carrier, and is not responsible for loss of property taken into its cars by passengers, unless such loss occurs through its negligence; *third*, because plaintiff's own negligence was the proximate cause of, and contributed to, his loss.

In the case of *Car Co. v. Pollock*, 69 Tex. 120, 5 S. W. Rep. 814, the following language of the supreme court of Massachusetts, used in deciding the case of *Lewis v. Car Co.*, 28 Amer. & Eng. R. Cas. 150, is quoted with approbation: "While it [the sleeping-car company] is not liable as a common carrier or as an innholder, yet it is its clear duty to use reasonable care to guard the passengers from theft; and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable therefor." We think this doctrine is as applicable to the case

now before us as it was in the cases in which it was asserted. The evidence suggests either that the plaintiff did not lose any money or that the servants of the defendant, or one of them, found and appropriated it. The district court found the issue in favor of the plaintiff, and the judgment is sufficiently sustained by the evidence to make it our duty to affirm it, following the rule always enforced in such cases. The position in which plaintiff left his money was unquestionably an act of negligence on his part; and, if the evidence did not so conclusively exclude the idea of its having been taken by anybody except the servants of defendant, who were in charge of the car, he ought not to have had a recovery, because of his own negligence. The fact, however, that plaintiff's negligence furnished the temptation and opportunity to defendant's servants to take the money did not release it from its obligation to protect him against them. The judgment is affirmed.

#### WARNER v. CROSBY.

(*Supreme Court of Texas. Dec. 3, 1889.*)

##### TRANSFER OF CAUSES—JURY FEE.

Rev. St. Tex. art. 8066, which provides for the payment of five dollars in the district and three dollars in the county court when a jury is demanded, does not require a defendant who pays the jury fee of three dollars in the county court to pay an additional fee when the case is removed to the district court, because the county judge is related to one of the parties.

**Commissioners' decision.** Appeal from district court, Upshur county; HOWARD TEMPLETON, Special Judge.

This was an action by B. F. Crosby, the appellee, against Charles Warner, appellant, originally brought in the county court of Upshur, but removed to the district court on account of the kinship existing between the county judge and one of the parties. The defendant, who had paid the jury fee in the county court, was denied a jury in the district court, and appeals.

*Moore & Hart* and *Geo. D. Hart*, for appellants. *Pettit & Crosby*, for appellee.

**Hobby, J.** This suit originated in the county court of Upshur county, and was instituted by the appellee, B. F. Crosby, against Charles Warner, the appellant, to recover the sum of \$250, etc., upon the allegations set forth in the petition, which are not necessary to be stated here, in order that the questions involved upon this appeal may be understood. The relationship of the county judge to one of the parties resulted in a transfer of the cause, at the November term, 1888, of the county court, to the district court of the county. It further appears that on July 2, 1888, the second day of the term of the district court, the case was tried by the judge, who rendered judgment for the plaintiff (appellee) for the amount sued for, from which this appeal is prosecuted upon assignments of error, as follows: "*First*. The court erred in denying the defendant (appellant) the right

of trial by jury, for the reasons set forth in bill of exceptions No. 1." The bill of exceptions referred to recites that the case was called for trial on the second day of the term. The plaintiff announced ready, and the appellant moved the court to place the same upon the jury trial docket, and that the cause be tried by a jury; it being an admitted fact that the defendant, prior to the transfer of the case from the county to the district court, and at the proper time prescribed by law, applied for and paid the jury fee in the county court, which entitled him to a trial by jury, to which the plaintiff objected, "because no jury had been demanded on the first day of the term of the district court, when the docket was called for jury and other orders, and the attention of the court was not called to the fact that said jury fee had not been paid in the county court until the cause was called for trial, and no additional sum was tendered by the defendant, and the jury for the week had been, on the first day of the term, discharged until appearance day, and because the demand and payment of the jury fee in the county court did not entitle defendant to a jury in this court." These objections were sustained, and the court refused to place the cause on the jury docket. The second error assigned is that, "the cause having been properly brought in the county court of Upshur county, and the defendant, while it was legally pending in said court, having demanded and secured his right to a jury trial, by a full compliance with the law giving him that right, no subsequent transfer of said cause to the district court, upon legal grounds, could deprive him of said right, and the district court erred in refusing the defendant the right of trial by jury." Such is a statement of the case, as presented to the record before us.

We are of opinion that the assignments of error are well taken. The demand for a jury, and the payment of the fee in the county court at the proper time, and in the sum prescribed by law, we think, entitled the party making such demand and payment to a jury; and this right we do not think was impaired by the fact that a transfer of the cause was subsequently necessitated by reason of the disqualification of the county judge. The payment of two distinct jury fees is expressly recognized by article 8066 of the Revised Statutes,—one of five dollars, when the demand is made in the district court, and one of three dollars, when made in the county court. No contingency is provided for by law which permits the payment in the district court of any sum less than five dollars as a jury fee. Hence the deposit of the sum of two dollars by appellant in that court, in addition to the three dollars paid in the county court, which, it is claimed by appellee, should have been done, would not have authorized the placing of the cause on the jury docket, because, if any jury fee is deposited in the district court, it is required to be no less a sum than five dollars. The appellant's

right to a trial by jury vested at the time of the payment of the fee of three dollars in the county court; and, unless this right was defeated by a transfer of the cause, under operation of law, to the district court, it followed the case to the latter tribunal. If the effect of the transfer was to destroy this right, then it follows that he would be required to pay a second fee for a jury in the district court, which we do not think is contemplated by the statute. We are of opinion that the appellant was entitled to have his cause tried by a jury in the district court; and, because he was denied this right, we think the judgment should be reversed, and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment is reversed, and cause remanded.

#### WILLIAMS *et al.* v. ELLINGSWORTH.

(*Supreme Court of Texas.* Dec. 17, 1889.)

#### MARRIED WOMEN—DEED—CERTIFICATE OF ACKNOWLEDGMENT.

Under Rev. St. Tex. art. 4818, requiring the certificate of acknowledgment to a married woman's deed to recite that she was privily examined apart from her husband, that the deed was explained to her, and that she declared that she had willingly signed it, and did not wish to retract it, a certificate which merely recites that "the grantors appeared before me in person, and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act, for the use and purposes therein set forth, including the release and waiver of the rights of homestead," is defective, and, in the absence of evidence that the wife was examined according to the statute, the heirs of the wife are not estopped to deny title in one who holds by purchase of the grantees.

Commissioners' decision. Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

This was an action brought by M. Ellingsworth against Eliza Williams and her daughters, Annie and Minnie Williams, heirs at law of Sarah Sandford, to establish title in himself to certain lands conveyed to him by Abraham Sandford and wife, Sarah Sandford. Judgment for plaintiff, and defendants appeal.

W. R. McLawry, for appellants. Oliver S. Kennedy, for appellee.

HOBBY, J. The appellee, M. Ellingsworth, on the 28th of December, 1887, sued the appellant Eliza Williams, and her minor daughters, Annie and Minnie Williams, who are the heirs at law of Mrs. Sarah Sandford, for the purpose of establishing title in himself to the land described in the petition as "Lot No. 5," containing 465 acres of the Hays Covington survey. He sought to correct and validate a deed executed by Abraham Sandford, and his wife, Sarah, in March, 1880, conveying her separate property, and the certificate of acknowledgment to which was defective, under the statute of this state regulating such certificates to the conveyances of sep-



arate property of married women. Appellee also contends that, if said deed was void, it was corrected by a valid conveyance, subsequently executed in November, 1885, by said Sarah Sandford, who was then a widow, and under whom appellee claims. The defense made by the heirs, the appellants, is that the first deed was void by reason of the fact that the certificate of acknowledgment thereto failed to state that Mrs. Sandford (who was a married woman) had been examined, privily and apart from her husband, and further failed to set forth that the contents of the instrument were explained to her by the officer, and that it did not disclose that she wished not to retract it. The appellants, also, deny that the deed of November, 1885, executed when Mrs. Sandford was a widow, embraced, or was intended to embrace, the land described in plaintiff's petition. The case, presenting these issues, was tried by the court without a jury. Judgment was rendered for the appellee, and it is now before us for review.

The material questions presented on this appeal, we think, are whether, under all the facts of the case, the deed of March, 1880, signed and acknowledged by Mrs. Sandford, conveyed the land to M. H. Presley, appellee's alleged vendor, it being her separate property, she being then a married woman, and the certificate of acknowledgment being fatally defective, as before indicated. If this be answered in the negative, the next question presented is, did the deed of November, 1885, which was executed by Mrs. Sandford when a widow, and which, it is claimed by the appellee, was executed for the purpose of correcting the defective instrument of March, 1880, convey the lot 5, containing 465 acres, the subject-matter of this suit? That relief will be afforded in a proper case, where a certificate of acknowledgment to the conveyance by a married woman of her separate estate is defective, and the facts authorize the officer to make a complete and perfect certificate, under the statute, is well settled in this state. In the well-considered case of *Johnson v. Taylor*, 60 Tex. 865, discussing this question, it was said that "equities of persons, claiming under instruments executed by married women, but not properly acknowledged and certified, have been recognized and protected," citing *Dalton v. Rust*, 22 Tex. 133, and *Womack v. Womack*, 8 Tex. 397. In the case quoted from it was held that, "while it is true that the statute must be complied with in order to pass title to a married woman's separate estate, it does not follow necessarily that an instrument willingly executed by her, and actually acknowledged as required by law, before a proper officer, is absolutely void, simply because the officer has failed to make the proper certificate which the facts authorized." Under the operation of this doctrine, there might have been a recovery by appellee, based upon the deed of 1880, executed by Mrs. Sandford, although the certificate was, as we have seen, defect-

ive, had the evidence established satisfactorily the facts that she had made the declarations prescribed by the statute, and the official duties required of the notary in this connection had been performed. The evidence in this case, however, failed to show a compliance with these essential requirements. The certificate of acknowledgment, while sufficient, it seems under the evidence, under the Illinois statute, is wholly wanting in the requisites prescribed by that of this state, (Rev. St. art. 4313;) and especially is this so with reference to the defects in the certificate already mentioned. The testimony of the notary, Randolph Smith, is not more satisfactory upon this point, in so far as it attempts to show a compliance with our law, than are the recitals of the certificate. He merely stated that "all the certificate set forth could be relied on as true; that he usually asked the parties executing a deed if they understood the nature of the instrument signed, and was it their free act," etc. Presley testified that "Mrs. Sandford proposed to sell the land to him, and he accepted the proposition; that he did not remember what was said at the execution of the deed of 1880; that he paid for the land, and everybody thought it was legal," etc. The certificate recited that the grantors "appeared before me this day in person, and acknowledged that they signed, sealed, and delivered the said instrument, as their free and voluntary act, for the use and purposes therein set forth, including the release and waiver of the rights of homestead." It requires nothing more than a statement of the foregoing evidence to show that the certificate was defective under our statute, and that there were no facts authorizing the officer to make such certificate as the law prescribed. It does not appear that she was examined privily and apart from her husband, nor that it was explained to her, nor that she declared that she wished not to retract it. It is argued by the appellee, that the appellants are estopped by the acts and conduct of Mrs. Sandford, under whom they claim as heirs. But the evidence does not disclose such facts as would constitute an estoppel against her heirs, by reason of any misrepresentations or acts on her part, relied and acted on by appellee, so as to operate as a fraud, in event of a recovery by appellants. She proposed to and did sell the land to Presley, received the purchase money, expressed herself as satisfied with the sale, and permitted appellee to take possession and erect valuable improvements thereon, and pay taxes since 1880; but no material facts were suppressed nor false representations made by her to induce the purchase. *Johnson v. Bryan*, 62 Tex. 625. The evidence outside of the deed of 1885 is very meager. Without further proof to identify the description in the deed of November, 1885, with lot No. 5, we are unable to say that the court's finding on that subject, is correct. The relative position of lots 3, 4, and 5 and the Creswell survey should be shown. We

think, also, that more satisfactory proof should be made of title in appellee, M. Ellingsworth, than appears in the record. We think the judgment should be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment is reversed, and cause remanded.

SMITH v. MOSELEY.

(Supreme Court of Texas. Oct. 29, 1889.)

COUNTIES—DEFAULT OF AGENT—ESTOPPEL—PARTIES.

1. Where a county employs an agent to sell its school lands at a value fixed by the commissioners' court, and subject to the approval of said court, and the lands are sold at less than the fixed price, but the sale is reported to the court while busily engaged, and the agent prevents a delay for examination of the report, by assuring the commissioners that the sale is in full compliance with the terms and prices fixed, and the purchaser is waiting for his deed, the approval of the sale constitutes no bar to an action by the county to recover of the agent the amount lost by the sale.

2. No issue having been raised as to the authority for bringing the suit, it was not a ground for dismissal that it was brought in the name of the county judge to the use of the county.

Appeal from district court, Marion county; JOHN L. SHEPPARD, Judge.

This was an action brought by S. W. Moseley, county judge of Marion county, against John T. Smith, to recover money due the county under a contract for the sale of school lands. Judgment for plaintiff, and defendant appeals.

H. McKay, for appellant. L. S. Schluter, for appellee.

HENRY, J. The county of Marion made with John T. Smith a contract in writing by which Smith was employed to sectionize the school lands belonging to the county; and, after they were classified and valued by the commissioners' court of said county, he was authorized to sell them at the value fixed upon them by the county. When sales were made they were to be reported by Smith to the commissioners' court, for its approval, before being completed. This suit grew out of a sale of 19 sections made and reported to the commissioners' court by Smith for a price of \$1,000 less than the value placed upon them by the county. The petition filed by the county against Smith for the recovery of the \$1,000 difference charges that at the time said report of sale was made to it said court was busily engaged upon other important business of the county, and, because it would require some time to examine the report, requested Smith to leave it before the court for that purpose, but Smith assured the court that the sale was in full compliance with the terms and prices fixed by the court, and that the purchaser was waiting for his deed, and that, if said sale was not in full compliance with the terms and prices as fixed by the court, he would be responsible therefor, and

make any defect good to the county; and that said court, relying upon such representations and promises, approved said report and sale; and that after the approval of the report the court investigated the sale, and ascertained that it, as reported and approved, was for \$1,000 less than the price fixed upon the land by the court. The suit was brought in the name of S. W. Moseley, county judge of Marion county, for the use of said county. The district court overruled exceptions to the petition upon the grounds—*First*, that the county was estopped by its approval of defendant's report of the sale; *second*, that the suit cannot be maintained in the name of plaintiff for the use of the county. Upon the verdict of a jury, judgment was rendered in favor of plaintiff for \$1,000 and interest. The facts alleged in the petition were substantially proved. The defendant testified, denying that he had promised to make the sale conform to his contract with the county, if the report failed to show it was so. Two witnesses—one a county commissioner and the other the county treasurer—testified, substantially, that he did make such promise. While it may be readily admitted that the county commissioners' court was guilty of culpable negligence in approving the report, however much urged to do so, without examining it sufficiently to see that the sale was made in pursuance of the instructions given the agent of the county, we yet cannot approve the proposition that the agent of the county shall be permitted to make profit for himself, at the expense of the county, by influencing the court to disregard its duty. In such a case, even without the promise to make the transaction conform to his contract, alleged to have been made by him in this case, he ought to be held to make the loss to the county good if the failure of the court to ascertain the wrong was to any extent knowingly induced by him. In justification of the commissioners' court it was proved that, with the exception of the judge, it was "a new one."

In support of the proposition that the suit ought to have been dismissed because it was brought in the name of S. W. Moseley for the use of Marion county, instead of in the name of the county itself, we are referred, by appellant's counsel, to the cases of *De la Garza v. Bexar Co.*, 31 Tex. 484, and *Looscan v. Harris Co.*, 58 Tex. 514. The case in 31 Tex. is in point, and it holds that the case ought to have been dismissed, MORRILL, C. J., saying: "There is nothing in this case that goes to show that any other officer of the county, except the chief justice, had anything to do with bringing the suit, or any knowledge of its pendency. Being in the name of the chief justice, he, and not the county, had the legal control of the suit." On the contrary, in the case of *McFadin v. MacGreal*, 25 Tex. 73, where the suit was brought by James McFadin for the use of Jack Davis and MacGreal, the defendant set up a demand in re-convention against McFadin; and, the plain-

tiff failing to further appear or prosecute his suit, MacGreal, on an *ex parte* trial, took judgment against McFadin. This court, on appeal, reversed the judgment, WHEELER, C. J., saying: "It is Davis who uses his name, it may be without his knowledge or consent, who is the real plaintiff, and the only party who seeks to litigate in that capacity his own demand against the defendant. \* \* \* He [McFadin] is merely a nominal party upon the record. Before a judgment can be recovered against him, it is very clear that he must be made a real party. \* \* \* It can only be as any other party is brought into court, and subjected to its jurisdiction over his person, by the service of process upon him." And see *Heard v. Lockett*, 20 Tex. 162. The question in the case of *Looscan v. Harris Co.*, as stated, in the opinion of Presiding Judge WALKER, was: "Whether the district attorney may, under the authority conferred on him as such officer, institute this action in the name of 'the county of Harris,' without the consent, and against the will, even, of the commissioners' court of said county." The petition alleged that the commissioners' court have refused to bring or authorize the bringing of the suit. No question was made in the case before us about its being brought by authority of the county. Under the above cited authorities, the county was the real plaintiff; and the suit appearing to be prosecuted for its benefit, and upon a cause of action belonging to it, no issue as to the authority by which it was being maintained could have been made, except by a plea in abatement. We can recognize no distinction in principle between a case like the present, where the name of a person having no connection with the controversy is used as plaintiff, for the use and benefit of the real party at interest, and the reported cases, where the person who sued for the use of another had a naked legal, but no beneficial, interest. The suit would properly have been brought in the name of Marion county, and the use of another name as plaintiff would properly have been stricken out as surplusage. The judgment is affirmed.

#### CITY OF JEFFERSON v. JONES.

(*Supreme Court of Texas*. Oct. 29, 1889.)

##### JUDGMENT BY DEFAULT.

Upon an appeal it was held that a cause had been improperly dismissed, and that plaintiff was entitled to judgment by default. Upon the first day of the next term of the trial court, plaintiff demanded judgment by default, and the case was taken under advisement. On the next day defendant's attorney filed an answer, demanded a jury, and deposited the jury fee. *Held*, that it was error to thereafter render a judgment by default.

Appeal from district court, Marion county; JOHN L. SHEPPARD, Judge.

This was an action by Erastus Jones against the city of Jefferson on certain bonds, coupons, and notes. Judgment for plaintiff, and defendant appeals.

*Geo. T. Todd, P. H. Rowell, and L. S.*

*Schluter*, for appellant. *H. McKay*, for appellee.

HENRY, J. This suit was instituted in the year 1883 by appellee upon certain bonds, coupons, and notes executed by the city of Jefferson. Questions with regard to the service of process upon defendant were acted upon by the court, resulting in an order dismissing the cause for want of service. On appeal by the plaintiff to this court, it was held that the service of citation upon defendant was good, and, instead of the order dismissing his cause, plaintiff was entitled to a judgment by default. 66 Tex. 576, 1 S. W. Rep. 903. The mandate of this court having been issued, the plaintiff, at the next term of the district court, and on the first day of the term, it being the 20th day of December, 1886, demanded a judgment by default. On the same day a jury was demanded in behalf of defendant by attorneys then claiming to represent the city, and who, the evidence shows, were on the next day, by formal action of the city council, authorized to represent it in the cause. The jury fee was paid by the attorneys making the demand on the first day of the term, December 20, 1886. When judgment by default was demanded by plaintiff, the cause was taken under advisement by the court. On the next day, the 21st day of December, an answer for defendant was filed. Afterwards, at the same term, on the 22d day of January, 1887, the case was called, at the court's own motion, and a judgment by default was rendered, reciting that the cause had been with the court for consideration since the first day of the term. In the same order, the court overruled plaintiff's motion to strike the cause from the jury docket, and directed it to be continued until the next term, to be tried with a jury on a writ of inquiry. At the next term the writ of inquiry was tried with a jury, resulting in a verdict which was set aside by the court at the instance of plaintiff. The motion of plaintiff was to set aside the verdict, and the judgment rendered on it, and to hold still in force the judgment by default, and such was the judgment of the court, against the contention of defendant that the judgment ought to be set aside as a whole, including the default. Plaintiff complained of the verdict, because it was for an amount greatly below his demand. At the June term, 1889, plaintiff renewed his motion to strike the cause from the jury docket, and the court so ordered, and directed the clerk to assess the damages. This was properly done, and final judgment entered for the amount by him assessed. The defendant appeals. At any time before a judgment by default has been actually announced by the court, a defendant has the right to file his answer. Rules that may properly control the practice of district courts when causes are taken under advisement by the judge have no application when the only question is the right of the plaintiff to take a default. We deem it unnecessary

to discuss the other grounds of error, as they cannot arise again in this cause, and, because of the error of the court in rendering judgment by default when the defendant had an answer on file to which the attention of the court had been called, we reverse and remand the cause.

#### LILIENTSTERNE v. LEWIS.

(Supreme Court of Texas. Oct. 20, 1889.)

##### APPEALABLE JUDGMENTS.

Where suit is brought against two partners, and the judgment entry only names one of them, and, so far as the record discloses, there is no disposition of the case as to the other partner, there is no final judgment from which an appeal can be taken.

Appeal from district court, Titus county; **FELIX J. McCORD**, Judge.

This was an action by Charles E. Lewis against M. & M. E. Liliensterne, partners, on open account. Judgment for plaintiff against M. Liliensterne, who appeals.

*S. P. Pounders*, for appellant.

**GAINES, J.** This suit was brought by appellee, to recover of appellant, M. Liliensterne, and one M. E. Liliensterne, as partners composing the firm of M. E. Liliensterne & Co., a sum alleged to be due on open account for goods sold. Both defendants answered, setting up in part separate defenses. A trial was had before the court without a jury, and a judgment rendered in favor of appellee, against appellant. M. E. Liliensterne is not named in the judgment entry; and, so far as the record discloses, there was no disposition of the case as to her. Without such disposition, there is no final judgment upon which process may issue, or from which an appeal can be taken. *Bradford v. Taylor*, 64 Tex. 169, and cases there cited. This court has no jurisdiction of the case, and the appeal is therefore dismissed.

#### TALIAFERRO v. CARTER et al.

(Supreme Court of Texas. Oct. 20, 1889.)

##### SERVICE BY PUBLICATION—APPEAL.

Under Rev. St. Tex. art. 1845, providing that, where defendants are cited by a publication, a statement of the evidence, approved and signed by the judge, shall be filed with the papers of the cause, as part of the record, a judgment for plaintiff in an action of trespass to try title will not be reversed, at the instance of plaintiff himself, for a failure to file the evidence as required.

Appeal from district court, Titus county; **FELIX J. McCORD**, Judge.

This was an action of trespass to try title brought by J. M. Taliaferro against Addison Carter and the unknown heirs of John Binion. The plaintiff obtained judgment, but appeals, because no statement of the evidence has been filed as part of the record.

*J. B. Stringer*, for appellant. *Snodgrass & Snodgrass* and *S. B. Pounders*, for appellee Carter.

**STAYTON, C. J.** Appellant brought this action of trespass to try title against Addison Carter and the unknown heirs of John Binion. Carter answered, and the unknown heirs of Binion were cited by publication, and represented by an attorney appointed by the court, they not appearing. A judgment was rendered in favor of appellant for one-sixth of the land sued for, and he now prosecutes a writ of error, and seeks a reversal on the sole ground that there was no statement of the evidence, approved, signed by the judge, and filed with the papers of the cause, as a part of the record, as is required by article 1845, Rev. St. That provision of the statute was enacted for the protection of defendants cited by publication; and, while it has been held that the failure to file such a statement would be ground for reversal, when asked by one injured thereby, we are not prepared to reverse a judgment on that ground alone, when we are asked to do so by one whose duty it was to see that the statement was filed. The judgment of the court below will be affirmed, but without prejudice to the right of the unknown heirs of John Binion hereafter to question its validity as to them, in any manner permitted by law. It is so ordered.

#### BAUGUSS v. CITY OF ATLANTA.

(Supreme Court of Texas. Oct. 20, 1889.)

##### MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS.

A city incorporated under the general laws of Texas is liable for injuries caused by the omission or negligence of its street commissioner to perform his duties in keeping the public sidewalks in a safe condition.

Appeal from district court, Cass county; **JOHN L. SHEPPARD**, Judge.

This was an action for damages brought by John A. Bauguss against the city of Atlanta. Defendant demurred to the petition, on the ground that it was incorporated under the general laws of Texas, and not liable as other cities specially incorporated. Judgment for defendant, and plaintiff appeals.

*J. M. Adams, O'Neal & Son*, and *L. S. Schluter*, for appellant. *J. H. Henderson, Travis Davidson*, and *O'Neal & Eberhardt*, for appellee.

**STAYTON, C. J.** This action was brought by appellant against appellee, alleged to be a city incorporated under the general laws of this state, to recover damages for an injury alleged to have been received by him in falling upon one of the public sidewalks of the city, claimed to have been in unsafe condition through appellee's negligence. The averments of the petition are in all respects such as would entitle appellant to recover, if a city so incorporated is liable for an injury received by appellant, as alleged, in the absence of a statute expressly so making it. General and special demurrers to the petition were sustained. The latter was as follows: "Defendant, further answering, demurs specially, and says the defendant, the city of Atlanta, being

incorporated under the general laws of the state of Texas, as stated in plaintiff's petition, and only exercising powers conferred on it by the general laws of Texas, which in their nature are essentially public, and there being no cause of action given by any statute of said state or any ordinance of said city, defendant is not liable in this action for damages for the omission or negligence of J. E. Howe, street commissioner, to perform his duties as such street commissioner." It is claimed that appellee is not liable as it would be if it had been incorporated by a special act of the legislature with powers and duties no greater than are conferred upon such cities and towns as incorporate under the general laws of this state. The reasons why *quasi* municipal corporations, created by general laws applicable to all such subdivisions of a state, for the better accomplishment of essentially public purposes, are not held liable for injuries resulting from the neglect or misfeasance of their officers, unless such liability is fixed by statute, has been considered in many cases, some of which are referred to in *City of Galveston v. Posnainsky*, 62 Tex. 119. It is not seen, however, why a city or town which incorporates under the general laws of this state, through the voluntary act of its inhabitants, for the benefit of the particular locality and its residents, should not be held responsible for an injury inflicted under circumstances which would fix liability on a city or town, incorporated by a special act of the legislature, clothed with the same powers and charged with the same duties. In the one case as in the other the charter is special, and in either case, in fact or presumptively, obtained through the request or voluntary act of those who seek benefit through the execution of the powers conferred. If there be any difference, it is not in favor of such cities and towns as by the voluntary act of their inhabitants incorporate under the general law; for, as to them, there is wanting the element of compulsory incorporation, and their inhabitants must be presumed to have weighed the local benefit to be obtained by incorporation before they asked that the powers be conferred upon them which fix the corresponding duty carefully to exercise them. The general question has been so often considered that we do not deem it necessary again to discuss it. *City of Galveston v. Posnainsky*, 62 Tex. 118; *Galveston v. Barbour*, Id. 172; *Klein v. City of Dallas*, 71 Tex. 284, 8 S. W. Rep. 90. We think the court erred in sustaining the demurrers, and its judgment will be reversed, and the cause remanded.

#### MUNZESHEIMER v. WICKHAM.

(*Supreme Court of Texas*. Oct. 29, 1889.)

##### APPEAL-BOND.

Rev. St. Tex. art. 2201, provides that an administrator appealing from an order of removal shall give a bond with two or more good and sufficient sureties, "payable to the county judge," "conditioned that the appellant shall prosecute said appeal to effect, and perform the decision, order, decree, or

judgment which the district court shall make therein, in case the cause shall be decided against him." *Held*, that the statute contemplates an obligation to pay money, and that a bond which merely recites that the principal and sureties "acknowledge" themselves to be held and firmly bound unto the county judge, "conditioned that said A. B., appellant, shall prosecute his said appeal," etc., is not such an obligation.

Appeal from district court, Cass county; JOHN L. SHEPPARD, Judge.

This was an appeal to the district court of Cass county by Max Munzesheimer upon his removal as administrator, and the appointment of Mary A. Wickham, the widow of the intestate. The district court found the appeal-bond insufficient to perfect his appeal, and from that judgment he now appeals.

*Talbot & Turner*, for appellant. *O'Neal & Son*, for appellee.

STAYTON, C. J. Appellant, having been appointed administrator of the estate of W. J. Wickham, was removed on application of appellee, who was the widow of the intestate, and she appointed in his place. Appellant gave notice of appeal to the district court, and to perfect his appeal executed a bond, which, after the requisite recitals, contained the following language: "Therefore we, Max Munzesheimer, as principal, and ———, as sureties, acknowledge ourselves to be held and firmly bound unto the county judge of Cass county, in the state of Texas, conditioned that the said Max Munzesheimer, appellant, shall prosecute his said appeal to effect, and perform the decision, order, decree, or judgment which the district court shall make therein, in case the cause shall be decided against him. Witness our hands," etc. In the district court a motion was made to dismiss the appeal on the ground that there was no sufficient appeal-bond, and the motion was sustained, from which ruling this appeal is prosecuted. To perfect an appeal in this class of cases, the statute provides that the party must "file with the county clerk a bond, with two or more good and sufficient sureties, payable to the county judge, and to be approved by the clerk, conditioned that the appellant shall prosecute said appeal to effect, and perform the decision, order, decree, or judgment which the district court shall make thereon, in case the cause shall be decided against him." Rev. St. art. 2201. The only question is, is the bond in question, in substantial, the bond required by the statute? The statute requires that the bond shall be "payable to the county judge," by which we understand to be meant that the bond on its face shall bind its makers to pay the person named such sum as may be necessary to satisfy the decision, order, decree, or judgment to be rendered. The bond before us contains no promise or obligation that the principal or sureties will pay any sum of money, in any event. It declares that its makers acknowledge themselves "to be held and firmly bound," but does not declare what they acknowledge themselves "to be held and firmly bound" to do.

The bond contemplated by the statute is an obligation to pay money, and an instrument which does not so bind its makers is not such an instrument as the statute contemplates, even though it may contain words which show that it was the intention of its makers to assume some obligation not stated. As said in *Hicks v. Oliver*, 71 Tex. 776, 10 S. W. Rep. 97: "The word 'payable' indicates that a sum should be named to be paid, as the word 'conditioned' indicates that there was to be an obligation to pay a specific sum;" but a bond would doubtless be good, under the statute in question, which, without naming a sum, bound its makers to pay such sum as might be necessary to satisfy the judgment, decision, order, or decree to be rendered by the appellate tribunal. The obligation to pay must arise from the words of the bond, but, if this can be fairly shown to have been so created, it matters not how inartistically the bond may have been drawn. It is not the purpose of the condition of a bond to impose an obligation, but to state the facts on performance of which the obligation assumed in the obligatory part of the instrument will cease to have effect; and the fact that the condition stated may be such as would have been proper, had the preceding part imposed on the makers the obligation to pay which the statute requires, cannot fix on them an obligation which they did not impose on themselves by the use of proper and necessary words. In the case before us, compliance by the principal with the conditions named in the bond would relieve its makers from all obligation arising upon it, but neither the condition nor compliance therewith can impose an obligation other than that imposed by the language used in the instrument. The makers not having placed on themselves the obligation required by the statute, the appeal was never perfected, and the court below correctly so held. The judgment will be affirmed.

**BLACK v. WICKHAM.**

(*Supreme Court of Texas.* Oct. 29, 1889.)

Appeal from district court, Cass county; JOHN L. SHEPPARD, Judge.

This was an action by A. Black against Mary A. Wickham, and appealed to the district court, whence it was dismissed for an insufficient appeal-bond. From the dismissal plaintiff appeals.

*Talbot & Turner*, for appellant. *O'Neal & Son*, for appellee.

STATTON, C. J. Appellant presented to Max Munzesheimer, then the administrator of the estate of W. J. Wickham, a claim against the estate, which was by the administrator allowed, and then placed on the claim docket, for approval by the county judge. Mary A. Wickham, who was interested in the estate, opposed the approval of the claim, and on hearing it was disallowed by the county judge. From this action of the court the appellant attempted to prosecute an appeal to the district court, but, on motion in that court to dismiss the appeal for want of a sufficient appeal-bond, it was dismissed, and the correctness of the ruling in that respect is the only question now presented. The obligatory part of the bond, as well as the condition, were the same as in the appeal-bond

considered in the case of *Munzesheimer v. Wickham*, ante, 751, (this day decided,) and for the reasons given in that case we hold that the ruling of the court below was correct, and its judgment will be affirmed.

**MARK v. WICKHAM.**

(*Supreme Court of Texas.* Oct. 29, 1889.)

Appeal from district court, Cass county; JOHN L. SHEPPARD, Judge.

This was an action by Joe Marx against Mary Wickham, commenced before the county judge, who decided adversely to plaintiff; whereupon he appealed to the district court, which dismissed his appeal for the want of a sufficient appeal-bond. From this dismissal plaintiff appeals.

*Talbot & Turner*, for appellant. *O'Neal & Son*, for appellee.

STATTON, C. J. The question presented in this case is the same as that presented in *Munzesheimer v. Wickham*, and *Black v. Same*, ubi supra, (this day decided,) and, for the reasons given in the case first named, the judgment rendered in this by the court below will be affirmed.

**TOLBERT v. McBRIDE.**

(*Supreme Court of Texas.* Nov. 12, 1889.)

ADMINISTRATORS—ACTIONS AGAINST—AMENDMENT OF PLEADINGS.

1. Where the petition in an action against an administrator on a note of his intestate fails to allege that the note was for valuable consideration, or to state the precise date of the transfer to plaintiff, and that plaintiff is still the owner, an amendment curing these formal defects does not constitute a new cause of action entitling defendant to plead the statute of limitations prescribed in case of failure to bring suit within 90 days after a claim is rejected by an administrator.

2. A judgment against an administrator is not invalidated by failure to prove that he is the administrator of the person who signed the note sued on, where there is no special plea that he is not the administrator, but a mere general denial.

3. Under Rev. St. Tex. art. 2028, providing that the memorandum of the executor or administrator, indorsed on claims presented to him, may be given in evidence, to prove the facts stated therein, without proof of the handwriting, unless the same is denied under oath, where the note sued on has a rejection indorsed with defendant's name, without being signed as administrator of the estate sued, it sufficiently proves the presentation and rejection of the note, in the absence of a sworn denial and of evidence to show that there is another person bearing the same name as himself.

Commissioners' decision. Appeal from district court, Wilbarger county; P. M. STINE, Judge.

This was an action brought by Dave McBride against J. H. Tolbert, administrator, on a note made by defendant's intestate. Judgment for plaintiff, and defendant appeals.

*H. Clay Thompson, W. W. Flood, and McGhee, Litterley & Elliott*, for appellant. *Dave McBride*, for appellee.

COLLARD, C. The appellant concedes that the averments of the original petition were sufficient, except in the following particulars: It did allege that the note was made, executed, and delivered, but failed to allege that it was so done for a valuable consideration; it did allege that it was transferred to plaintiff by the payee for a valuable consideration, after its execution, but failed to state the precise

date, and it failed to allege that plaintiff was still the owner. The amendment cured these defects by formal allegations, and appellant insists that in so doing a new cause of action was set up, which, being done more than 90 days after the note, as a claim against the estate, had been rejected by the administrator, it was barred by the limitation prescribed by the statute in such cases. We cannot agree to this. The original suit and the amendment set up the same note, the same liability, and the same right in the plaintiff. The omission of formal allegations in the original petition, as stated, were amendable, and the amendment related back to the filing of the original petition. *Thouvenin v. Lea*, 26 Tex. 613; *Kendall v. Riley*, 45 Tex. 20; *Jones v. George*, 56 Tex. 152. A promissory note imports a valuable consideration, and none need be proved, even when a sworn answer is filed, impeaching the consideration, when no evidence is offered to support the plea. The filing of the plea does not shift the burden of proof, nor does the holder to whom a note is indorsed in full have to prove that he paid value. He is *prima facie* a holder for value. Defendant offered no evidence in support of his pleas. In such case the production of the note, with the indorsement, makes a *prima facie* case. *Jones v. Holliday*, 11 Tex. 413; *McAlpin v. Finch*, 18 Tex. 885; *Watson v. Flanagan*, 14 Tex. 353; *Harris v. Cato*, 26 Tex. 339; *Knight v. Holloman*, 6 Tex. 153; *Rev. St. arts. 266, 267, 271, 272.*

Appellant insists that there was error in the judgment because there was no proof that he was the administrator of the estate. No such proof was required. He had not put the matter in issue by a special plea that he was not the administrator, and the general denial did not put the fact in issue. 3 *Walt, Act. & Def.* 270; *Williams, Ex'rs*, 1654, 1655; 3 *Chit. Bl. Comm.* 940, note; *Cheatham v. Riddle*, 12 Tex. 112. Appellant also contends that there was no proof that the claim was presented to the administrator, and rejected by him, and therefore the judgment was erroneous.

There is a rejection of the claim indorsed on it on May 16, 1886, by J. H. Tolbert. He did not sign "as administrator of the estate" sued, and there was no evidence that he was the person sued as administrator, or that he was in fact the administrator. It is the law that, to maintain the suit, it must be averred and proved that the claim was presented to the administrator of the estate, and rejected. *Fulton v. Black*, 21 Tex. 425; *Hall v. McCormick*, 7 Tex. 278; *Gaston v. McKnight*, 43 Tex. 624. But the statute provides that "the memorandum in writing of the executor or administrator, indorsed on or annexed to such claim, may be given in evidence to prove the facts therein stated, without proof of the handwriting of such executor or administrator, unless the same be denied under oath." *Sayles, Tex. Civil St. art.* 2028. The indorsement on the claim in this case must be deemed sufficient to prove the presentation

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and rejection of the claim, in the absence of a sworn denial of the facts. It is true that J. H. Tolbert is not proved to be the identical person sued, and who answers as defendant; but, in the absence of proof, it would be presumed that he is the same person. He was alleged to be the administrator, or J. H. Tolbert was alleged to be such administrator; the claim was alleged to have been presented to, and rejected by, him; and J. H. Tolbert answered the suit as defendant. If there were two persons of the name, and the one sued was not the person who signed the memorandum indorsed on the claim, it was the duty of defendant to show it. Such facts will not be presumed. Finding no error in the judgment of the court, we conclude it ought to be affirmed.

STAYTON, O. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

#### SHELLEY v. CITY OF AUSTIN.

(*Supreme Court of Texas. Oct. 20, 1889.*)

#### DEFECTIVE STREETS—EXPERT EVIDENCE—INSTRUCTIONS.

1. In an action against a city for personal injuries caused by the alleged defective construction of two bridges,—one a wagon way, and the other a foot bridge,—whereby an open space over a gutter was left between them, about ten feet long, four feet wide, and two feet deep, expert evidence is not admissible on the question as to whether the opening was dangerous.

2. Neither are the opinions of non-expert witnesses who have examined the place, and who are able to state the facts on which their opinions are based, admissible.

3. Where it appears that plaintiff, while riding on horseback, was injured by her horse's falling backward into the open space between the two bridges, evidence that another person had been injured at the same place by falling from the foot-bridge is not admissible on the question of notice, as it has no tendency to show that the wagon-way was unsafe for travel on horseback.

4. An instruction that if the jury, looking to all the circumstances, find that the city used ordinary care and prudence in keeping the bridge in the dimensions shown,—that is, if the bridge was reasonably safe for the public,—then to find for the city; but if the city failed to exercise such care, etc., then to find for plaintiff,—sufficiently submits to the jury the question whether the bridge was of sufficient dimensions to relieve the city of negligence in its construction and keeping.

5. Plaintiff, who was 18 years of age at the time of the accident, was bound to use that degree of care which an ordinarily prudent person would use in like circumstances to avoid the injury.

Commissioners' decision. Appeal from district court, Travis county.

Action by Maud M. Shelley, a minor, by R. C. Shelley, as next friend, against the city of Austin, for personal injuries. The accident occurred on a wooden wagon bridge, over a gutter, running across Pecan street where it enters Congress avenue. The wagon bridge is about 10 feet 8 inches wide, and is short about 3 feet at each end of the outer line of the sidewalk. There is an iron foot-bridge, 4 feet wide, extending across the gutter from the avenue, leaving an open space



between the iron bridge and the wagon bridge of 4 feet 7 inches in width, 10 to 12 feet in length, and where plaintiff fell it was 2 feet 3 inches in depth. There was a verdict for defendant, and from an order overruling her motion for a new trial plaintiff appeals.

*Jas. H. Robertson*, for appellant. *Mawey & Fisher*, for appellee.

COLLARD, J. It is insisted in appellant's brief that expert testimony was admissible to prove that the bridge at the point where plaintiff was injured was improperly constructed, because it was not built entirely across the street at the north end of the bridge, rendering the crossing dangerous. It was admitted by plaintiff, on the trial, that the two bridges were constructed in a good and workmanlike manner, and of good, sound material, and it was also admitted that the issue in the case was: "Was the street crossing rendered unsafe by leaving the opening between the two bridges?" One of the bridges was the carriage-way across the gutter across Pecan street where it entered Congress avenue from the west; the other was a foot-bridge near the north end of the wood bridge leading from the avenue onto the pavement. The wooden bridge or wagon-way was so constructed that it lacked nearly three feet of reaching the foot-bridge, which left at the north and south ends of the wagon-way an open space between the bridges over the gutter, which was two feet three inches deep in the center. It was at the north end of the crossing where plaintiff was hurt, by her horse falling backward into the space between the two bridges. It occurred as follows: Four couples of young people were taking a pleasure ride in the city of Austin about 8½ P. M. For some purpose, they intended to form a line on this wooden bridge. The first two couples rode onto the crossing, the plaintiff being on the outside, next to the north end of the crossing, at the open space between it and the foot-bridge. They halted, or were moving slowly, to allow the two other couples, who were behind, to ride up, and form in a line on the right. During this maneuver, and while the plaintiff's horse was only moving very slowly, if at all, his hind feet missed the end of the bridge, and he fell backwards. From some statements in the testimony, it might be inferred that plaintiff's horse was backing, or that he was jerked by plaintiff, causing him to back, or step out of line, at the time he fell. His hind feet went in first.

The rule as to the admissibility of expert testimony is not subtle or hard to understand, but it is sometimes difficult to draw the line, and say where it should stop. It has been said that it is admitted on the ground of necessity. In the investigation of a subject where special knowledge or skill is required to deduce from the facts a reliable opinion, and where the ordinary juror would not be presumed to understand the subject, or to be competent to form a correct conclusion from

a given state of facts, then, of necessity, the jury must be instructed by persons possessing the requisite special information. But when the inquiry is about a matter that may be understood by one man of sense as well as another, where no special course of study or training is required to understand it, opinions of experts are rejected. In such cases the facts must be stated, and the jury allowed to draw their own conclusions. For instance, as to mechanical experts, where a horse escaped, and passed over a cattle-guard on a railroad, and was killed by a moving train, it was held error to allow an expert to testify that the guard was properly constructed. The description of the guard floor was enough to enable the jury to say whether cattle could pass over it. *Lawson*, Exp. Ev. 94, 95. Where one span of a bridge, consisting of several spans, fell while the plaintiff was crossing it, it was held error to permit experts to testify that "it was caused by the water and ice raising the bents, whereby the stringers were displaced." The court said: "They [the jury] required no opinion of experts to enable them to determine whether water and ice, under given conditions, would or would not raise the bents of the bridge." *Hughes v. County of Muscatine*, 44 Iowa, 676. In *Railway Co. v. Conroy*, 68 Ill. 564, it was held that the opinions of experts were of no value when other witnesses had testified as to the facts themselves that caused the bridge to give way; the cause being rotten timber and supports. See *Stolp v. Blair*, 68 Ill. 541.

In the case at bar the facts are simple. There is no defect in either of the bridges as structures. It is said, on the one hand, that the space between the bridges is dangerous to travel; that the wood bridge should have been constructed to the foot-bridge, and so covered the opening. It was contended, on the other, that the bridge was long enough for travel, when used as it should have been, and was intended to be. The dimensions of the bridge are given,—54 feet long,—the width of the open space, depth of the gutter, and all the physical facts necessary to a complete understanding of the question, together with the circumstances attending the accident itself; and, this being so, we are unable to see any necessity for calling in a scientific person to explain or decide any matter at issue. There is no question of science, art, or professional skill involved; only a simple question, the facts of which are open to the sense and observation of common men, and about which a juror of ordinary intelligence would be as competent to judge as the best engineer or mechanic. There is no question about whether the bridge be weak, sufficiently supported, or safe as a bridge; but the simple question is, should it have been built longer, and is it a dangerous crossing? We think the court correctly ruled that experts were not needed to aid the court or jury in determining the question. We think the court ruled correctly in excluding the

opinions of other persons, not experts, who knew the place, had examined it, and were able to state the facts upon which their opinions were based as to whether the crossing was dangerous. In an action against a turnpike company for injuries caused by falling into an excavation on its road, opinions of persons, not adepts, as to whether the hole was dangerous were held inadmissible. *Turnpike Co. v. Coover*, 26 Ohio St. 521, the court said: "Whether that place in the road was dangerous was a question for the jury, and not for the witnesses. It was not a question of science or art, nor was it one where the jury could not be put in possession of all the facts necessary to its decision." In the case of *City of Parsons v. Lindsay*, 26 Kan. 490, the plaintiff, while crossing a street in the city about midnight, stepped from a street crossing into a gutter, and was injured. "The crossing had formerly extended over the gutter, making the surface of the sidewalk and the crossing continuous; but, several weeks before the accident occurred, an abutting lot-owner had cut off the planks composing the crossing, for the purpose of putting in stone curbing and guttering, and, after putting them in, left the gutter uncovered." Opinions of witnesses cognizant of the facts were admitted by the trial court. The supreme court, on review, stated the general rule that opinions of witnesses are not competent, "although such opinions may be derived from witnesses' personal observation, and are sought to be given in evidence, in connection with the facts on which they are based." The court proceeds to note the exceptions, as where experts are allowed to testify whether cognizant of the facts or not, and other exceptions, where, from the nature of the inquiry, the facts cannot well be put before a jury without involving an opinion. The court then proceeds: "The present case, however, does not come within any of the exceptions, but comes within the general rule;" and concludes that "all the circumstances, however, should have been given to the jury, and then the question whether the crossing was safe or unsafe should have been left to the jury." See, also, *Kelley v. Town of Fond du Lac*, 81 Wis. 179; *Tuttle v. City of Lawrence*, 119 Mass. 276; *Oleson v. Tolford*, 37 Wis. 330.

The court below, we think, correctly refused to permit plaintiff to prove by J. M. Thornton that, previous to the date of the injury to plaintiff, he had fallen into the same hole where plaintiff was injured; that the city had notice of the fact, and had not repaired the place. Thornton fell from the foot-bridge, and the evidence was objected to on this ground. Such evidence would not tend to show that the wood bridge was unsafe for travel on horseback.

Appellant assigns as error the following extract of the court's charge: "If they [the jury] find that the bridge was reasonably safe and sufficient for the public, then they will find for the defendant." Appellant says this

is error, because the issues were: "(1) Had the defendant rendered the street crossing dangerous by constructing the bridge of a width less than the traveled portion of the street, thus leaving an uncovered hole in the street? and (2) was it negligence in defendant to so construct the bridges as to leave said uncovered opening, rendering the street crossing less safe than it would have been without the bridge?" The whole paragraph of the charge from which the above extract is taken is as follows: "From the testimony the jury will determine whether the city authorities used that care and skill which a prudent man would ordinarily use in like circumstances in making and keeping the bridge as shown to have been on July the 30th, 1887, with the surrounding facts; and if they find such care and prudence to have been taken and used in keeping said bridge in the dimensions shown, looking to all the circumstances,—that is, if they find that the bridge was reasonably safe and sufficient for the public,—then they will find for the defendant." The jury were then instructed that if the city failed to exercise such care, etc., to find for plaintiff. We see from the foregoing that the charge of the court, taken in its proper connection, is not obnoxious to the criticism contained in the assignment of error. By a fair construction, it did submit to the jury the issue contended for by appellant as to whether the bridge was of sufficient dimensions to relieve the city of negligence in its construction and keeping. If the jury had concluded that the bridge was too short, or that the uncovered opening rendered the crossing unsafe, or that the bridge was not reasonably sufficient for public travel, they would have so found under the charge. If the charge was not full enough, it was the plaintiff's privilege to make it complete by special charges.

The next complaint of appellant is that the court, in its charge, ignored the question of negligence of defendant in making the uncovered opening in the street, in charging that "if the bridge was reasonably safe and sufficient," etc. We are unable to see that the question of negligence was ignored in the charge. It directed the jury to find for the defendant, if they should believe, from the evidence, that it had exercised the care that a prudent man would exercise in like circumstances; and then submitted the converse of the proposition, which was in effect to submit the question of negligence or not of the corporation. The court laid down the correct rule as to the duty of the city,—that the bridge must be reasonably safe and sufficient for public use. It is said by a text-writer upon this subject that "the liability is not that of a guarantor of the safety of the traveler. The corporate authorities are only bound to use reasonable skill and diligence in making the streets and sidewalks safe and convenient for travel. It is under no obligation to provide for everything that may happen upon them, but only for such things as ordinarily exist,

or such as may reasonably be expected to occur." Dill. Mun. Corp. § 1015. And, again, he says: "It [the street] must be made reasonably safe for use; but this does not necessarily imply, as a matter of law, that the whole width of the street must be in good condition. Whether the street was wide enough to be safe, whether it was in a reasonably safe condition for public use by travelers who use ordinary care to avoid injury, are almost always questions for the jury." Id. § 1016, and authorities cited; also section 1019, where the doctrine that the streets, sidewalks, and bridges are required "to be in only reasonably safe condition for travel in the ordinary modes" is emphasized. These quotations, we think, correctly enunciate the law.

Appellant complains that the court erred in not defining the degree of care required of plaintiff, she being only 18 years of age, and in not giving the correct legal definition of "ordinary care," as applied to her. The court instructed the jury that "if plaintiff was wanting in the use of such care and prudence as an ordinarily prudent person in like circumstances would use to avoid the injury, and that but for her own want of such care the injury would not have happened," she could not recover. The charge was correct as applicable to ordinary persons, and we can see no reason why it should not apply to the plaintiff. There was evidence supporting the verdict of the jury, the court submitted the law applicable to the case as we understand it, and we do not feel authorized to set the verdict aside. We conclude the judgment of the court below should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

#### CLARK COUNTY v. CALLAWAY.

(Supreme Court of Arkansas. Jan. 4, 1890.)

##### CORONERS—INQUEST.

Mansf. Dig. Ark. § 692, which provides for a coroner's inquest when a person dies an unnatural death, does not authorize the coroner, in the absence of any circumstance tending to induce the belief that death resulted from an unnatural cause, to hold an inquest on the body of a person who died from apoplexy.

Appeal from circuit court, Clark county; R. D. HEARN, Judge.

Action by W. H. Callaway against Clark county for services rendered by him as coroner in holding an inquest over the body of William Rooks. The county court disallowed the claim. On appeal to the circuit court, the claim was allowed by the court sitting as a jury. The county appeals. On the trial plaintiff testified as follows: "On or about September 8, 1887, I was notified by Dan Hardy of the death of William Rooks. He stated to me the manner of his death, which statement was substantially the same as his testimony in this case taken at the coroner's inquest. At the inquest the verdict of

the jury was as follows: 'We, the jury, find from the testimony before us that the deceased came to his death by apoplexy.' Deceased died within twenty or thirty steps of his house." At the inquest Dan Hardy testified: "Myself and William Rooks were sawing this morning, and he (Rooks) was complaining, and we stopped sawing, and Rooks straightened by the fence, and taken a fit, and fell down, and died in about three minutes. He did not complain before we began to saw." Three other persons who witnessed Rooks' death substantially corroborated Hardy. Mansf. Dig. Ark. § 692, provides: "If any person die in prison, or if any person be slain, or die an unnatural death, except by the sentence of the law, or if the dead body of any person be found, and the circumstances of the death be unknown, information shall be immediately given to the coroner of the county."

Crawford & Crawford, for appellant. Murry & Kinsworthy, for appellee.

PER CURIAM. It is not necessary that an inquest should be held in the case of one dying with fever, apoplexy, or other disease. It was not required by the common law, (2 Hale, Com. Law, 57,) and is not demanded by the statute. Mansf. Dig. § 692. It is not the duty of the coroner to inquire of sudden deaths, unless there is reasonable ground to believe that they are the result of violence or unnatural means. The authority is to be exercised within the limits of a sound discretion, and when exercised the presumption is that the coroner has acted in good faith on sufficient cause. Lancaster Co. v. Mishler, 100 Pa. St. 624. As was said in the case cited: "The duty of a coroner to hold an inquest rests on sound reason,—on that reason which is the life of the law. It is not a power to be exercised capriciously and arbitrarily against all reason. The object of an inquest is to seek information, and to obtain and secure evidence in case of death by violence or other undue means. If there be reasonable ground to suspect it was so caused, it becomes the duty of a coroner to act. If he has no grounds for suspecting that the death was not a natural one, it is a perversion of the whole spirit of the law to compel the county to pay him for such services." It is the province of the county court to determine whether the case is one for the expense of which the county is liable. Lancaster Co. v. Mishler, supra; State v. Marshall, 82 Mo. 486. In this case there were no circumstances tending to induce the belief that there was any unnatural cause conducing to the death. Reverse and remand.

#### WEAR et al. v. GLEASON.

(Supreme Court of Arkansas. Jan. 11, 1890.)

##### INNKEEPERS—GRATUITOUS BAILIWS—GROSS NEGLIGENCE.

1. Where a person surrenders his room and pays his bill at an inn, the extraordinary liability

of an innkeeper to his guest does not arise as to baggage subsequently delivered to the innkeeper.

2. The delivery of baggage by an innkeeper to an apparent stranger without an effort to verify his claim to the property, and without inquiry as to its ownership, is an act of gross negligence for which the owner may recover, though the innkeeper was merely a gratuitous bailee of the baggage.

Appeal from circuit court, Pulaski county; J. W. MARTIN, Judge.

Action by J. H. Wear, Boogher & Co. against L. D. Gleason, for the loss of a trunk left at defendant's hotel by John R. Boddy, plaintiff's traveling salesman. On the trial it appeared that on the night of August 19, 1887, Boddy stopped at the Union Depot Hotel at Little Rock, kept by defendant. After paying his bill, Boddy asked defendant to loan him \$25, and offered to leave a trunk as security. Defendant replied that he did not care for any security, and offered to give Boddy a check for the trunk, which Boddy refused. Boddy then gave his due bill for \$25, and defendant loaned him the money. Before departing, however, Boddy gave his railroad check to defendant, who sent a porter to the railroad baggage room, and got the trunk. Some time afterwards a stranger came, and, pointing out Boddy's trunk, which was in the hall of the hotel, said he wanted it sent to the railroad baggage-room. This defendant accordingly did. The trunk has never been heard of since. There was a verdict for defendant, and from an order overruling their motion for a new trial plaintiffs appeal.

*U. M. & G. B. Rose*, for appellants. *Sanders & Watkins*, for appellee.

**PER CURIAM.** There is no evidence to show that Gleason received the trunk in the capacity of innkeeper. Boddy had severed his personal connection with the hotel by surrendering his room and paying his bill, before the trunk was delivered to Gleason. It was subsequently delivered to him either under an understanding that it should be held as a pledge for money loaned by him to Boddy or for the accommodation of Boddy alone. In neither case would the extraordinary liability incident to the relation of innkeeper and guest arise. *Bish. Non-Contract Law*, §§ 1172, 1180.

If the defendant became a gratuitous bailee or depositary without reward, for the accommodation of Boddy, as the jury might well have found from the evidence, he was not answerable except for gross neglect. His only excuse for his failure to deliver on demand the trunk deposited with him was that he had delivered it to a third person, who claimed it as his own. But by delivery to a third person the bailee deals with the subject of the bailment in a manner not warranted by the understanding between the parties, and thereby commits a wrongful act for which he becomes liable. As to whether an honest mistake by a gratuitous bailee in the identity of the owner or of the property, made

after the exercise of care on his part, would excuse him, is not presented by the facts in this case. The delivery by Gleason was made to an apparent stranger without an effort to verify his claim to the property, and without inquiry as to its ownership. He thus manifested a culpable indifference to the safety of the property committed to his care, which, according to all the authorities which have come to our notice, makes him answerable for the value of the goods. *Schouler, Bailm.* §§ 117, 118; *Edw. Bailm.* §§ 99, 162; *Nelson v. King*, 25 Tex. 655; *Dufour v. Mephram*, 31 Mo. 577; *Coykendall v. Eaton*, 55 Barb. 193; *Willard v. Bridge*, 4 Barb. 361. In view of this fact, the evidence does not warrant the verdict, and the judgment will be reversed, and the cause remanded for a new trial. It is so ordered.

#### ST. LOUIS, I. M. & S. RY. CO. v. BOX.

(*Supreme Court of Arkansas. Jan. 11, 1890.*)

#### DEFECTIVE HIGHWAYS—CONTRIBUTORY NEGLIGENCE.

The fact that plaintiff knew of the defective condition of a highway crossing over defendant's railroad track, which was not necessarily dangerous, and attempted to drive across it with a loaded wagon, when he was injured, is not of itself conclusive proof of contributory negligence; but it is for the jury to determine, under all the circumstances, whether plaintiff was justified in attempting to cross the roadway notwithstanding the defect, and whether in doing so he used due care.

Appeal from circuit court, Craighead county; J. E. RIDDICK, Judge.

Action by G. W. Box against the St. Louis, Iron Mountain & Southern Railroad Company, for personal injuries sustained in being thrown from his wagon by reason of a defective crossing over defendant's track near the depot in the town of Corning. On the trial, it appeared that plaintiff was hauling lumber at the time of the accident. There were three tracks at the crossing,—the main track, and one side track on each side. The condition of the crossing over the main track was very bad. An incline led up to it, and the distance from the top of the rail to the ground was eight or ten inches. Between the rails was a hole six or seven inches deep, where a plank had been broken off. Plaintiff crossed the side track all right, but when he came to the main track the wheels struck a plank outside of the rail. The team stopped, and quit pulling, and the wagon rolled back some two or three feet. Plaintiff then took the whip and struck one of the mules, which started up again, and pulled the wagon over the rail. The fore wheels went into the hole, and the jar threw plaintiff onto the double-tree. Failing to recover himself, he fell to the ground, was run over by the wagon, and badly hurt. Plaintiff had driven over the crossing that day, and many times before. He knew its condition, as did everybody in Corning. The citizens had been complaining of it for some time. The next crossing was about half a mile north. Plaintiff had a ver-

dict, and from an order overruling defendant's motion for a new trial it appeals.

*Dodge & Johnson*, for appellant. *F. G. Taylor*, for appellee.

**PER CURIAM.** It is admitted that there was proof showing negligence on the part of the company in its failure to keep the road crossing in repair; but it is argued that the plaintiff's attempt to cross the track with a loaded wagon, when he knew of the defective condition of the crossing, is of itself conclusive proof of contributory negligence, and bars a recovery. It is certainly true that one cannot recover for an injury caused by his own wanton or unreasonable conduct in this more than in any other class of cases, (see *Railway Co. v. Rosenberry*, 45 Ark. 256;) but a traveler is not compelled to abandon the use of the only highway conveniently accessible to him merely because he is apprised that it is out of repair. "A person who, in the lawful use of a highway, meets with an obstacle, may yet proceed, if it is consistent with reasonable care so to do; and this is generally a question for the jury, depending upon the nature of the obstruction, and all the circumstances surrounding the party." This language, announcing the general rule which governs such cases, was used by the supreme court of Massachusetts in a case very similar to this one, *Mahoney v. Railroad Co.*, 104 Mass. 73. See, too, *Thomp. Neg. p. 1205, § 53*. The defect in the road crossing was not necessarily dangerous, and it was a question for the jury to determine whether, under the circumstances, the plaintiff was justified in attempting to cross the roadway notwithstanding the defect, and whether in doing so he used due care. The court submitted the question under proper instructions to them, and their verdict is conclusive here. Affirm.

#### MCQUADY v. MATTINGLY.

(*Court of Appeals of Kentucky*. Dec. 14, 1889.)

##### PUBLIC LANDS—ACTUAL SETTLERS.

Cutting a few logs and making a small clearing on vacant and unappropriated land do not constitute one an "actual settler" thereon, so as to entitle him to the notice which Gen. St. Ky. c. 109, § 2, requires to be given "actual settlers" on such land of an intention by another to locate the same.

Appeal from circuit court, Breckinridge county.

"Not to be officially reported."

Action by R. T. Mattingly against Obediah McQuady. Judgment for plaintiff. Defendant appeals.

*R. A. Miller* and *Thos. H. Hines*, for appellant. *John Allen Murray*, for appellee.

**HOLT, J.** The right of the appellee, R. T. Mattingly, to the land in contest, is resisted, upon the ground that when his vendor, who was the patentee, located it, the appellant had no notice of such an intention, and was in the actual possession of it. Section 2, c. 109,

Gen. St., provides: "An actual settler on any vacant and unappropriated land shall have a pre-emption right to any number of acres, not exceeding one hundred, to be laid off as nearly as possible in a square, his improvements in the center. Before any other person shall locate the same, three months' notice of intention to do so must be given to the actual settler, in which notice the land intended to be taken up or appropriated must be described." The patent issued on July 2, 1877, and was based upon a survey made March 10, 1876. Prior to the latter date the appellant, Obediah McQuady, had cut some 40 or 50 house logs upon the land, and had made a small clearing; otherwise it was in woods. He testifies that he did so in the spring of 1876. Other evidence shows, however, that it was before the making of the survey. When it was made, however, none of the land was inclosed. The appellant then had no defined boundary, unless it was one furnished by adjoining lands. He had then never occupied or used it in any way, save in making the clearing named. This appears to have been done, and the logs cut preparatory to building a house. There is upon the one hand evidence tending to show that, after doing this much, he declared his intention to move to another state, and have nothing further to do with the land. Upon the other, however, there is testimony conducing to show that he intended to return to it in the following fall. He in fact did so; erected a small house thereon; moved into it; and has so resided ever since. The appellee was slow to sue for the land, but nevertheless the fact appears that when the survey was made, back to which time the title acquired by the patent relates, the appellant had never been in possession of, or occupied or used, the land in any way, further than to cut a few logs and make the small clearing thereon. This did not make him an actual settler upon it, and notice to him, therefore, of an intention by another to locate it was not necessary. He certainly was not then, and never had been, an actual occupant of it; and whether he was then in the actual possession or not was an ordinary issue upon which the lower court has found against him. With the testimony conflicting to any considerable extent, we would not feel disposed to disturb its conclusion, and cannot do so when it is, as we think, fully sustained by it. Judgment affirmed.

#### BUSH et al. v. JOHNSON et al.

(*Court of Appeals of Kentucky*. Dec. 14, 1889.)

##### VOLUNTARY CONVEYANCES.

A father, owning about 44 acres of land, being old and infirm, conveyed it to one of his sons, in consideration that the latter would support the father and mother during the life of each. Held, that there was nothing irrational in the act, nor an indifference to the rights of his other children, and that the transaction would not be disturbed at the instance of the latter.

Appeal from circuit court, Owen county.

"Not to be officially reported."

Action by James L. Bush and others against R. S. Johnson and others. Judgment for defendants. Plaintiffs appeal.

*J. W. Perry and Thomas R. Gordon, for appellants. J. W. Greene and Montgomery, Lindsay & Botts, for appellees.*

**PYOR, J.** There is some conflict in the testimony in this case as to the capacity of the intestate, as well as what constituted the consideration for the deed executed by Samuel Johnson to his son R. T. Johnson. The father, owning about 44 acres of land, and being old and infirm, conveyed it to his son R. T. Johnson, in consideration that the latter would support the father and mother during the life of each. The deed expresses a money consideration, but the real consideration was as stated. This conveyance is sought to be set aside by the brothers and sisters of the appellee on the ground of undue influence and the want of capacity on the part of the grantor to execute it. They allege and prove that the old man was made to believe by his son that his land would be taken for debt, and that, to secure him in his estate, it was best to convey the land to the appellee, who would hold it for all the children at the father's death. Some of the land had been sold to satisfy debts that the grantor was liable for as the surety of his sons-in-law, and the 44 acres had been set apart as a homestead. The widow is still in the occupancy of the land, and is content with the execution of the deed and the agreement made between the father and son; and the latter is yet complying with his agreement, and did so during the life of the father. The proof conduces to show that the aid of the son was essential to the welfare and comfort of his parents, and that this aid was cheerfully rendered. Besides, from the old man's surroundings, there was doubtless an apprehension that his estate would be lost; and it certainly was manifest that he was in no condition to support himself. He knew what was best for his interests, and that of his wife, and recognized the necessity of looking to the son for his support and maintenance. There is nothing irrational in the act, nor an indifference to the rights of his other children, but an exercise of a matured judgment that prompted him to do that which secured a living to both husband and wife in their declining years.

Judgment affirmed.

**PIEL v. COVINGTON S. R. T. RY. CO.**

(Court of Appeals of Kentucky. Dec. 12, 1889.)

**APPEAL—MANDATE AND PROCEEDINGS BELOW.**

In proceedings to condemn land for railroad purposes, an appeal taken by the plaintiff railroad company from the judgment rendered in the circuit court was accompanied by a *supersedeas* issued at the instance of both parties. Held, that an order of the circuit court for payment of the amount of the judgment into the hands of the clerk of the court, and for a writ of possession, made, at the instance of plaintiff, after the delivery by the

court of appeals of an opinion affirming the judgment, but before the mandate of that court was or could be legally issued, was illegal and void; and that no costs could be imposed on either party by reason of any order of the court made in reference to the money.

Appeal from circuit court, Kenton county.  
"Not to be officially reported."

A proceeding by the Covington Short Route Transfer Railway Company to condemn the property of C. Piel for railroad purposes. From an order granting a writ of possession, defendant appeals.

**LEWIS, C. J.** In a proceeding to condemn the property of appellant for use of appellee, judgment was rendered in the Kenton circuit court for \$8,250, based upon finding of a jury, from which an appeal was prosecuted by the present appellee, and, on motion, a cross-appeal from order of the lower court awarding a writ of possession for the property condemned. This court affirmed the judgment, (8 S. W. Rep. 449;) but the mandate was not issued until June 29, 1888, being 30 days after the opinion was delivered, nor filed in the clerk's office of the lower court until June 30, 1888. But June 16, 1888, an order was made as follows: "It appearing that the plaintiff, said railway company, by its attorney, Hallam & Myers, this day tendered to the defendant, said Piel, in the person of his attorney, William Goebel, \$8,250 in money, the same being the value in damages of the condemned property, as assessed and fixed by the verdict and judgment herein; and that the plaintiff, by its attorneys, had paid in full all costs herein adjudged to said defendant, plus \$10, for costs since accrued; and that said Piel, by his attorney, Goebel, rejected the tender aforesaid, and the plaintiff, by its attorney, thereupon tendered, and actually paid into court, into the hands of H. C. Hallam, the clerk thereof, the said sum of money, and moved the court for a writ of possession for the premises described in the judgment herein: Now, therefore, a writ of possession is awarded, to be issued forthwith for the premises aforesaid." But the writ appears from the record to have been superseded June 25, 1888. There appears, however, to have been issued another, and the fourth writ, June 30th, which was returned July 6th, indorsed executed by delivering the property to possession of the plaintiff. The record in the present case was filed, and appeal granted, June 25, 1888, from the order of the circuit court mentioned. But as upon the filing of the mandate, June 30, 1888, the last writ of possession was issued and executed, and it is presumed the money previously tendered was then accepted, there is now nothing involved in this appeal, except the costs, including an allowance for receiving, caring for, and disbursing the \$8,250, which it appears the clerk moved for in the lower court. The effect of the former appeal, accompanied, as it was, by a *supersedeas* issued at the instance of both parties, was to suspend all proceedings in the circuit court;

and the order for payment of the \$8,250 into the hands of the clerk of the court, and for a writ of possession, before the mandate was issued, or could be legally issued, from this court, was illegal and void. For while the plaintiff and appellant in that action might, before the mandate was filed in the lower court, have tendered the money finally decided to be due, with the effect of stopping interest, no costs could thus be imposed on either party, by reason of any order of court made in reference to the money, because the court had no power to make any. Wherefore the judgment or order of the lower court is reversed, and cause remanded, for setting it aside.

#### WILLIAMS v. WILLIAMS.

(Court of Appeals of Kentucky. Dec. 14, 1889.)

##### DOWER—LIMITATION OF ACTIONS.

1. As Gen. St. Ky. c. 52, art. 4, § 2, gives the widow dower in any real estate of which the husband, or any one for his use, "was seised of an estate in fee-simple, at any time during coverture," the fact that the husband lost title to lands of which he was seised during coverture, by adverse possession, does not affect his widow's right to dower therein.

2. Gen. St. c. 71, art. 1, §§ 1, 2, and 4, provideth that an action to recover real estate can only be brought within 15 years from the time the cause accrued, except when the person to whom the right accrued is an infant, married woman, or person of unsound mind, and then it may be brought within 8 years after removal of disability, but in no case shall the period be extended beyond 80 years from the time the action first accrued. *Held*, that these provisions have no application to an action by a widow, on the death of her husband, to recover dower in lands the title to which her husband lost, during coverture, by adverse possession, as her right of action does not accrue until his death.

Appeal from chancery court, Pendleton county.

"To be officially reported."

This is an action for dower in lands by Elizabeth B. Williams against E. P. Williams. Judgment for defendant and plaintiff appeals.

*Dougherty & Boner* and *C. H. Lee*, for appellant. *M. M. & C. A. Rardin* and *O'Hara & Bryan*, for appellee.

HOLT, J. Pope Williams died, intestate, in 1834, the owner of a considerable tract of land, and leaving nine children as his heirs. One of them, Felix Williams, married the appellant, Elizabeth B. Williams, in 1839. The testimony does not clearly show a division of the land among the heirs, but it is probable one was had in 1842 or 1843. It is claimed the appellant and her husband sold his interest in or portion of the land, in 1843 or 1844, to their brother-in-law, one Byrd, and he, in 1845 or 1846, to the appellee, E. P. Williams. The latter, and those claiming under him, have had the actual possession of it ever since his purchase, claiming it as their own. Felix Williams died July 27, 1883; and the appellant, as his widow, brought this action on July 31, 1886, to re-

cover dower in the land. The three requisites to entitle her to it at common law are shown, to-wit, the marriage, seisin by the husband, and beneficially so, during the coverture, and his death. Unless, therefore, she has in some legal mode been divested of the right, she is entitled to relief.

The appellee defends upon the ground that she and her husband sold and conveyed the land to Byrd, and, if not, that then the adverse possession for so long a time bars a recovery by her. No writing evidencing any sale is produced. There is no deed of record, and search has been made at the proper places, and inquiry of the proper persons, and none found. We cannot doubt, however, but what the husband, at the time named, sold his portion of the land. All the circumstances say so. He remained near the land until 1839, and, long after his removal from the state, returned to its vicinity for a protracted visit. During all this time he knew his portion of the land was adversely held and claimed; and yet, from the time when it is claimed he sold to Byrd until his death, he never set up any claim to it. We cannot presume, however, that a deed was executed by the appellant. None is produced, or shown to have been executed by her; and, unless this was done, and it recorded, her then inchoate right of dower did not pass, although a sale was made by the husband. She testifies that she never joined in any deed, and never knew of any sale of the land. One witness says she told him that they (her husband and herself) had sold and conveyed it. He is, however, interested adversely to her in this litigation, and is contradicted by her.

Not having parted with her right, is she now prevented, by lapse of time, from asserting it? This state of case is presented: The appellee asserts a sale by the husband and wife. The appellant denies it; and it is urged in argument for the appellee that, if her denial be true, yet she cannot recover, because of the adverse holding of the land for over 40 years. In short, if she conveyed, she has no right; but, even if she did not, and her version be true, then limitation defeats her. The last question remains to be considered. Article 1, c. 71, of the General Statutes, provides, "Section 1. An action for the recovery of real property can only be brought within fifteen years after the right to institute it first accrued to the plaintiff, or to the person through whom he claims. Sec. 2. If, at the time the right of any person to bring an action for the recovery of real property first accrued, such person was an infant, married woman, or of unsound mind, then such person, or the person claiming through him, may, though the period of fifteen years has expired, bring the action within three years after the time such disability is removed. \* \* \* Sec. 4. The period within which an action for the recovery of real property may be brought shall not in any case be extended beyond thirty years from the



time at which the right to bring the action first accrued to the plaintiff, or the person through whom he claims, by reason of any death, or the existence or continuance of any disability whatever." Manifestly, neither the 3 nor 15 nor the 30 years' statute apply to the appellant's claim. It is true, she sues to recover a freehold estate, and that the right of dower is a right to real property. *Anderson's Trustee v. Sterritt*, 79 Ky. 499. Her right is only inchoate, however, where marriage and seisin in the husband concur. It is consummate at his death. During his life, she has only a mere shadowy expectancy, or future contingent interest. No right of action accrues to her, as to it, until his death. It, of course, never did accrue to the husband; and therefore the limitations provided by the sections of the statute above cited do not apply to the case in hand, or forbid a recovery.

It is urged, however, that the adverse holding against the husband, had before his death, continued so long as to extinguish his title; and that, as he was barred of a recovery long before his death, therefore the widow cannot be endowed. Waiving the undoubted fact that the appellee claims through the husband of the appellant, we will consider whether an adverse holding, so long continued before the husband's death, but not before the marriage, as to vest the disseisor with a right, and toll the husband's right of entry, will defeat the wife's claim to dower. Upon first thought, one might suppose it would do so. The wife is, however, endowable, under our law, not of what the husband may be seised of in fee-simple at his death, but of any real estate so held by him at any time during the coverture. The statute says: "After the death of the husband, the wife shall be endowed for her life of one-third of the real estate of which he, or any one for his use, was seised of an estate in fee-simple at any time during the coverture, unless her right to such dower shall have been barred, forfeited, or relinquished." Gen. St. c. 52, art. 4, § 2. The dower estate arises in perfection at the death of the husband. It relates back, however, by virtue of the inchoate right, and embraces any real estate beneficially held by him in fee-simple at any time during the coverture. The wife cannot be heard until she becomes a widow; and the law is unwilling to make the silence of a party deprive her of a right when it at the same time forbids her to speak. The statute of limitations is founded upon the idea that if one has a right, and neglects to avail himself of the remedy which the law affords within the time limited, it is to be presumed that he has abandoned the right. It would be unreasonable to divest the wife of her inchoate right of dower for non-action, when she has no power to protect or save it, and is guilty of no laches. If so, she would suffer from silence enjoined by law. This would be paradoxical. Limitation cannot justly run against her right, because every such statute rests for its existence upon the laches of the

party to be affected by it. From its earliest history, the common law has favored the right of dower, because it is necessary to the support of the widow, and the nurture of her children. It will not, therefore, admit of its defeat by the acts or laches of the husband. 1 Washb. Real Prop. (Ed. 1862), p. 218, says: "So far as the statute of limitations grows out of the supposed right to presume a title from long adverse enjoyment by the person in possession, it could not well apply to the case of dower, since, upon the death of the husband the wife is not seised, nor has she a right of entry." Again, on page 250: "At common law, the moment her coverture and her husband's seisin concur, she acquires a right which nothing but her death or her voluntary act can defeat, unless it be by an exercise of sovereignty, by the forms of the law, in appropriating the estate of the husband to a public use. No adverse possession, therefore, as against her husband, however long continued, can affect her right to recover dower after his decease." He is sustained in this view both by decision and other text-writers. The same rule will be found more fully laid down in 2 Scrib. Dower, 579. It is there declared that an adverse occupation of the premises during the life of the husband cannot affect the rights of the widow; that she cannot be prejudiced by his laches, nor her inchoate right affected by his act, or that of a third person. In the case of *Durham v. Angier*, 20 Me. 242, there had been an adverse holding for over 20 years before the husband's death, and the widow was allowed dower. The court, in its opinion, says: "Nor can the neglect of the husband to enter during his life destroy the right of his widow." The case of *Hart v. McCollum*, 28 Ga. 478, is to the same effect. There the husband had been disseised for about 23 years at the time of his death, but the court said: "The mere failure of the husband to sue for lands, of which he was once legally seised during coverture, until the statute of limitations attaches as against him, does not exclude the wife's right to dower in said lands,—a right which she may assert when she becomes discovert." In *Moore v. Frost*, 3 N. H. 126, the same rule was applied, and we have not been able, after a careful investigation, to find any counter authority. The case of *Hawkins v. Page's Heirs*, 4 T. B. Mon. 186, so far as it relates to this question, merely decides that where the husband, by adverse possession, has acquired the right to land, his widow is entitled to be endowed. The case now presented is unlike that of a husband selling the wife's land. In such a case, she may sue at once. Nor is it one where the disseisor's right by adverse possession to the husband's land becomes perfect before marriage, and the husband, therefore, has no title at any time during the coverture; but it is one where the husband was seised in fee-simple during the coverture, and the right of the wife has never been "barred, forfeited, or relinquished." She is therefore entitled to dower; and the

judgment is accordingly reversed, and cause remanded for further proceedings consistent with this opinion.

**BUSH et al. v. LISLE et al.**

(Court of Appeals of Kentucky. Dec. 17, 1889.)

**WILLS—TESTAMENTARY CAPACITY—UNDUE INFLUENCE.**

Testator for some years before making his will had had syphilis, and had become a physical wreck, losing his hair, teeth, eye-sight partially, and use of his lower limbs, and while in this condition went to live with his married sister, shortly afterwards losing his eye-sight entirely. His sister and her husband gave him the most careful and affectionate nursing and attention. To relieve his pain he used morphine in large quantities, and while suffering he was extremely profane and blasphemous. Up to the time he executed his will he transacted all his business, lending money, buying land, keeping account of interest, and having full charge and control of his estate. After living at his sister's house for eight years he made the will, leaving his property to her, her husband, and their children, to the exclusion of his other brothers and sisters. The person who wrote the will testified that besides himself no one was present, and that testator, without aid or suggestion, dictated the will as written, and was at the time in full possession of his mental faculties, the provisions of the will showing unusual intelligence as to the legal effect of restraints and limitations put on the devise. Testator's sister with whom he lived was his favorite sister, and he had twice before made a will leaving her the greater part of his estate. Held, that neither a lack of testamentary capacity nor the existence of undue influence was shown.

Appeal from circuit court, Clark county.

"To be officially reported."

*Wm. Lindsay and W. M. Beckner*, for appellants. *Breckenridge & Shelby and Chas. J. Bronston*, for appellees.

**LEWIS, C. J.** This is an appeal from a judgment rendered on verdict of the jury finding a paper dated October 30, 1876, and probated in the county court, not to be the true last will and testament of F. M. Lisle, who died in February, 1879, at about the age of 58 years, without wife or child. He left no parents, his mother having died before he did, though, subsequent to date of the paper, those who would have inherited his estate in case of no will being one brother, three sisters, and children of each of four sisters who were dead. But he devised, or attempted to devise, the whole of his estate, of value about \$20,000, consisting of choses in action, money, and land, to his sister Minerva Bush, her four daughters, and husband, Robert E. Bush; there being given to the last named, who was appointed executor, five shares of bank-stock, to each of the four nieces specified land and money, and to the sister the residue. The grounds upon which the other heirs at law assail the validity of the paper as a will are want of testamentary capacity and undue influence. It appears that previous to 1866 the decedent had been a professional gambler, but as the effect of syphilis contracted many years previously, from which he never recovered, and probably of excess and dissipation, he became a wreck physically, losing

his hair, teeth, eye-sight partially, and use of his lower limbs, to such an extent as to make crutches necessary for locomotion; and in that condition he went to the residence of a double cousin, in Fayette county, Rufus Lisle, with whom he staid until 1867 or 1868, when he removed to the house of Robert E. Bush, in Clark county, where he remained until his death; a room adjoining the dwelling-house having been constructed, at his own instance and expense, for him to occupy. Within a year or two after going to the house of his brother-in-law he became totally blind, unable to walk, and from his mouth, which was drawn out of its natural shape, offensive matter escaped. So he thereafter required and received from those to whom he attempted to give his estate the most assiduous, careful, and affectionate nursing and attention. He had before going there, as relief from his intense suffering in his lower limbs, contracted, and continued to his death, the habit of using morphine, a comparatively large quantity of which he daily consumed. It further appears that during paroxysms of physical pain he was excessively and offensively profane and blasphemous; and from these two habits, both mental incapacity to make a will and undue influence are sought to be deduced as existing facts. There is no evidence whatever of unreasonable prejudice on his part towards any of the contestants, nor that he was swayed or prompted to abandon any fixed purpose, or to ignore any worthy or recognized claim on his bounty. On the contrary, 10 years before the date of the paper, when his situation was less deplorable than it afterwards became, and when there is no evidence that he was not entirely rational, he offered to give his whole estate to his cousin Rufus Lisle to secure a home and needful care and attention while he lived, and the disposition he finally made of it was consistent, natural, and commendable, because intended as a grateful recompense, no more probably than adequate, to those who did minister to him in affliction. The person who wrote the paper testifies that besides himself no one was present; that the decedent was in full possession of his mental faculties, and, without aid or suggestion, dictated the paper as written; and the provisions of it show not only a preconceived and fixed plan for disposing of his estate, and full knowledge of the character and value of it, and the persons to whom it was left, but unusual intelligence of the legal effect of restraints and limitations put upon the devise to his nieces.

Of the very large number of witnesses who testified on the trial but three express any doubt of capacity of the decedent to make a will. One of them, who is a contestant, stated as his opinion that he did not think a man could be a sane man who used blasphemous language towards Jesus Christ. Another, who visited him as a physician once or twice, expressed the opinion that he did not think a person who used morphine and whisky as decedent did was capable of taking into

consideration his property and relations, and making a fair, just, and equitable disposition of his property, though he does not undertake to say what quantity of either he was in the habit of using, nor what his mental condition actually was when the paper was written, nor when it was, two days afterwards, signed and acknowledged. And the third, who once saw him while in a paroxysm of pain, testified his professional opinion to be that no man who had been an invalid for a number of years, and under influence of morphine for such length of time, is competent to transact business. But neither one of those three witnesses, nor any one else throughout the entire trial, testifies to a single irrational act or speech by the decedent, or even profane language, when he was not for a time racked with pain, with the single exception of J. B. Lisle, the principal contestant, who refers to one trivial remark, about which it was shown by another witness he evidently misunderstood the decedent. On the contrary, those acquainted with him testified he possessed a clear, vigorous intellect and strong will, which continued, when he was not in a sleepy state from use of morphine, up to his death; and it clearly and fully appears that from the time he went to the house of Robert E. Bush to the date of the paper, and even afterwards, he transacted business, loaning money, buying land, keeping account of interest and dividends on stock due him, was consulted by his friends about business matters, discussed politics, banking, and neighborhood affairs with perfect intelligence, and kept full control of his estate, so that when he died there had not been any part of the principal consumed, nor any of his income wasted or disposed of at all, except with his consent and full knowledge.

It seems to us, as the record stands, there is a total failure by the contestants to show lack of mental capacity on part of the decedent to make the will, and, in our opinion, evidence of undue influence by the devisees, or any other person, is equally unsatisfactory, and the verdict of the jury can be accounted for only on the supposition that their attention was diverted from facts proved, to abstract theories of physicians who never examined nor had knowledge of the actual mental condition of decedent when the paper was executed. It is needless to refer in detail to the testimony of the learned experts, because there was such an agreement in their statements as to make reference to the evidence of one suffice for all. The general conclusion drawn from the hypothetical case assumed by them is that the brain of a person who has syphilis in tertiary form is likely to become more or less affected, and that a person in the condition the decedent was shown to be in, if confined in the same family eight or nine years, taking morphine habitually three or four times per day, administered by members of that family, would have no capacity to make a will or do any thing which he believed would be contrary to the wishes

of such family, and would seek by every means to please them, although he at the same time might talk intelligently, and impress an ordinary observer as being exceedingly bright. It seems, however, to be conceded by the experts that the use of morphine does not necessarily impair the intellectual faculties, and consequently their evidence, if pertinent in this case at all, has relation alone to the question of undue influence. Expert testimony is worse than useless, it is misleading, when given on a subject about which there is proof so convincing as to leave no reasonable ground for dispute, or when variant from the actual state or condition shown by positive evidence to exist, and no conclusion reached by mere theorist, however learned, can be reasonably accepted and applied in any case without being founded on and consistent with the facts as they are proved to be. If there had been doubt or contrariety of evidence in regard to the real state of the decedent's intellectual faculties, it might have been pertinent to show by experts what are the usual consequences of physical infirmities and habits such as his. But it does not appear that his mind was impaired or affected by the disease he was afflicted with, nor that he was dependent upon Robert E. Bush or any of his family for morphine, nor was their aid in procuring it, or permission to use it, ever sought by him. On the contrary, he had an estate sufficient to gratify every wish, and supply every want, the character and value of which he well knew, and the management and control of which he kept without dispute or question till his death, and the morphine used by him was purchased with his own means, and at his own pleasure, without hindrance or protest from any one. And, whatever may be the ordinary effect of use of morphine, the evidence in this case does not show any weakening of the will power of the decedent, nor the slightest effort on the part of any one of his devisees or other person to influence or control, by coercion, argument, or persuasion, the final disposition of his estate, nor that he was influenced to dispose of it as he did do by any other reason, motive, or feeling than gratitude to and affection for Mrs. Bush, who was his favorite sister, as shown by two previous wills, in one of which he gave his estate to her and a brother since dead, and in the other the bulk of it to her, and by the significant fact that, when he became a helpless and doomed invalid, he selected her of all others to nurse and care for him.

There is some evidence tending to show her anxiety about the manner in which he would dispose of his property, but none that she or any one else attempted to influence him in regard thereto by importunity, persuasion, or even suggestion. In two instances she interfered to prevent gifts by him to other persons, one of them being a drunken man, and the other a lewd woman, his former mistress, to whom he had previously given money, and who was endeavoring to obtain

more. It also appears that he was unwilling for his sister to leave him, and some of the witnesses quote her as saying he displayed weakness by shedding tears when she did go away from home, leaving him to the care of others. But there is no evidence showing, or from which it can be reasonably inferred, that any of the devisees acquired such dominion or influence over him as deprived him of the power to dispose of his estate in accordance with his own wishes; and in view of the claims of his other relations, and without the existence and actual exercise of such dominion, as has been often held by this court, he must be regarded as executing the will without undue influence; for neither mere appeals to the affections, nor arguments addressed to the understanding, even when effective, amount to undue influence, in the meaning of the law. There was, however, according to the evidence, no other influence exerted or appeal made by the devisees than such as affectionate care and attention offered, which the law upholds rather than condemns. In our opinion, the evidence in this case shows clearly that F. M. Lisle had testamentary capacity, and freely and without undue influence executed the paper in contest, and it should be held his true last will and testament. Wherefore the judgment must be reversed, and, as the verdict is not sustained by the evidence, the cause is remanded, with directions to the lower court to dismiss the appeal from the order of the county court, probating and admitting to record the paper as his will.

**CONLEY v. CINCINNATI, N. O. & T. P. RY. CO.**  
(*Court of Appeals of Kentucky.* Dec. 17, 1889.)  
**RAILROAD COMPANIES—INJURIES TO PERSONS ON TRACK—TRESPASSERS.**

In an action against a railroad company for the negligent killing of plaintiff's intestate, there was evidence that, as defendant's train was coming towards a small town, the houses of which were on either side of the track, and while some distance from the depot, part of the train was detached, the engine and some of the cars running on ahead and passing the depot, while the detached portion was allowed to come on more slowly down the grade, with no lights in front, no bell or other signal to announce its approach, and no one to look out for persons on the track. The night was dark, and plaintiff's intestate, after having seen the engine with cars attached to it pass by, started across the track, though not at a public crossing, and was run over by the rear portion of the train and killed. *Held*, that the detaching of part of the train, and allowing it to run into the town in such a manner, was such a departure from defendant's duty to the public as to entitle plaintiff to recover, though his intestate was a technical trespasser.

Appeal from circuit court, Mercer county.  
"To be officially reported."

*T. C. Bell and Thompson & Roach*, for appellant. *C. B. Simrall and Durham & Jacobs*, for appellee.

**BENNETT, J.** The appellant, as administrator of Ed. Conley, sued the appellee in two counts for killing his intestate,—one for will-

ful, and the other for gross and ordinary, neglect. There is no allegation in either count of the petition that the intestate left either widow or child. Besides, the proof shows that he left neither. Therefore, according to the repeated decisions of this court, recently rendered, the appellant cannot recover on the count for willful neglect.

The only question is, does certain evidence, as it appears in the record, if believed, authorize the appellant to recover for ordinary or gross neglect? Let us see. The appellant's intestate was killed almost immediately, at Burgen depot, Mercer county, Ky., by the rear part of the appellee's stock train, No. 10, running over him on January 8, 1883, about 7 o'clock at night. On behalf of the appellant, the evidence shows that, while the said train was coming south, about 7 o'clock at night, it being very dark and a drizzling rain falling, said train was cut in two, probably about three-fourths of a mile from Burgen depot, and the front part of the train was drawn by the engine, at a more rapid rate, until it passed Burgen depot, and stopped at the stock-yard, and the rear part of the train, which included three box-cars and one caboose, ran at a slower rate by its own momentum, the grade being a down grade, from the place of uncoupling nearly to the Burgen depot, from thence level to said depot, until it got almost to the said depot, when it stopped; that the said rear part of the train was thus permitted to run without any light being placed or kept at the front end of it, but a light was at the rear end; that no signal was kept on said rear part of the train; that no person was stationed thereon, in a position to look out for danger and give warning or stop the train; that the appellant's intestate was at the depot about the time the front part of the train passed it on its way to the stock-yard; that he boarded at the section-house, situated on the west side of the railroad track, and the depot was situated on the east side of it; that there was a public crossing about 50 feet south of the depot, at which he could cross to go to the section-house, or he could cross by a pathway, used principally by the section-house people, and thereby shorten the distance that he would have to go; that said road and path crossed the track nearly at the same place; that, by the front part of the train blowing its whistle and passing the depot, the deceased, not being able to see the rear part of the train, there being no light in front, and not hearing its silent approach, believed that the track was clear, and started to cross it, either at the public or private crossing, and, while crossing, was struck down and run over, or if not on either of said crossings, but on a private part of the track when struck, it was the darkness of the night that caused him to miss his way, and the silent, undiscernible approach of the rear portion of the train that caused him not to hear or see it. On the other hand, the appellee's proof shows that it did not uncouple its train

until it had passed the depot, going north, and had arrived at the stock-pens, at which place the train was uncoupled, and the rear portion permitted to run back to a point just south of the depot, where it stopped; that a light was on the rear part of the caboose, which light, by reason of said portion running back toward the south, was in front, and furnished sufficient light to enable the deceased, or other persons on or near the track, to easily discern the approach of said portion of the train; that the deceased, while trespassing on the track, either in attempting to cross just ahead of said train, or while walking on the track, or attempting to cross by crawling under the train, in either case, negligently failing to notice that the train was approaching, was killed.

It may be that the deceased was run over and killed while he was on the track, either walking on it or crossing it not at a point where he had the legal right to be. If this be so, he was technically a trespasser, and only technically a trespasser. So, the question is, did the fact that he was technically a trespasser excuse the appellee, if the deceased was killed under the circumstances contended for by the appellant? According to the appellant's contention, the appellee having uncoupled its train on a dark night, without a light in front to warn persons having occasion to be on the track of its approach; without a lookout to warn persons, that might be on the track, of danger, and powerless to discover such persons for the want of a light; without a person on the train to stop it in case of danger to such persons, or if, having the train in charge, unable to discover such danger for the want of light; and having suffered it to run up to its depot, situated in a town of 150 or 200 inhabitants, living on either side of the track, near the depot, and a public and private crossing near the same, and persons likely to be crossing the track in going to and from the depot at that hour, either for business or pleasure, also crossing in going to their respective homes from business pursuits; and as these persons, by seeing and hearing the main part of the train pass the depot, would naturally suppose that the way was clear, and would attempt to cross the track at the most convenient place of crossing, as is customary in towns of that size, without fear of evil, or, by reason of the darkness of night, might miss their way, and cross at a point where there was no public crossing,—that, under these circumstances, it was inexcusable negligence to thus turn said rear train loose, to silently and unseen run down any person that might be crossing the track, whether or not at a crossing.

We recognize and repeat the rule that the operators of a train are ordinarily under no obligation to look out for trespassers; that, as a rule, they have the exclusive right to their track, and have the right to presume that no person will trespass upon it, and are therefore under no obligation to look out for

them. But this rule as to looking out for such persons has its exceptions,—one of which is that where the train is running through a city or town, and the people thereof may cross the track at any and all hours at such points as may be convenient, whether public or not, and the operators have reason to know that such is the habit, it is their duty to look out for such persons, and take reasonable precaution not to run over them. In making approaches to these places, or going through them, they are required not only to look out, but to ring the bell, etc., whether approaching a crossing or not. Why so? It is for the purpose of seeing persons in time not to injure them, and of warning them, whether trespassers or not, of the approach of the train, in order that they may get out of the way. This they are required to do, even in the bright day-time. If they fail to do this, it has been held, time and again, that such failure is actionable negligence. In this line is the case of *Railroad Co. v. Schuster*, (Ky.) 7 S. W. Rep. 874; *Shelby's Adm'r v. Railway Co.*, 85 Ky. 224, 8 S. W. Rep. 157. But the case here, according to the appellant's facts, is that the appellee having turned its rear cars loose, unlighted in front, and therefore not under control, so far, at least, as to render any assistance, the night being dark, in case of a collision with any person that might be on the track, the cars being separated from the engine, their approach would be, at least as compared with the ordinary movement of trains, almost noiseless, and not likely to be heard or noticed; also in a dark night, and in the absence of a light to arrest the attention, their approach would not ordinarily be observed until too late to get out of the way. It is a well-known fact that a person standing in a straight line with a train that is approaching or receding is often unable to discern that it is moving. This is so even in the day-time. In a dark night it may be regarded as a fixed fact that a person, being on the track of a road-bed, would be unable to discern cars unlighted, approaching him by their own momentum, until they had gotten immediately up to him.

So the question is, is the turning these cars loose, under the circumstances, such a departure from a manifest duty towards the local public as to entitle the appellant to recover for the injury inflicted on his intestate by reason of such departure, although the intestate was at the time a technical trespasser upon the track? The rule applicable to actions for the negligence of the defendant, that, if the negligence of the plaintiff so far contributed to the injury as that the injury would not have occurred but for such contributory negligence, he cannot recover, is as well settled as any principle of law. But is it applicable to a case where the negligence on the one side consists of a technical trespass, as the one in this case, and a failure to perform a manifest duty, as in this case? The omission to do or the doing anything

that is the manifest duty of a person not to do or to do, does not entitle such person to immunity from liability, in damages, to the person injured thereby, simply because such person was a mere trespasser, and but for which the injury would not have occurred. Where the injury is the result of the non-performance or a violation, however innocent of intention, of a plain and manifest duty for the protection of human life or safety, the party thus acting will not be heard to say, in justification, that the person thus injured was merely a trespasser. This is true even though the party injuring was dealing with his own property, and the party injured was a technical trespasser thereon. Of course, the foregoing rule does not apply, if the injured party, knowing the existence of the danger, purposely or negligently puts himself in its way. He thus puts himself in its way at his peril, and should be considered as having purposely brought the injury on himself, and should be left to bear it. A train of running cars—these were running, according to the appellant's proof, at the rate of about 15 miles per hour—is more dangerous, if thus circumstanced, to the life of persons with whom it comes in contact, than that of the most ferocious and powerful wild animal, and, certainly, it cannot be lawfully turned loose to run by itself, and expose persons that may be on the track, either by accident, mistake, or design, to its destructiveness. Humanity positively forbids the owner of property that is dangerous to human life and safety to knowingly turn such property loose, even upon his own ground, where it will do mischief, even to a technical trespasser. Such conduct is regarded as utterly at war with the principles of humanity, and as smacking of savagery. That the party hurt was a mere trespasser, and, otherwise than in this legal aspect, perfectly innocent and harmless, does not excuse the person that injured him by means manifestly injurious to human life and safety. By being technically a trespasser he does not forfeit all right to protection. This fact is made manifest in various ways; for instance, although, ordinarily, the conductor in running his train is not bound to look out for trespassers, yet he is bound, if he discovers him in time, to use all means at his command to protect him. Why is he not ordinarily required to look out for trespassers in running his train? It is not because the trespasser has forfeited his right to protection, but it is because he has the right to presume that he will not trespass upon the track. But if he does trespass, and is seen, it is the duty of the conductor to use all the means at his command to protect him. This obligation presupposes it to be the duty of the owners of the train to have it always properly and efficiently equipped and controlled, and, while it is ordinarily not their duty to look out for trespassers, yet they have no right to voluntarily deprive

themselves of the means and power of protecting them, if discovered in time. If the train, with steam up and under headway, should be abandoned and permitted to run by itself, no one would doubt the owner's liability for any injury done to a trespasser on the track, while thus running. Why so? Because those whose duty it was to have the train in charge had abandoned it to the destruction of human life, and had deprived themselves of the power of preventing it. It has been repeatedly held—indeed, we do not recall a single exception to the rule—that if a person knowingly turning a ferocious animal loose, even in his own inclosure, which is likely to be visited by mere trespassers, and if any trespasser, ignorant of the presence of the animal, is injured by such animal while trespassing in the inclosure, the owner is liable in damages for the injury. The owner has the right to the exclusive use of the animal and inclosure, but he has no right to do that which is a manifest injury to others, even though such others be trespassers; for there is no proportion between the technical trespass in merely walking through another's inclosure and the manifest wrong done to the life and safety of all persons, whether trespassers or not, that may come in contact with it. It is the duty of the citizen not to knowingly do an act that will hazard human life and safety, unless it is done to prevent crime. If the appellee had turned loose on the track a ferocious bull to run down it, and, in running down it, it had killed the appellant's intestate, would it be doubted that the appellee would be liable in damages for the injury, although the intestate was a trespasser? Both the bull and the track belonged to the appellee, and the deceased was technically a trespasser on it, else he would not have gotten killed, yet the appellee is made responsible for the killing, because he does that which is manifestly dangerous to the lives of all persons that may, rightfully or wrongfully, be on the track. If it be said that the parallel between the cases just put and the running of the train is wanting in the fact that the running of the train is a business operation, and is governed, as to matters of damages, by a violation of prudential business rules and obligations, and, in the cases put, the parties are held responsible for violating police duties and obligations, as a general proposition this distinction is correct. But here the train, possessing most destructive power, contrary to a manifest duty, is turned loose to run, unlighted and uncontrolled, and kill all persons, whether trespassers or not, that may be overtaken by it. Such conduct is a violation of a manifest duty to the public, trespassers and all, not to turn such a power loose. An instruction ought to have been given in accordance with the foregoing views. The judgment is reversed, with directions to grant a new trial, and for further proceedings consistent with this opinion.

**NICKELL et al. v. FALLEN.***(Court of Appeals of Kentucky. Dec. 17, 1889.)***ACTION BY HEIRS—PLEADING—APPEAL—RECORD.**

1. In an action by brothers and sisters of an intestate to recover her lands, an allegation that they are the "only heirs" of said intestate is insufficient in Kentucky, where the father, if living, is preferred.

2. Where a paper is filed in the record, on appeal, by the clerk, styled "Petition," but he certifies that it was not filed, or indorsed as filed, in the lower court, and he does not certify that it was considered or used in the lower court as a petition, it must be regarded as out of the case.

3. An order filing a case away for want of prosecution is not a final order.

Appeal from circuit court, Wolfe county.  
"Not to be officially reported."

Action by appellants, Morrison Nickell and others, brothers and sisters of Nancy Fallen, deceased, wife of appellee, Oscar Fallen, to recover their interest in lands of deceased.

*Ed. C. O'neal*, for appellants.

**BENNETT, J.** The appellants, as the brothers and sisters and nieces, etc., of Nancy Fallen, deceased, wife of the appellee, Oscar Fallen, brought suit to recover two-thirds of a tract of land that belonged to Nancy Fallen and the appellee jointly, in proportion of two-thirds to the former and one-third to the latter. Appellants having failed to prosecute the suit, the same was filed away, and the appellant Morrison Nickell adjudged to pay the appellee's cost. The appellants' amended petition alone is in the record as a part of the original record of the case. There is a paper filed in this record by the clerk, styled "Petition;" but he certifies that the paper was not filed or indorsed as filed, in the lower court, nor does he certify that the same was considered or used in the court below as a petition. So it must be regarded as out of the case.

We cannot consider the proof in the case, as it appears from this record, because, first, the appellants sue only as the brothers, sisters, nieces, etc., of Nancy Fallen, and claim that by reason thereof they are her only heirs. The allegation that they are her only heirs is but a conclusion of the pleader. It is not an assertion of a fact. The fact alleged is that they are the brothers, sisters, etc., of Nancy Fallen. This fact, while it shows the relationship, does not show that the appellants are entitled to inherit the land, for the reason that the father, etc., under the statute, if living, is preferred to the appellants; and, in order to entitle them to recover, they must allege and prove, if denied, that those standing in priority of right are dead, etc. This allegation, as has been decided by this court, is indispensable, in order to entitle the claimant to recover; and the proof in that regard cannot be considered, unless such allegation is made.

Also, the order filing the suit away and giving judgment against the appellant Morrison Nickell for cost is not excepted to. No motion to submit the case appears in the record. If the appellants were ready or willing

to try the case, they did not say so. All that appears is that the court filed the case away for want of prosecution, to which there was no objection or exception. The clerk says that, by reason of some of the orders in the case having been consumed by fire, and their places not having been supplied, he is unable to copy them in the record. It must, in the absence of these orders, be presumed that they show sufficient reason for ruling the appellants to prosecute the case, and for filing it away for the want of prosecution, and for adjudging that Morrison Nickell should pay the cost. Also, the order filing the case away is not final, and not appealable. If the appellants were dissatisfied with it, their remedy was to move to reinstate the case, and then appeal from the order overruling the motion, if overruled. Also, we must presume that, if the entire record were here, it would fully sustain the court in adjudging that Morrison Nickell should pay the cost. We must presume that the absent record would sustain the judgment of the court, unless it appears that such record did not relate to anything that might be the foundation of the judgment. There is no brief on file for the appellee. The appeal is dismissed.

**EVANS v. COMMONWEALTH.***(Court of Appeals of Kentucky. Dec. 19, 1889.)***ASSAULT WITH INTENT TO KILL—DEADLY WEAPON.**

1. Where the court has charged that, if defendant willfully and maliciously struck and wounded the prosecutor with a pitchfork, with intent to kill, and the jury believed said pitchfork was a deadly weapon, they should find him guilty of a felony, it is proper to refuse to charge that, before they could find defendant guilty as set forth in the instruction, "they must believe from the evidence, beyond a reasonable doubt, that the defendant struck with intent to kill, and they must further believe that said pitchfork, at the time in the hands of defendant, used in the manner he used it, if he did so use it, was a deadly weapon."

2. A pitchfork is a deadly weapon, within the meaning of Gen. St. Ky. c. 29, art. 8, § 2, prescribing the punishment for willful and malicious striking with a deadly weapon, with intent to kill.

Appeal from circuit court, Grayson county.  
"Not to be officially reported."

James W. Evans was indicted for willfully and maliciously striking one Whitworth with a pitchfork, with intent to kill. Upon being convicted, he appeals.

*J. C. Graham*, for appellant. *P. W. Hardin*, Atty. Gen., for the Commonwealth.

**LEWIS, C. J.** Upon trial of appellant, indicted for willfully and maliciously cutting, thrusting, striking, and stabbing one Whitworth with a pitchfork, a deadly weapon, the court, upon proof that he struck him merely, but did not cut, thrust, or stab, instructed the jury that if he willfully and maliciously struck and wounded Whitworth with a pitchfork, with intent to kill him, and the jury believed said pitchfork was a deadly weapon, they should find him guilty as charged in the indictment, and fix his punishment at confinement in the penitentiary not less than one



nor more than five years. In the second instruction they were told, if they had reasonable doubt of the defendant's guilt under the first instruction, but believed he unlawfully, and not in self-defense, assaulted and struck Whitworth with a pitchfork, they should find him guilty of assault and battery, and fix his punishment at fine or imprisonment in the county jail, or both. There was another instruction, to acquit if he acted in self-defense; and the fifth, that, before the jury could find him guilty under the first instruction, they must believe the pitchfork used was a deadly weapon, when used in the hands of one for striking another.

We think all the conditions and restrictions upon which the particular offense described in the indictment, and denounced by section 2, art. 6, c. 29, Gen. St., may be punished, are fully and correctly stated in the first instruction. But an instruction was asked by appellant, and refused. It is as follows: "That, before the jury can find the defendant guilty as set out in instruction No. 1, they must believe from the evidence, beyond a reasonable doubt, that the defendant struck Whitworth with intent to kill him; and they must further believe that the said pitchfork, at the time in the hands of defendant, used in the manner he used it, if he did so use it, was a deadly weapon." A pitchfork is an instrument with which life may be readily taken, and therefore a deadly weapon, in the meaning of section 2, art. 6; and it does not make any difference whether an injury inflicted with it be by striking or by stabbing or thrusting, if done willfully and maliciously, with intent to kill the person wounded. But, if not done with such intent, the offense is an assault and battery merely, and punishable as such; and, as no presumption of malicious intent to take life necessarily arises from the use of a pitchfork in striking, the qualification contained in the instruction quoted is necessary and proper, in determining whether the offense be a felony or misdemeanor, for without it the jury might conclude the use of the pitchfork as a weapon made the act a felony, without regard to the manner or intent with which it was used. But the instruction, in the form it was asked, is objectionable, because it authorized the jury to acquit, although the jury might believe the injury was done maliciously, and with intent to kill. Besides, the fifth instruction given contains, in substance, the qualification that, in the absence of malicious intent to kill, appellant was not guilty of a felony, although the pitchfork was used, but of assault and battery, as set out in the second instruction. Perceiving no error to the prejudice of appellant, the judgment is affirmed.

#### EVANS v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 19, 1889.)

#### CRIMINAL LAW—SENTENCE—APPEAL.

1. Under Crim. Code Ky. § 288, providing that, "if the defendant be convicted of two or more of-

fenses, the punishment of each of which is confinement, the judgment shall be so rendered that the punishment in one case shall commence after the termination of it in the others," a defendant convicted and sentenced, at same term of court, of house-burning and malicious striking, may be confined for the full period embraced in each sentence; and it is proper to provide that the punishment for the second conviction shall not commence until that for the first had expired.

2. Where the instructions to the jury are not identified and made a part of the record by any bill of exceptions, or even by any order of court, no claims of error can be considered.

Appeal from circuit court, Grayson county.

"Not to be officially reported."

Indictments against James W. Evans for house-burning and malicious striking. Defendant was convicted, and appeals.

J. C. Graham, for appellant. P. W. Hardin, Atty. Gen., for the Commonwealth.

HOLT, J. The appellant, James W. Evans, was jointly indicted with two other persons upon the charge of house-burning, the statutory punishment of which is not less than one nor more than six years' confinement in the penitentiary. He was granted a separate trial, found guilty, and his punishment fixed at two years' confinement. He had at the same term of the court been convicted upon another indictment, and sentenced to the penitentiary for three years, for malicious striking; and the second judgment, after reciting this fact, provided that the punishment for the second conviction should not begin until that for the first one had expired. This was proper. It was formerly held that, where a prisoner was found guilty, upon two indictments, for separate felonies, and his punishment in each case fixed at five years in the penitentiary, and the sentence was that he should be confined for "five years upon each indictment," that he could be confined for five years only, both terms beginning and ending at the same time. *James v. Ward*, 2 Metc. (Ky.) 271. The Criminal Code, § 288, furnished a new rule, however. It provides: "If the defendant be convicted of two or more offenses, the punishment of each of which is confinement, the judgment shall be so rendered that the punishment in one case shall commence after the termination of it in the others."

The evidence in the case is altogether circumstantial, and quite conflicting. Where this is so, however, this court should not invade the province of the jury, and determine the guilt or innocence of the accused. Circumstances appear in the record sufficiently pointing to the guilt of the accused to forbid a reversal upon the ground that the conviction is clearly unsupported by evidence, or was the result of prejudice. The lower court, therefore, properly refused, at the close of the state's testimony, to peremptorily instruct the jury to acquit the accused. What purport to be the instructions are copied into the record by the clerk. The second one is in itself objectionable. The jury were told by it that if they merely believed from the

evidence that the burning was done by either of the persons indicted with the appellant, and that he was present, aiding or abetting, they should convict him. His conviction should not, of course, have been made to depend upon a mere preponderance of the testimony, or an ordinary belief upon the part of his triers. This was cured, however, by the next instruction, which told them, in substance, that a conviction could not be had unless the accused was proven guilty beyond a reasonable doubt. Aside, however, from this correction, we could not consider any claim of error in instructing the jury, as the instructions are not identified and made a part of the record by any bill of exceptions, or even by any order of court. Perceiving no error, the judgment is affirmed.

#### EVANS v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 9, 1890.)

##### ARSON—INDICTMENT.

Under the Kentucky statute making it a felony to "willfully and unlawfully burn a stable, barn, or any house or place where wheat, corn, or other grain, grass, \* \* \* is usually kept, or any other house whatever," an indictment for burning "a barn, the property of," etc., is sufficient, without an averment that wheat, corn, or other articles named in the statute, were usually kept in it.

On petition for rehearing. For former report, see ante, 768.

"Not to be officially reported."

J. C. Graham, for appellant. P. W. Hardin, Atty. Gen., for the Commonwealth.

HOLT, J. The brief for the accused was not with the record when this case was decided. The questions presented by it, and which were not discussed in the opinion, as well as those now urged in the petition for a rehearing, will therefore be now considered. The demurrer to the indictment was not well taken. It charges the accused with burning "a barn the property of and belonging to Allen Whitworth." It is urged that it should also have stated that wheat or corn, or some article named in the statute, was usually kept in it. This was not necessary. The word "barn" is an ordinary term. Its meaning is well understood. The statute reads: "If any person shall willfully and unlawfully burn a powder-house, tobacco-house, warehouse, store-house, stable, barn, or any house or place where wheat, corn, or other grain, grass, \* \* \* is usually kept, or any other house whatever, \* \* \* he shall be confined in the penitentiary not less than one nor more than six years." Gen. St. c. 29, art. 7, § 3. The enumeration of certain articles in storage is to be read in connection with the words "any house or place" only. Granting counsel's contention that if the evidence had shown the structure to have been a stable, instead of a barn, (provided there be any distinction,) there would have been a variance between the proof and the indictment, yet the testimony is that it was a barn.

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What purport to have been the instructions to the jury were erroneous only in the respect mentioned in the opinion; and this error was cured, as therein suggested. The indictment charges the accused with the burning. It does not speak of aiding or abetting. If, however, the torch was applied by a co-defendant of the accused, and he was then present, aiding and abetting, he was, under our law, a principal; and the indictment therefore authorized such an instruction. But, as already said, what purport to be the instructions cannot be considered, as they have not been properly made a part of the record. The record fails to show that one of the jurors, after the case was submitted to them, was permitted by the court to separate from the others, but under the charge and in company with the proper officer. We need, therefore, consider whether, if shown, there would be anything in this objection to the conviction. The petition for a rehearing is overruled.

#### WEBB v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 9, 1890.)

##### HOMICIDE—HARMLESS ERROR.

Under a plea of self-defense to an indictment for murder, where defendant was convicted on testimony of positive nature, the admission of evidence of general good character of deceased, though irrelevant because that fact was not in issue, is harmless error.

Appeal from circuit court, Bell county.

PRYOR, J. We have not been favored by a brief in this case from counsel for the appellant, but have nevertheless examined the record with a view of ascertaining whether any reversible error was committed during the trial. The father and son, who were jointly indicted for the murder of Partin, evidently sought the hostile meeting, and, if not, when the parties met the father of the accused originated the difficulty, and at once applied to his son for a pistol either to take the life of Partin, or to intimidate him, so that the latter might submit to his abuse without resistance. When the fight took place between Pierce Webb and the deceased, the accused, the son of Pierce Webb, who had regained the possession of the pistol, fired and killed the deceased, when no necessity existed for such a cruel act. It is true the accused and his father make statements conducing to show that the shooting was in self-defense, but another eyewitness, disinterested in the prosecution, places different light on the difficulty between these parties from its inception to its close, and from his testimony the killing was in no manner justifiable. The jury, however, were the judges of the facts, and after hearing all the testimony came to the conclusion that the killing was not done in self-defense, and, if we could properly pass on the facts, the same conclusion would be reached.

There is some evidence introduced by the state showing the general good character of the man whose life had been taken, that was

objected to by counsel for the defense, and the objection should have been sustained. The testimony, however, was admitted, when no effort had been made by the defense to show that the deceased was a man of bad character, or any issue made on that subject. The good character of the deceased was no answer to the plea of self-defense, or any reason for convicting the accused, if the deceased was in the wrong. It was clearly incompetent, and, if the facts were not so conclusive against the accused, the judgment would be reversed for this error. As this error could not have prejudiced one who had taken the life of his fellow-man without cause, there is no reason for awarding another trial, unless for the purpose of having a more severe punishment inflicted. Judgment affirmed.

**HEIDRICH *et al.* v. SILVA *et al.***

(Court of Appeals of Kentucky. Jan. 9, 1890.)

**INSOLVENCY—PARTIES—PLEADING.**

1. Gen. St. Ky. c. 44, art. 2, § 1, provides that every sale, mortgage, or assignment, made by debtors in contemplation of insolvency, and with the design to prefer creditors, shall operate as an assignment for the benefit of all the creditors. Section 3 provides that an action to declare such acts an assignment shall be conducted as one for the settlement of a decedent's estate. Civil Code Ky. § 433, provides that a creditor of a decedent, by proving his claim before the master, becomes a party to the action. An insolvent, having sold part of his property, and paid some of his debts, conveyed the residue of his property to a trustee for payment of his debts. An action by a creditor to have the conveyance to the trustee and the sales declared acts of insolvency was consolidated with an action by the trustee for a settlement of the estate, and a reference ordered to hear proofs of claims and any acts of insolvency. *Held*, that creditors who proved their claims before the master became parties to the proceedings, and may appeal from a dismissal thereof, though their claims had not been acted on by the court.

2. Under said section 1, where the pleadings did not aver that the debtor knew of his insolvency, or that he contemplated it, or that there was any design on his part to prefer, and where no facts were stated from which these essential conditions were necessarily inferable, the action was properly dismissed.

Appeal from chancery court, Campbell county.

"To be officially reported."

*John S. Ducker*, for appellants. *Charles J. Helm*, for appellees.

HOLT, J. December 24, 1887, the appellee Albert Silva, for \$10,420, conveyed certain real estate to F. C. Miller, and a grocery store for \$4,500 to Thomas Weston. He also, upon the same day, paid Anna E. Webster a debt of \$340, and one of \$5,500 to the German National Bank. He was then insolvent, and, upon the night of the day of these sales and payments, he conveyed his remaining property to a trustee for the payment of his debts. Suits were brought by some of the creditors, and attachments obtained. December 28, 1887, Heidrich & Co., who were creditors of Silva, brought an action for the purpose of having the sales and payments mentioned de-

clared acts of insolvency under what is generally known as the law of 1856. The trustee also brought an action for a settlement of the debtor's estate, and all of the actions were consolidated. An order of reference to the master to hear proof of claims and of any acts of insolvency was entered in them. He filed a report, which, among other claims, allows those of the creditors who now claim the right to maintain this appeal. A personal judgment was rendered against Silva in the suit of Heidrich & Co., for their debt, and the action was discontinued as to Miller and Weston. It was then submitted for judgment as to whether Silva had committed any act of insolvency, the purpose being, of course, to compel Anna E. Webster and the bank to account for the money paid them, and its division *pro rata* among the creditors. Before any judgment was rendered, an assignment from Heidrich & Co. of their claim to Paris C. Brown was filed. The action was subsequently dismissed, upon the ground of defective pleading. None of the creditors, save Heidrich & Co., who brought the suit, were parties to it by pleading. This appeal was taken in the name of Heidrich & Co., and some of the other creditors, who proved their claims before the master. Heidrich & Co. appear not to have authorized it, and Brown now objects to it. The appellees, therefore, move to dismiss the appeal *in toto*, claiming that the creditors who were not parties to the suit by pleading, and merely proved their claims before the master, have no right to maintain it. Such an action, however, when brought by one creditor, inures to the benefit of all the other creditors. He cannot, by dismissal of his petition, after they have filed their claims, destroy this right. The statute expressly declares that the act of insolvency "shall operate as an assignment and transfer of all the property and effects of such debtor, and shall inure to the benefit of all his creditors." It also provides that the action shall be conducted as one for the settlement of a decedent's estate, so far as applicable. Gen. St. c. 44, art. 2, §§ 1, 3. And section 432, Civil Code, declares that a creditor of a decedent, by proving his claim before the master, becomes a party to the action, and is concluded by the final judgment. The creditors in this instance, by proving their debts, became parties to the action, and are entitled, equally with the original plaintiff, to make any question or take any step in it. As he could not, by dismissing his petition, prejudice their rights acquired by the filing of their claims, so he cannot, by objecting to an appeal, cut off their right to one. By presenting their claims, they acquire a right independent of him, and which they may assert in the action, even over his objection. Nor is this right as to an appeal to be denied because the master's report as to claims may not have been acted upon by the court. They had become parties to the action, and may therefore question by appeal any final judgment

which affects their rights. They had a right to prove their claims without waiting for the judgment of the court as to whether an act of insolvency had been committed by the debtor. It was quite proper that they should do so to enable the chancellor to act intelligently, and by doing so they became parties to the action. Any other rule would often lead to unfair combinations between the creditor bringing the suit and the opposing parties, and defeat that equality among creditors which the statute was intended to produce. *Sawyers v. Langford*, 5 Bush, 539. The motion to dismiss the appeal is therefore overruled.

The question next presents itself whether the pleadings upon the part of the plaintiffs furnish ground for the desired relief. Proof, without pleading, cannot, of course, avail. It is quite meritorious in a debtor to pay his creditor. He may even prefer him over his other creditors, without being guilty of actual fraud. Relief in such a case is afforded by reason of the statute alone. To obtain it, the party must aver in his pleading the facts required by the statute to authorize it. Its language is: "Every sale, mortgage, or assignment made by debtors, and every judgment suffered by any defendant, or any act or device done or resorted to by a debtor in contemplation of insolvency, and with the design to prefer one or more creditors to the exclusion in whole or in part of others, shall operate as an assignment and transfer of all the property and effects of such debtor, and shall inure to the benefit of all his creditors \* \* \* in proportion to the amount of their respective demands." Gen. St. c. 44, art. 2, § 1. Two things must concur to entitle the creditor to relief, to-wit: *First*, the act must be done in contemplation of insolvency; and, *second*, with the design to prefer one creditor over another. If the debtor knows that he is insolvent at the time, then the design to prefer will be presumed, but not absolutely; or if he contemplates becoming so, and does the act with the design to prefer, then the transaction is within the statute. If, however, the circumstances show that no preference was intended, then the act will not be held to be one of insolvency, within the statute, although the debtor may in fact have been insolvent at the time. *Grimes v. Grimes*, 86 Ky. 511, 6 S. W. Rep. 333. Thus if A. be bound both as principal and surety, and considering all this liability is insolvent, yet if he have ample to pay his own debts, and it is not known he will have to pay those for which he is surety, and under these circumstances he, not in contemplation of insolvency, or with any design to prefer, makes a payment to a creditor, it should not be held to be a preference within the statute. This instance is given to show that it is not sufficient to merely aver the insolvency of the debtor at the time of the doing of the act. In doing it he must contemplate his insolvency, and intend to prefer the creditor. The pleader need not, of course,

use the language of the statute. It is sufficient if the facts required by it are substantially stated; but, while the intent of the debtor may be inferred from facts proven, yet this does not dispense with the necessity of pleading the facts essential to relief. In this instance it is not averred that the debtor knew of his insolvency, or that he contemplated it, or that there was any design upon his part to prefer, nor are facts stated from which these essential conditions are necessarily inferable. It is merely averred that when the payments were made Silva was insolvent. It is not necessary to aver that the preferred creditor knew of the insolvency at the time. The question of his knowledge does not enter into it, but it must be averred that the debtor acted under the conditions named in the statute. In this instance facts are not stated from which the law presumes what is necessary to entitle the plaintiff to relief, nor can they be implied from what is stated. The fact that objection was not taken to the pleading by demurrer or otherwise, and that there was no denial of it, cannot, therefore, avail, because it presented no grounds. The averments that the payments were acts of insolvency and preference, and operated for the benefit of all the creditors, were merely legal conclusions, which fail to support the pleadings, and it results that the chancellor properly dismissed the action because the grounds for relief required by the statute were not stated. Judgment affirmed.

#### COMMONWEALTH v. SHERLEY.

(Court of Appeals of Kentucky. Jan. 9, 1890.)

#### CONSTITUTIONAL LAW—PUNISHMENTS.

Act Ky. April 10, 1878, providing that, where a fine imposed in a misdemeanor case is unpaid, defendant may be required by the verdict to be put at hard labor for a certain time, is not unconstitutional, or discriminating between the rich and poor.

Appeal from circuit court, Marion county.  
"Not to be officially reported."

P. W. Hardin, Atty. Gen., and Finley Shuck, for appellant. J. R. Thomas, for appellee.

PRYOR, J. This case was transferred from the superior court to this court, for the reason that the question raised by the defense involved the constitutionality of the act approved April 10, 1878, under which penalties for misdemeanors in certain cases can be satisfied by requiring the accused to labor for the county for the period named in the verdict. The punishment at hard labor is substituted in lieu of imprisonment in the county jail, if the jury in their discretion see proper; and upon such finding it is made the duty of the court to place the prisoner in the custody of the jailer, that the punishment may be imposed, etc.

On the trial of this case the attorney for the commonwealth asked an instruction investing the jury with the discretion given by

the statute; that is, with the right to require the accused to pay his fine by hard labor in lieu of imprisonment. The court refused to give the instruction, and the defense maintains that the act is unconstitutional, because it discriminates between the rich and the poor, in compelling the one to labor for the county, and permitting the other to satisfy his fine by the payment of the money. We perceive no such objection to the act. Where the penalty is a fine only, if the money is paid, this relieves the accused from any punishment; but if the fine is not paid, if the jury in their verdict so determine, the defendant, whether rich or poor, shall be put at hard labor in lieu of imprisonment, and is entitled to a credit of one dollar for his day's work, and can at any time replevy or pay his fine, and be discharged from custody. If the statute in question was repealed, and the law administered as it was prior to its passage, the same constitutional question could be made. A *capias* would issue on the judgment, and, if a rich man, he could discharge his fine by payment in money; if without means, the officer would take him into custody, and confine him in the county jail.

The question raised is scarcely worthy of discussion, and we have no doubt the court below refused the instruction on other grounds. As the judgment has been rendered, and a *capias* doubtless issued, no reversal will be made, but the opinion certified, so that there may be a uniform practice on the subject.

#### REED v. KING.

(Court of Appeals of Kentucky. Dec. 17, 1889.)

##### REPLEVIN—JUDGMENT—BONA FIDE PURCHASER.

1. Under Civil Code Ky. § 888, providing that, where property obtained by an order of delivery is adjudged to belong to defendant from whom taken by the order, the judgment shall be in the alternative, with the right on part of plaintiff to return the property or pay its value, a judgment in favor of a defendant for the value is erroneous.

2. Where a lot of pieces of timber, called headings, are merged with other headings, of a like description and value, the owner may maintain an action to recover the same number of headings without identifying the particular ones belonging to him.

3. A *bona fide* purchaser of timber cut by a trespasser does not acquire title as against the owner.

Appeal from circuit court, Casey county.  
"To be officially reported."

Action by John M. Reed against Benjamin King to recover certain headings purchased of John W. Reed, nephew of plaintiff. Judgment for defendant, and plaintiff appeals.

*Stone & Stone and Hill & Alcorn*, for appellant. *R. J. Breckinridge and J. B. McFerran*, for appellee.

PRYOR, J. In this action is involved the recovery of the possession of 40,000 pieces of timber, called "headings," made out of timber standing upon the ground alleged to belong to the plaintiff. The timber was taken

from the defendant under an order of delivery and delivered to the plaintiff. The right of property was asserted by the defendant under a purchase made from one William Reed and his son; and, on the trial, the verdict being for the defendant, he was allowed the value of the headings, \$600, and a judgment rendered.

This judgment is not only informal, but erroneous; for the reason that the Civil Code, (Carroll,) § 388, requires the judgment to be in the alternative, with the right on the part of the plaintiff to return the property or pay its value. It is plain that John W. Reed, the son of William Reed, was either a trespasser when he cut this timber, or the right to its use and appropriation, as well as the land itself, belonged to the father. That the defendant was innocent of the want of title in John W. Reed, considering the latter to have been a trespasser, is plain from the facts; still his innocence of the wrong cannot vest him with title as against the lawful owner, who has been deprived of his title by the trespasser. There is testimony in the case showing that the plaintiff, John M. Reed, and the witness William Reed are brothers, and that this land, from which the timber was cut, descended to them, and to their other brothers and sisters, from their father. William Reed sold his undivided interest in this land to his brother John; and those interested with John, being the absolute owners, as they claim, brought this action. A conveyance was made by William to John, and recorded in the county where the land lies; but William testifies that he never surrendered the possession of the land, and only made the deed in secret trust to his brother, to save his interest from being sold to pay his debts. John W., who sold the headings to the defendant, says that his father was in the possession of his interest at the time he cut and sold the timber; and, if this secret trust is established as stated by William, the plaintiff cannot recover, and instruction No. 1, not embodied in the bill of evidence, should have been, in substance, given. This court would not notice the instruction if a reversal did not necessarily follow, as it is not properly in the record. The mere possession by William, or his son John W., would not authorize them to cut and dispose of this timber; but if the title was held in secret trust by John M., for his brother's use, and the latter was in its use and possession, the sale to defendant by the son of William, under the authority of the latter, passed the title. It is true that, as between the vendor and the vendee, the title passed, whether fraudulent or *bona fide*; but where innocent parties appear, who are not connected with the fraud, they may show the real facts connected with the transfer, and thus establish the authority of the vendor in possession to cut and dispose of the timber as his own.

It was not necessary for the plaintiff to identify the headings, under the facts of this case, to enable him to maintain the action.

They had been merged with other headings of a like description and value; so if there had been 40,000 of the headings in the one pile, and 10,000 of them belonged to the defendant by purchase from the real owner, and 30,000 from one who was a trespasser by taking them from the plaintiff, the latter could maintain detinue or replevin for the 30,000; and obtaining possession under an order of delivery would leave the defendant with his 10,000, of which he is the rightful owner.

There was no perceptible difference in the headings as to size, kind, shape, and value; and when you separate the 30,000 from the 40,000 each party has what he is entitled to. Where the articles are different in quality, size, or shape, it is not practicable to make the separation; but where it is practicable the action for the recovery of the specific property may be maintained. Kent says: "Where corn or flour of equal value is mixed, the party injured may take his quantity." 2 Kent, Comm. 365. Cooley says, where the grain mixed is all of the same kind, a like rule applies. Cooley, Torts, 53.

So, the appellee may have been innocent of any wrong when he mingled the goods with his own. Under the proof, the action could be maintained; and the only question arising on the facts as they now appear is, did John W. have the right, under the authority of his father, to sell this timber, and was the title passed to the plaintiff, John M., that he might hold it in secret trust for his brother, and without any other consideration? Judgment reversed, and remanded for a new trial consistent with this opinion.

*SULLIVAN et al. v. HODGKIN et al.*

(Court of Appeals of Kentucky. Jan. 9, 1890.)

**DEEDS—CANCELLATION—UNDUE INFLUENCE.**

A deed, executed by an aged parent in favor of two of his daughters and a grandson, will not be set aside at the instance of the other children of the grantor, on the ground that he was controlled by the improper influence of one of the daughters, his favorite child, where the facts indicate that his will power was equal to that of such daughter, and that he resisted the influence attempted to be exercised by his son, when the latter told him that the deed ought not to be made.

Appeal from circuit court, Clark county.  
"Not to be officially reported."

A suit in equity to cancel a conveyance, brought by S. H. Sullivan and others against John M. Hodgkin and others. Petition dismissed. Plaintiffs appeal.

*Wm. Lindsay and Hagyard & Benton*, for appellants. *Wm. M. Beckner and Geo. B. Nelson*, for appellees.

PRYOR, J. Fielding Bush died in the county of Clark in the summer of the year 1885. He left several children, and the descendants of children, who were his heirs at law. The most of his estate he had distributed or given to his children years prior to his death. He seems to have been a thrifty

and prosperous farmer, endowed with more than ordinary business habits in the accumulation of property, and certainly liberal in its disposition when acquired, between those who had claims upon his bounty. In May, 1881, he owned a tract of 225 acres of land, that he conveyed to two of his daughters, Mrs. Hodgkin and Mrs. Logan, and to his grandson, Charles B. Stewart, who was the child of a deceased daughter. This tract of land was the remnant of his large estate, and of the value of near \$15,000. To his grandson he gave 70 acres of the land, and the remainder of the tract he gave to his two daughters, to be equally divided between them, the possession to be delivered at his death. The children of his deceased daughter, Mrs. Sullivan, his son F. M. Bush, and his daughter Mrs. Groom, instituted this action in equity, seeking to cancel the conveyance made in May, 1881, to his two daughters and his grandson, on the ground of his want of mental capacity to execute such an instrument, connected with the exercise of an undue influence over him in its execution by his daughter Mrs. Hodgkin. The beneficiaries in the deed were made defendants, and also the children, who are asserting no interest, because of their having received in the life-time of their ancestor their full share of his estate. Much testimony was taken by both parties on the issues made, and, the chancellor below dismissing the petition, the plaintiffs have appealed.

The grantor, at the date of the conveyance, had reached the age of 87 years, and for the last two or three years preceding his death suffered with a disease of the kidneys that conduced to shorten his life, and that existed, but not in an aggravated form, at the time he signed the conveyance. The evidence shows that with this disease upon him, connected with his advanced years, he gradually declined in physical strength, and no doubt lost much of his intellectual vigor; but it fails to show that when this deed was written and signed his intellect was so much impaired as to prevent him from making a rational disposition of his property, and understanding fully the character of business transactions. While extreme old age will not authorize the presumption of a want of mind or of mental power sufficient to enable one to conduct his business affairs, the chancellor will always scrutinize with vigilance the character of transactions resulting in voluntary donations or grants to those who are likely, from their surroundings, to have exercised an influence over the aged and infirm, when thus disposing of their estate. The testimony on the part of the appellants, who are contesting the validity of the deed, leaves but little room to doubt that in May, 1881, the grantor was entirely rational, and possessed of a mind fully competent to transact all of his business, and retained his mental vigor long after the date of the deed, and until a short time before his death. The testimony of his son John Bush, with whom he

lived when the deed was made; the testimony of Stewart, one of the beneficiaries in the deed; that of other members of the family, whose interest would be subserved by its cancellation,—all conduce to show that the grantor was a man of unusual physical and mental strength for one so old; and when reading the testimony of his neighbors, and that of a learned and experienced physician, who had known him for near half a century, and treated him during his last illness, we have no doubt as to the capacity of the grantor to dispose of his whole estate according to his own wishes.

It is insisted, however, that while this mental power existed he was controlled by the improper influences exerted over him by his favorite daughter, Mrs. Hodgkin, and his mind, that was gradually falling by reason of his disease and advanced years, made subordinate to her will, and to such an extent, using the language of one witness, "as to cause him to become a monomaniac when her name was mentioned; that he was lost to everything else but this daughter." That one of the beneficiaries of the deed, Mrs. Hodgkin, was a favorite daughter, and one to whom he was much devoted, is apparent from the testimony; but we have failed to find any proof conducing to show that she caused the execution of this deed, or attempted in any manner to influence her father in the disposition of any part of his estate. He lived with his son John when the deed was executed, and, while it was written and signed at the house of his daughter, his son knew his purpose in going there, and the draughtsman states that he wrote it at the dictation of the grantor; that he left the front porch at the request of the grantor, and took a seat with him in the yard, on the opposite side of the house, where the grantor explained to him the nature of the deed he wanted written. This witness states that he was fully competent to execute the deed. The other attesting witness states that the grantor was a man of vigorous mind, and of considerable will power. He had preached to a congregation of which he was a member for years, and must have necessarily had an opportunity for forming this opinion. That Mrs. Hodgkin was patterned after her father in disposition is doubtless true. She was a woman of strong will, and, it may be, could have controlled all around her, if she had desired. But did she exercise this influence? It is said the grantor had repeatedly said that he intended to make his children equal, and that this intention was abandoned because of the influence of the daughter over him. We cannot well presume its exercise, in the absence of proof; but, on the contrary, the facts of this case would indicate that the will power of the father was equal to that of the daughter, and that no member of the family could induce him against his will to dispose of his property. Nor does it appear there was such an unjust division of his estate by the grantor. It is evident that the children of Mrs. Sulli-

van had received less, perhaps, than the other children; but it is not at all satisfactory, from the record before us, that Mrs. Hodgkin obtained the lion's share. It is shown that the grantor said that he had given to each of his children \$10,000, and the amount given to each is not now easily ascertained. The parties to this litigation knew of the execution of the deed when it bears date. The grantor lived nearly four years after its execution. He resisted the influence attempted to be exercised by his son when he told him that the deed ought not to be made. He had full control of his mental faculties; and if the favored daughter was attempting to get from him his estate to the exclusion of his other children, and had the power over his will that we are asked to infer she exercised, there was no reason for a division of the spoils with the sister who lived in Texas, and a grandson, perhaps not of age, in order to reconcile the family to such improper conduct; but, on the contrary, the claims of her brothers and sisters living in the immediate neighborhood would have been considered, and a division had to the exclusion of the Texas sister, by which they could have participated in the old man's act of benevolence resulting from the dominating will of his daughter over him.

We have read the testimony carefully, and must coincide with the learned chancellor below in determining that the execution of this paper was the offspring of the rational mind, uncontrolled by those around him.

Judgment affirmed.

#### HARMON v. DYER *et al.*

(Court of Appeals of Kentucky. Jan. 14, 1890.)

##### WILLS—VESTING OF ESTATE.

A will gave the whole of testator's estate, with certain exceptions, to his widow, during widowhood, and provided that, "in case my wife marries or dies, her present heir, Mary Belle, becomes sole heir to the property, and, in case both die, then all the property not herein bequeathed to other parties reverts to Jesse Harmon, my son, and his bodily heirs, equally, forever." Held, that the devise to the daughter took effect at once, and the daughter, having survived the marriage of her mother, became the owner of the absolute estate.

Appeal from circuit court, Union county.  
"Not to be officially reported."

*B. F. Buckner, Kohn & Barker, and Geo. Du Relle*, for appellant. *Gordon & Gordon, Ken Chapeze, and Yeaman & Lockett*, for appellees.

PRYOR, J. In the year 1866, Elijah Harmon died, leaving a will, the construction of which is involved in this controversy. He left his wife surviving him, and had been twice married, leaving two children, Jesse Harmon and Mrs. Ghomley, by his first wife, and a daughter, Mary Belle Harmon, by his last wife. He gave to his widow his whole estate during widowhood, with the exception of certain special devises, in regard to which there is no litigation. The fourth clause of



the will provided that the cash on hand is to be kept out, and the interest only used; and, further, "in case my wife marries or dies, her present heir, Mary Belle, becomes sole heir to the property, and, in case both die, then all the property not herein bequeathed to other parties reverts to Jesse Harmon, my son, and his bodily heirs, equally, forever." The widow renounced the provisions of the will, and married. The daughter Mary Belle married James Head, and died, childless, subsequent to the marriage of her mother. Her husband claims of her guardian the money that was loaned out under the provisions of the will, and her brother and sister of the half blood are litigating their rights; the brother, Jesse Harmon, insisting that under the fourth clause of the will he is entitled to the whole of the estate, both the personality and the land, and his sister, Mrs. Ghomley, contending that on the marriage of the mother Mary Belle took the absolute estate, holding it in fee, and subject to no restriction or limitation whatever. The devise provides: "In case my wife marries or dies, her present heir, Mary Belle, becomes sole owner to the property; but if both die, then it is devised to Jesse Harmon, and his bodily heirs, forever. We think the devise took effect at once, and the title vested in Mary Belle, subject to the mother's life-estate, and subject to be defeated if Mary Belle was not living to take at the marriage or death of the mother. Mary Belle was then an infant, and in fact died before she arrived at age; and the testator desired to designate the person to take in the event that Mary Belle, to whom had been devised the whole estate, was not living at the death or marriage of her mother. The devisee, Mary Belle, survived the event, the happening of which was intended to deprive her of the fee, and therefore died the owner of the absolute estate. It was never contemplated by the testator that the death at any time of his daughter Belle, however remote, should vest the title in his son, Jesse, but his plain purpose was to vest her with the entire estate, if living when the event happened upon which she became entitled. She was to have the use and possession of the property. The case of *Birney v. Richardson*, 5 Dana, 424, is very similar to the case before us, and that of *Wills v. Wills*, reported in 85 Ky. 486, 3 S. W. Rep. 900, sustains the ruling of the court below. The clause in the will providing that the money shall be loaned out, and the interest only used, is not inconsistent with the construction given the fourth clause. The testator had directed that his widow should have annually \$200 of the interest, and he was devising the means by which this interest could certainly be realized; and if not, the direction to loan terminated when the devisee, Belle, became entitled to the use and possession of the whole estate. In our opinion, the court below, in adjudging that the husband, as administrator, was entitled to the money, and that the land left by Mary Belle passed to Mrs. Ghomley and Jesse Har-

mon in equal parts, placed the proper construction on the will of the testator. The judgment below is affirmed.

#### STEVENS v. GREGG *et al.*

(*Court of Appeals of Kentucky*. Jan. 23, 1890.)  
NEGOTIABLE INSTRUMENTS—LEX LOCI CONTRACTUS—COMMIT.

1. A note made in Kentucky and payable in Ohio is to receive its legal character from the laws of the state where it is made payable.

2. Under Rev. St. Ohio 1836, § 8171, providing that "all bonds, promissory notes, bills of exchange, foreign and inland, and checks for a sum certain and payable to any person or order, or to any person or assigns, shall be negotiable by indorsement thereon," a promissory note payable "to the order of" a person is a negotiable instrument.

3. In an action in Kentucky on a note payable in another state, and negotiable under its laws, the law of the forum governing defenses between antecedent parties to negotiable instruments will be applied, though the note is not negotiable under the Kentucky laws. Overruling *Davis v. Morton*, 5 Bush, 160.

Appeal from circuit court, Campbell county.

"To be officially reported."

C. L. Raison, Jr., and G. H. Ahlering, for appellant. Geo. Washington, for appellees.

BENNETT, J. The appellant executed and delivered to W. E. Hampton the following note: "Persimmon Grove, Aug. 14, 1882. Twelve months after date I promise to pay to the order of W. E. Hampton ninety-three dollars, at Exchange National Bank, Cincinnati, Ohio; value received, &c. J. J. STEVENS." This note was indorsed and delivered to the appellees in the state of Ohio, before its maturity, for a valuable consideration, and without any knowledge or information of the existence of the note executed by the payee to the payor, which note the latter attempts to plead as a set-off against the note sued on by the appellees as indorsees. As is shown by the note itself, as well as the admissions of the appellant, it was made payable at the Exchange National Bank in Cincinnati, Ohio; and it is conclusively shown that the note was, before its maturity, for a valuable consideration, and without notice to the appellees of any defenses, legal or equitable, existing between the payor and payee, indorsed by the payee to the appellees. If said note, according to the law of the state of Ohio, is placed upon the footing of, or is in fact, a bill of exchange, then the question arises, is it, in this state, in the hands of an innocent indorsee, subject to said set-off?

1. Does the fact that said note was made payable in the state of Ohio impress it with the character of similar paper executed and made payable in said state? The authorities, the decisions of this court included, all agree that it does. In *Goddin v. Shipley*, 7 B. Mon. 577, it is said: "The general principle that a contract referring by its own terms to a particular place where it is to be performed is to receive its construction and

legal character and effect from the laws of the place thus referred to is in itself so obviously reasonable, and, on the score of authority, so well established, as to preclude all discussion of its correctness."

2. Did the law of Ohio put said note upon the footing of a bill of exchange? We think it did; for the statute of said state then and now in force is as follows: "All bonds, promissory notes, bills of exchange, foreign and inland, and checks for a sum certain, and payable to any person or order, or to any person or assigns, shall be negotiable by indorsement thereon; and all such instruments payable to a person or bearer shall be negotiable by delivery, so as absolutely to transfer and vest the property thereof in each and every indorsee or holder, successively."<sup>1</sup> There can be no doubt that the above statute places a promissory note, made payable to a person or his order, or his assigns, upon the footing of a bill of exchange, and, if such note is made payable to a person or bearer, it is placed upon the same footing of a bill of exchange; the only difference being that in the former case the absolute title is vested in the indorsee by the written indorsement of the owner, which indorsement is required to invest such title; in the latter case the title vests in the indorsee by delivery merely. In either case such note, according to said law, is put upon the footing of a bill of exchange, and is not affected, in the hands of an innocent indorsee, by any equities existing between the antecedent parties to the paper,—such is the immunity of the innocent indorsee of a bill of exchange; and a promissory note placed upon the same footing is entitled to the same immunity.

The supreme court of Ohio and this court (*Carlisle v. Chambers*, 4 Bush, 268) construe said statute as placing such promissory notes as the one therein described upon the same footing are bills of exchange, and are therefore not subject, in the hands of an innocent indorsee, to any equities existing between the antecedent parties. Therefore, the third question is, is said note, in this state, subject, in the hands of the appellees, as innocent indorsees, to the set-off existing against the indorser? It is conceded as a general proposition that all defenses are governed by the law of the forum, and not of the place of the contract; that set-offs are creatures of the law of the forum, and may be pleaded to a contract, if allowed by the law of the forum, though not allowed as a defense by the law of the place where the contract was to be executed. But the inquiry is, does the law of this state allow a set-off to be pleaded in a case like this? We think not. Section 19 of the Civil Code of Practice provides: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any discount, set-off, or defense now allowed; and, if the assignment be not authorized by statute, the assignor must be a

party, as plaintiff or defendant. This section does not apply to bills of exchange, nor to promissory notes placed upon the footing of bills of exchange, nor to common orders or checks." This section allows, among other defenses, any set-off that may exist in favor of the payor against any of the antecedent parties to "a thing in action" to be pleaded against the "thing," though it is in the hands of an assignee or indorsee for value, and without notice, although the "thing" may contain words of negotiability. If such paper was in the hands of an innocent indorsee a defense existing between the antecedent parties would be allowed, unless such paper, under our law, is a bill of exchange, or a promissory note placed upon the footing of a bill of exchange, while, under our law, to place a promissory note upon the footing of a bill of exchange, such note must be payable and negotiable at some bank incorporated under some law of this state, or organized in this state under some law of the United States, and indorsed to and discounted by the said bank at which it is made payable. See Gen. St. 1888, § 21, p. 252. Yet the Code and statute must be construed to refer to such promissory note as is made with reference to any law where its payment may be enforced, and not to such promissory note as by the express statute of another state has been made in effect and fact a bill of exchange,—in other words, placed upon the footing of a bill of exchange,—and such note was executed with reference to such statute. Such statute enters into the vitals of such contract, and must be looked on as impliedly incorporated in it. If a contract contains a proviso that it should be absolutely void if not enforced within a certain time, or that a set-off should not be pleaded against it in the hands of an innocent transferee of the contract, there can be no doubt that such a proviso, being a part of the contract, and based upon a sufficient consideration, would be enforced, notwithstanding it might be restrictive of the person's rights under the general law of the forum. Why, then, might not such a proviso, impliedly made by the law of the place where the contract was executed, be enforced? In the one case the parties expressly make the proviso. In the other, the proviso, as a matter of expressed law, enters into the contract, and becomes a part of it. In both cases, the proviso is equally a part of the contract, and in either case must be held inviolate wherever the contract is attempted to be enforced. Where a contract is made with reference to the common or general law, such contract is subject to any remedy allowed by the state in which it is attempted to be enforced, though such remedy might be unknown to the state in which the contract was made; but, as we have attempted to show, if the contract is to be executed in a particular state, then its statutory law fixing the character of such contract, and denying the right to make certain defenses to it, becomes a part of the contract, and the comity existing between the states

<sup>1</sup> Rev. St. Ohio 1886, § 8171.

forbids the allowing of such defenses in any other state to which the party may be compelled to resort for remedy for a breach of the contract. The case of *Carlisle v. Chambers*, 4 Bush, 272, aptly illustrates the foregoing views, and is a case directly in point. It is there said: "As payment was to be made in Ohio, the *lex loci solutionis* fixed the character of the documents [promissory notes] indorsed by Carlisle to Chambers; and, as that law made them bills of exchange, an universal law of comity requires their recognition as such." Accordingly, it must be held that by the law of Ohio the paper sued on is placed upon the footing of a bill of exchange, and it must be so treated here; and consequently the defense of set-off existing between the antecedent parties cannot be allowed against the appellees, who are innocent indorsees. The case of *Davis v. Morton*, 5 Bush, 160, in so far as it conflicts with this opinion, is overruled. Judgment affirmed.

**McELWAIN et al. v. RUSSELL et al.**

(Court of Appeals of Kentucky. Jan. 14, 1890.)

**DEEDS—CANCELLATION—MENTAL CAPACITY—ISSUES TO JURY.**

1. A paralytic, 10 days before his death, and at a time when he was a mental and physical wreck, could not speak, or be induced to write or use a tin alphabet of large letters prepared for his benefit, executed a conveyance of his entire estate, consisting of land worth \$8,000 and personal property, the recited consideration being an agreement by the grantees to pay off a mortgage of \$2,500, a medical account due one of the grantees for \$375, and to provide for the grantor during his life a comfortable home and support, competent attendance, necessary medical attendance, and to decently bury him. The deed was prepared by the county clerk, without any suggestion from the grantor, and taken to his house, and his mark made to it without any alteration, although he expressed a desire to reserve the use of his dwelling-house, yard, and garden. *Held*, that it was a nullity, and would be set aside at the instance of his heirs at law.

2. It appeared that the grantor had been addicted to drink, and that whisky was furnished to him by the grantees, and used in such excessive quantities as to bring on a second shock of paralysis causing his death. *Held*, that this did not justify a charge that the grantees purposely caused his death.

3. A reference to a jury in equity cases being merely to aid the chancellor in determining issues of fact, its finding is not so conclusive as would be the verdict of a properly instructed jury, and the correctness of the judgment rendered thereon will be determined on appeal without regard thereto.

Appeal from circuit court, Todd county.

"Not to be officially reported."

*Ben. T. Perkins* and *Edward W. Hines*, for appellants. *H. G. Petrie*, for appellees.

**LEWIS, C. J.** Appellants brought this action for settlement and division of the estate of B. A. Parrish among his heirs at law, themselves included, and to that end asked judgment canceling a deed executed June 29, 1888, which they allege he at the time did not have sufficient capacity, but was induced to make it to appellees, Russell and Young, by fraud and undue influence. The court having submitted to a jury issues of fact made by the plead-

ings, they returned to certain questions propounded answers, in substance, as follows: (1) That the deceased did at the date of the deed possess mental and physical capacity sufficient to enable him to understand the extent and value of his property, his own condition and necessities, and dispose of his estate by contract, judiciously and intelligently. (2) That the deed was not procured by undue influence exerted, nor by fraud practiced, by appellees, or either of them; and thereupon, motion for a new trial by the jury having been first overruled, judgment was rendered dismissing the action.

As reference to a jury in equity cases is merely for the purpose of aiding the chancellor in determining issues of fact, and is made or not in his discretion, the finding is not conclusive. It does not, however, follow, as contended for appellees, that the judgment rendered, whether it be in pursuance or disregard of the finding, is to be treated by this court in the same way as would be the verdict of a properly instructed jury. Such is the rule of practice where the law and facts have been submitted to and passed on by the court, there being only legal issues involved, but not where the judgment is upon equitable issues. As, then, the correctness of the judgment in this case is to be determined without regard to the verdict of the jury, we need not consider the instructions. By the deed sought to be set aside the deceased conveyed to appellees the whole of his estate, consisting of two tracts of land worth at least \$8,000, and personal property the value of which is not shown,—the recited consideration being an agreement by them to pay off a debt for about \$2,500 due to another person and secured by mortgage on one of the tracts, a medical account due appellee Russell for \$375, and whatever other debts he owed, the amount of which does not appear, to provide for him during life a comfortable home and support; a competent person to wait on him; needed medical attention; and to decently bury him when dead. As he died within about 10 days after the deed was made, the actual consideration for the conveyance must be considered as but little, if any, more than one-third of the value of what they received, not counting the personal property, unless the agreement to maintain him be estimated as of value, and whether it should be depends upon the circumstances under which the contract was made; for although, as said in Story's Equity Jurisprudence, (volume 1, § 238a,) "courts of equity \* \* \* should be very watchful not to adopt the idea of the inequality of the contract, apparently presented by the sudden decease of the party to be maintained during life," yet if his condition be such as to render early death highly probable, and it is so known to the other contracting party, the undertaking to maintain him must be presumed to have been regarded when the contract was made, and therefore treated by the court as of very little, if any, value, especially if due care was not used

to prolong his life. It is not the province of courts of justice to release men of ordinary understanding from bargains merely because they were imprudently made, and consequently inadequacy of consideration does not alone constitute substantial ground for setting aside a conveyance of property. But if a vendor is either of feeble understanding, in a condition of extreme necessity or distress, or, by reason of natural defect or disease, unable to intelligently and fully communicate his ideas and wishes, and the bargain made with him is unconscionable, no other proof is needed to show the conveyance was obtained by fraud, imposition, or undue influence, and it will be set aside by a court of equity.

B. A. Parrish, a bachelor and farmer, was in May, 1886, at about the age of 55, stricken with paralysis, (*hemiplegia*), by which his power of speech and locomotion was permanently destroyed, and the use of the limbs of his right side lost. He remained in that condition until the date of the deed, though there is evidence he recovered somewhat from the prostration caused by the first shock. He had used intoxicating liquors intemperately for many years before his affliction, and continued to use them up to and after the time the deed was made. An intelligent physician, and an apparently impartial witness, who visited and examined him May 30 and again June 9, 1888, though not his regular medical attendant, gave it as his decided opinion that his case was an incurable and progressive disease of the brain; that he could not make known his wishes or thoughts, except by a few signs of his ordinary wants, the only word he apparently could or attempted to articulate being the monosyllable "No." He stated he was, on the occasion of his first visit to the farm of Parrish, requested to examine him, which he did do, and his second visit was for the purpose of paying for corn he had purchased from one of his tenants, and that, in his opinion, he (Parrish) was utterly incapable of taking a survey of his property, and making sale of his estate, on June 29, 1888. Other witnesses who visited and examined him after his attack in 1886, including another physician, gave it as their opinion he was incapable of making a contract, or intelligently transacting business. On the other hand, witnesses introduced by appellees who had business transactions with him express the opinion he was capable of understanding and transacting business. But the evidence makes it clear that when the deed in contest was made he was, in the language of one of the physicians, a mental and physical wreck, and incapable of communicating intelligently and fully, by speech or otherwise, his wishes or thoughts on any subject, and the only person who pretended to be able or undertook to interpret his signs, in regard to objects or subjects not immediately before him, was a servant who waited on him; and it is manifest even he could not clearly, certainly, or fully understand all of his wishes or thoughts, for he did not write, or attempt to

do so, could not speak, nor be induced to use a tin alphabet of large letters prepared for his benefit and convenience; the only way by which he communicated his ideas or wishes being by a movement of his head or left hand. And it seems to us, therefore, almost conclusive he had lost all idea of the meaning of words, for, if he had not, it is incomprehensible why he did not either speak, write, or resort to the alphabet furnished him. From the time of his attack, in 1886, he continued to reside on his farm, and was supported by the rent of it, which he received from tenants or croppers, and the only reason appellees undertake to give for his desire to sell his estate is that he was distressed with the fear it would have to be sacrificed to pay off the mortgage debt; yet it is clear either one of the two tracts was more than sufficient to satisfy that debt. The deed appears to have been prepared in the town of Elkton by the county clerk, without his presence or any suggestion from him, and was carried to his house, and his mark made to it without any alteration, although appellees admit he expressed a desire to reserve the use of his dwelling-house, yard, and garden. By what means he was able to communicate his wishes in regard to the terms of the sale does not appear, nor in fact was it possible for him to do more than to assent to the precise terms of the sale they chose to insert in the deed, for he could not intelligibly and fully indicate any stipulation and condition he might wish inserted, or more than feebly dissent from it as written at their dictation; and that the instrument was not of the precise character he wanted, if he was capable of expressing his wishes at all, appears from their admission he desired to reserve the control and use of the house he had occupied all his life. The only modification of the contract dictated by appellees, and prepared at their instance, which they assented to after getting to his house with the deed, was the execution by them of a note to him for \$100, with which to enable him to procure whisky, and in a suit on it by a person to whom he gave it they made defense he had not sufficient capacity to make a gift of it, and that it was not intended to be paid by them except for the purpose of maintaining him. It seems to us clear that B. A. Parrish not only lacked the requisite mental capacity to make the deed in question, but that, being unable to intelligibly and fully communicate his ideas or wishes in regard to the contract, or, in the expressive language of one of the witnesses, to "hold up his end of it," it should not nor can be regarded as his act and deed, but ought to be held a nullity. One of the appellees, Russell, had been since the first attack his regular physician, and by reason of such relation was not only well acquainted with the physical condition of his patient, but in a position to exercise dominion over him, and courts of equity in such case should look with favor on a claim of relief from a contract so unequal as this appears to us to be. Besides, he, as

well as appellee Young, are collateral kindred of the deceased. The evidence in the case is not such as to justify the charge appellees purposely caused the death of B. A. Parrish, but it does appear that whisky was furnished to him by them, and used in such excessive quantities as to bring on sooner or later a second attack, which, as before stated, occurred within 10 days after the deed, causing his death, whereby they were relieved from their obligation to longer maintain and support him. Wherefore the judgment is reversed, and cause remanded, with directions to cancel and set aside the deed in question.

#### HARDIN v. HARSHFIELD.

(Court of Appeals of Kentucky. Jan. 23, 1890.)

##### LIBEL—ACTIONABLE WORDS.

1. To recover special damages for the utterance of words not actionable *per se*, such words need not, of themselves, convey the meaning of injurious imputation, but it is sufficient if they were intended to, and did in fact, convey such imputation, and reasonably had some connection with the damages claimed to have been caused by them.

2. Such words need not be uttered by defendant in the presence of the person alleged to have been influenced by them, but it is sufficient if they are brought to his knowledge by others, either with or without the authority of defendant.

Appeal from circuit court, Bullitt county.  
"Not to be officially reported."

Action by Cordie Hardin, by her next friend, against C. C. Harshfield, to recover damages for slanderous words spoken of plaintiff which caused her marriage engagement to be broken. Defendant had judgment. Plaintiff appeals.

Chas. Carroll and N. J. Weller, for appellant. Fairleigh & Straus, for appellee.

BENNETT, J. The appellant, an unmarried young lady, about 20 years of age, who sues by her father, as her next friend, alleges that the appellee falsely, maliciously, and with a design to injure her standing in society, and to bring her into public ridicule, shame, and disgrace, and to break off a marriage agreement existing between her and Charles Bean, a person altogether eligible, spoke of her, in the presence and hearing of quite a number of persons, in substance, these slanderous words: "Boys, I have a damned hard tale on Cordie Hardin. I will tell you after dinner." After dinner he said: "Cordie Hardin went to the store of Chris Pauley to buy some groceries, and while Chris Pauley was waiting on her she let a big fart that was heard all over the house. Two or three young men being present, Chris Pauley looked at them and laughed, and they walked out of doors. Chris Pauley having fixed up the groceries, she took them, left the house and got on her horse, and forgot her gloves. She got down, and came back into the store. He supposed she was demoralized by what she had done, the fact being impressed on her mind so strongly. She said when she came back into the store: 'Mr. Pauley, did you see anything

of that fart I let in here a while ago?' His reply was 'No, but I smelt it damned strong.' Boys, ain't that a damned hard one on her?" That the utterance of the foregoing words injured her standing in society, and brought her into public ridicule, shame, disgrace, etc., and caused said Bean, he having heard and believing said report, to break off said engagement.

In an action to recover special damages for the utterance of words not actionable in themselves it is not necessary that the words of themselves should convey the meaning of an injurious imputation. It is sufficient if the words used were intended to convey such imputation, and did in fact convey it to the minds of the persons who heard them, and had the effect intended. All that is required is that the words used, coupled with the manner, tone, look, or wink of the person using them, are capable of conveying the meaning intended. For instance, to say of a woman that she was fond of showing her petticoat to men, coupled with such manner, tone, gesture, or wink as to convey to the minds of the speaker's listeners that the woman was lewd or lascivious, and such meaning was so intended, and the listeners did in fact so understand it, such language, if uttered falsely and maliciously, and did degrade the woman in public estimation, would be actionable. To falsely and maliciously say of a physician, lawyer, or shoemaker that he is a quack, jackleg, or cobbler, entitles the person thus spoken of to damages commensurate with the injury that such language has done his profession or trade. The reason is much stronger for protecting defenseless and helpless woman against false and malicious imputations, that tend to humiliate and degrade them in society. Kentucky manhood demands that they should be protected, and the guilty party mulcted in damages commensurate with the humiliation and degradation thus inflicted. The language, taken all together, attributed to the appellee, was capable of making the impression upon the hearers that the appellant was an immodest, indiscreet, coarse, vulgar young woman, which, if so understood and believed, would lower and degrade her in the estimation of good and refined society. If any man had engaged to marry her because of her supposed modesty, discretion, and exemplary conduct, such a report, if believed by him, would doubtless, and should, cause him to break the engagement. It is alleged that the appellee falsely and maliciously used said language for the purpose of humiliating and degrading the appellant, etc., and of breaking off said engagement, and it did have the desired effect; and, as said, the language, taking it all together, was capable of producing such an effect. The person speaking the words and intending them to have an injurious effect, it is enough that such words, taken all together, have, in common sense and reason, some connection with the damage said to have ensued from them; but it is not enough

that the unwarrantable caprice of some person has caused a damage to result from them which the speaker did not intend, and had no reason to apprehend. It is said that, the accusation being false, Bean, though believing it, and acting on that belief, wrongfully broke the engagement. If the words had been true, as just intimated, Bean would have been perfectly justified in breaking off the engagement, provided he had made it in consideration of the belief that the appellant was a modest, discreet, and innocent young lady. It turns out, however, that the words, the truth of which he believed and acted on as true, were false and slanderous, and Bean made a mistake in believing them to be true; but appellee spoke them, as is alleged, for the purpose that they should be believed, and produce a damaging effect upon the standing and marital prospects of the appellant; and it does not lie in his mouth to say that Bean should not have believed his slanderous language to be true. He caused the wrongful impression to be made that brought such serious consequences upon the appellant, and is responsible to her for it.

It is also said that there is no allegation that the appellee uttered this language in the presence of Bean, and, if other persons repeated the appellee's language to Bean, which caused him to break off the engagement, the appellee is not responsible, unless he authorized such person to repeat the language. There are two objections to this proposition: *First*. It would allow the appellee to invent and utter a slander in the hearing of persons, and if they spread it far and wide, believing it to be true, the appellee would not be responsible for their utterances thus made. It cannot be true that a person may invent and utter language damaging to another, and say to the other that "the person who acted on these utterances did not get them from me, but from the persons that heard me speak them; therefore I am not liable to you for the injury." It seems to us that the reply that "you were the author of this language, and the persons repeating simply acted as your mouth-piece, and the foundation of the person's action is traceable to you, and you are responsible for it. Besides, *second*, you did not utter this language to these persons in confidence, rather with an injunction not to repeat it, but you uttered it as though they were at perfect liberty to repeat it; and you, by thus uttering it, authorized them to repeat it, and you doubtless intended them to repeat it, so you are responsible for any damage that has ensued from uttering said language." The judgment is reversed, with directions for further proceedings consistent with this opinion.

WILSON v. WILLIAMS.

(Supreme Court of Arkansas. Jan. 4, 1890.)

REPLEVIN—DELIVERY BOND—TRESPASS.

1. Under Mansf. Dig. § 5575, requiring an officer, before executing an order of delivery in re-

plevin, to take a bond to the defendant with one or more sureties, where he executes the order without such bond he becomes a trespasser, and is responsible to the party injured to the extent of the value of the property taken.

2. The solvency of the plaintiff in the replevin suit does not dispense with the necessity for one or more sureties on the bond.

Appeal from circuit court, Sebastian county; JOHN S. LITTLE, Judge.

Action against a sheriff to recover damages for the wrongful taking, by his deputy, of property belonging to plaintiff, a married woman, in an action of replevin against her husband. The deputy took the property on an order of delivery issued by a justice of the peace, and turned it over to the creditor. Before executing the order he took a bond, which was signed by the creditor only. He subsequently lost this bond.

Cook, Lucas & Hull, for appellants.

PER CURIAM. The only bond taken by the sheriff before executing the order of delivery in the replevin suit was signed by the plaintiffs in replevin alone. But the statute prescribes that the order shall not be executed by the officer until a bond to the defendant, with one or more sureties, for the plaintiff, has been executed in his presence. Mansf. Dig. § 5575. If the officer executes the order without such bond, he becomes a trespasser, and is liable to the party injured as such. Pirani v. Harden, 5 Ark. 89; State v. Stephens, 14 Ark. 264. The solvency of the plaintiff in replevin does not dispense with the necessity for one or more sureties, for that is a statutory requirement. See cases cited in Wells, Repl. § 390. The charge of the court was erroneous. Reverse the judgment, and remand the cause for a new trial.

HENDERSON et al. v. GATES et al.

(Supreme Court of Arkansas. Jan. 11, 1890.)

CHATTEL MORTGAGES—DESCRIPTION OF PROPERTY—MORTGAGES.

1. A chattel mortgage describing the mortgaged property, as "my entire crops of cotton and corn to be raised by me the present year, or contracted by me," is not void for insufficient description.

2. Nor is there an insufficient description of the mortgages in reciting their name as "Henderson, Echols & Co.," without more.

Appeal from circuit court, Prairie county; SANDERS, Judge.

The appellees, F. Gates & Co., were sued by appellants, Henderson, Echols & Co., for the value of two bales of cotton which had been purchased by them from one Maddox, and upon which appellants claimed to have had a mortgage. On the trial appellants offered their mortgage in evidence, and, appellees objecting to its introduction as evidence, the court sustained their objections, and excluded it. Two defects in the mortgage were insisted on—*First*, that the description of the crops of corn and cotton was too imperfect to render the instrument valid as against third parties who had acquired an

adverse claim to the same innocently and in good faith; *second*, the description of the mortgagees was too uncertain, their name being recited as "Henderson, Echols & Co." The mortgage relied on describes the crop in these words: "My entire crops of cotton and corn to be raised by me the present year, or contracted by me."

*J. E. Gatewood and T. J. Oliphant*, for appellants. *Sandels & Warner*, for appellees.

**PER CURIAM.** The mortgage offered in evidence sufficiently described the subject of the mortgage, (*Johnson v. Grissard*, 51 Ark. 410, 11 S. W. Rep. 585,) and the parties named as mortgagees, (*Percifull v. Platt*, 36 Ark. 456; *Kellogg v. Olson*, 84 Minn. 103, 24 N. W. Rep. 364; *Morse v. Carpenter*, 19 Vt. 613; *Sherry v. Gilmore*, 58 Wis. 332, 333, 17 N. W. Rep. 252; *Lumber Co. v. Ashworth*, 26 Kan. 212; *Newton v. McKay*, 29 Mich. 1; *Beaman v. Whitney*, 20 Me. 413; *Hoffman v. Porter*, 2 Brock. 156; *Murray v. Blackledge*, 71 N. C. 492.) The court erred in refusing to admit the mortgage in evidence. Reverse and remand for a new trial.

#### MOSCOWITZ v. LEMP.

(*Supreme Court of Arkansas*. Dec. 4, 1890.)

##### SETTLEMENT—APPEAL—WAIVER OF OBJECTION.

1. Where there has been a settlement of accounts between parties, a restatement of the account will be allowed by a court only upon the ground of fraud or mistake; and where it is not claimed that any fraud has been practiced, and the proof of mistake is not clear or convincing, the settlement must stand.

2. Where the record shows that the appellant voluntarily submitted the cause in the court below for final hearing upon the proof taken, he cannot, in the appellate court, complain that he was misled, and failed to take proof which he might have adduced under the issue before the court, under the belief that the account involved in the cause would be referred to a master for settlement.

Appeal from circuit court, Garland county; *J. B. Wood*, Judge.

Bill by Lemp to foreclose a mortgage executed by Moscowitz. Decree for complainant, and defendant appeals.

*C. D. Greaves and C. V. Teague*, for appellant. *Geo. G. Latta*, for appellee.

**PER CURIAM.** Moscowitz, in his answer, admits the execution of the note and mortgage, but says they were executed as security for the faithful discharge of any debt he might thereafter owe to Lemp. The preponderance of the evidence is to the effect that the instruments were executed to secure an amount found due to Lemp upon a settlement of accounts between the parties made in December, 1882. There were dealings between them for several years subsequent to the execution of the note and mortgage; and the answer was made a cross-bill, seeking a statement of the accounts prior to the execution of the note and mortgage as well as after, in order to show that the plaintiff was indebted to the defendant. But a restatement

of the account prior to the settlement of 1882 could be had only upon the ground of fraud or mistake. It was not claimed that any fraud had been practiced, and the appellant's proof of mistake is not clear or convincing. We must therefore leave the settlement of December, 1882, to stand. As to the allegations of the appellee's indebtedness to the appellant upon the subsequent dealings between them, the answer was a plea of set-off, and the burden was upon the appellant to establish it. The preponderance of evidence is against him upon that issue.

It is argued that the appellant was misled, and failed to take proof which he might have adduced upon this issue, under the belief that the account would be referred to a master. But the record shows that he voluntarily submitted the cause for final hearing upon the proof taken, and he cannot now complain. The decree must be affirmed.

#### HENDRICKS et al. v. SMITH.

(*Supreme Court of Arkansas*. Dec. 4, 1890.)

##### APPEAL—PRACTICE—CROPPING ON SHARES.

1. Under rule 9, Sup. Ct. Ark., when the plaintiff who obtained judgment below does not appear in the supreme court, the abstract filed by the appellant will be taken as a true statement of the facts.

2. A cropper, under an agreement by which the land-owner is to furnish teams, utensils, and supplies to make the crop, which is to remain the land-owner's, the cropper to have what remains after deducting half of the crop for the use of the land, and enough to pay for the supplies furnished him, has no title to any part of the crop until his share is set apart to him. *Hammock v. Creekmore*, 43 Ark. 264, 3 S. W. Rep. 180, followed.

Appeal from circuit court, Howard county; *R. D. HEARNE*, Judge.

This action was begun before Franklin Smith, a justice of the peace of Howard county, by the appellee, James F. Smith, for the recovery of 125 bushels of corn and a yoke of oxen, claimed by him under a mortgage executed to him by one A. J. Blevins. The corn was part of a crop raised by the said Blevins on the farm of appellants, during the year 1881, as a share cropper. The jury rendered a verdict for the plaintiff for 125 bushels of corn, at 80 cents per bushel, of the value of \$100. Upon this verdict the court rendered judgment. The oxen were found by the jury to be the property of the appellants Hendricks & Dillard, and were adjudged to them by the circuit court of Howard county, which tried the case on appeal; and no objection was made by the appellee to such finding and judgment. The plaintiff did not appear in the supreme court. John P. Hendricks, the first witness for appellants, testified that he contracted with Blevins to work the farm of appellants during the year 1881 "on the halves," or as a share cropper; that appellants were to furnish the team, tools, land, and feed for the team and supplies with which to make the crop; that he should make the crop, and when it was made and gathered one-half thereof was to belong to appellants, and the



other half to Blevins, but that the crop should remain in the possession of appellants, and they should hold it, until they were paid for such supplies as they had furnished him; that the corn was gathered and put in separate cribs, but that Blevins turned his half of the crop over to them, under their contract, and it was then put into the crib of appellants. This was done before Blevins' death, which occurred on the 5th day of October, 1881. There were only 150 bushels of corn raised by Blevins. The crop raised by Blevins was the property of Hendricks & Dillard. Blevins' half of the crop of corn and cotton did not pay for the supplies furnished him by Hendricks & Dillard with which to make the crop. Mary A. Blevins, widow of A. J. Blevins, testified that her husband raised the corn on the farm of appellants on "the halves," and that he turned his part thereof over to them, and that she nor his estate laid any claim to any part of the crop. R. B. Blevins, son of A. J. Blevins, testified upon this point just as his mother, Mary A.

*A. B. & R. B. Williams*, for appellants.

PER CURIAM. Smith, the plaintiff, who obtained judgment below, has not appeared in this court. The abstract filed by the appellants is therefore uncontroverted; and, taking it as a true statement of the facts, in accordance with rule 9, there is no evidence to sustain the verdict as to the corn in controversy. See *Hammock v. Creekmore*, 48 Ark. 264, 8 S. W. Rep. 180. The judgment as to the oxen will be affirmed. Reverse the judgment, and remand the cause for a new trial as to the corn in controversy.

#### SMITH v. FINLEY.

(*Supreme Court of Arkansas*. Jan. 11, 1890.)

#### JUDGMENT BY CONFESSION.

Mansf. Dig. Ark. § 5185, provides that any person indebted, or against whom a cause of action exists, may personally appear in a court of competent jurisdiction and confess judgment therefor. *Held*, that a judgment confessed before a justice, the record of which falls to show, except by inference, that defendant personally appeared, is void.

Appeal from circuit court, Garland county; J. B. Wood, Judge.

O. F. Smith sued Addie Finley for the possession of lot 6, of block 74, of the Hot Springs reservation, in Garland county, and claimed title under a deed of trust made by defendant to D. Beitler, trustee, for the benefit of E. Smith, under which there was a sale of the property by R. L. Williams, sheriff of Garland county, the trustee having refused to act, purchase by O. F. Smith, and a subsequent conveyance made by the sheriff to him. The deed of trust was filed as an exhibit to the complaint. It bears date September 5, 1885; indebtedness \$60; authorizes the sheriff of Garland county to act in case of the trustee's refusal. The deed of the sheriff, bearing date July 19, 1887, was filed as an

exhibit to the complaint; recites a sale on the 21st day of February, 1887, after publication of notice according to the terms of the deed of trust, the refusal of the trustee to act, bid of appellant of \$66.50, etc. This deed was duly acknowledged, and both were recorded. The deed of trust bore the following indorsement: "I hereby refuse to act as trustee for the sale of the within described property. D. BEITLER, Trustee." The deeds were introduced in evidence on the part of the plaintiff; also the advertisement of sale. The defendant pleaded usury. The original transaction was shown by the evidence to be usurious. Plaintiff introduced in evidence a judgment of Henry James, a justice of the peace, as follows: "In justice court, Garland county, Ark. E. Smith, Plaintiff, v. Addie Finley, Defendant. Judgment by confession. Before H. James, justice of the peace. On this, the 3d day of November, 1886, comes said plaintiff, by agent, O. F. Smith, and files before me one promissory note against the defendant for the sum of sixty dollars, dated September 5th, 1885, and made payable to E. Smith, or order, two months after date, with ten per cent. interest per annum from maturity until paid, and secured by deed of trust of even date herewith; and the said defendant says that she is indebted to the said plaintiff in the sum of sixty dollars, and confesses that judgment may be rendered against her for said amount. It is therefore considered by me that said plaintiff have judgment, and recover from said defendant the sum of sixty dollars, with all the interest and all the costs in and about this suit expended. H. JAMES, J. P." The plaintiff moved the court to instruct the jury that after the defendant confessed a judgment on the note it was too late for her to make the defense of usury, but the court refused to do so, and the plaintiff excepted. Plaintiff filed a motion for a new trial, which was overruled. There was evidence tending to show that the confession of judgment by defendant was not in conformity in all particulars with the manner prescribed by section 5185, Mansf. Dig. This section provides that any person indebted, or against whom a cause of action exists, may personally appear in a court of competent jurisdiction, and confess judgment therefor.

*Davies & Greaves*, for appellant. *G. W. Murphy*, for appellee.

PER CURIAM. The justice's record does not show jurisdiction of the person of the defendant, Finley, unless by inference; and the parol testimony which was heard at the trial, and was admissible to show want of jurisdiction, (*Jones v. Terry*, 43 Ark. 230; *Visart v. Bush*, 46 Ark. 153,) is conclusive of that fact. The judgment was therefore void. The proof was clear that the transaction was usurious. The plaintiff therefore took nothing by his purchase at the trustee's sale. Affirm.

**SANDERS et ux. v. MOORE.**

(Supreme Court of Arkansas. Jan. 11, 1890.)

**ACTION BY HEIR—APPEAL—DISMISSAL.**

1. The sole heir of a decedent, upon whose estate administration has ceased by the death of the administrator, and no effort has been made by the creditors, if there are any, to renew it, may maintain an action to enforce a vendor's lien existing on land of the estate sold by the administrator under order of court.

2. The dismissal of an appeal for want of prosecution does not bar a second appeal.

Appeal from circuit court, Phillips county; M. T. SANDERS, Judge.

This is a suit by Henry Sanders and wife against John J. Moore, administrator of W. A. Humphries, to enforce a vendor's lien. The complaint states that in 1867 John Cliff, the father of the plaintiff Mrs. Sanders, died, leaving her then a minor, and his heir; being at the time of his death the owner and in possession of certain lands. That one Woodall was appointed administrator, and sold said lands, under the order of the probate court, to one J. W. Humphries, who went into possession. Four hundred dollars was paid in cash, and the remainder upon a credit; the last payment, of \$400, falling due January 1, 1871. That no deed was executed, but only a certificate agreeing to make the deed upon payment of the purchase money. That for said last payment, of \$400, Humphries executed his note. That Woodall has since died, and one Ballou was appointed administrator *de bonis non*. That on February 22, 1872, the administrator *de bonis non* executed a deed to Humphries, falsely reciting the payment of the purchase money. That in 1873 Humphries died, leaving the defendant his heir, who has been in possession of the land ever since. That Ballou has since died, and the purchase-money note referred to was filed among his papers. Said note is also in the list of the assets filed by Ballou with his settlements in 1873 and 1876, which latter settlement showed Ballou to be indebted to the estate in the sum of \$723. That Humphries procured the execution of the deed by promising to pay the note within a specified time, but died before that time, requesting the defendant, upon his death-bed, to pay off the debt, and thus secure a home. That at the time of the sale of the lands Mrs. Sanders was a minor, and has only learned of the making of the deed since the death of Ballou. That Ballou and his sureties are insolvent, and there are no debts due by the estate of Cliff. They therefore pray for the enforcement of their vendor's lien. The defendant answered—*First*. Denying that he had promised to pay to plaintiffs anything, or was indebted to them. *Second*. He denied that he was the owner of the land, and stated that the heirs of W. A. Humphries had conveyed away their equity of redemption from a tax-sale to the tax-purchaser. *Third*. That the debt that was due from W. A. Humphries was a personal obligation, and that the vendor's lien had been waived by taking personal security, or in some other

way. *Fourth*. That the last request of his father imposed no legal obligation upon him, and he declined to state what it was. *Fifth*. He pleads the statutes of limitations. *Sixth*. He denies that he owns the land, or has any interest in it. *Seventh*. He demurs to the bill for want of equity, and because the representatives of Woodall were the proper defendants. The plaintiffs filed their amended complaint, stating that the defendant had procured his attorney, George Sibly, to buy the tax-title upon the land when the defendant was himself in possession at the time the taxes accrued, and was bound to pay them; and that this was a mere device to defraud plaintiffs of their rights; and they made George Sibly a party defendant. Humphries having died, the suit was revived against his administrator. The demurrer to the complaint was sustained for want of proper parties plaintiff,—a ground not stated in the demurrer,—and the plaintiffs appealed.

*U. M. & G. B. Rose and John C. Palmer*, for appellants. *George Sibly*, for appellee.

**PER CURIAM.** 1. The dismissal of an appeal for want of prosecution does not bar a second appeal. *Ashley v. Brasil*, 1 Ark. 144; *Turner v. Tapscott*, 29 Ark. 318.

2. The only question decided by the circuit court, or pressed for determination here, is the right of the plaintiff to maintain the action. She is the sole heir of her deceased father, who died in 1867. There was administration on his estate soon after. The administration ceased, by the death of the administrator, in 1882; and no effort has been made by the creditors, if there are any, to renew it. The principle governing the cases of *Graves v. Pinchback*, 47 Ark. 470, 1 S. W. Rep. 682; *Crane v. Crane*, 51 Ark. 287, 11 S. W. Rep. 1; *Winningham v. Holloway*, 51 Ark. 385, 11 S. W. Rep. 579; *Bank v. Williams*, 6 Ark. 156,—permits the maintenance of the action by this plaintiff. The plaintiff's position is strengthened by the allegation that there are no subsisting debts against the estate. The court erred in sustaining the demurrer. Reverse the judgment, and remand the cause, with directions to overrule the demurrer.

**BUSH v. CELLA.**

(Supreme Court of Arkansas. Jan. 11, 1890.)

**PLEADING—UNCERTAINTY.**

Where the allegations of a complaint are ambiguous and uncertain as to some of the material facts necessary to sustain it, but the inference may be drawn by a fair intendment from the allegations that a cause of action exists, defendant's remedy is by motion to make more certain, and not by demurrer.

Appeal from circuit court, Miller county; C. E. MITCHELL, Judge.

This is an action of ejectment, brought by appellee against appellant, in the circuit court of Miller county, to recover possession of lot 5, in block 13, in the town of Texarkana.

The complaint is in the usual form, alleging ownership in appellee by mesne conveyances from the United States government to one Thomas T. Murray, and from him to appellee, by deed of November 12, 1885. Appellant answered denying appellee's ownership of the lot, and alleging that said Thomas T. Murray, on or about November 1, 1885, being the owner of said lot, entered into negotiations with appellant to sell it for him; that Murray proposed to take \$300 for it, and give appellant for his commissions all over that sum which he might be able to get; that appellant then proposed to purchase it himself for that sum, to which Murray agreed. This was consummated on or about November 13, 1885. Appellant then borrowed from J. L. Cella, the husband of appellee, \$300 with which to make the purchase, agreeing to repay said amount, with 20 per cent. interest thereon, after the expiration of one year, and further agreeing that the deed might be made by Murray to said Cella, or to his wife, the appellee, to be held as security for such repayment, and a reconveyance to be made to appellant upon such repayment. Appellant afterwards, upon maturity of the loan, presented a deed to appellee for her examination and signature, stating that he was prepared to pay the loan and interest as agreed upon. Appellee disclaimed any knowledge of the transaction, and desired to consult her husband about it. Appellant then left her house, thinking that at a convenient time the deed to him would be properly executed and presented, and the money demanded, and he alleges a willingness and readiness at all times since the maturity of the loan to pay it, and the 20 per cent. interest thereon, according to agreement. The answer further states that, ever since his said purchase from Murray, appellant has lived on said lot with his family, has made valuable improvements thereon, paying about \$200 therefor, and has paid all taxes assessed against it; and that appellee was never consulted, nor asked to pay for any of these things; and denies that appellant wrongfully holds possession of the lot, or has damaged appellee; and prays that the cause be transferred to the equity docket; that appellee's deed be held and treated as a mortgage to secure the money loaned; that appellee be required to convey the lot to appellant upon payment by him of the \$300, and interest, as agreed on, which sum he then brought into court and tendered; and for other relief. To this answer appellee demurred. The demurrer was sustained, and, appellant declining to answer further, judgment was rendered for appellee. Appellant excepted and appealed.

*Dan W. Jones and T. B. Martin* for appellant. *Scott & Jones and Francis Johnson*, for appellee.

**PER CURIAM.** The allegations of the cross-complaint are slovenly, ambiguous, and

uncertain as to some of the material facts necessary to sustain it, but the inference may be drawn by a fair intendment from the allegations that the defendant either caused the deed upon which the plaintiff relies to be executed to her as security for money loaned him by her husband, or that it was executed to the plaintiff under an agreement with the husband, who paid the purchase money, that, upon repayment by the defendant of the amount, with interest, he should cause the land to be conveyed to the defendant, and that the latter had entered into possession under the agreement, paid the taxes, and made valuable improvements in part performance of the contract. In either event a defense or cause of action was defectively stated, and the plaintiff's remedy was by motion to make more certain, and not by demurrer. In the second contingency, the allegations, the truth of which is confessed by the demurrer, show the wife to be a naked trustee, or only a conduit for the passage of the title; and her coverture would present no argument against the enforcement of the contract. Reverse the judgment and remand the cause, with instructions to overrule the demurrer.

*JACOBSON et al. v. CAMPBELL et al.*

(*Supreme Court of Arkansas. Jan. 11, 1890.*)

**JUDGMENT—DECEASED PARTY.**

A judgment rendered in favor of a deceased party is void.

Appeal from circuit court, Perry county; *W. S. Eakin*, Special Judge.

The appellees sued appellants for the conversion of two bales of cotton before a justice of the peace. There was no written answer, but the testimony and the proceedings show that the defense was that appellees had given a mortgage on the cotton to *M. Jacobson*, for whom they were acting as agents at the time they took it; that appellees had first delivered the cotton to appellants, and then had taken possession of it again, and were trying to dispose of it, contrary to the terms of the mortgage. Before the trial of the case in the circuit court, and the rendition of the judgment appealed from, the plaintiff, *William Martin*, had died. The mortgage to *M. Jacobson*, under which the cotton was taken, had not been paid off, but was not due at the time the cotton was taken. The cotton was regularly sold, and the overplus, after paying the mortgage to *M. Jacobson*, was tendered to appellees before they began their suit. After the trial there were motions for new trial, and in arrest of judgment, overruled.

*J. F. Sellers* for appellants.

**PER CURIAM.** It was error to render judgment in favor of the deceased plaintiff. Reverse the judgment, and remand the cause.

## GARNER v. WRIGHT.

(Supreme Court of Arkansas. Jan. 11, 1890.)

PRESUMPTION AS TO LAWS IN INDIAN TERRITORY—  
CHATTEL MORTGAGES—RECORD.

1. Where a mortgagee in a mortgage executed in the Indian Territory invokes the aid of the Arkansas courts to establish his rights under the mortgage, no presumption will be indulged as to the law in force in the territory; but, in the absence of proof, the law of Arkansas will be applied, and justice will be administered according to its principles.

2. If a mortgagee takes possession of the mortgaged chattels before any other right or lien attaches, his title is good against everybody, if the mortgage was previously valid between the parties, although it be not acknowledged and recorded.

3. While the mortgaged chattels are in the custody of the mortgagee, he may lend them to the mortgagor for occasional temporary use, without prejudice to his security.

Appeal from circuit court, Sebastian county; JOHN S. LITTLE, Judge.

Cook, Luce & Hill, for appellant. E. E. Bryant, for appellee.

HEMINGWAY, J. The appellant, Garner, and one Brown, white men and citizens of the United States, resided in the Indian Territory. On the 19th of January, 1886, Brown there executed a mortgage to Garner, whereby he conveyed to him certain chattels, including the horse and wagon in controversy, as security for a debt. The mortgage provided that Garner should have possession and control of the mortgaged chattels. They were accordingly delivered to him, and remained in his sole possession for more than a month, when Brown borrowed them to use in hauling wood. He used them during 10 days, but at night returned them to Garner's barn. On the 9th of April following, Brown borrowed them to make a trip to Ft. Smith, and after his arrival there they were seized under an attachment against his property. Garner appeared in the attachment suit, and filed an interplea, claiming them under his mortgage. There was judgment against him on the interplea, and he appealed.

In determining the merits of his claim, it is essential to know by what law the validity of the mortgage is to be determined. As a rule, when rights arise in a particular country, they are to be determined by the laws of that country, and the party who would avail himself of them should prove them. The mortgage in controversy was executed in the Indian Territory. No proof was offered of the laws in force there applicable to the matter, but it was agreed between the parties that there was no local Indian law that was pertinent. This absence of proof cannot be supplied by presumption. In similar cases the courts of this state will generally presume the common law to be in force in another state. *Cox v. Morrow*, 14 Ark. 603; *Thorn v. Weatherly*, 50 Ark. 243, 7 S. W. Rep. 33. But this presumption is indulged as to those states only that have taken the common law as a basis of their jurisprudence. Such a presumption would not be indulged as to the laws of the state of Louisiana or

Texas, because we know that their jurisprudence is founded upon a different system. The same reason forbids such a presumption as to the laws of the Indian Territory, for we know that no system of laws has been adopted there. But property rights are asserted there, and their existence universally recognized. They do not depend upon the uncertain tenure of possession, but rest upon a more substantial basis. As such rights are respected there, they should be enforced when they become involved in the courts of this state. There is no federal law on the subject. We have no proof of, and can indulge no presumption as to, the local laws in force there. As the parties have invoked the aid of our courts, we must therefore apply our own law, and administer justice according to its principles. Such we understand to be the practice of the supreme court of the United States. *The Scotland*, 105 U. S. 24.

Under our law, if a mortgagee took possession of the mortgaged chattels before any other right or lien attaches, his title under the mortgage is good against everybody, if it was previously valid between the parties, although it be not acknowledged and recorded. The delivery cures all such defects. *Jones, Chat. Mortg.* § 178, and cases cited; *Applewhite v. Mill Co.*, 49 Ark. 279, 5 S. W. Rep. 292; *Cameron v. Marvin*, 26 Kan. 625; *Hutton v. Arnett*, 51 Ill. 198. While the mortgaged chattels are in the custody of the mortgagee, he may lend or hire them, and they continue in his possession constructively; and there is nothing in the relation which he sustains to the mortgagor that forbids to him the offices of ordinary kindness or good neighborhood. Therefore the mortgagee may lend the mortgaged chattels to the mortgagor for occasional temporary use, without prejudice to his security. In a case very similar to this, the supreme court of Vermont so ruled. *Farnsworth v. Shepard*, 6 Vt. 521. The learned judge of the circuit court held that appellant's mortgage was void for want of filing and record; but it follows from the principles herein announced that he was mistaken in this. If the transactions of delivery and loan were had *bona fide*, the mortgage should be sustained. The judgment is reversed, and the cause remanded.

## LITTLE ROCK &amp; F. S. RY. CO. v. DICK.

(Supreme Court of Arkansas. Jan. 18, 1890.)

## RAILROAD COMPANIES—STOCK-KILLING CASES.

1. Where a railroad company permits cotton seed to accumulate on or about its track, it is under obligation to maintain reasonable care to prevent injury to stock attracted thereby.

2. Where stock is killed by a train while eating such seed, scattered near the track, the burden is upon the railroad company to overcome the *prima facie* case of negligence made by the killing, by showing that its servants had used reasonable care to avert the injury.

Appeal from circuit court, Crawford county; JOHN S. LITTLE, Judge.

Action for the value of a bull killed by de-

pendant's train. At the place where the animal was killed was a seed-house, used for storing cotton seed for an oil-mill; and when the seed was loaded into the cars considerable seed would fall out on the ground, by the chute from the seed-house to the car, and cattle would come around and eat it. Plaintiff's bull was eating this scattered seed at the time, and jumped out on the track as the train approached. Plaintiff obtained judgment, and the railroad company appeals.

*J. W. Shinn*, for appellant.

**PER CURIAM.** The company having permitted cotton seed to accumulate on or about its track, was under obligation to maintain reasonable care to prevent injury to stock attracted thereby. *Jones v. Nichols*, 46 Ark. 207; *Railway Co. v. Kirksey*, 48 Ark. 366, 8 S. W. Rep. 190; *Crafton v. Railway Co.*, 55 Mo. 580; *Page v. Railway Co.*, 71 N. C. 222.

The burden was upon the company to overcome the *prima facie* case of negligence made by the killing, by showing that its servants had used the degree of care indicated to avert the injury. The proof does not show that state of case, and the judgment will be affirmed.

#### BOEHM v. BOTSFORD et al.

(Supreme Court of Arkansas. Jan. 18, 1890.)

##### TAX-TITLES.

All inquiry as to the validity of a tax-title is cut off by a decree of confirmation of the tax-sale under which the title was acquired.

Appeal from circuit court, Arkansas county; *JOHN A. WILLIAMS*, Judge.

Appellees brought suit, on the chancery side of the circuit court of Arkansas county, against appellant, to remove a cloud from title to certain land, setting up and claiming title to same by virtue of deeds from the auditor of the state of Arkansas, for non-payment of taxes charged thereon for the year 1868; also by a decree of confirmation of said title by the chancery court of Arkansas county at its March term, 1876. To this complaint appellant answered, setting up claim to the said land by direct chain of title from the state of Arkansas to himself; also tax-title to the same through *W. M. Price*, who purchased from the state, for non-payment of taxes due thereon for the year 1876; also by statute of limitations under *Price's tax-deed*. To his answer appellant appended a demurrer clause, assigning—*First*, that said complaint did not state facts sufficient to support said action; and, *secondly*, that said plaintiffs had full and adequate relief in a court of law, etc. At the hearing, appellant, to support his answer, offered to prove that "the pretended assessment, levy of taxes, return of the delinquent list, advertisement and sale of the lands in controversy, were absolutely void; and that, at the time of the pretended decree of confirmation of appellees' tax-title, appellant and his vendor were non-residents of the state, and without the jurisdiction of the

courts thereof; and that as such he had the right to show to the court, in defense of his title, the illegal proceedings in condemning his lands." This demurrer was overruled, and appellant denied the privilege of showing such illegal proceedings; the court holding that the decree of confirmation cut off all defense on the part of appellant, or those under whom he claimed title. At the hearing, appellees offered, and had read in evidence, the decree of confirmation, as the same appeared on the record of the chancery court of Arkansas county, at the March term, 1876, over the objections of appellant; also the duplicate deeds issued to appellees by *Paul M. Cobbs*, as commissioner of state lands, to which the appellant also objected; but his objections were overruled, the decree and duplicate deeds read, and upon this evidence the court found for appellees. The admission of the uncertified and unrecorded decree of confirmation and duplicate deeds, upon which the court found for appellees, appellant also assigns as error.

*W. H. Halliburton*, for appellant. *Gibson & Holt*, for appellees.

**PER CURIAM.** All inquiry as to the validity of the plaintiff's tax-title was cut off by the decree of confirmation of the tax-sale under which their title was acquired. *Wallace v. Brown*, 22 Ark. 118; *Buckingham v. Hallett*, 24 Ark. 519; *McCarter v. Neil*, 50 Ark. 188, 6 S. W. Rep. 731. The court adjudged the defendant's subsequent tax-title invalid upon proof which has not been brought upon the record, and we cannot inquire into the correctness of the finding.

Affirmed.

#### In re VANVAVER.

*STATON v. TYLER*, Judge.

(Supreme Court of Tennessee. Jan. 10, 1890.)

##### MISDEMEANORS—SENTENCE AND PUNISHMENT—HABEAS CORPUS—APPEAL—BILL OF EXCEPTIONS—MANDAMUS—CONTEMPT.

1. Act Tenn. 1875, § 1, provides that every person convicted of a misdemeanor who fails to pay or secure the fine and costs adjudged against him shall be sentenced to be confined, and shall be confined, in the county work-house, after the term of his imprisonment, if any, has expired, until he works out his fine and costs. Section 4 provides that every person so confined shall be credited at the rate of 25 cents per day, and no person shall be discharged from the work-house before his fine and costs have been fully paid as aforesaid. Act 1889, § 155, provides for the election of work-house commissioners, who shall have complete control and management over the institution, but does not give them any power to make rules for the discharge of prisoners. *Held*, that the commissioners have no authority to make rules by which, if a prisoner charged with a misdemeanor goes to work as soon as imprisoned, any subsequent sentence against him shall date from the day of his incarceration, and by which deductions from sentences shall be made for good behavior.

2. Section 4 further provides that a prisoner may be discharged by the county judge before he has worked out his fine, but that no person shall be so discharged except on the certificate of a physician that such person is physically unable to

labor. *Held*, that a discharge by such judge, in the absence of such a certificate, is a nullity.

3. Act Tenn. c. 157, entitled "An act giving to parties in *habeas corpus* cases the right of appeal to the supreme court," gives to either the relator or defendant the right of appeal in any *habeas corpus* case, but contains the following proviso: "Provided, this act shall not apply to parties held in custody in criminal cases." *Held*, that the proviso applies only to persons held in custody in a pending case, and that one in custody on a judgment of conviction is not held in custody in a criminal case, within the meaning of the proviso.

4. As, by the provisions of Code Tenn. 1888, § 3760, the proceedings in a *habeas corpus* case, including all the papers and the final order, are required to be returned to the nearest court of the trial judge, there to become a record, a case in which the judgment was rendered at chambers is appealable.

5. This court will not compel by *mandamus* the signing by a trial judge of a particular bill of exceptions presented to him by counsel to be signed, without additions or alterations, where the affidavits of the judge and counsel are conflicting as to the correctness of such bill on many material matters.

6. Where a judge has, in a case within his jurisdiction, ordered the discharge of a prisoner on *habeas corpus* proceedings, and has refused the prayer of the sheriff for an appeal from such order, the latter is guilty of contempt of court, within Code Tenn. 1888, § 4106, when, all the parties being present in court, he refuses to release the prisoner, though both the order of discharge and the refusal of an appeal were erroneous.

Error to, and *certiorari* and *supersedeas* to, criminal court, Montgomery county; C. W. TYLER, Judge.

Application for *mandamus*.

*West & Burney* and *Wm. M. Daniel*, for Tyler and Vanvaver. *Leach & Savage*, for Staton.

LURTON, J. The questions for decision in this case arise—*First*, upon a writ of error sued out by Mr. Staton, the sheriff of Montgomery county, from a judgment of the Honorable C. W. TYLER, J., upon a writ of *habeas corpus* ordering the discharge and release of one Allan Vanvaver, a misdemeanor convict in his custody, as superintendent of the county work-house; *second*, upon a writ of *certiorari* and *supersedeas* granted by this court, upon petition of Staton, to bring into this court for review a judgment against him of fine and imprisonment for contempt of court alleged to have been committed pending the *habeas corpus* proceeding; and, *lastly*, upon a petition for a writ of *mandamus* to compel Judge TYLER to sign a particular bill of exceptions accompanying the petition, and charged to be a full and true bill of all the proceedings in the *habeas corpus* case, and of the facts constituting the alleged contempt. The prisoner Vanvaver, on the 3d of May, 1889, pleaded guilty upon an indictment charging him with unlawfully carrying a pistol, and, on his plea, was, by the criminal court of Montgomery county, sentenced to pay a fine of \$50, and all the costs of his prosecution, "and that he be confined in the jail or work-house, at hard labor, until he there works out the same according to law." Under this judgment he was committed to the custody of the defendant Staton.

On the 16th of May he applied by petition to the Honorable C. W. TYLER, judge of the criminal court of Montgomery county, for a writ of *habeas corpus*, alleging in general terms that he "was illegally restrained of his liberty in the jail of Montgomery county by C. W. Staton, the jailer." The writ was awarded. Upon this writ, such proceedings were had as resulted in a judgment ordering the release and discharge of the relator. From this judgment the sheriff prayed an appeal to this court, which was refused. Upon his petition a writ of error was granted upon the fiat of a member of this court.

Inasmuch as a writ of error will only lie when an appeal is authorized, it becomes important to settle at the outset the question as to whether in a case of this character an appeal is given by statute. At the common law an appeal would not lie from a judgment in a *habeas corpus* proceeding. *State v. Malone*, 3 Sneed, 413; *State v. Galloway*, 5 Cold. 326; *State v. Taxing Dist.*, 16 Lea, 240. The same cases decide that neither under the Code nor any subsequent statute was an appeal in *habeas corpus* cases granted. Since these decisions the legislature has provided for an appeal in such cases by chapter 157 of the Acts of 1887. The title of this act is as follows: "An act giving to parties in *habeas corpus* cases the right of appeal to the supreme court." The body of this act, in the broadest terms, gives to either the relator or defendant the right of appeal in any *habeas corpus* case. The only room for any controversy as to the meaning and scope of this act arises upon a proviso in the following words: "Provided, this act shall not apply to parties held in custody in criminal cases." It is insisted that under this proviso there can be no appeal where the person is held in custody under a judgment of conviction; that such a person is one "held in custody in criminal cases." Such a construction would sustain the action of the trial judge in refusing an appeal in this case; but it would at the same time emasculate the act, by robbing it of all its vigor and form. Relief upon a writ of *habeas corpus* is rarely sought, save by persons held in custody either in a pending criminal case or upon a judgment of conviction. We think this proviso applies only to persons held in custody in a "criminal case;" that is, in a pending case. The words "criminal cases" apply to one held upon a criminal charge, against whom there is a pending case. In such cases an appeal would only operate to delay a trial and continue the imprisonment. One in custody upon a judgment of conviction is not one held in custody in a "criminal case," within the meaning of the proviso. We reached this conclusion upon full argument; and the opinion of the court, by Judge SNODGRASS, is reported in the case of *State v. McClellan*, 3 Pickle, 52, 9 S. W. Rep. 233.

The fact that the judgment discharging the prisoner was rendered by a judge sitting in chambers did not deprive either party of

the right of appeal. By section 3760 of the Code of 1858 the proceedings in a *habeas corpus* case, including all the papers and the final order, are required to be returned to the nearest court of the trial judge, there to become a record, upon which the clerk is to issue execution as in other cases.

Upon the petition for a writ of *mandamus* to compel the signing of the bill of exceptions accompanying the petition an alternative writ was ordered to issue. This writ, as actually issued and served, required the judge to sign the bill of exceptions presented by petitioner, or to show cause why he should not do so. The trial judge has answered this alternative writ by a sworn answer, in which he states that the bill accompanying the petition is not a true or complete bill of exceptions, and that it was presented to him after he had returned the papers in the *habeas corpus* proceeding to the clerk of the criminal court of Montgomery county, by the counsel for Staton, with the request that he should sign it, or refuse, without making corrections or additions, and that, finding it an incomplete bill, he had refused to sign it, and had indorsed the request of Mr. Savage, counsel for Staton, with his own reasons for refusing to sign it, upon the bill, and returned it to him. The contention of counsel for Mr. Staton now is that the bill as presented to the judge is a full and complete bill, and this contention they have supported by several affidavits. The answer of the trial judge is likewise supported by affidavits filed therewith. The power of this court, though exclusively a court of appellate jurisdiction, to compel by *mandamus* the signing of a bill of exceptions by the trial judge, cannot be now questioned. It is a power inherent in every appellate court, as a necessary incident to its appellate jurisdiction. *Miller v. Koger*, 9 Humph. 236; *State v. Hall*, 8 Cold. 262.

The question as to whether we may require the signing of a particular bill, which the inferior judge has refused to sign because, in his opinion, an untrue or incomplete bill, admits of more doubt. Though the intimations of the court in the opinions above cited seem to support the view that the power exists, we have been able to find but two cases from the courts of other jurisdictions where this question has been discussed. In *Sikes v. Ransom* the power to compel the signing of a particular bill was broadly asserted. 6 Johns. 279. In *Bradstreet v. Thomas* the supreme court of the United States held that it could not require a judge to sign a bill which he asserted did not contain the truth. 4 Pet. 102. The usual course is for adversary counsel to agree upon a bill of exceptions, and present it to the judge for his signature. Failing to agree, the practice is to submit their differences to him for settlement. Here no submission was proposed. On the contrary, the judge was requested to sign the bill prepared by counsel for Staton without additions or alterations. No option was given him. He was requested to sign the bill as prepared,

or refuse. Under these circumstances, he refused to sign the bill. Notwithstanding the request made that he should make no change, we are all of opinion that it was his duty to have made such change in the bill as he felt that the truth required, and to have then filed the bill as a true bill. If counsel felt that the bill as signed was not full, or did not recite the proceedings truly, the question could then have been made, upon *mandamus* proceeding, as to whether he could be made to correct the bill as signed so as to conform to the facts. Upon such an application as upon the one now before us, great weight should be attached to the sworn answer of a disinterested trial judge, as to the evidence heard by him and his rulings thereon. Nothing but the clearest proof of mistake or abuse of power would justify a superior court in requiring the judge of an inferior court to sign a bill of exceptions which he upon his oath asserts to be incorrect. If it be assumed that we have the power in a clear case,—which, however, we do not decide,—no such clear case is made out by the affidavits filed in this case. They are conflicting upon many material matters, and upon them we are not disposed to exercise any doubtful power. In the absence of a bill of exceptions, we are limited to such errors of law as appear upon the face of the record.

The original petition and the other pleadings, together with the order of the trial judge, constitute, as we have already seen, a record. Upon this record certain questions of law arise which will now be considered. The petition for the writ of *habeas corpus* simply alleges in indefinite terms that the petitioner is illegally held in confinement by the defendant Staton. The return of the defendant sets out these facts: That defendant is sheriff of Montgomery county and that as such he is the jailer and superintendent of the work-house; that on the 11th March, 1889, Allan Vanvaver was arrested upon a warrant, issued by a magistrate, charging him with the offense of unlawfully carrying a pistol; that in default of bail he was committed to the jail of the county to await the action of the grand jury; that subsequently he was indicted, and that on the 3d of May following he pleaded guilty, and was sentenced to pay a fine of \$50, and the costs of his prosecution, "and that he be confined in the jail or work-house, at hard labor, until he there worked out the same according to law;" that, in accordance with this judgment, he was committed to jail, he failing to pay or secure his fine or costs; that he had not yet satisfied this judgment; and that he was "holding him to the end that said judgment may be enforced, and holding him by virtue of said judgment, as I was directed by the court to do." This answer is supported by the record of the indictment and conviction, same being made a part of the return. This return was replied to by the petitioner; his replication setting out—"First. That he was arrested more than two months [since:] that, under the



rule long in force by the work-house commissioners, when a prisoner is arrested, he may at once go to work voluntarily in the work-house, and the time he so works will be credited upon his sentence. And they also, as an inducement to good behavior, make allowances for good time. He did so work, and did obey the rules of those in authority; and with his good time, and under the rules above stated, his time has expired, and he is entitled to his discharge." *Second.* He is entitled to his discharge on the further ground that the county judge, by authority of law, regularly discharged him from the work-house by an order of May 11, 1889; and the said superintendent declines to release him, and illegally detains him in custody." This plea presents just two issues, and upon them alone the petitioner claimed his right to liberty.

The final order of the judge, indorsed upon the petition and a part of the record, is a full statement of the grounds upon which the order for the discharge and release of the petitioner was rested. From this order it appears—*First.* "That the jail commissioners of Montgomery county have made an order by which any prisoner charged with a county offense might go to work as soon as imprisoned, and in that event any subsequent sentence against him should date from the day of his incarceration." "They have also made rules allowing liberal deductions from sentences for good behavior." *Second.* That it appears that Vanvaver had been incarcerated since 11th March; and that he had voluntarily gone to work before his conviction; and that, under the rules dating his sentence from time of imprisonment, and the rule allowing deductions for good behavior, his time had expired. Assuming the facts to be just as stated, the conclusion of the learned judge that the time of the prisoner had expired depends upon the legality of the rules made by the jail commissioners. Section 1 of the work-house act of 1875 prescribes "that hereafter every person convicted of a misdemeanor, who fails to pay or satisfactorily secure the fine and costs adjudged against him or her, shall be sentenced to be confined, and shall be confined, in the county work-house, after the term of his or her imprisonment, if any, has expired, until he work out his fine and costs, including all jailer's fees accruing before and after conviction, and down to final discharge." By section 4 of the same act it is provided "that every person confined in a work-house for failing to pay or secure his or her fine and costs, or costs only, as the case may be, shall be credited at the rate of 25 cents per day in addition to the jailer's fees, and no person shall be discharged from the work-house before said fine and costs, or costs only, as the case may be, and the costs of all necessary clothing provided, have been fully paid as aforesaid, or the county judge so orders:" "provided, however, that no person shall be so discharged except upon certificate of a physician that such person is physically unable to

labor." By the sixteenth section of the act the several quarterly county courts are given authority to "make and enforce all rules and regulations necessary for the safe-keeping and economic employment of said convicts." By chapter 155, acts of 1889, the quarterly court of Montgomery county is authorized to elect three commissioners, "who, with the county judge, shall act as jail and work-house commissioners, and shall have complete control and supervision over the institution." The act then proceeds to specifically define the mode and manner and extent of this control and supervision. They are given power to employ a physician to attend the inmates; to examine and approve all accounts for medicines, clothing, and supplies; to work the inmates upon the county roads, or to place them in other employment. They are required to keep an account of all expenses of the jail and work-house, and report to the county court; and they are authorized to elect a superintendent, and to suspend or remove such officer for good cause, subject to the approval of the county court. These powers do not in the most remote way confer authority to make the rules under which the petitioner claims his discharge. The work-house act is the general law of the land, and is and was in force in Montgomery county as in all the other counties of the state. Under the provisions of that act, as heretofore quoted, no one may be confined in the work-house or come under the provisions of that act unless he has been lawfully sentenced to the work-house. It is a place for convicts and not for suspects. The sentence can only date from its rendition, and no rule of commissioners can for a moment be recognized by which the voluntary labor of one awaiting trial can be set off against a subsequent sentence. The work-house act prescribes that the convict shall be allowed 25 cents per day for his labor after conviction. There is no known statute or principle of law by which the whole system of the criminal laws of the state can be in effect set aside as to misdemeanants by rules of the kind under which Vanvaver obtained his discharge. The suggestion that, inasmuch as the costs of misdemeanor convicts are paid by the county, and all fines go to the county, that therefore the county alone is interested, and should be suffered to regulate sentences in such cases, is utterly unsound. The offense of the misdemeanant is an offense against the state. The state prosecutes him, and to the violated law of the state he must atone. That the policy of the state has been to impose costs in such cases upon the county in which the conviction was had cannot affect the question. The state has simply chosen that method of raising such costs, as one more equitable than a general tax upon the whole state for that purpose. The fine and costs imposed in a misdemeanor case are imposed as punishment. If the convict cannot pay or secure them, then he must pay them by his labor in the work-house, at the rate of 25 cents per day, in ad-

dition to his jail fees. This is the process of the law for the payment of such fine and costs. If, by his voluntary labor while held in jail in default of bail, he has earned money, he may, of course, use this gain in paying the judgment imposed. But there is no authority for the detention of any one in the work-house who is simply detained because unable to give bail. Such suspects are inmates of the jail, and not of the work-house, and are in the custody of the jailer, and not of the keeper of the work-house. The rule making deductions for good behavior is equally unauthorized. No power to make such rules exists anywhere save in the legislature. That body has not by any kind of construction delegated this power to either the quarterly courts or to commissioners. The scheme for the management of the inmates of the jail and work-house of Montgomery county may be a very wise and salutary one; but our plain duty is to test its legality by the law of the land, regardless of its utility. Under this test these rules were unauthorized; and the petitioner's time had not, therefore, expired, he not having either paid or secured his fine or costs, or worked it out, under the law of the state as it exists.

But the order of discharge is based not alone upon the ground just stated, the trial judge adding that in addition to this he finds that on the 11th of May preceding the county judge had ordered the discharge of the prisoner, and that he had since been held by the defendant in defiance thereof. The only authority conferred by law upon a county judge to discharge a work-house convict is found in section 4 of the work-house act. This provision only authorizes such action upon the certificate of a physician that the convict is unable, by reason of physical disability, to labor. Such certificate is the essential basis of such an order, and without it there is no authority in the county judge to discharge the convict. The reply of the petitioner does not claim that the order of the county judge releasing him was based upon any such certificate; neither does the order made in the *habeas corpus* case find that there was such a certificate. It is true that this order recites that it was made in accordance with law. This is a conclusion of law, and not the finding of a fact. The county judge has no general authority to release such prisoners. None are entitled to such clemency save those who are physically unable to labor. The evidence of this fact is by the statute the certificate of a physician. Armed with such a certificate, a county judge may exercise this statutory power. His order, without such certificate, is a nullity. No such certificate appears to have been obtained by the petitioner, and the order of the county judge was made without authority of law. To support such an order it must be accompanied by the certificate required by the statute. The defendant was therefore discharging his duty when he refused to recognize an order not accompanied by such certificate,

and the learned trial judge was in error when he decided that the detention of the petitioner after such order was illegal. Thus, for errors of law appearing upon the face of the order made in the *habeas corpus* proceeding, the judgment discharging the petitioner must be reversed. The costs in the *mandamus* and *habeas corpus* branches of this case must be taxed to the petitioner, Vanvaver.

We come now to the petition for writs of *certiorari* and *supersedeas*, filed by the defendant Staton, to bring up for review the fine and imprisonment imposed by Judge TYLER for contempt of court alleged to have been committed during the trial of the matter involved in the *habeas corpus* case. In reviewing this commitment for contempt upon a writ of *certiorari*, we are limited to an inquiry into the jurisdiction of the court; and, there being no bill of exceptions bringing any of the evidence before us, this inquiry is necessarily limited to that which appears upon the face of the judgment. *Warner v. State*, 13 Lea, 52; *State v. Galloway*, 5 Cold. 326. The order made and indorsed upon the papers on the *habeas corpus* case likewise sets out the facts which constituted this contempt and the judgment of fine and imprisonment. From this it appears that when the defendant Staton's prayer for an appeal was refused the court then said to the prisoner that he was at liberty to go; that thereupon the district attorney, Mr. Savage, who had appeared for the sheriff, then said to the latter, "I tell you to hold the prisoner;" that the sheriff replied, "I will;" that the prisoner had arisen from his chair, and that the sheriff then started towards him and seized him. The judge then said, "Release the prisoner, sir." The sheriff replied that he was going to do what Mr. Savage said. Thereupon the judge said: "I fine you fifty dollars, and imprison you in jail ten days, for contempt of court." It then appears that the prisoner advanced several steps towards the door, as if to go out, whereupon the sheriff followed him, and placed handcuffs upon him. The court then, upon being called upon by the prisoner's counsel to prevent such treatment, said: "I fine you fifty dollars more, for this additional insult to the court." The handcuffs were removed at the suggestion of Mr. Savage, and upon the promise of the prisoner to go with the sheriff without trouble. The prisoner was then carried back to the work-house by the sheriff, and again put in confinement. The order of his honor the criminal judge releasing the prisoner was erroneous, as we have already decided. But it was not void, being made in a case within his jurisdiction. Until superseded or reversed or vacated by appeal, it was a valid order, which the sheriff and all other persons were obliged to respect and obey. The refusal of the prayer for an appeal was likewise erroneous, but this did not operate to vacate the judgment discharging the prisoner. It is only the granting of an appeal, and compliance with the terms

and conditions upon which it was granted, which vacates the judgment and deprives the inferior court of jurisdiction. The jurisdiction of Judge TYLER was not lost by his erroneous refusal to allow an appeal. Thus we have the case of an officer of the court refusing to obey a valid and lawful order of the court, to release and discharge a prisoner then in the presence of the court, and in the personal custody of the officer ordered to discharge him. The willful refusal of an officer of a court to obey any lawful order, rule, or command of the court is by the statutes made a contempt of court. Code 1858, § 4106. That the sheriff intended no personal disrespect to the court is altogether probable. He was guided by the opinion of the district attorney, who doubtless was of the opinion that the prayer for an appeal operated to vacate and annul the order discharging the prisoner. In this he was clearly in error. The order of discharge continued in force until superseded or reversed, and it was the clear duty of the sheriff to obey and respect it while it continued in force and operation. To have obeyed it would probably have resulted in the escape of the prisoner; but for that no responsibility would have rested upon him. This would have been of insignificant importance, compared to the just respect and obedience that every court is entitled to demand and receive. The court having had jurisdiction, the contempt being one committed in the presence of the court, the judgment was not void, and is not therefore reversible, and must be affirmed. The costs in this branch of the case will be paid by petitioner Staton; and his petition will be dismissed, and the *supersedeas* discharged.

KANSAS CITY *ex rel.* BLUMB v. O'CONNELL  
*et al.*

(*Supreme Court of Missouri.* Dec. 21, 1889.)

BONDS—RIGHTS OF THIRD PERSONS.

A contract for the construction of a sewer in Kansas City provided that the contractor should be responsible for all unlawful damages to persons or property from negligence or carelessness, and indemnify the city against all losses or claims for damage on account of such neglect or carelessness; and the sureties thereto agreed that he should well and faithfully perform all the terms of the contract. Held that, as the charter of Kansas City (Acts Mo. 1876, art. 8, § 9) requires that such contracts shall contain a covenant for the payment of laborers, to be guaranteed by sureties, and gives laborers the right to an action thereon, the bond, apart from the covenant for the benefit of laborers, was for the benefit of the city only, and an action against the sureties on their contract for damages for injuries sustained by the carelessness of the contractor or his employes cannot be maintained by a third person.

Appeal from circuit court, Jackson county.

This suit was brought by the City of Kansas, to the use of Mary Blumb, against Timothy O'Connell, and several others, who are sureties on a bond executed by the principal defendant. Plaintiff was nonsuited, and appealed.

W. J. Scott, for appellant. Gage, Ladd & Small, for respondents.

BLACK, J. This is a suit in the name of the City of Kansas, to the use of Mary Blumb, against O'Connell, and against five or six other persons, who are the sureties of O'Connell on his bond to the city. O'Connell was not served, and the sureties are the only parties defendant before the court. Defendants' objection to the introduction of any evidence was sustained, and the plaintiff took a nonsuit with leave. The question, therefore, is whether the petition states a cause of action. It discloses these facts: O'Connell was the contractor with the City of Kansas for the construction of a district sewer, and gave the bond upon which this suit is based to secure the performance of that contract. During the performance of the work Mary Blumb received personal injuries from a fragment of a stone thrown upon her by reason of the negligence of O'Connell and his laborers in blasting out the excavation for the sewer. For these injuries she sued O'Connell and the city, and recovered a judgment for \$2,500, which remains unpaid, and in full force as against O'Connell, though reversed and annulled as to the City of Kansas. The bond is in the form of a contract, O'Connell being party of the first, the sureties of the second, and the city of the third, part, and contains, among others, the following stipulations: "It is further distinctly agreed that the said party of the first part shall be responsible for all unlawful damages to persons or property from negligence or carelessness in doing said work, or in not using proper precaution between commencing and completing the job by barricades, signals, lights, or otherwise, to prevent injury to persons or property from said work, and the approaches thereto, and shall indemnify the City of Kansas against all losses or claim for damages on account of such neglect or carelessness; and the said party of the first part covenants with said City of Kansas to pay all laborers employed on said work. \* \* \* Said parties of the second part hereby guaranty that said party of the first part will well and truly perform the covenants hereinbefore contained, to pay all laborers employed on said work, but they shall not be liable on this guaranty beyond two thousand dollars, the estimated cost of the labor on said job; and said parties of the second part hereby agree with said City of Kansas that said party of the first part will well and faithfully perform each and all of the terms and stipulations in the foregoing contract to be done, kept, and performed on the part of the said party, and said parties of the second part shall not be liable hereon beyond the sum of eight thousand dollars."

The plaintiff, it will be seen, takes the ground that this bond is available to her for the satisfaction of the injuries which she received; and the defendants insist that their contract is simply one of indemnity to the city, and that plaintiff cannot sue upon the

bond. Section 9, art. 8, of the city charter (Acts 1875, p. 255) provides that contracts of the character of the one here in question shall contain a covenant on the part of the contractor to pay all laborers, which covenant shall be guaranteed by two or more sureties, who shall not be liable beyond the estimated cost of the labor on the job, to be stated in the contract. The same section goes on to give the laborers an action upon the contract, and prescribes the procedure. But the charter makes no such provisions in favor of other persons. Nor is it claimed that there is any statute which gives to plaintiff a right to sue on this bond. The bond is of a dual character. It is statutory as to the covenant to pay the laborers, and as to that covenant the penalty is separately fixed and stated. In other respects, it is but a common-law undertaking. The substance of the covenant relied upon by the plaintiff is that the contractor shall be responsible for all unlawful damages to persons from negligence or carelessness in doing the work, and shall indemnify the city against all losses or claims for damages on account of such neglect or carelessness. As to laborers, the agreement is to "pay all laborers employed on said work." Aside from the covenant as to laborers, the object and purpose of the bond is to secure a performance of the work according to the terms of the contract, and to protect and save harmless the city from damages occasioned by the negligent acts of the contractor and his servants. In these respects it is not an agreement with the city for the benefit of third persons, but for the protection and benefit of the city. Whether the city could require the contractor to give a bond which would be available to third persons in case of injuries received by them on account of the negligence of the contractor is a question which need not be considered. This bond must be construed as a whole, and, when this is done, aside from the covenant to pay laborers, it is simply one of indemnity to the city. It does not profess to create any obligation in favor of third persons, save in the single case of laborers. The petition shows no cause of action against the defendants, and the judgment is affirmed. All concur.

#### GRIMES v. PORTMAN et al.

(Supreme Court of Missouri. Dec. 21, 1889.)

##### HOMESTEAD—JUDGMENT—MORTGAGE.

1. As the homestead of a judgment debtor is not subject to levy and sale under the judgment, no lien attaches to the land thereunder.

2. Under 1 Rev. St. Mo. 1879, § 2689, the owner of a homestead and his wife may lawfully mortgage the same, and the mortgage would be valid as against them, and all parties claiming under them.

3. Where a wife joins with her husband in the execution of a deed of trust of their homestead, which is foreclosed, and sale made thereunder, a quitclaim deed of the property, executed by her after her husband's death, will not pass any title thereto.

Appeal from circuit court, Grundy county; G. D. BURGESS, Judge.

Ejectment by James Grimes against John Portman. The Union Bank was afterwards made defendant, on its own motion. Case was tried to the court without a jury, and judgment rendered for plaintiff. Defendants appealed.

J. H. Shanklin and George Hall, for appellants. R. A. De Bolt and A. W. Mullins, for respondent.

RAY, C. J. This is an action in ejectment, the petition being in the ordinary form. It was originally instituted against defendant Portman alone, but afterwards the Union Bank, upon its own motion, was also made a defendant, and defendants answer jointly, by a general denial. The defendant bank, by deed dated in March, 1883, conveyed the lands involved herein to defendant Portman, who was, when the suit was brought, in possession of the premises. The case was tried to the court without a jury, and judgment had for plaintiff, from which defendants have appealed.

Plaintiff claims title under a deed of trust executed October 7, 1878, by one Wilson and wife, on the 120 acres in suit, and under the sale of foreclosure, at which plaintiff became the purchaser, and received a deed in due form, the same being acknowledged and recorded September 7, 1882. The defendants derived title under a judgment obtained in January, 1878, by one Chrisman, against said Samuel Wilson, in the circuit court of Grundy county, for \$845, which judgment passed by successive assignments to the defendant the Union Bank. After the death of said Wilson, in January, 1879, the said judgment was duly classified in the probate court, and the administrator of said Wilson's estate thereafter, upon proper petition, reciting said judgment, and upon proper orders and proceedings in that court for the sale of the lands of the deceased for the payment of debts, sold said lands, including those in suit, and the Union Bank, becoming the purchaser of the 120 acres involved, as well as other lands belonging to said Wilson, received the administrator's deed therefor. The bill of exceptions, among other things, recites as follows: "That the plaintiff, to sustain the issues on his part, introduced testimony which was not controverted by any evidence offered by defendants, and which said testimony offered by plaintiff tended to prove that one Samuel Wilson died at Grundy county, Mo., on the 1st day of January, 1879; that at the time of his death, and for many years prior thereto, to-wit, fifteen years and more, said Wilson was seised and possessed of the land in controversy, the title thereto being evidenced by patents of record; that said Wilson also owned about 27½ or 28 acres adjoining the land in question on the east, on which he resided with his family; that said Wilson, at the time of his death, and for many years prior thereto, was the head of a family; that

since about the year 1857 or 1859 said Wilson resided on said tract of about 28 acres continuously, and that during all that time said small tract was the place of abode of himself and family; that the 120 acres in controversy lay joining said 28-acre tract, and that the 120 acres in controversy had, during his residence aforesaid, constituted the farm and plantation and homestead of said Wilson; that the 120 acres in controversy had for many years been mostly under fence, and a large part of it under tillage; that the 28 acres and the 120 acres in controversy, in 1878, were together worth about \$1,800, and had not been worth exceeding that sum; and that the rental value of the 120 acres in controversy was about \$120 or \$125 per year." It may also be added, in this behalf, that the evidence also shows a declaration on the part of said Wilson, at the time of said conveyance in trust for the use and benefit of plaintiff, that the tract conveyed, being the 120 acres in suit, was a part of his homestead, and that he requested leniency in respect to the payment on that account.

The evidence shows very clearly that the land in question was a part of Wilson's homestead. The family abode was, it is true, on the contiguous 28-acre tract adjoining on the east, and Wilson owned other lands, some of which were contiguous and others detached; but the bill of exceptions, as we have seen, *supra*, expressly states that during his said residence of 15 or more years the 120 acres "constituted the farm and plantation and homestead of said Wilson." The 28-acre tract and the 120 acres in suit were together less, both as to quantity and value, than the statute authorizes.

There is no question now before us on this record in respect to the validity or effect of the Chrisman judgment as to the other lands owned by Wilson; but the said judgment created, we apprehend, no lien upon the homestead of Wilson, or upon any part thereof. Where the real estate of the judgment debtor is not subject to levy and sale to satisfy the judgment, no lien attaches thereon in virtue or by reason of the judgment. *Freem. Judgm.* §§ 339, 340, 355; *Freem. Ex'ns*, § 249. A party may sell or mortgage his homestead, or any part thereof. "His creditors have no concern with it. He may give it away, and they are not prejudiced." *State v. Mason*, 88 Mo. 228; *Holland v. Kreider*, 86 Mo. 59; *Beckmann v. Meyer*, 75 Mo. 383. Wilson and wife, themselves, might, however, lawfully mortgage their homestead, or any part of it; and the mortgage would be valid and binding as against them, and all parties claiming under them. 1 *Rev. St.* 1879, § 2689, p. 451; *Thomp. Homest. & Ex.* § 456; *Freem. Judgm.* § 355.

It follows, therefore, from these views, that the administrator's sale and deed, so far as the homestead and the 120 acres in controversy are concerned, did not pass the title. The quitclaim deed executed by the widow of said Samuel Wilson, of date March 20, 1879,

did not pass any title or interest in the lands in suit, for the reason that she had previously, and in October, 1878, joined with her husband, in his life-time, in the execution of the said deed of trust for the use and benefit of plaintiff. The 120 acres in controversy being, as the evidence shows and as the trial court found, a part of the homestead so owned and occupied by said Wilson, he held the same free from any incumbrance or lien of the judgment under which defendants claim; and, as he and his wife might lawfully execute the trust-deed conveying the land in question by their own voluntary act and deed, and have jointly done so, the title has, by the subsequent foreclosure sale thereunder, vested in plaintiff.

The action of the trial court in giving and refusing declarations of law was in harmony with the views here expressed; and, as we find no material error in the record, we affirm the judgment. All concur.

#### MITCHELL v. CITY OF CLINTON.

(*Supreme Court of Missouri*. Dec. 21, 1889.)

#### MUNICIPAL CORPORATIONS—NEGLIGENCE—PLEADING.

1. In an action against a city for damages for personal injuries caused by the negligent construction of a set of public scales, owned and operated by the city, the petition must show that the city was a corporation, and that it was within the scope of its powers to construct and maintain such scales.

2. It is not necessary that the petition should specifically state the nature of the injuries sustained by plaintiff.

3. Nor is it necessary that the plaintiff should show that he was not guilty of contributory negligence, that being a matter of defense.

BLACK, J., dissenting.

Error to circuit court, Henry county; J. B. GANTT, Judge.

This action was brought by Olive Mitchell against the city of Clinton, to recover damages for the death of her husband, John C. Mitchell. There was judgment for defendant on demurrer, whereupon plaintiff sued out a writ of error.

*C. B. Wilson and J. Parks & Son*, for plaintiff in error. *C. A. Caldwell*, for defendant in error.

BRACE, J. The petition in this case, after alleging that plaintiff is the widow, and at the time of the grievances complained of was the wife, of John C. Mitchell, deceased, proceeds as follows: "Plaintiff says that defendant is a corporation under the laws of the state of Missouri, and was a corporation at the time of the happening of the grievance herein set forth. That as such corporation it was defendant's duty to keep all its streets and thoroughfares, including its public scales, and the approaches thereto, in a reasonably safe condition for public use. That at the time herein set out defendant was the owner of, and was operating, a set of long platform scales for weighing hay, corn, coal, and other heavy articles, by the wagon load, or otherwise. That said scales were being used and

operated by defendant for the use of the public. That defendant charged parties weighing on said scales the sum of 10 cents per wagon for each loaded wagon weighed thereon. That on or about the 28th day of June, 1881, defendant, by ordinance, provided for a city weigher and gauger to take charge of said scales, and to weigh all hay, corn, grain, and stone coal that was required to be weighed thereon, or which might be brought to him for that purpose, and to collect from the vendor or person having the same weighed a fee of 10 cents for each and every loaded wagon weighed by him on said scales. That defendant put a weigher and gauger in charge of said scales to collect said fee of 10 cents, and that said employe of defendant was in charge of said scales at the time herein set out. Plaintiff says said scales were situated within the corporate limits of defendant. That said scales, and the approaches thereto, were at the time complained of very narrow, being barely wide enough for a wagon to drive or stand on, and were elevated a great distance from the ground, to-wit, about three feet. Plaintiff says that at the time of, and for a long time before, the happening of the grievances herein complained of, defendant, unmindful of its duties in the premises, carelessly and negligently left the sides of said scales, and the approaches to the same, wholly unprotected by railing, banister, or any other guard whatever to prevent wagons, while being driven on said scales, or after getting on the same, or in being driven off the same, from falling off said scales or approaches, and being overturned in case of accident, although the same was necessary to make said scales and approaches reasonably safe, and defendant, at the time, and for a long time before, had full knowledge of the unprotected and dangerous condition of said scales and approaches. Plaintiff says that on the day of August, 1882, John C. Mitchell, plaintiff's husband, being desirous of weighing a wagon-load of hay on defendant's said scales, drove his wagon-load of hay upon the platform of defendant's said scales to have the same weighed by the said weigher of defendant, and that the said Mitchell was at the time sitting on said load of hay. That while the wagon and load of hay, as aforesaid, were being weighed by defendant's weigher, or immediately afterwards,—either the one or the other of which plaintiff believes is true, but is ignorant of which, whether it be the one or the other,—the wagon and load of hay upon which the said John C. Mitchell was at the time sitting, through the fault, carelessness, and neglect of defendant in failing to have railing, banisters, or other barriers or guards at the sides of said scales, and the approaches to the same, ran off the sides of said scales, and was precipitated to the ground below and overturned. That by reason of said wagon and load of hay being thrown from said scales and overturned as aforesaid, by the negligence of defendant as aforesaid, said John C. Mitchell, without

fault on his part, was thrown with great force and violence against the ground, and among the rocks which defendant had placed below said scales, and so badly injured about the head and back that he died from the effects thereof on or about the 7th day of April, 1883. Plaintiff says this action is brought within six months after the death of John C. Mitchell, plaintiff's said husband. That by reason of the death of her said husband, John C. Mitchell, as aforesaid, she has sustained damages in the sum of five thousand dollars, under the statutes in such cases made and provided. Wherefore she prays judgment for said sum of five thousand dollars against defendant, under the statutes in such cases made and provided."

To this petition defendant demurred, assigning for grounds: (1) That it did not state facts sufficient to constitute a cause of action; (2) that it did not show any authority in the defendant to set up and operate the scales as therein charged; (3) that it did not show that deceased was exercising ordinary care at the time of his injury; (4) that it did not state how or to what extent deceased was injured, so as to advise defendant whether said injuries were of a character likely to produce death. The demurrer was sustained, judgment rendered thereon for defendant, to reverse which plaintiff sues out this writ of error.

The grounds of demurrer will be noticed in inverse order.

1. The fact that the petition did not specifically advise the defendant of the nature and extent of the injuries which the plaintiff alleges caused the death of her husband was no ground of demurrer. The nature and extent of the injuries, and their connection with the death of plaintiff's husband, was matter of proof, and not of pleading.

2. Contributory negligence is a defense to be pleaded and proven by the defendant. It is not necessary that its absence should be pleaded or shown by the plaintiff in the first instance. *Buesching v. Gas-Light Co.*, 73 Mo. 220; *Parsons v. Railroad Co.*, 94 Mo. 286, 6 S. W. Rep. 464.

3. The first and second grounds of demurrer may be disposed of together; the second being simply a specification of the particular in which the petition fails to state a cause of action, which is the first ground of demurrer. The petition is very loosely drawn. It does not show whether the city of Clinton is a corporation under the general laws of the state, or by special charter; in fact, it only appears inferentially that it is a municipal corporation at all. To what class it belongs, what are its powers, and what its duties, appear from no fact contained in any averment in the petition. Conceding the power of the defendant, under its charter, to erect and maintain scales for the use of the public, for which it charged and received a compensation, the duty which it is alleged the corporation owed the plaintiff to keep the same, and the approaches thereto, in a reasonably

safe condition, would appear. 2 Dill. Mun. Corp. (2d Ed.) § 778. But no fact is averred in the petition from which the conclusion can be drawn that it was within the scope of defendant's corporate powers to erect and maintain such scales, and without such power no such duty could arise, and consequently no liability for failure to discharge it. Id. § 766. The fault with the petition in this case is that the pleader, instead of stating the facts from which the legal conclusion might be drawn that defendant's duty to the plaintiff was as charged therein, contents himself with simply stating that duty as a legal conclusion. A conclusive fact may and ought to be stated; facts from which the ultimate and conclusive fact may be inferred are evidence, and need not be stated; but the facts from which a legal conclusion is to be drawn, upon which depends the plaintiff's right of action, must be stated, in order to show a cause of action, under our system of pleading. Bliss, Code Pl. § 210 et seq. The petition failing to show a cause of action in the particular pointed out, the demurrer was properly sustained, and the judgment is affirmed. All concur, except BLACK, J., who dissents.

#### BENDER v. DUNGAN.

(Supreme Court of Missouri. Dec. 31, 1889.)

#### TAXATION—FORFEITURE FOR NON-PAYMENT—EJECTMENT.

1. Under Laws Mo. 1872, § 224, relating to the sale of lands forfeited to the state for the non-payment of taxes, and providing that when purchasers of such lands shall become entitled to a deed the same shall be made by the collector, as near as may be, in the form prescribed in the act, and that they shall have the same force and effect, and be governed by all the conditions, provided for tax-deeds, a deed so executed, which does not recite all the proceedings prescribed by law for the purchase of such forfeited lands, is void.

2. Laws Mo. 1872, § 226, relating to the forfeiture of lands for the non-payment of taxes, provides that at the tax-sale of 1875 lands previously forfeited and unsold, and unredeemed, should, after being offered for sale for the amount due thereon, and not sold, be then immediately offered for sale to the highest bidder, and that the forfeitures of such lands as would not sell should be complete. *Held*, that a private sale, made subsequent to the tax-sale of 1875, of lands forfeited prior to that date, was illegal and void.

3. In ejectment, where the plaintiff's claim is based on a tax-title, and the defendant pleads the general issue, and plaintiff's tax-deeds are excluded, it is proper to refuse an instruction that the plaintiff, though defeated in this action for the recovery of the lands in suit, would nevertheless be entitled to judgment against the defendant for the full amount of all taxes paid by the plaintiff on said land, with the penalty and interest thereon.

Appeal from circuit court, Holt county; C. A. ANTHONY, Judge.

Ejectment brought by John C. Bender against T. C. Dungan. There was judgment for defendant, and plaintiff appealed.

S. C. Irwin and J. D. Crosby, for appellant. T. C. Dungan, pro se.

RAY, C. J. This is an action of ejectment to recover the described premises, which are situated in Holt county, Mo. The petition

is in the ordinary form, and the answer one of general denial. By agreement of parties a jury was waived, and cause tried by the court. A finding was had for defendant, from which plaintiff has appealed. Plaintiff offered in evidence three tax-deeds,—one for the taxes of the year 1873, another for the taxes of 1874, and the remaining one for the taxes of the year 1875,—all of which were, upon the objections of defendant, excluded by the court. No other evidence was offered in the cause. No declarations of law were asked by defendant, and but one on the part of plaintiff, which the court refused, and which will be considered later, in the progress of the opinion.

We may premise that the three several tax-deeds all bear the same date, to-wit, February 28, 1879, and convey the same land, being the 160-acre tract involved in this suit, and that these lands were not sold for delinquent taxes, but were lands forfeited to the state, and sold from the forfeited lists to plaintiff, at private sale, on October 7, 1876. The law, we may observe, does not specifically prescribe the form for this class of deeds, but section 224, Laws 1872, provides that, when purchasers shall become entitled to deeds for real property forfeited to the state, the same shall be made by the collector, as near as may be, in the form prescribed in the act, and that they shall have the same force and effect, and be governed by all the conditions, provided for tax-deeds. It is manifest from this language, and from inspection of the provisions of said section 224, that the form and phraseology of the tax-deed applicable to the sale of lands for delinquent taxes would have to be added to, modified, and altered, in order to be adjusted to and embrace the requirements peculiar to section 224, under which deeds for forfeited lands are authorized. Although the form, other than as above, is not prescribed, yet, as was said in *Guffey v. O'Reiley*, 88 Mo. 424, the deed must contain apt and appropriate recitals, in order that it may be *prima facie* evidence of such recitals.

The tax-deed for the taxes of the year 1873, which is the one plaintiff selects to set out in full in his abstract, shows on its face, and recites, among other things, that "John C. Bender did on the seventh day of October, 1876, pay to the collector of said county the sum of twenty-eight dollars and ten cents, being the amount of taxes, costs, and penalty then due thereon, as above stated, opposite each tract, respectively, required for the purchase of said tract of land according to law, and did receive from said collector a certificate of purchase duly describing said tract of land, and duly signed by said collector, and countersigned by the clerk of the county court, and that said tract of land had not been redeemed according to law;" but it fails to show or to recite, as section 224, Laws 1872, requires, that said Bender, the plaintiff herein, applied to the county clerk to purchase the said lands, or that the county



clerk issued his order to the county collector, directing him to receive from said Bender the amounts due on said tract, and fails to recite or show that said order particularly described the land, and set forth the amount due, and that the same was the 10 per cent. penalty, in addition to the taxes, interest, and costs. Nor does the deed recite that said order was presented to the county collector, or that the collector gave the duplicate receipts, setting forth the amount received, and a proper description of the property. Recitals that various matters are done as required by law amount to nothing. The facts must be set out so that the court may see whether or not the law has been complied with. *Pearce v. Tittsworth*, 87 Mo. 640, and cases cited.

Again, section 228 provides, among other things, that at the regular sale, in the year 1875, lands which had been previously forfeited, and then remained unsold and unredeemed, should, after being offered for the amount due thereon, and not sold, be then and there immediately offered and sold to the highest bidder, but not for a greater sum than was due thereon, including costs, etc., and that the former forfeitures of such property as would not sell should be canceled. The land in suit had been, as we have seen, forfeited for the amounts due for the taxes of the years 1873 and 1874, and, if not sold at the regular sale, in 1875, to the highest bidder, the said forfeitures for said taxes should have been canceled at that time, so that this private sale of the land thereafter, in October, 1876, recited in the deed, was, we think, illegal and void. These omissions are, we think, sufficient to show that the deed does not strictly comply with the substantial requirements of the law; and for these reasons the deed is, we think, void on its face.

The deed for the taxes of the year 1875, set out by the defendant in his abstract, contains all the omissions in the deed just passed on, with some additional defects of its own, and peculiar to itself. For example, this deed recites that a special execution issued out of the county court dated July 17, 1876, and that the land was offered for sale thereunder October 7, 1876, but was not sold, for want of bidders, so that the land could not legally be forfeited and sold at private sale on this day; October 7, 1876, being the same day it was offered at the delinquent sale. But, as the defects already stated are fatal, and render the deed void on its face, others need not be further discussed.

The court, as before stated, refused the declaration of law, asked on the part of plaintiff, to the effect "that, although the plaintiff should be defeated in this action for the recovery of the land in suit, he would nevertheless be entitled to judgment against defendant Thomas C. Dungan for the full amount of all taxes paid by plaintiff on said land at the time of his purchase thereof, with penalty thereon for non-payment of taxes, together with interest thereon at the rate of

ten per cent. per annum from the time of payment by plaintiff, provided said Dungan be the successful claimant of said land." This action of the trial court was, we think, correct. The action was, as stated at the outset, in the usual and ordinary form for the action of ejectment, and the answer was a mere general denial. No such question as that presented by the said declaration was raised or embraced in the pleadings. These deeds, when in conformity with the statutes, are made *prima facie* evidence; but, if void on their face, as in this case, they are not competent for any purpose, especially where the pleadings are as stated. The deeds were excluded, and were no longer before the court for any purpose. As the tax-deeds were excluded, and no other evidence was offered, there was nothing either in the evidence or in the pleadings on which to base the declaration asked for, or the money judgment therein prayed for. *Smith v. Laumier*, 84 Mo. 672, and *Smith v. Laumeier*, 12 Mo. App. 547. It follows, therefore, from these views, that the court's ruling in this behalf was also right and proper, and its judgment herein is therefore affirmed. All concur.

#### DUNCAN v. ABLE.

(Supreme Court of Missouri. Dec. 31, 1889.)

##### EJECTMENT—INSTRUCTION.

In ejectment, where the plaintiff claimed title by virtue of a sheriff's deed under a sale on a judgment against defendant's lessor, the defendant claimed that his lessor was in possession as agent of a third person merely. *Held*, that an instruction that if the jury believed defendant's lessor was in possession of the premises, and afterwards the defendant acquired possession through him, and was in possession at the time the suit was begun, the jury should find for plaintiff, is erroneous, and is not cured by an instruction that if the jury believe defendant's lessor was in possession as the agent of such third person, and not in possession himself, their verdict should be for defendant.

Appeal from circuit court, Lincoln county; E. M. HUGHES, Judge.

This is an action of ejectment to recover four-fifths of a tract of land. Plaintiff claims title by virtue of a sheriff's deed under a judgment against Henry A. Forgey, and a sale in March, 1884. His other evidence tended to show that the latter lived on the land in 1882-83; rented it to tenants in 1884 and 1885, claiming it as his own, and offering to sell it; and that he made a deed of trust for it in 1884 to secure a debt. Defendant's evidence, in so far as it related to the plaintiff's claim, tended to prove that the possession of Henry A. Forgey was merely as agent for Thomas J. Forgey, his father, who claimed title as tenant by the curtesy. At the trial the court declared the law as follows for plaintiff, viz.: "If the jury believe from the evidence that Henry A. Forgey, at the date of the sale mentioned in the sheriff's deed, read in evidence, was in the possession of the premises sued for, and that afterwards the defendant Able acquired possession from

or through said Henry A. Forgey, and was in the possession of the said premises at the institution of the suit herein, to-wit, on the 12th day of March, 1886, then the jury will find for the plaintiff that he recover the land sued for, and will assess the value of the monthly rents and profits as they shall find from the evidence that the rents and profits are reasonably worth, not exceeding the amount claimed in the petition." The court also gave the following instruction of its own motion, viz.: "If the jury believe from the evidence that Henry A. Forgey was acting as the agent of Thomas J. Forgey in renting the lands to Story or Able, and not in the possession of the lands himself, then the verdict will be for the defendant." The defendant had requested this instruction with the words "and not in possession of the lands himself" omitted. The finding and judgment were for plaintiff. Defendant appealed, after saving the proper exceptions.

*Martin & Avery*, for appellant. *Silver & Brown and R. H. Norton*, for respondent.

**BARCLAY, J.**, (after stating the facts as above.) In the action of ejectment it is essential to plaintiff's case that he show such a right as is necessary to a recovery under our law. A defendant in possession may rest upon that alone until the plaintiff exhibits a better title. Laying aside any consideration of the effect of a purchase at the sheriff's sale of only a fractional part of the land in dispute, it is clear that, in any view of the case, plaintiff's evidence established no greater title in Henry A. Forgey at or after the time of that sale than arises from mere possession under claim of ownership. In the absence of explanation, possession of realty is evidence of ownership; and, where no better title than possession is shown, he who is prior in time is prior in right. Henry A. Forgey, in the present case, could not deprive plaintiff of the benefit of his purchase by any abandonment of his possession to another after the lien of the judgment had attached. But if, as defendant asserted and his evidence tended to prove, Henry A. Forgey neither claimed ownership nor possession otherwise than as agent for Thomas J. Forgey when the judgment was obtained, or afterwards, that fact would constitute a good defense to plaintiff's recovery in this action. The possession of the agent would be that of his principal. Nothing would pass to a purchaser by a sale under a judgment against the agent, as against the rights of the principal. The case in the trial court turned on the nature of Henry Forgey's possession, whether it was in his own right, as claimant of ownership, or as agent for his father, Thomas J. Forgey. But the court, in its instructions, did not define that issue of fact with sufficient distinctness. It appeared to intimate that mere possession by Henry A. Forgey was conclusive against defendant. The instruction given for plaintiff is susceptible of that construction. The instruction by the court of its own

motion did not correct it. The latter should at least have been given as requested by defendant, without the amendment it received from the court. For these reasons the judgment is reversed, and the cause remanded, all concurring.

#### HOLLIDAY v. AEHLE et al.

(Supreme Court of Missouri. Dec. 21, 1889.)

#### LANDLORD AND TENANT—ASSIGNMENT OF TERM—EXECUTION.

1. Under Rev. St. Mo. 1889, § 6368, providing that no tenant for a term not exceeding two years shall assign or transfer his term or interest, or any part thereof, to another without the written consent of the landlord, such interest cannot be passed by sale under legal process.

2. When a tenant holds under a tenancy from month to month, as provided in Rev. St. Mo. 1889, § 6371, relating to such tenancy, the landlord may insist upon holding the tenant to the terms of his tenancy.

BLACK, J., dissents.

Appeal from circuit court, Cooper county; R. L. EDWARDS, Judge.

This is an action of ejectment, originally against defendant Aehle only, to recover possession of a lot and building in the city of Boonville. The petition is in the usual form. The answer of Aehle denied the allegations of the petition. Afterwards the court permitted Sauter, on his motion, to be made a party defendant. He answered, denying the allegations of the petition and affirmatively stating that he was the owner of the property. The case was tried before the court without a jury. It appeared that the plaintiff was the purchaser at sheriff's sale under a judgment against defendant Aehle of all his right, title, and interest in the lot sued for. The plaintiff introduced the sheriff's deed, conveying all the interest of Aehle in the lot, and then proved that the latter had been in possession for two or three years before the trial, and ever since the house was built; that he was in possession at the time of the sheriff's levy and sale, and continued in the possession to the day of trial. The plaintiff then proved rents and profits, and rested. Defendants asked the court to sustain a demurrer to the evidence, which it declined to do. It was admitted for the purposes of the trial that at the time of the sheriff's sale the title to the property was in the defendant Sauter. Defendants then offered evidence tending to show that Aehle, the defendant in the execution, was a tenant of Sauter's, occupying the lot and the building thereon by a verbal letting, and that he had been such for two or three years, including the time when the execution sale took place. At the instance of plaintiff, the court declared the law as follows, viz.: "If the court, sitting as a jury, shall find from the evidence that the defendant Charles F. Aehle was in possession of the property described in the petition at the time of the sheriff's sale, and at the institution of this suit, and still remains in possession thereof, then the sheriff's deed read in evidence

passed all of the right, title, and interest of defendant Aehle to plaintiff, Anna Holliday, and the court must find the issues for the plaintiff, although the court may believe that said Aehle is in possession as the tenant of his co-defendant, Sauter." There was a finding for plaintiff. After the necessary measures for a review, defendants appealed.

*E. R. Hayden*, for appellant. *Draffen & Williams*, for respondent.

BARCLAY, J., (*after stating the facts as above*.) The case requires us to determine the effect of a purchase at execution sale of the tenant's interest under a statutory tenancy from month to month, (Rev. St. 1889, § 6371,) when the landlord resists such transfer to the purchaser. That an interest in land created by mere possession may, generally speaking, form the subject of a recovery in ejectment, will be assumed. But, in applying that rule to a case like this, regard must be had to the terms of positive law regulating assignments of such an interest in possession as is here involved. By our statute it is declared that "no tenant for a term not exceeding two years, or at will, or by sufferance, shall assign or transfer his term or interest, or any part thereof, to another, without the written assent of the landlord, or person holding under him." Section 6368, Rev. St. 1889. In this case the interest in dispute is a tenancy from month to month, and therefore included within the statute as a tenancy "for a term not exceeding two years." To sanction a transfer by means of legal process of the tenant's interest in such an estate without assent of the landlord would be to afford an easy mode of evading the plain meaning of the law.

Had the landlord assented to the transfer, the case would be different. But he has not done so. He may, therefore, lawfully insist on holding the original tenant to the terms of the existing tenancy as defined by the statute governing it. Rev. St. 1889, § 6371. An execution purchaser from the tenant cannot deprive him of this right. The instruction given by the court at plaintiff's instance is not in accord with these views. It is therefore necessary to reverse the judgment and remand the cause, which is accordingly done.

BRACE, J., concurs. RAY, C. J., and SHERWOOD, J., concur in reversing the judgment and remanding the cause. BLACK, J., dissents.

#### WEIR *et ux.* v. MARLEY.

(*Supreme Court of Missouri. Jan. 27, 1890.*)

#### HABEAS CORPUS—RES ADJUDICATA—CUSTODY OF CHILDREN.

1. The doctrine of *res adjudicata*, in the absence of a new state of facts, applies to a discharge on *habeas corpus*, even when used to obtain custody of children.

2. Where the good of the child will apparently be as well promoted in one family as the other, it will not be taken from its father, and placed with

its grandparents, with whom it has lived since the death of its mother, on the ground that the father had by parol given it to them.

SHERWOOD, J., dissenting.

On writ of *habeas corpus*.

*Boyd & Delaney*, for petitioners. *J. H. Morrison* and *Goods & Cravens*, for respondent.

BRACE, J. The issues in this case arise upon the return of the respondent to a writ of *habeas corpus* issued by SHERWOOD, J., on the 9th day of September, 1889, returnable to the supreme court at the October term thereof, by which the petitioners, who are husband and wife, and the maternal grandparents of Louise Marley, an infant aged six years on the 6th day of May last past, seek to recover the custody of said infant from the respondent, who is the father of said infant, and who on the same day, before W. D. HUBBARD, judge of the circuit court within and for Greene county, on writ of *habeas corpus*, had theretofore recovered the said infant from the custody of the petitioners. The parties to this suit and to that before Judge HUBBARD are the same. The state of facts on the same day and almost within the same hour within which that adjudication was had and this writ was issued are the same. The facts stated in the return of the petitioners to the writ of Judge HUBBARD and those stated by them in the petition herein are substantially the same, and the question whether the discharge of a party in custody by writ of *habeas corpus*, by a court or officer of competent jurisdiction, is final and conclusive as to the legality of such custody upon the then existing state of facts, is presented by the facts in the case, and we are requested to express an opinion thereon, though not formally pleaded as an estoppel.

Treating this case for the present as a normal one, in which a party charged to be illegally restrained of his liberty, and for whose relief a writ of *habeas corpus* is the appropriate remedy, and who has by such writ been discharged from that restraint by a tribunal competent to so discharge him, is such discharge final and conclusive? That the doctrine of *res adjudicata* is not applicable to the case of a refusal to discharge, and that the prisoner is entitled to the opinion of all the courts or officers authorized in a given cause to issue the writ as to the legality of his imprisonment, is conceded and is not limited in this state by statutory enactment, except in the one particular that the applicant for the writ in his petition must state "that no application has been made or refused by any court or officer superior to the one to whom the petition is presented." Subject to this limitation, one restrained of his liberty may in succession apply to every court or officer authorized to issue the writ, notwithstanding another court or officer having jurisdiction may have refused to issue it or to discharge him from such restraint, "and from such refusal no appeals will lie," as was held

in *Howe v. State*, 9 Mo. 690, the reason assigned in that case being that "the refusal to grant a discharge is not a final judgment from which an appeal will lie to this court;" and in *Ferguson v. Ferguson*, 36 Mo. 197, where an order had been made by the circuit court discharging one child from and remanding two other children into the custody of the father, on a writ issued upon the petition of the mother, appealed from to this court, it was ruled that, "so far as the decision discharged or remanded the persons restrained, this court has no appellate jurisdiction to interfere with it, and no appeal lies to this court in such case," (citing *Howe v. State*, supra.) "In this respect the decision is not of the nature of a final judgment. It concerns only the present actual condition of things, and the order of the court is at once executed and accomplished beyond recall, and, in reference to any new state of facts existing afterwards, the parties have the same remedies as before, whether by writ of *habeas corpus* or other proceeding, in any court of competent jurisdiction." From these cases may be deduced the doctrine that the principle of *res adjudicata* does not apply in cases of *habeas corpus* to judgment remanding the prisoner, or to judgments discharging the prisoner, where a new state of facts warranting his restraint is shown to exist different from that which existed at the time the first judgment was rendered. That it does apply to a judgment discharging the prisoner, where no such new state of facts is shown, may as readily be deduced from the case of *Ex parte Jilz*, 64 Mo. 205. The distinction thus made between judgments remanding and those discharging the prisoner grows out of the nature of the writ, whose *raison d'être* is the protection of personal liberty. It loses none of its characteristics when used for the purpose of obtaining the custody of children, and the same analogies ought to obtain in such cases as when used simply for the purpose of discharging a prisoner from illegal restraint. If this be so, then the judgment of a court or officer of competent jurisdiction, discharging the infant in this case from the custody of the petitioners on the 9th day of September, 1889, on writ of *habeas corpus*, ought to be a complete answer to their petition presented on the same day to another court or officer of like jurisdiction, for a like writ, to recover that custody from the same person to whom it was awarded, setting out the same grounds for such recovery in their petition as was set up in their return to the former writ; and this conclusion would not be inconsistent with the actual rulings in the cases cited from this state or the nature of the writ, and would be sustained by authority elsewhere, (*Mercien v. People*, 25 Wend. 64; *People v. Mercien*, 3 Hill, 399; *People v. Brady*, 56 N. Y. 182; *Com. v. McBride*, 2 Brewst. 545; *In re Da Costa*, 1 Park. Crim. R. 129; *Brooke v. Logan*, 112 Ind. 183, 18 N. E. Rep. 669; *Spalding v. People*, 7 Hill, 301; *People v. Burtnett*, 5

*Park. Crim. R.* 113; *McConologue's Case*, 107 Mass. 154; *Freem. Judgm.* (3d Ed.) § 324; *Church, Hab. Corp.* §§ 386, 387.) and might be placed upon the ground thus stated in *Freeman*, supra: "The principles of public policy requiring the application of the doctrines of estoppel to judicial proceedings, in order to secure the repose of society, are as imperatively demanded in the cases of private individuals contesting private rights under the form of proceedings in *habeas corpus* as if the litigation were conducted in any other form; otherwise, as is well stated in the opinion of Senator PAIGE, [*Mercien v. People*, 25 Wend. supra,] 'such unhappy controversies as these may endure until the entire impoverishment or the death of the parties renders their further continuance impracticable. If a final adjudication upon a *habeas corpus* is not to be deemed *res adjudicata*, the consequences will be lamentable. This favored writ will become an engine of oppression, instead of a writ of liberty.' " The serious objection to the conclusiveness of a judgment on *habeas corpus* in such cases would be removed by a provision for review by appeal or writ of error. It would seem that such provision has been made by statute in some of the states, (*Church, Hab. Corp.* § 388;) but Mr. Church is mistaken in the statement that decisions in such cases may be reviewed by statutory authority in Missouri by appeal, and *Ferguson v. Ferguson*, supra, cited by him, is not authority for such statement.

This much has been said in reference to the conclusiveness of the discharge of the infant from the custody of the petitioners on the first writ, in deference to the wish of the parties to have the views of the court upon that subject expressed; but as both parties seem desirous of having the *status* of this infant definitely settled as far as may be by this court on the merits of the case, and with this view have taken testimony bringing the *status* of the relations of the parties *inter sese* and towards the child before this court up to the time of its submission, and as this remedy from its nature must be ambulatory, to the extent that a judgment in any case can be conclusive only when the same state of facts is shown to exist, we pass to the consideration of the case on its merits.

The mother of the infant Louise (Julia Marley) died in the city of Oswego, Kan., on Monday, the 10th of June, 1883, when the child was five weeks old. The petitioners and respondent were both living in that city at the time, and the kindest and most affectionate relations existed between both parties and their families. She died at the home of the respondent's father, with whom the respondent and his wife were living at the time, and where the petitioners were also in attendance upon her. The petitioner, Mrs. Weir, testifies that three days before she died she told her that she wanted to have a talk with her husband, and that she said she wanted to tell him, among other things, that she wanted Mrs. Weir to raise the baby. That

just before she died, when the parties were by her bedside, she (Mrs. Weir) having kissed her daughter, "her daughter said, 'This means something;' when Mrs. Weir said to respondent, 'Yes; she wants me to ask you if I may raise the baby? You will, won't you?' He hesitated a moment, and said, 'Yes.' My daughter then motioned for a kiss, and, when he bent over her to kiss her, she said, 'It is ma's baby.' He said, 'Yes; ma's baby.' That was all that was said that related to the baby." The testimony of Dr. Weir and his daughter Miss Ellen, as to what occurred at the bedside just before the death of Mrs. Marley, is to the same effect. Mr. and Mrs. Hobart testified that, on the Thursday after the death of Mrs. Marley, Mr. Hobart asked Mrs. Weir, in the presence of Mr. Marley, "Is this Julia's baby?" and Mrs. Weir replied: "No; it is ours. Julia gave her to us to raise, and Mr. Marley consented;" and Mr. Marley made no reply. On the other side the respondent denied that any such conversations took place; testified that Mrs. Weir appealed to her daughter to give her the child on the night of her death, but that her daughter made no response, nor did he. The testimony of the other witnesses who were in attendance upon her that night tended to support the testimony of the respondent, and the respondent introduced other evidence tending to prove that, in response to a request of Mrs. Weir, subsequently made to him, to give her the child, he gave a denial, and here ends the only material conflict in the testimony. The child was taken to the home of the petitioners, was tenderly cared for, and nursed by its grandparents through the ill incident to childhood, with the consent of the father, and remained with them almost continuously until about the 27th of April, 1889. In the mean time the petitioners had removed from Oswego to Springfield, Mo., and the respondent had married again. At the date last aforesaid Louise was taken to her father's home at Oswego; remained a time; returned to Springfield; remained a short time at the home of her grandparents; returned again to Oswego; remained with her father at his home until about the 4th of September, when she returned with him to the home of her grandparents. On the 22d of August, just before the last return, the respondent had written to Dr. Weir signifying his desire that Louise should make her future home with him at Oswego, and during this last visit this controversy about the future home and custody of Louise grew up, and culminated in these proceedings by *habeas corpus*.

The petitioner, Dr. Weir, is a physician aged about 50 years, in comfortable circumstances, with a large and increasing practice, a pleasant home, a refined and cultured family, consisting of his wife, aged about 45 years, two daughters, aged, respectively, about 23 and 20 years, and two sons, about 19 and 15 years, and the aged mother of Mrs. Weir, of about 80 years. The respondent is a bank-

er, aged about 36 years, in comfortable circumstances, of exemplary character and habits, and bright prospects; has a pleasant home, his family consisting of his father, a retired banker, aged about 60 years, and his wife, aged about 26 years, to whom he has been married about 2½ years, and by whom he has no child. His wife is a refined, cultured, and affectionate lady. The parties and their families, before this controversy, entertained for each other the kindest feelings, and have each at all times treated each other with the greatest cordiality and respect, and since with such consideration as speaks volumes in their favor. The glimpse which the evidence gives us into these two eras while, and now, save for this unfortunate controversy, happy homes, leaves no doubt in our minds that Louise would find a congenial and happy home in either; to the members of each of which she seems warmly attached, and by whom it is as warmly reciprocated.

In all civilized countries in which the family is regarded as the unit of social organization, its minor members must and ought to be subject to the custody and control of those who are immediately responsible for their being; for the reason that by nature there has been implanted in the human heart those seeds of parental and filial affection that will assure to the infant care and protection in the years of its helplessness, to be returned to the parents again when they in their turn may need protection in their years of helplessness, and of their child's strength and maturity. The law at the birth of an infant imposes upon the parent the duty of such care and protection, to the performance of which the instincts of nature so readily prompt, and clothes him with the right of custody that he may perform it effectually, upon the presumption that such custody, being in harmony with nature, is best for the interest, not only of the parent and child, but also of society. Conceding, however, that the primary object is the interest of the child, the presumption of the law is that its interest is to be in the custody of its parent. The law has made provision in two instances, whereby this presumption may be overcome, in the statutes providing for the adoption and apprenticing of children, when, for their interest, this right of custody is permitted to be transferred to another. In regard to all other contracts by parents for the custody of their children, this presumption must obtain; and while the parent may, by his inability or failure to discharge properly his duty towards his child, forfeit his right to its custody because the interest of the child demands it, yet, upon the trial of an issue involving such a forfeiture, he is entitled to the benefit of such presumption, and, unless the interest of the child does demand it, such forfeiture cannot take place. He cannot deprive himself of this right of custody, which is the concomitant of a personal trust imposed upon him by the law of nature as well as by posi-

tive law, and essential to the discharge of the duties of that trust, by contract *per se*; otherwise he might deprive his child and society of the benefits which the law contemplates will inure to each by the personal discharge of his parental duties. An analysis of the many cases to which we have been cited by counsel serves only to confirm, in our judgment, the correctness of the ruling of this court in the Case of Berenice Scarritt, 76 Mo. 565, that a father cannot, by contract other than such as are provided for by statute, confer upon another irrevocably and absolutely, as against himself, a right to the custody of his minor child; that, notwithstanding any such contract, upon *habeas corpus* for the custody of such child, the custody will be awarded to the father unless the welfare of the child demands that it should remain in, or be restored to, the custody of the person with whom it was placed by the father under such contract, or that some other disposition be made of it. Such a contract is not to be entirely ignored. It is to be considered, not for the purpose of fixing the rights of the parties, but for the purpose of shedding light upon their actual relations and feelings toward the infant, and assisting the exercise of a wise discretion by the court as to what disposition should be made of it for the promotion of its own welfare. What is for the best interest of the infant? is the question upon which all the cases turn, at last, whatever may be said in the opinion about contracts; and the answer returned is that the custody of the child is by law with the father, unless it appears by satisfactory evidence that the best interest of the child demands that he should be deprived of that custody, and upon him who so avers devolves the burden of proof,—the presumptions are against it. *State v. Libbey*, 44 N. H. 321; *Chapsky v. Wood*, 26 Kan. 650; *U. S. v. Green*, 3 Mason, 482; *Hurd*, *Hab. Corp.* 537; *Jones v. Darnall*, 103 Ind. 569, 2 N. E. Rep. 229; *Brooke v. Logan*, 112 Ind. 183, 18 N. E. Rep. 669; *State v. Banks*, 25 Ind. 495; *Armstrong v. Stone*, 9 Grat. 102; *Johnson v. Terry*, 34 Conn. 259; *State v. Paine*, 4 Humph. 523; *Rust v. Vanvacter*, 9 West Va. 600; *State v. Richardson*, 40 N. H. 272; *State v. Baldwin*, 5 N. J. Eq. 454. And no well-considered case will be found where the custody of a minor child was by *habeas corpus* taken from the father and given to another upon the sole ground that the legal right of the father had passed to and vested in such other person by parol contract, and yet upon this ground alone, in the light of all the evidence, we are asked to take this child from its father, and give it to the petitioners; for it is impossible to see from the evidence that the interests of the child will be better promoted by awarding its custody to the grandparents than it would be if such custody was awarded to the father. In such case the presumption of the law must obtain that it is to the interest of the child to be in the custody of its father. The said Louise Marley will

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therefore be remanded to the custody of the respondent. All concur, except SHERWOOD, J., who dissents; BARCLAY, J., in the result.

### STATE v. BURNS.

(Supreme Court of Missouri. Jan. 27, 1890.)

CRIMINAL LAW—APPEAL—HOMICIDE—INDICTMENT—PUNISHMENT.

1. Judgment in a criminal case will be reversed for substantial error apparent on the record, though no motion in arrest or for new trial was made.

2. An indictment charging that defendant with a certain knife did stab, etc., in and upon the left side of the body of deceased one mortal wound, omitting before "one mortal wound" the expression "giving him then and there," etc., is sufficient after verdict.

3. Rev. St. Mo. § 6538, reducing by one-fourth the period of imprisonment of orderly and peaceable convicts, does not prevent a jury from awarding imprisonment for life for murder.

Appeal from circuit court, Camden county; W. I. WALLACE, Judge.

*Nixon & King*, for appellant. *Atty. Gen. Wood*, for the State.

BRACE, J. At the August term, 1887, of the circuit court of Camden county the defendant was tried and convicted of murder in the second degree, and his punishment assessed at imprisonment in the penitentiary for life. There is in the record neither a motion in arrest or for new trial, consequently there is nothing before us for review except the record proper, for error in which affecting the merits a judgment will be reversed in a criminal case, although no such motions were made in the trial court. *State v. Marshall*, 36 Mo. 400. The indictment charges "that David Burns, on the 12th day of June, A. D. 1886, at the county of Camden, in and upon one Frank Phelan, then and there being, feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought, did make and assault, and with a certain knife, which he, the said David A. Burns, in his right hand then and there had and held, him, the said Frank Phelan, feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought, did strike, stab, and thrust in and upon the left side of the body of him, the said Frank Phelan, one mortal wound, of the length of one inch, of the breadth of half an inch, and of the depth of three inches, of which said mortal wound the said Frank Phelan, from the 12th of June, in the year aforesaid, at Osage Iron-Works, in the county aforesaid, did languish, and languishing did live, on which said 15th day of June, in the year aforesaid, the said Frank Phelan, at Osage Iron-Works, in the county aforesaid, of the mortal wound aforesaid, died, and so the grand jury aforesaid," etc. The conclusion is in the usual form.

1. If the pleader in this indictment had inserted next before the words "one mortal wound" the words "giving to the said Frank Phelan then and there, with the knife aforesaid, in and upon the left side of the body of him, the said Frank Phelan," the indictment

would have been in the usual and approved form of indictment for murder by stabbing. Kelley, Crim. Law & Pr. § 445; 1 Whart. Prec. Ind. 155.

It is contended that the indictment fails to charge that the defendant produced the death of Frank Phelan. If so, it is because of the omission of this participial expression, whose office it is in allegation to connect the act of the defendant with the death of the deceased as its cause. But if that office is as well performed, to the ordinary understanding, by the direct and positive averments of the indictment, its omission can have worked no prejudice to the defendant on the merits. In order to determine whether this has been accomplished in this instance, let the expression in the usual form and the averments of the petition be shorn of their qualifying terms, for the sake of clearness, and placed beside each other, using for illustration either one of the verbs "strike," "stab," or "thrust." Take "stab," for instance, as the most comprehensive and characteristic. In the usual form we would have the expression thus: "That the said David Burns with a certain knife him, the said Frank Phelan, did stab in and upon the left side of the body, giving to the said Frank Phelan, then and there, with the knife aforesaid, in and upon the left side of the body of him, the said Frank Phelan, one mortal wound;" and in the indictment thus: "That the said David Burns with a certain knife him, the said Frank Phelan, did stab in and upon the body of him, the said Frank Phelan, one mortal wound;" or, omitting unnecessary repetitions, and reducing the expressions to their last form, in the first we have: "The said Burns with a certain knife did stab the said Phelan in and upon the left side of his body, giving him then and there one mortal wound;" and in the second, "The said Burns with a certain knife did stab, in and upon the left side of the body of him, the said Phelan, one mortal wound." The difference between the two expressions is simply that in the first it is said the defendant stabbed the deceased, giving him a mortal wound, and in the second that the defendant stabbed a mortal wound in and upon the deceased. The sense is the same in each, and however much it may be regretted that a pleader in an indictment for so grave a crime as murder should hazard a departure from the usual and approved form in an essential charge, and however unusual and awkward the charge may appear in the form used in this indictment, nevertheless the foregoing analysis we think shows that the difference is one of form only, and not of substance, and is not such error as can avail the defendant after verdict. Rev. St. 1879, § 1821. The uncontradicted evidence was that the defendant stabbed the deceased to the death with a knife.

2. There is nothing in the suggestion that the jury were not authorized to assess the punishment of the defendant at imprisonment in the penitentiary for life, under sec-

tion 1284, Rev. St. 1879, because of the three-fourths rule provided for the benefit of orderly and peaceable convicts in the penitentiary by section 6538. Finding no error on the face of the record properly calling for a reversal in this case, the judgment is affirmed. All concur.

STATE *ex rel.* KANSAS CITY *v.* FIELD, Judge.

(Supreme Court of Missouri. Dec. 21, 1889.)

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS.

Const. Mo. art. 9, § 16, provides that a city of more than 100,000 inhabitants may frame a charter for its own government, and prescribes the manner of its adoption. Act Mo. March 10, 1887, repeats the provisions of the constitution, and provides, further, that, upon the expiration of 30 days after a ratification and adoption of such charter, "it shall be and constitute the entire organic law of such city, and shall supersede all laws of this state then in force in terms governing or appertaining to cities having one hundred thousand inhabitants or more." *Held*, that the provisions of a city charter adopted under the constitution and enabling act, regarding the assessment of damages and benefits caused by grading the streets of that city, supersede the provisions of Act Mo. March 26, 1885, as amended by Act March 31, 1887, relating to assessment of damages and benefits arising from the grading of streets in cities.

*Mandamus.*

Application of the state, on the relation of Kansas City, for a writ of *mandamus* against Richard Field, judge of the circuit court.

O. H. Dean, for relator. Gage, Ladd & Small, for respondent.

BLACK, J. Kansas City, by its proper officers, filed in the circuit court of Jackson county a certified copy of an ordinance to grade a designated street, and asked the respondent, who is one of the judges of that court, to appoint commissioners under article 8 of its charter to assess damages and benefits. The respondent declined to make the appointment under the provisions of the charter, on the ground that article 8 is in conflict with the laws of the state, and for that reason void. Hence this application for the writ of *mandamus*. The question in the case is whether the commissioners should be appointed and the proceedings had under the charter, or under the act of the legislature of March 26, 1885, (Acts 1885, p. 47,) as amended by the act of March 31, 1887, (Acts 1887, p. 37.) Both the charter and this act of the legislature, as amended, point out a procedure for the assessment of damages and benefits in such cases, but they are so different that the court in following one must of necessity disregard and exclude all consideration of the other. The question is therefore one of vital importance to the validity of such proceedings in Kansas City. The act of 1885, as amended, is a general law, and in terms applies to all cities in this state, except those of the second class organized under the general law, and prescribes a method for the assessment of damages and benefits arising from grading and regrading streets in cities. It embraces no other subject, and was de-



signed to carry into effect section 21 of article 2 of the constitution, which says private property shall not be taken or damaged for public use without just compensation. Prior to the adoption of its present charter, Kansas City was governed by a special act, so there can be no doubt but the act of 1885, as amended, applied to that city. The question in this case, therefore, resolves itself into this, whether Kansas City is, by force of its recent charter, withdrawn from the operation of the act of 1885 and the amendment thereto. The present charter was adopted by the qualified voters at an election held on the 8th April, 1889, by authority of section 16 of article 9 of the constitution, and of the act of the legislature of March 10, 1887, (Acts 1887, p. 42.) Section 16 of article 9 of the constitution provides: "Any city having a population of more than one hundred thousand inhabitants may frame a charter for its own government, consistent with and subject to the constitution and laws of the state, by causing a board of thirteen freeholders" to be elected, who shall return to the mayor a draft of the charter. The proposed charter shall then be submitted to the qualified voters, and, if ratified, "it shall, at the end of thirty days thereafter, become the charter of such city, and supersede any existing charter and amendments thereof." The charter may be amended by a three-fifths vote of the qualified voters, "but such charter shall always be in harmony with and subject to the constitution and laws of the state." The first section of the enabling act of March 10, 1887, is but a repetition of said section 16 of the constitution, with some matters added of no value to the present inquiry. The second section enacts: "After the expiration of said thirty days after the ratification and adoption of such charter as aforesaid, such charter shall be and constitute the entire organic law of such city, and shall supersede all laws of this state then in force in terms governing or appertaining to cities having one hundred thousand inhabitants or more." The fiftieth section gives such cities exclusive control of the streets, and the exclusive power to vacate streets and alleys.

While the constitution says any city having the requisite population "may frame a charter for its own government," it also declares that such charter shall be "consistent with and subject to the constitution and laws of the state," and, as the law of 1885 is a general law, the claim is made on behalf of the respondent that the charter is subject to that law. The legislative power of the state is vested in a senate and house of representatives, and, when it is declared that any city of the required population may frame and adopt a charter for its own government, the right thus granted and the charter adopted is subject to legislative control. The proposition made for relator, that when any such city has adopted a charter it is out of and beyond all legislative influence, cannot be sustained. We held to the contrary in the case

of *Ewing v. Hoblitzelle*, 85 Mo. 76, 77. Subject to this superior power of the legislature, the constitution accords to any city having the requisite population the right to frame and adopt a charter for its own government which will supply its peculiar wants. Charters thus adopted will of necessity be more or less at variance, and that they will be unlike in many respects is within the contemplation of the constitution. It is also within the fair contemplation of the constitution that a charter thus adopted may embrace the entire subject of municipal government, and be a complete and consistent whole. The enabling act of March 10, 1887, is in perfect accord with the spirit of the constitution, and it discloses a well-defined purpose to clear the legislative field, and pave the way for the adoption of a charter which will of itself present a complete system of local municipal government. It says the charter thus adopted shall be and constitute the entire organic law of such city. Stronger language could hardly have been selected to express the purpose and intention which we have said is disclosed by the act. A system has grown up of legislating for cities by population, and, in view of this character of legislation, the argument is made that the second section of the enabling act exempts cities framing and adopting their own charters from such laws only as relate exclusively to cities having more than 100,000 inhabitants; that the exemption does not extend to those laws which apply alike to cities of over 100,000 and to cities of a less population. This argument is based on that clause of the second section of the enabling act which declares that the charter adopted by the qualified voters shall supersede all laws then in force "in terms governing or appertaining to cities having one hundred thousand inhabitants or more." A law in terms governing or appertaining to all the cities of this state would surely be a law in terms governing or appertaining to those cities having 100,000 inhabitants. The lesser included in the greater. The construction contended for requires us to say for the legislature what it has not said for itself. Whether we look to the letter of this enabling statute; or are guided by its object, purpose, and intent, the result is the same. Under it, laws, though general they may be, which relate alone to the government of cities, must yield to the provisions of the adopted charter. This matter of assessing damages and benefits for grading and regrading streets naturally falls within the domain of municipal government. The act of 1885, as amended, is one of those laws which the enabling act declares shall be superseded by the adopted charter. When the present charter of Kansas City became a law, the eighth article suspended and took the place of the general law of 1885. That a general law relating to municipal affairs may be in this way in effect repealed, so far as the particular locality is concerned, is established by *State v. Binder*, 38 Mo. 451. Our conclusion is that the char-

ter of Kansas City, and not the act of 1885 as amended, is the law by which damages and benefits arising from grading and re-grading streets in Kansas City are to be assessed. The peremptory writ is therefore awarded. All concur.

**WHITEHEAD v. BEGLEY et al.**

(Supreme Court of Missouri. Jan. 27, 1890.)

**CONTRACTS—CONSTRUCTION.**

Where, from shafts already sunk, it was known that there was in a tract of land a deposit of iron ore difficult to work and of inferior quality, an agreement to give one a deed of an interest "as soon as he may have successfully developed a deposit of iron ore of sufficient value to warrant further development," does not entitle him to a deed on the development in another spot of a deposit of the same vein, quantity, and quality.

Appeal from circuit court, Iron county; JOHN L. THOMAS, Judge.

*Silver & Brown*, for appellant. *J. W. Emerson*, for respondents.

BRACE, J. On the 10th of March, 1882, the plaintiff and the defendant Begley entered into a written contract by which said defendant agreed that the plaintiff might enter upon a certain tract of land of which he (the said Begley) was the owner, and prospect for iron ore and other minerals thereon until the 10th of March, 1883, and agreed to execute and deliver to plaintiff a sufficient deed of conveyance for the one undivided half thereof, "as soon as he may have successfully developed a deposit of iron ore or other mineral of sufficient value to warrant the further development:" the said Whitehead to have no interest in said land, except to prospect as aforesaid, "unless such development be so made." The plaintiff in this action seeks the specific performance of said contract, averring that he did in good faith develop, and cause to be developed, in said tract of land, a deposit of iron ore of great value, and of sufficient value to warrant its further development. Nevertheless, said defendant refuses to execute to him a deed for the undivided half thereof, but has agreed in writing to convey the same to his co-defendant, who had notice of plaintiff's contract. The only issue in the case is one of fact, on which the trial court found for the defendants, and dismissed the bill; and plaintiff appeals.

At the time this contract was made, it was well known to Whitehead and Begley that there was a deposit of iron ore in this land. Its existence had been developed already by three shafts which before that time had been sunk upon the property. In these developments it was further brought to light that, from the character of the ore and its situation in the rock, the ore was of inferior quality, difficult and expensive to get out, and the mining of it unprofitable; hence the indications of such developments were that the property was not valuable as mining property. This contract must be read in the light

of these facts. The hope of the parties was evidently that plaintiff's prospecting would develop a deposit of ore which, from its lay, quantity, and quality, would demonstrate that the property was more valuable as a mining property than was indicated by previous developments. The undertaking of plaintiff to make such a development was the consideration of defendant Begley's promise to convey a half interest in the land. The result of plaintiff's prospecting was simply to develop in another spot a deposit of iron ore of the same vein, lay, quantity, and quality as had previously been brought to light by the sinking of the previous shafts, and, instead of thereby enhancing the value of the property as mining property, depreciated it, by confirming the conclusion resulting from previous developments, and to dissipate which this contract was made, *i. e.*, that there was not a deposit of iron ore in said land of sufficient value to warrant its further development. The plaintiff having failed to perform the condition upon which the deed was to be made, the judgment was for the right party, and is affirmed. All concur.

**WEBER v. KANSAS CITY CABLE RY. Co.**

(Supreme Court of Missouri. Jan. 27, 1890.)

**CABLE CARS—ACCIDENTS TO PASSENGERS—DEMURRER TO EVIDENCE.**

1. In an action for injuries received in getting off a moving cable car, by a car passing on another track, evidence that the cars were running at a higher rate of speed than was authorized by city ordinances, coupled with some evidence that the bell on the passing car was not rung, is sufficient to show negligence of defendant.

2. A passenger on a grip-car pulled the rope for a stop at a crossing, but the signal, being out of order, gave no sound; and, while the car was in full motion, without signaling the conductor or gripman, who was near him, he stepped out of a side door, which was open and unguarded, and was struck immediately by a car passing on another track. *Held*, that he was guilty of contributory negligence.

3. Defendant, by putting in evidence, does not waive a demurrer to plaintiff's evidence, when renewed at the close, but only takes the chance of aiding plaintiff's case.

Appeal from circuit court, Clay county; J. M. SANDUSKY, Judge.

*Johnson & Lucas*, for appellant. *Wash Adams*, for respondent.

BLACK, J. The plaintiff recovered a verdict for \$13,200, and, on the suggestion of the trial court, remitted a part, and accepted a judgment for \$10,000, to reverse which the defendant appealed. The defendant, at the close of the plaintiff's evidence, submitted a demurrer to the evidence, and asked a like instruction at the close of all of the evidence, both of which were refused. These instructions present the question whether the court should have taken the case from the jury. The facts disclosed by the plaintiff's evidence are, in substance, these: The defendant's road runs east and west through the City of Kansas. The cars run east on the south, and west

on the north track; and when the trains pass there is a space of not more than 18 inches between the cars. The cars going east stopped only at the east, and those going west at the west, sidewalk crossings; and then only when persons desired to get on or off. The plaintiff, a young man, about 20 years old, boarded an east-bound train, composed of a coach and grip-car, intending to go to Holmes street. He took a seat on the north side of the grip-car, near the rear end. Besides end doors, this car had two side doors at the rear end,—one opening out on the north, and the other on the south, side. These doors were open, and there was no gate or other contrivance to prevent persons from going out on the north side. Plaintiff testified that when he reached Holmes street he pulled a cord, which was attached to an air-whistle, twice; that he heard no signal, and the cars did not stop; that he was looking out of the side windows of the car, and then leaned over and looked out of the front end car-door, and did not see any train coming from the east on the north track; that he then got up, went to the rear end of the car, and then stepped out of the north door, and, just as he got upon the ground, a train going west, on the north track, hit him, and knocked him down. His legs were thrown under the wheels of the cars upon which he had been riding. The bones were broken, but amputation was not necessary. He is a cripple for life. He stepped off at or within a few feet of the east crossing. He says the train going west was so close to him when he got off that he could not see it. The whistle attached to the cord was in the grip-car, and was out of order, so that it gave no signal. The plaintiff's seat in the car was within six or eight feet of the gripman, and the plaintiff did not notify the conductor or gripman where he desired to leave the car. He had been in the habit of going back and forth, to and from his work, by way of the defendant's road, and was familiar with the running of the cars. There were 8 trains on the road, and each made 10 or 12 daily trips. These trains were running at the rate of a fraction over seven miles per hour, in violation of a city ordinance which limits the rate of speed to six miles per hour.

The evidence tends to show that it was the custom to ring the bells on both trains when and wherever they passed. The gripman of the train on which plaintiff took passage testified in positive terms that the bells on both trains were ringing at and before plaintiff stepped off; but the plaintiff testified, in answer to the question whether he heard any bells: "I don't remember of one on the car I was on. I never heard the bell on the approaching car." Another witness for the plaintiff, being asked if he was accustomed to hear signals, said: "Yes, sir. On that occasion I cannot say whether I noticed any." The defendant offered evidence to the effect that there were notices in the cars warning persons not to get off while the cars were in motion. The defendant offered other evi-

dence; but, as it does not aid the plaintiff's case, it need not be recited.

The defendant, in running its trains at a rate of speed prohibited by ordinance, was guilty of negligence *per se*. *Keim v. Transit Co.*, 90 Mo. 314, 2 S. W. Rep. 427. Besides that, there is some evidence, though it is very weak, to the effect that the gripman on the west-bound train did not, as was the custom, ring the bell of his car when passing the east-bound train, upon which plaintiff was a passenger. We shall assume, for all present purposes, that this bell was not rung. It is argued for the defendant that the speed of the train had no direct agency in causing the injury, but we cannot yield a consent to the proposition. There was sufficient evidence of negligence on the part of the defendant. The important question is whether the case should have been taken from the jury because of contributory negligence on the part of the plaintiff.

While carriers of passengers are held to a very high degree of care, there is a corresponding obligation on the part of the passenger to act with prudence; and, if his negligent act contributes to bringing about the injury, he cannot recover. Ordinarily, as has been said by this court on several occasions, contributory negligence is a question of fact, for the jury; but the power and the duty of the court to direct a verdict in proper cases cannot be questioned. As has been said, if it appears, without any conflict of evidence, from the plaintiff's own case, or from the cross-examination of his witnesses, that he was guilty of negligence proximately contributing to produce the injury, it would be the duty of the court to take the case from the jury. *Buesching v. Gaslight Co.*, 73 Mo. 219. A demurrer to the evidence must be sustained where an unavoidable inference of contributory negligence arises out of the plaintiff's own evidence, or out of other evidence which stands undisputed in the case. 2 *Thomp. Trials*, § 1680. But where the undisputed facts relied on to establish contributory negligence are such as may, in the judgment of sensible men, lead to different conclusions as to whether they establish want of care, the question of negligence on the part of the plaintiff should be submitted to the jury. *Petty v. Railroad Co.*, 88 Mo. 306. The chief difficulty lies, not in the rule, but in its application; and here we may dispose of some preliminary questions. Much reliance is, by the plaintiff, placed upon the fact that the north door was open, and without a gate or other guard to prevent persons from getting off on the north track. Though it was warm weather, the fact that the door was left open and unguarded might be regarded as an invitation to alight from that side when the car was employed in receiving and discharging passengers. But it was certainly no invitation for any one to jump off when the car was running at full speed. The very fact that the cars did not stop or check up was a warning to the passengers not to

get off. In *McGee v. Railroad Co.*, 92 Mo. 218, 4 S. W. Rep. 739, the brakeman announced the station, and he and the conductor went out, taking their lights with them; and in the mean time the train stopped at a dangerous place. These facts, it was held, could be construed in no other light than a direction for the passengers to alight. The facts of that case are unlike the facts in the case at bar, as will be readily seen. The fact that the door was open cannot and ought not to be construed as any invitation to alight while the train was at full speed. It was, in substance, said in *Doss v. Railroad Co.*, 59 Mo. 27, that to jump from a car propelled by steam, while in rapid motion, might be regarded as mere recklessness; but to step from a car at a platform while the motion of the car is slight may or may not be negligence, and the question is one for the jury. These observations have been quoted or cited with approval in subsequent cases. *Kelly v. Railroad Co.*, 70 Mo. 604; *Nelson v. Railroad Co.*, 68 Mo. 598; *Leslie v. Railway Co.*, 88 Mo. 52. To jump from a horse-car while in rapid motion is not negligence *per se*. *Wyatt v. Railroad Co.*, 55 Mo. 487. In that case there was evidence tending to show that the conductor ordered the boy to get off. Whether a party jumping or stepping from a moving car is guilty of negligence must, it is manifest, depend upon other circumstances than the speed of the cars; and these circumstances are so variant that general rules only can be stated. If the rate of speed is so high, and the place of descent so obviously perilous, that a person of ordinary prudence would not attempt to get off, then the act is contributory negligence, and will bar a recovery. 2 Amer. & Eng. Cyclop. Law, 763.

Again, it is argued that the plaintiff was not bound to look out for the approaching car, because, being a passenger, he had a right to assume that defendant would do nothing to put him in danger when alighting, and in that respect he stood on a different footing from a footman crossing the track; and in support of this we are cited to *Railroad Co. v. Robinson*, 127 Ill. 9, 18 N. E. Rep. 772. In that case a boy six years old alighted from standing grip-cars, on which he had been a passenger, and was run over and killed when going over the sidewalk crossing at or near where he got off. It was held that the fact that he did not stop and look to see whether a train was approaching was not, as a matter of law, and without any regard to the surrounding circumstances, negligence, but the question of his negligence was one for the jury. If a failure to look for an approaching cable train in that case was evidence of negligence, then for much stronger reasons is the failure of the plaintiff in this case to look for an approaching train evidence of negligence. Persons getting on and off of these cars are, while so doing, entitled to the protection due to passengers. The defendant is in duty bound to stop its cars, and let them remain

at rest long enough for persons to get on and alight with safety; and the servants in charge of an approaching train are in duty bound to govern their conduct accordingly. But there is nothing in this case to show that defendant was required to stop its trains at crossings when no one desired to get on or off. The train upon which plaintiff was a passenger being in full motion, the servants on the approaching train would not suspect that he, or any one else, would be in the act of getting off. We do not see that the plaintiff stands on any better footing than he would if he had jumped off at a place other than a crossing. We have not said, nor do we now say, that the act of alighting when the car was in full motion, taken by itself, or the failure of the plaintiff to look for approaching cars when he reached the car-door, taken by itself, or any other single circumstances in the case, would be, as a matter of law, negligence. The undisputed evidence must be taken as a whole, and the conclusion must be drawn from the circumstances as a whole. We are not at liberty to consider them singly, and thus divide the case up into parcels. It cannot be, and we believe it is not, claimed, that the failure of the whistle to give an alarm afforded an excuse for leaving the car while in full motion.

Now, it is clear that the plaintiff was in possession of his faculties, and was accustomed to these cars, and must have known that they passed every few minutes. He left his seat without signifying any desire to get off to the brakeman, who was in close proximity to him, and without any reason to believe the cars would come to a halt. When at the door of the car he could have seen the approaching train by casting an eye east, for he then had an unobstructed view; but that he did not do so is clear. Under these circumstances, he stepped off while the cars were running at full speed, and was struck by the approaching cars as soon as he landed on the ground. With the other evidence resolved in favor of the plaintiff, and guided by what a prudent person would ordinarily do under such circumstances, it seems to us there can be but one conclusion, and that is that the plaintiff was very negligent, to express the result in mild terms. The conclusion of negligence is a necessary and unavoidable result. One cannot thus voluntarily place life and limb in peril, and claim to be free from fault. But for the plaintiff's negligence, he would not have been injured. The court should have sustained the demurrer to the evidence.

The point made that the defendant waived the demurrer to the evidence by putting in its own evidence is not well taken. The demurrer was not only interposed at the close of the plaintiff's evidence, but a like request was made at the close of all the evidence. The defendant, by putting in its evidence, took the chance of aiding the plaintiff's case; but it was not thereby deprived of the right to ask the court to direct a verdict on all of

the evidence. We see no reason for remanding this cause, and the judgment is simply reversed. All concur.

BARGLAY, J., concurs in reversing the judgment, but is of the opinion that this cause should be remanded.

# BROWN v. ROBERTS et al.

(Supreme Court of Texas. Nov. 12, 1889.)

## PUBLIC LANDS—HEADRIGHT CERTIFICATES—POWER OF ATTORNEY.

1. In trespass to try title to land located under a headright certificate by one claiming an interest in the land by virtue of a power of attorney to G. to obtain and locate the certificate in consideration of an interest therein, where it is not shown that G. ever obtained the certificate, caused any part of it to be located, or did anything towards executing the power, and it appears that plaintiff has held the power of attorney for 46 years, and nearly 80 years after the certificate was located by those under whom defendants claim, without asserting any rights, plaintiff cannot recover.

2. In an action of trespass to try title to land, it devolves on the plaintiff to show title in himself, and, until he makes a *prima facie* case, the defendant is not required to offer any evidence at all.

Commissioners' decision. Appeal from district court, Wichita county; P. M. STINE, Judge.

Geo. S. Walton, Walton, Hill & Walton, and W. G. Eustis, for appellant. A. K. Swan, for appellees.

ACKER, P. J. Appellant brought this suit in October, 1887, in trespass to try title to an undivided 1,796 acres of land in the Moses F. Roberts survey of one league. On the 7th day of March, 1887, Moses F. Roberts executed an instrument, empowering W. W. Gant to demand and receive title from the government for all land he was entitled to receive as his headright, and to take possession of the title and land so received, and giving to Gant, with full right of disposition as his own, 1,796 acres of the land, Gant to pay all expenses thereon. W. W. Gant died early in 1840, leaving no children, but leaving a widow, Harriet E., to whom he bequeathed all of his property, by will, duly probated, the latter part of 1840. Appellant married the widow of Gant in 1841, and she died in 1862, leaving no descendants, and bequeathed by duly-probated will all of her estate to the appellant. Appellant testified that he had held the power of attorney from Roberts to Gant since 1841; that he found it among Gant's papers when he married Mrs. Gant; and that he claimed a locative interest in the land under that instrument. The Moses F. Roberts headright certificate for a league and a labor was issued on the 1st day of February, 1838, and the duplicate certificate was issued to Roberts on the 6th day of September, 1855. On the same day a certificate for unlocated balance of one league was issued to Roberts, by virtue of which the land in controversy was located in 1858 by H. W. Merrill, to whom patent was issued as assignee in 1860. In 1882, appellees, as heirs of their mother,

who died in 1839, and who was the wife of Moses F. Roberts from 1832 to her death, recovered judgment against the patentee, H. W. Merrill, for one-half of the league, which was partitioned by giving them the east half, and Merrill the west half, of the league. Moses F. Roberts died in 1886. Merrill was not a party to this suit. The trial was without a jury, and judgment was rendered that plaintiff take nothing by his suit, and pay costs. Under numerous assignments of error it is contended that the court erred in rendering judgment for defendants, but we do not think so. There was no evidence adduced upon the trial tending to show that Gant ever obtained the certificate, caused any part of it to be located, or did anything towards carrying out his contract with Roberts, upon which his right to the 1,796 acres of land depended. Plaintiff held the instrument in his possession for 46 years, and nearly 30 years after the certificate was located by Merrill, without asserting any right under it. We think the plaintiff failed to make a case that entitled him to recover, and that the court did not err in rendering judgment for defendants. Several of the assignments of error relate to rulings of the court on objections made by plaintiff to evidence offered by defendants. What we have said disposes of these assignments, as it devolved on plaintiff to show title in himself, and, until he made a *prima facie* case, defendants were not required to offer any evidence at all. We are of opinion that the judgment of the court below is correct, and should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

# KIRBY et al. v. ESTILL et al.

(Supreme Court of Texas. Dec. 17, 1889.)

## TRESPASS TO TRY TITLE—PARTIES—PLEADING—ASSIGNMENT OF HEADRIGHT—NOTICE.

1. Rev. St. Tex. art. 1209, provides that before a case is called for trial additional parties, when they are necessary or proper to the suit, may be brought in on such terms as the court may prescribe, but not in such manner as to unreasonably delay the trial. Article 4738 provides that when a party is sued for lands the real owner or warrantor may make himself, or may be made, a party defendant, and entitled to make such defense as if he had been the original defendant in the action. Held that, in an action of trespass to try title, defendants' vendor being in court, and having made separate answer, defendants were properly allowed to plead his covenants of warranty to them, and to ask judgment against him thereon, in the event of a judgment against them for the land.

2. An original headright certificate contained an indorsement that the grantee of the certificate thereby granted, bargained, and sold half the certificate, and the land due under it, to one R., through whom plaintiffs claimed. At the time the land in controversy was located, more than half the land called for in the certificate had been located for the joint benefit of the grantee and R.; and the conveyance from the heirs of the grantee to their vendee, and from their vendee to defendants' vendor, each expressly recited the transfer to R. of half the lands called for in the certificate, and the deeds were duly recorded. Held, that a

charge that one of two joint owners of a certificate might have his interest located by separate survey, was not justified by the evidence, and had a tendency to mislead the jury.

3. The record of the deeds reciting the assignment of half the certificate to the intestate of plaintiffs' vendors was sufficient notice to defendants at the time of their purchase.

Commissioners' decision. Appeal from district court, Tarrant county.

*T. M. Harwood and Hunter, Stewart & Dunklin*, for appellants. *R. M. Wynne and N. A. Stedman*, for appellees.

ACKER, P. J. Appellants, R. H. Kirby and E. S. Chambers, brought this suit against J. P. Smith, C. F. Estill, and J. W. Burgess to recover an undivided half interest in 8,524,765 square *varas* of land located and surveyed by virtue of headright certificate No. 375, for a league and labor, issued to James Riley on the 1st day of March, 1838, and patented to the original grantee in 1877. It was alleged that plaintiffs owned the land sued for in equal parts, and that defendants claimed to be the owners of the other one-half. The suit was also brought for partition. Defendants Estill and Burgess answered separately by plea of not guilty, the statute of 3, 5, and 10 years limitation, and specially described by metes and bounds the portions of the land claimed by them, respectively, pleaded improvements in good faith, impleaded their vendor and warrantor, J. P. Smith, upon his covenants of warranty, and asked that, in the event of their eviction, they have judgment against him for the purchase money paid by them, respectively, with interest. Defendant J. P. Smith, by separate answer, pleaded the general issue, not guilty, and the 3, 5, and 10 years statutes of limitations. By supplemental petition, plaintiffs set up the coverture of their vendors, who were the heirs of W. K. Revere, who, at his death, in May, 1859, owned a half interest in the certificate by virtue of which the land in controversy was located. Plaintiffs moved to strike out that part of the answers of defendants Estill and Burgess in which they sought to recover judgment against their vendor on his covenants of warranty, in the event of judgment against them for the land. This motion was overruled, and plaintiffs excepted. There was a verdict and judgment for defendants, and all of the plaintiffs appealed.

Under the first assignment of error it is urged that the court erred in overruling plaintiffs' motion to strike out part of the answers of defendants Estill and Burgess, "because the issues raised by said answers are not germane or pertinent to the object of this suit, and are issues in which the plaintiffs have and can have no possible interest, and are improper issues, and an improper joinder of causes of action, and that to permit the defendants in this suit to litigate and controvert questions between themselves, in which plaintiffs are wholly disinterested, would be detrimental to plaintiffs' interests, and ought not to be allowed." Article 4788 of the Re-

vised Statutes authorizes the defendant, in actions of trespass to try title, to make his warrantor a party, and the practice of doing so seems to have been recognized by this court as proper. *Crain v. Wright*, 60 Tex. 515; *Brown v. Hearon*, 66 Tex. 63. Rev. St. art. 1209, provides: "Before a case is called for trial, additional parties may, when they are necessary or proper parties to the suit, be brought in by proper process, either by the plaintiff or the defendant, upon such terms as the court may prescribe; but such parties shall not be brought in at such a time, or in such a manner, as unreasonably to delay the trial of the case." Article 4788 expressly makes the warrantor a proper party, and he was already before the court by his answer to the plaintiffs' petition. It was not, therefore, necessary to delay the trial to bring him in by process. Being a party to the suit already before the court, he was bound to take notice of all pleadings filed and steps taken in the case. *Bryan v. Lund*, 25 Tex. 98. The vendee's right, when sued for the land, to make his warrantor a party, seems quite clear, but it is equally clear that it must be done in such manner as not to unreasonably delay the trial of the plaintiff's case. It is not contended that any delay was occasioned by the answers against which the motion was directed. Nor does it appear that appellants sustained any injury by the ruling of the court to which the first assignment of error relates. We think the court did not err in overruling the motion. Cases, however, may arise in which the court might be authorized to disallow litigation between defendants to the prejudice of plaintiff.

The second assignment of error is: "The court erred in the second paragraph of its charge to the jury, which is as follows: 'You are further instructed that, when a certificate is jointly owned by two or more, either of such joint owners may have his interest in such certificate located in a single survey, without also having the interest of the other owners located or patented;' because, while such is correct as an abstract proposition of law, it was not applicable to the facts proven in this case, which the proof showed." It appears from the evidence that the original certificate was issued to James Riley on the 1st day of March, 1838, and on the back of the original is indorsed the transfer, in these words: "For and in consideration of the sum of two hundred and fifty dollars, and other valuable considerations, I hereby give, grant, bargain, and sell unto William Revere one-half of this certificate, and the land due me in consequence hereof, and to said Revere's heirs and assigns forever, this 30th day of September, 1840." It also appears from the evidence that, at the time the location and survey of the land in controversy was made by virtue of the certificate, more than half of the land called for by the certificate had already been located, by virtue thereof, in Red River county, for the benefit of James Riley, the original grantee, and W. K. Re-

were jointly, and was afterwards patented to them jointly; that the deed from the heirs of James Riley to William Jernigin, the immediate vendor of defendant Smith, dated January 23, 1872, conveyed their interest in the certificate, and the "land located by said certificate, or that may be located by the same, or any part thereof." This deed expressly recited the transfer of one-half of the certificate by James Riley to William K. Revere on the 30th day of September, 1840; that the deed from William Jernigin to defendant Smith, dated November 25, 1874, conveyed one-half of the certificate conveyed to the vendor by the heirs of James Riley on the 23d day of January, 1872, together with all lands located, or that may be located, by the same, forever, and recited the transfer of the half interest to Revere on September 30, 1840; that these deeds were both recorded in Tarrant county prior to the sales of portions of the land by defendant Smith to defendants Estill and Burgess; that plaintiffs proved title in themselves by direct conveyance from the only heirs of W. K. Revere, dated February 10, 1885, both of whom were married women, for the interest of said heirs in the certificate, "and all lands heretofore or hereafter to be located, or heretofore or hereafter to be patented, by virtue of said certificate;" that the heirs of Riley asserted claim to their interest in the locations made in Red River county; that the entire certificate had been located in Red River county for the Riley heirs and Revere, but a portion, being in conflict with prior locations, was floated and located in Tarrant county, on the land in controversy. Under this state of facts, we think it obvious that the charge here complained of was neither called for nor justified by the evidence. While the charge is correct as an abstract proposition of law, it has no application to this case; and it seems probable that it misled the jury, to the prejudice of appellants.

The third assignment of error is: "The court erred in refusing to instruct the jury as requested by the plaintiffs, in substance, that the deeds and title papers read to them in evidence showed that, at the time J. P. Smith sold to the defendants the land in controversy, he owned an undivided half interest in that half of the certificate located in Red River county, and but a half interest in the lands located in Tarrant county; and that the title papers and deeds read in evidence by the plaintiffs entitled the plaintiffs to recover the Revere half interest in the lands sued for by them; and that, if the entire certificate had at one time been located on lands in Red River county, in favor of James Riley and Wm. K. Revere, and part of it was afterwards floated or lifted and located in Tarrant county, then plaintiffs would be entitled to recover one-half of the lands located in Tarrant county by virtue thereof." The facts hereinbefore recited were not contradicted in any material particular. The defendant Smith had full notice, by the recita-

tions in the deed from the Riley heirs to Jernigin, by the recitations in the deed from Jernigin to him, and by the transfer indorsed upon the certificate itself, and filed in the general land-office, that the Riley heirs claimed and owned a half interest in the certificate, and all lands that had been located by virtue of the certificate prior to the execution of their deed to Jernigin. By the same means he was equally well informed that W. K. Revere owned a half interest in the certificate, and the lands that might be located by virtue thereof. The deeds from the Riley heirs to Jernigin, and from Jernigin to Smith, were of record in Tarrant county prior to the purchases of defendants Estill and Burgess from defendant Smith, and they, too, thereby had full notice of the interest of W. K. Revere. While the court may not have erred in refusing to give the several special charges in the form they were requested, we think they were sufficient to call the attention of the court to the important matter embraced in them. On the case made by the evidence, we think the court should have instructed the jury to return a verdict for the plaintiffs. In view of what we have said, other assignments of error become immaterial. We are of opinion that the judgment of the district court should be reversed, and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment is reversed, and the cause remanded.

#### BRASHER v. JEMISON *et al.*

(*Supreme Court of Texas. Nov. 19, 1889.*)

##### FRAUDULENT CONVEYANCES—INSTRUCTIONS.

1. In an action by a creditor to set aside, on the ground of fraud, a bill of sale executed by the debtor to a relative, an instruction to the jury that, if the consideration, or any part of it, alleged to have been paid by the vendee for the goods was unreal and fictitious, the transfer would be fraudulent, was properly given.

2. Instructions to the effect that, if the consideration really existed to the amount alleged, and the goods were transferred upon that consideration, the transfer would be valid, unless the value of the goods was greater than that amount, and that, if any portion of the debt alleged by the vendee to constitute the consideration of the sale did not exist, or, having once existed, had been paid in whole or in part, the conveyance would be fraudulent, were properly given.

Commissioners' decision. Appeal from district court, Limestone county.

Action by Jemison, Grace & Co. against T. W. Brasher to set aside a bill of sale of a stock of goods belonging to J. A. Brasher. Judgment for plaintiffs, and defendant appealed.

E. P. Turner, for appellant. Burrow & Kincaid, for appellees.

HOBBY, J. This was a trial of the right of property in and to a stock of merchandise, etc., levied on by virtue of an attachment issued out of the county court of Limestone



county, at the instance of the appellees, in a suit brought by them against J. A. Brasher. The property was in appellant's possession, who filed affidavit and gave bond, etc. Appellant's claim was based on an alleged *bona fide* purchase of the goods from J. A. Brasher for the sum of \$2,250, prior to the levy of the writ. Appellant's title was evidenced by a bill of sale dated November 12, 1883, conveying the goods involved in consideration of \$2,250, executed by J. A. Brasher, and acknowledged and recorded. This conveyance was attacked by the appellees as fraudulent, and appellant was alleged to have had knowledge of the fraud. It was also alleged that the debt constituting the alleged consideration was fictitious, etc. Verdict and judgment was rendered for appellees for the sum of \$600, with interest, etc.

There was evidence that appellees were creditors of J. A. Brasher, who was, on November 12, 1883, and for some time before, in failing circumstances; that on the day stated he executed a bill of sale conveying the entire stock owned by him to his brother, the appellant, for a receipted consideration of \$2,250. There was also proof that this consideration was a debt due by J. A. Brasher to appellant, for money loaned and notes indorsed by the latter. There was also testimony that a part of this debt had been paid to appellant by J. A. Brasher, before the conveyance of the goods, and there was evidence to the effect that none of this debt in fact existed on November 12, 1883. The goods were variously estimated at from \$1,800 to \$3,000 in value. The jury, under the instructions of the court, found that the conveyance was fraudulent.

It is assigned as error that the court charged the jury that, "if the consideration, or any part of it, alleged to have been paid by T. W. Brasher to J. A. Brasher for the goods, was unreal and fictitious, then the transfer would be fraudulent." This principle we believe to be correct. If any portion of the consideration recited in the bill of sale was unreal or fictitious, the transfer would be fraudulent, because the law will not attempt to ascertain what part of the consideration is genuine. There being a part of it unreal and fictitious, the entire conveyance is tainted with the fraud.

The following paragraphs of the instructions given, it is contended, were error: The jury were told that, "if the consideration really existed at the time of the conveyance as alleged by appellant on account of money loaned, and because of liability on his indorsements and debts assumed for J. A. Brasher to the amount of \$2,250, as alleged, and the goods were transferred in satisfaction of said indebtedness, then, unless the value of the goods transferred was greater than was reasonably required to pay said debt, the transfer would be valid;" and further, that, "if any portion of the debt claimed by appellant to have been due him by J. A. Brasher did not exist at the time of the trans-

fer of the goods, or if, having once existed, the debt had been paid in whole or in part," etc., then the conveyance would be fraudulent. It will be noticed that the consideration stated in the bill of sale, which constituted appellant's title, was \$2,250. There was evidence from which the jury may have believed that this recited consideration was not real. In other words, that, if any indebtedness existed, it did not exist to the extent of \$2,250; and, consequently, that the consideration recited was a false one. There was no attempt made by the appellant, who testified, to explain this. It was not shown to have been inserted by mistake, or the result of a miscalculation of the amount of the debt in the settlement, if any, between J. A. Brasher and appellant. On the contrary, it appears from the testimony that the appellant himself claimed that the debt was only \$1,800. Such being the evidence, the inference was well warranted, in the absence of any explanation of this recited consideration, that it was inserted for the purpose of covering all the goods then owned by J. A. Brasher. These instructions last referred to were in harmony with the charge first quoted, to the effect that any part of the consideration actually paid for the goods, if fictitious and unreal, would invalidate the conveyance, because in such case the entire transaction is tainted, and an inquiry will not be instituted as to how much or what portion of the consideration is genuine, unless it be shown that the amount inserted was done by mistake, or in some way not affecting the fairness or *bona fides* of the transaction. The charge, we think, properly presented the issues in the case. There is no error in the judgment, and it should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

#### MISSOURI PAC. RY. CO. v. MITCHELL.

(Supreme Court of Texas. Nov. 12, 1889.)

#### RAILROAD COMPANIES—ACCIDENTS TO TRAINS—DAMAGES—PLEADING—EVIDENCE.

1. Allegations in a petition against a railroad company for personal injuries, that plaintiff was put to great inconvenience and delay; that he was expected at a certain city on a certain day, but was unable to reach it; that the weather was bitterly cold, and the place of the accident not near any house, and he was forced to walk back to nearest town for shelter, and suffered greatly thereby; and that, by reason of said inconvenience and delay, he was damaged in the further sum of \$500,—are too vague to warrant an allowance for inconvenience.

2. Where the court charges that, "to entitle plaintiff to recover for future damage, there must be a reasonable certainty as to such future damage,—a mere probability of its occurrence is not enough,"—it is not error to refuse to give, as part of the same charge, the following: "Future damages can only be awarded when it is rendered reasonably certain from the evidence that such damages will evidently and necessarily result from the original injury."

3. An expert, while testifying as to an injury received by plaintiff, was permitted to testify without objection that plaintiff assured him he had

never suffered with sore eyes or been injured in his eyes. *Held*, that it was proper to refuse a request to charge the jury not to consider evidence of symptoms of injury not testified to by plaintiff, but stated by him to his physician, as the objection to the evidence came too late.

4. A refusal to charge the jury not to include in their estimate of actual damages any expense for attorney's fees, or expense incurred by plaintiff in attending court to prosecute his suit, is proper, where such damages are not alleged in the pleadings or included in the evidence.

5. In an action against a railroad company for injuries received in a wreck, the evidence as to the condition of the road should be confined to the time and place of the accident, and all evidence as to other wrecks excluded, though presented on the question of exemplary damages.

Appeal from district court, Upshur county; **FELIX J. McCORD**, Judge.

This was an action for damages, brought by J. W. Mitchell against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals.

*Whittaker & Bonner*, for appellant. *H Chilton*, for appellee.

**HENRY, J.** Appellee brought this suit to recover damages for personal injuries received by him in a wreck of one of defendant's trains, on which he was being conveyed as a passenger, at a point between Tyler and Troupe. The petition charges that the road-bed between the two places named, as well as at the place of the wreck, was out of order, in bad condition, and unsafe for the transportation of passengers thereon; that the ties, at the place of the derailment, were old and rotten, the iron rails were worn and broken, and the track was out of level,—all of which contributed to and caused the wreck. The petition charged that plaintiff's expense for medical attention, to which he was subjected in consequence of his injuries, amounted to \$100; that the value of time lost by him amounted to \$500; and that, by his physical and mental suffering, he had been damaged \$10,000. He prayed for \$20,000 as exemplary damages. The petition contains also the following additional allegation: "Plaintiff further charges that by said derailment he was put to great inconvenience and delay; that he was expected at the city of Tyler on the said 26th day of December, 1887, but was unable to reach said city; that the weather was bitterly cold, and the place of the accident was not near any house, and that he was forced to walk back to the town of Troupe for shelter, and suffered greatly thereby; and that, by reason of said inconvenience and delay, he was damaged in the further sum of five hundred dollars."

The court, in its charge to the jury, directed them to take into consideration the injuries of defendant on account "of mental pain and physical suffering; his loss of time, medical bills, and his inconvenience." The defendant specially excepted "to all allegations in the petition claiming five hundred dollars for inconvenience and delay, because they are vague, and do not show with sufficient certainty facts that entitle plaintiff to recover

such damages." The exception was overruled by the court. Over the objection of defendant, plaintiff was permitted to prove, by many witnesses, that the International & Great Northern Railroad bed and track between Troupe and Tyler, and also between Tyler and Lindale, at and before the time of the wreck, was in bad condition; that many ties were rotten, and the iron greatly worn; and that several wrecks of freight and other trains had occurred between said points. The bill of exceptions taken by defendant to the ruling states that the evidence was offered by plaintiff to show gross negligence under his claim for exemplary damages. At the request of defendant's counsel, the court charged the jury "not to find exemplary damages against defendant, merely because of the alleged bad condition of the railroad, bed, and track, and not to consider any evidence of the bad condition of the track and road-bed at other places than where the wreck occurred, if the wreck was caused by a broken rail." The jury found a verdict for actual damages only. The petition charged the damages claimed resulted from the "inconvenience and delay," and the charge directed the jury to consider "inconvenience" as one of the grounds of damage. The plea does not state a cause of action with the required precision, and the exception should have been sustained, and the charge referring to it ought not to have been given.

The court, at the request of the defendant, charged as follows: "To entitle plaintiff to recover for future damage, there must be a reasonable certainty as to such future damage; a mere probability of its occurrence is not enough." Defendant asked the court to give the following as part of the same charge: "Future damages can only be awarded when it is rendered reasonably certain from the evidence that such damages will evidently and necessarily result from the original injury;" which the court refused. We think the discrimination made by the court was correct.

Dr. Walker, a witness for plaintiff, among other things, testified as follows: "I am positive plaintiff is permanently injured in his spine, and can demonstrate it to the jury. He has a nervous twitching in his right eye, and the eye itself indicates some spinal affection. I examined his eye before, and found the trouble, and he assured me he had never suffered with sore eyes or been injured in his eye. He will never get well. He will constantly grow worse." This witness had, on a previous examination, given strong testimony to the effect that plaintiff had suffered a permanent spinal injury, while other expert witnesses had expressed opinions, to some extent, challenging the correctness of his conclusion. This evidence was admitted without objection, but afterwards defendant's counsel requested the court to charge the jury to not consider "evidence of symptoms of injury not testified to by plaintiff, but stated by him to Dr. Walker." We

think the evidence was improper, and, if it had been objected to when offered, it ought to have been excluded. The objection, however, came too late when interposed for the first time in the form of a charge to the jury, and the court properly refused to give the charge.

The defendant requested the court to charge the jury not to include in their estimate of actual damages any expense for attorney's fees or expense incurred by plaintiff in attending court to prosecute his suit. Such damages were not alleged in the pleadings, or included in the evidence, and a charge upon the subject was properly refused.

It is claimed that the verdict for \$7,500 actual damages is excessive. As the cause will be reversed upon another ground, and as neither the verdict nor the evidence may on another trial correspond with what it was upon the trial under review, we deem it improper to discuss this assignment. The evidence with regard to the general condition of the International & Great Northern Railroad, on which the wreck occurred, between Troupe and Lindale, ought not, under the circumstances of the case, to have been admitted upon the issue of exemplary damages, or for any other purpose. The question of the liability of the defendant for damages of any kind should have been confined to the condition of the road at the time and place of the occurrence, and all issues as to the condition of the road elsewhere, as well as of previous wrecks elsewhere, ought to have been carefully kept from the jury, in whatever form they were presented. Railroad Co. v. Johnson, 10 S. W. Rep. 328; Railroad Co. v. Shuford, Id. 411. As will be seen by the charge we have quoted, all evidence of this character was excluded, by the charge of the court, from the consideration of the jury for all purposes. While we think the introduction of such evidence, and especially of such a mass of it, as we find in the record, was highly improper, yet, if the admission of the evidence was the only error shown by the record, then, in view of the fact that it was admitted only on the issue of exemplary damages, and as the jury were instructed not to consider it under that issue, and as the jury gave no verdict for exemplary damages, we would not reverse the cause for that reason. For the errors committed in overruling defendant's exception to the petition, and in giving the charge on the same subject, the judgment is reversed, and the cause remanded.

#### WHITE SEWING-MACHINE CO. v. ATKESON *et al.*

(Supreme Court of Texas. Dec. 6, 1889.)

##### CREDITORS' BILL—ADEQUATE REMEDY AT LAW.

In an action to recover a debt, the petition alleged that various parties, who were made parties defendant, were indebted by promissory note to defendant, which notes had been assigned to defendant J. to defraud creditors. The defendant's creditors were also made parties, and an injunction

and appointment of a receiver were prayed for. The petition further alleged "that the plaintiffs are informed and believe that a large portion of said above-mentioned notes are now due and unpaid, and are upon good and solvent parties, out of whom can be made and collected the amount due upon each of said notes, and the plaintiffs are unable to give the amounts due upon any of said notes." Held, that the petition should be dismissed, as it failed to show that plaintiff did not have an adequate remedy by garnishment.

Appeal from district court, Johnson county; J. M. HALL, Judge.

This was an action brought by the White Sewing-Machine Company against J. B. Atkeson and others, to have a receiver appointed, and restrain defendants from collecting their notes, and to secure an equitable adjustment of the rights of the creditors of defendants to the proceeds of said notes.

*Field & Davis and Crane & Ramsey*, for appellant. *W. A. Ledbetter, Davis & Harris*, and *F. M. Brantley*, for appellees.

GAINES, J. The appellant corporation, being a creditor of appellee J. B. Atkeson, brought this suit to recover the debt, and made J. D. Atkeson and others parties defendant. It was alleged that both J. B. Atkeson and J. D. Atkeson were insolvent, and, in effect, as we take it, that neither had any property subject to forced sale; that sundry persons, who were named, were severally indebted to J. B. Atkeson by promissory notes, payable to his order, and that, for the purpose of defrauding his creditors, he had transferred these evidences of debt to J. D. Atkeson, who was proceeding to collect the same. Other creditors were made parties defendant to the suit, with the view that their rights in the fruits of the recovery as to the notes should be adjusted. The prayer was for an injunction against J. B. Atkeson and J. D. Atkeson, restraining them from transferring or collecting the notes; that a receiver should be appointed to take possession of and to collect them; and that, upon final hearing, the plaintiff have judgment for his debt, and that the court should make an equitable adjustment of the rights of the plaintiff, and of the other creditors of J. B. Atkeson, in the proceeds. The injunction was issued, and a receiver appointed, but before the hearing demurrers were sustained to so much of the petition as sought equitable relief. The injunction was dissolved, and receiver directed to restore the notes and money in his hands to the defendants J. B. Atkeson and J. D. Atkeson. The plaintiff recovered a judgment against J. B. Atkeson for its debt only. The action of the court in sustaining the demurrers to the petition is assigned as error. In the cases of *Price v. Brady*, 21 Tex. 614, and *Taylor v. Gillean*, 23 Tex. 508, the question of the power of the district court, through its equitable jurisdiction, to subject, to the payment of his debts, choses in action belonging to an insolvent debtor, which have been fraudulently assigned to a third party, was discussed, but in neither case was it definitely decided. In the former (*Price v. Brady*) the

attempt was to hold notes which belonged to a judgment debtor, and were in the hands of an agent for collection, subject to a writ of garnishment served upon the agent. It was held that the writ of garnishment reached only such property as was subject to levy and sale under execution, and that, therefore, promissory notes themselves were not subject to the writ. *Taylor v. Gillean*, supra, was a case more like the present. The suit was brought by a creditor of *Gillean & Co.*, who alleged that they were insolvent, and that they had fraudulently transferred notes and accounts, large in number and amount, to one *Reeves*, as trustee for the purpose of paying certain fictitious debts, and that certain of the notes so transferred had previously been assigned to the plaintiff, as collaterals to secure his debt. A writ of injunction and the appointment of a receiver were prayed for, and the prayer was granted. The effort was not only to subject the notes which had been assigned to plaintiff to the payment of his debt, but to subject, also, the other notes and accounts to the payment of the debts of *Gillean & Co.* in general. In the lower court the injunction was dissolved and the relief denied, except as to the notes which had been assigned to the plaintiff. The judgment was affirmed upon the ground that it appeared from the face of the petition that the plaintiff had an adequate remedy at law. The petition alleged the insolvency of *Gillean & Co.*, but did not show that they had property subject to execution; and the court say, further, that there was a remedy by writ of garnishment.

We think that in the first particular the petition in the present case differs from that in the case of *Taylor v. Gillean*. The allegations in the case before us are probably sufficient to show that the defendant *Atkeson* has no property which can be reached by attachment or execution. In the second particular the two cases are essentially the same. In the petition before us it is alleged "that the plaintiffs are informed and believe that a large portion of said above-mentioned notes are now due and unpaid, and are upon good and solvent parties, out of whom can be made and collected the amount due upon each of said notes, and the plaintiffs are unable to give the amounts due upon any of said notes." From this allegation it does not appear that the sum of the amounts due upon the matured solvent notes is not sufficient to discharge plaintiff's demand. The petition, therefore, fails to show that plaintiff had not an adequate remedy at law by the writ of garnishment, and hence we conclude that the demurrer was properly sustained. There is a distinct intimation in the opinion in the case of *Price v. Brady*, supra, that, if it was desired to subject choses in action belonging to a debtor in the hands of a third person to the payment of his debts, legislation would be appropriate. The Revised Statutes have provided a remedy for reaching the shares of a debtor in an incorporated company, but contain no such provision as to negotiable instruments. The

rule of the law-merchant, which forbids the garnishment of debts evidenced by these instruments before maturity, enables a debtor to convert his property into such securities, and thereby to defeat or delay the collection of the debts against him, and leaves open a door to fraud. But in view of the doubts expressed in the opinion above referred to, as to the power of the courts to afford a remedy, and of the fact that we find no authoritative opinion of this court, since rendered, affirming the power, it may be questioned whether such remedy should be held to exist. The case of *Railway Co. v. McDonald*, 53 Tex. 510, is cited in the brief of appellant's counsel in support of the affirmative of the question. But that was a case in which the creditor of a corporation, which had been dissolved and the assets of which were in the hands of trustees, sought, by a direct suit, to subject a debt due to the trustees to the payment of her demand. The court held, in effect, that, because of the trust, the remedy by garnishment was embarrassed, if not inappropriate, and that, therefore, a court of equity had jurisdiction. The court further say that since it did not appear that there were any other creditors of the insolvent corporation, and since the trustees had not objected to the judgment, their debtor, the appellant in the case, had no right to complain. The appellant corporation owed the debt, and, the trustees being before the court, it was protected by the judgment. We find no error in the judgment, and it is affirmed.

### McFARLIN v. VAUGHN.

(Supreme Court of Texas. Nov. 12, 1889.)

#### TRESPASS TO TRY TITLE—JUDGMENT—APPEAL— WEIGHT OF EVIDENCE.

1. Where, by agreement, two methods of locating a survey are presented to the jury, with instructions to find for the plaintiff or defendant according to the reliability of the method contended for by each, and the verdict is in favor of locating the survey as plaintiff claims, and the court awards judgment thereon, the judgment will not be disturbed, unless defendant's method of locating the survey is certainly the most accurate.

2. Where a verdict has been rendered in favor of a plaintiff, who claims under a certain survey, a judgment may be rendered giving the calls of said survey with the bearings of a resurvey, and also directing the mode of fixing the locality of the land to correspond with the verdict and plaintiff's claim, though the petition did not call for the bearings.

Commissioners' decision. Appeal from district court, Burnett county; *W. A. BLACKBURN*, Judge.

This was an action by *T. D. Vaughn* against *John McFarlin*. Judgment for plaintiff, and defendant appeals.

*Matthews & Wood*, for appellant. *J. G. Cook*, for appellee.

*COLLARD, J.* The verdict of the jury was in favor of the plaintiff below, and in favor of his method of locating the *R. B. Moore*

survey. The question for us then is, is the verdict so clearly wrong as to require an appellate court to set it aside? By an agreement filed by the parties, both methods of locating the Moore survey—the one contended for by plaintiff below, and the one contended for by the defendant—were submitted to the jury, and it was agreed that, if the jury should find that the more reliable and definite way of locating the survey was by running from the J. D. Raines survey, then they should find for the plaintiff; but, if they should find that it was more reliable to begin down the river at the Payne corner, the verdict should be for the defendant. The court gave the jury appropriate instructions of the law applicable to the case, and the question so submitted was decided in favor of the plaintiff. The Moore survey, under which plaintiff claimed, was older than the Acosta, under which defendant claimed; the former insisting that the Moore survey covered over two-thirds of the Acosta, and the latter that the conflict was for only a small quantity of land, for which defendant did not ask for judgment. The Payne survey mentioned in the agreement of the parties is a survey of 26 labors, No. 6 in a block of surveys on the north side of the Colorado river, in Burnett county, and the Raines survey is No. 13 of the same block, there being about 13,000 *varas* between the two, covered by other surveys, the Raines being up the river from the Payne. The Moore survey lies to the north of this block of river surveys, but not contiguous. Plaintiff's evidence showed that the Moore survey could be located from the Raines. By an old map, a sketch from which was in evidence, it is seen that survey No. 33 lies north of the Raines; that from the Raines north-west corner N. 30 E., 3,053 *varas*, with the west line of No. 33, to its north-west corner; and thence, with its north line, S. 60 E., 6,444 *varas*, its north-east corner would be reached. The west line of the Moore intersects the north line of No. 33 at 1,077 *varas* from its (33) north-east corner. It was proved that, by running from the north-west corner of the Raines, the courses and distances indicated in the map for the west and north lines of the survey No. 33, the south-west corner of the Moore, where its west line intersects the north line of No. 33, was reached at 5,367 *varas*, to which, if the 1,077 *varas* called for in the Moore be added, the north line of No. 33 would be completed at 6,444 *varas*, as shown on the old map. The same witness who testifies to this fact also says that this line (the north line of No. 33) must be extended 200 *varas* to reach its north-east corner, as plaintiff fixes it by the Moore call, but that 200 *varas* is the usual excess in a line of such length in other surveys in the neighborhood. To extend the line, the 200 *varas* would, however, locate the Moore very near where plaintiff claims it is. Harvey made the original Moore survey in 1839, and made a resurvey in 1863; by the last marking the lines and establishing corners where plaintiff

below now says it is. The north-east corner of No. 33 is called for in the original survey, as identical with the south-west corner of survey No. 23, and it (the Moore) then runs with No. 23 around three of its sides, calling for its corners, taking a block out of the Moore on the south. This shows that the Moore, as originally run, had special respect to these surveys Nos. 33 and 23, and that their position may be looked to in locating the Moore. The position of these surveys is fixed by the old map from the Raines. To so locate them would fix the Moore where the jury found it was. In addition to this, Harvey, who, as before stated, made the original Moore survey as well as the Payne and other adjacent surveys, in 1839, testified on the trial that, in the resurvey in 1863 of the Moore, he commenced, as near as he can recollect, at the same point that he did in 1839, and it was in proof that, in 1863, Harvey commenced on the Raines survey to locate the place of the Moore. Harvey also testified that in the resurvey he does not recollect that he made any change on the ground as to the Moore. One of the surveyors also testified that he could as easily and reliably locate the Moore from the Raines as from the Payne. We therefore see there was evidence tending to establish the conclusion reached by the jury. The verdict may not be more satisfactory than it would have been if the jury had located the survey from the Payne. It is not our province to decide that question, as neither side furnishes us with a controlling demonstration. The survey may be established from the Payne. The south-west corner of the Payne on the river is found by the shape of the river, and distance from its known south-east corner. Its west line then runs out from the river 10,612 *varas*, where the Davis league joins it on the north, to the east and north end of which is the Yates survey of 8½ labors, whose west boundary, by calls, is the east boundary of the Moore; but from the river corner of the Payne there is not a marked line or corner on any of these connecting surveys, a distance of some 18,000 *varas*. To locate the Moore where defendant says it is, course and distance alone must be relied on without taking into account any of the surplus of 700 or 800 *varas*, known to exist between the Payne and Raines surveys. So we cannot see, by comparison of the two methods of locating the Moore as submitted to the jury by the parties, that defendant's method is certainly the most accurate, or so clearly so as to require a reversal. The court rendered judgment for plaintiff, giving the calls of the original Moore as described in plaintiff's petition, with the bearings as in the resurvey of 1863, and also directing the mode of fixing the locality of the land to correspond with the verdict and plaintiff's claim. There was no error in this. It was necessary and proper to do so under the evidence, even though the petition did not call for the bearings. *Jones v. Andrews*, 9 S. W. Rep. 170. We conclude the judgment should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

**SOUTHERN PAC. RY. CO. *et al.* v. MADDUX *et al.***

(*Supreme Court of Texas. Dec. 3, 1889.*)

**LIVE-STOCK SHIPMENTS—LIMITING LIABILITY—  
HEARSAY EVIDENCE.**

1. A carrier cannot limit its liability for the full value of stock lost, through its negligence, by a contract to pay "the actual cash value at the time and place of shipment, but in no case to exceed one hundred dollars per head," in case of total loss of said stock.

2. In an action against a carrier to recover the value of mules shipped to a certain town which were killed in transit, it is error to permit a witness to state what persons there told him such mules, as he described those killed to have been, were worth in the market of said town.

Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

This was an action brought by R. E. Maddux & Co. against the Southern Pacific Railway Company, John C. Brown, receiver of the Texas & Pacific Railway Company, and that company, to recover the value of mules shipped from Fort Worth, Tex., to Los Angeles, Cal. Judgment for plaintiffs, and defendants appeal.

*Finch & Thompson*, for appellants.  
*Hunter, Stewart & Dunklen*, for appellees.

STAYTON, C. J. This action was brought by appellees to recover the value of mules shipped from Fort Worth, Tex., to Los Angeles, Cal., which were killed by the collision of trains after they passed into the possession of the Southern Pacific Company. The action was brought against the company, John C. Brown, then receiver of the Texas & Pacific Railway Company, and against that corporation. The Texas & Pacific Railway Company, it appearing from the petition that its railway was operated by the receiver appointed by a circuit court of the United States, questioned appellees' right to maintain the action against it; but its exceptions were overruled. On final trial, however, there was a judgment in its favor, and it therefore becomes unnecessary to consider questions affecting it.

The action was brought on November 7, 1887, and the injury occurred during September preceding. The receiver, by exception, questioned the right of the court below to entertain the action against him on the ground that he could not be sued in any other court than that by which he was appointed. This defense was correctly overruled. The petition alleged that both companies were railway corporations; that Brown was the receiver of the one; and that there was an agreement between the defendants that the Southern Pacific Company would receive from the other and the receiver all goods, live-stock, and other merchandise transported over the Texas & Pacific Railway from Fort Worth, Tex., at El Paso, Tex., and

transport the same to Los Angeles, Cal., at a fixed rate per car-load, agreed upon, the money received for such service to be divided between them. It further alleges that all the defendants received the mules at Fort Worth, Tex., and agreed to transport them to Los Angeles, Cal., for which plaintiffs agreed to pay the sum of \$210, the customary price, but that the defendants failed to comply with their contract, and that, through the negligence of the defendants and their employes, the mules were killed by the collision of trains. The petition did not allege that the contract was in writing. The receiver alleged that the shipment was not a through shipment, and that, if so originally intended, it was rescinded by a contract made at El Paso between the plaintiffs and the Southern Pacific Company, whereby his contract terminated, the shipper receiving the mules and delivering them to the Southern Pacific Company, from whom plaintiffs received another shipping contract, under which the mules were lost. He further pleaded that the mules were received by him at Fort Worth, and shipped under a special written contract, by the terms of which plaintiff agreed not to claim over \$100 per head for the mules in the event they were lost or damaged; that it was agreed this should be the full extent of his liability; and that the consideration for this contract was a reduction in rate of freight given to plaintiffs. The contract was made an exhibit to the answer, and contained many provisions not now necessary to mention, some of which are such as a common carrier cannot enforce to relieve himself from liability in case of loss. The shipping contract executed at Fort Worth was a through contract, binding the carrier to transport the mules from that place to Los Angeles, Cal., and contained the following provision: "The said Southern Pacific Railway Company, as aforesaid, will not assume any liability over the actual value, but in no case exceeding one hundred dollars per head on horses and valuable live-stock, except by special agreement." This is contained in what is styled, "Rules and Regulations for the Transportation of Live-Stock," made a part of the contract, which also contains the further provision that "the said second party further agrees, for the consideration aforesaid, that, in case of total loss of any of his said stock from any cause for which the said party will be liable to pay for the same, the actual cash value at the time and place of shipment, but in no case to exceed one hundred dollars per head, shall be taken and deemed as a full compensation therefor, and, in case of injury or partial loss, the amount of damages claimed shall not exceed the same proportion." The Southern Pacific Company denied that the contract made at Fort Worth was a through contract, and claimed that it received the mules at El Paso under a contract there made between itself and the plaintiffs, but admitted that the mules were killed while in transit on

its road between El Paso and Los Angeles. It further pleaded that, under the contract made with it, appellees agreed, in case of loss of the mules, they would not claim more than \$65 per head for them, which was the full amount of liability to be assumed by it; but it also set up the contract made at Fort Worth, and under that claimed exemption from liability for more than \$100 per head. The contract made at El Paso was made an exhibit to the answer, and contained the following provision: "And the said party of the second part agrees that, in case any injury to or loss of such stock shall occur for which the said Southern Pacific Company is legally liable, that the amount to be by him claimed for each animal so lost or injured shall not exceed the sum of sixty-five dollars." This contract was signed by the agent of the company, but not by the shippers, or any one of them; but the name of the employee of appellees, who was traveling with the stock, seems to have been signed to the paper, probably for the purpose of identifying him as the person entitled to passage in charge of the stock. Appellees denied under oath the execution of the contract alleged to have been made at El Paso; and there was no evidence to show that it was executed by them, or any one acting under their authority; but the person who was traveling in charge of the mules seems to admit that he signed it, but states that he did it without authority, after being told by the agent of the company that he had to do so in order to ship the mules through and get a pass for himself.

On the trial a witness stated that the mules were killed in a collision of the cars in which they were with a passenger train, and that the engineer was drunk. It is urged that the admission of this evidence was improper; but it was surely competent to prove the destruction of the mules, and there was no impropriety in showing how they were killed. Evidence tending to show that the agent traveling in charge of the mules had no authority to execute the contract made at El Paso was admissible under the sworn plea; and, as the contract executed at Fort Worth entitled appellees, at least against the receiver, to through transportation of the mules, all of which was known to the agent of the Southern Pacific Company, there can be no claim that the company relied on the fact that the employee was in possession of the mules as sufficient evidence of his authority to make the contract. As will hereafter be seen, it is unimportant, however, in so far as the question of the liability of the receiver or the Southern Pacific Company is concerned, whether the employee had or had not authority to execute the contract claimed to have been made at El Paso.

One of appellees was permitted to testify as to the value of such mules at Los Angeles, about the time they were killed; and this evidence was objected to on the ground that the contract cut off the right to prove a higher value than the maximum named in the con-

tract, and because the evidence was hearsay. The witness seems to have had no personal knowledge of the value of such mules at Los Angeles, but was permitted to state what persons there told him such mules, as he described those killed to have been, were worth. In proving value, it often becomes necessary to receive the opinion of witnesses, but in such cases it should appear that the witnesses have had opportunity to form correct opinions. The witness saw no mules sold in the Los Angeles market, heard no offer made for any, and only knew what prices persons told him had been paid for some mules he saw, and what prices were asked for others; in fact, had no information as to the value of mules in that market other than such as he derived from statements made by others. He only remained in Los Angeles a few days, and did not pretend to base his opinion on knowledge actually acquired through observation of the market, but upon statements made to him by others. His estimate, as well as the finding of the jury, was higher than the valuation placed on such mules by persons, in the course of business, having opportunity to form a correct opinion as to value. From the necessity of cases arising, opinions as to value are received; but in all cases, before the reception of such evidence, it should be made to appear that the witness is in possession of such information as will enable him to form an intelligent opinion. We think his evidence, resting, as it did, on hearsay, not public in its nature, and therefore entitled to credit, and consisting largely of what persons told him, should have been excluded; and, as his evidence alone is all on which the verdict can stand, its admission furnishes ground for reversal, and especially so when a motion for new trial, based on the admission of this evidence and an excessive verdict, was overruled.

It is urged that the court erred in admitting evidence to show that the mules were worth more than the maximum value fixed in the contracts pleaded, and that the court erred in refusing to charge the jury that the contracts were binding in so far as they stipulated for a maximum valuation. The court instructed the jury as follows: If "you further believe from the evidence that, while said mules were in the possession of the Southern Pacific Company, they were killed by a collision of the trains of said defendant, caused by reason of the drunkenness or negligence of the employees of said defendant, or any of them, then you will find for the plaintiffs against the defendants John C. Brown, receiver of the Texas & Pacific Railway Company, and the Southern Pacific Company, the market value of said mules at Los Angeles, Cal., at the time they should have been delivered there, with eight per cent. interest on said amount from the date they should have been so delivered up to the present time, less two hundred and ten dollars, the freight agreed to be paid." The court refused all instructions which declared those parts of



the contracts valid, which placed a limit on the valuation of the mules in case of their loss through the negligence of either of the carriers. There is great conflict of authority as to whether such contracts will protect the carrier against liability for the actual value of property to which they apply, if this be lost or injured through the negligence of the carrier; and many cases are cited in the briefs of counsel in support of the different rules. It would seem reasonable, upon the parties having actually negotiated and come to an agreement as to the value of a thing shipped, with a view to avoid controversy as to the actual value, if it be lost while in the hands of the carrier, that such an agreement should be sustained; for the parties, before loss, may as well by agreement fix value, while each have equal means of doing so, as by proof to be made after a loss occurs, and such an agreement would not operate as a limitation on the liability of the carrier, for the valuation actually agreed upon ought to be deemed, in such cases, the actual value. In such case, however, it may be doubted if an agent empowered to ship ought to be held to have power to fix value, unless authorized to do so by the owner; and no wrong would be done to the carrier by so holding in any case where the thing to be shipped is open to the inspection of the carrier, or, though boxed or otherwise inclosed, is one of ordinary commerce, whose value could be ascertained by inquiry; for in such cases the carrier may for himself determine the value, and regulate his charges thereby. It ought not to be presumed that a shipping agent had power to make a contract other than the carrier may lawfully require. There is no obligation resting on the owner to make an agreement as to value, and the carrier may secure to himself a reasonable freight by determining that for himself. If there be a concealment of the thing to be carried, or of its value, by an agent, the owner is as fully responsible therefor as though the act were his own, and the same results would follow. In the case before us, the owners had fixed the price at which the mules were to be transported, which was determined by the car-load, without inquiry as to the value of the mules; but, when they were afterwards shipped by the agent, he signed the contract before us without authority to fix a valuation, unless such an authority is to be implied in every case of shipment by an agent. Ought such authority to be implied, under the facts? The contracts before us, however, are not contracts in which an agent assumed the power to make an agreement as to the value of the mules; and we do not propose to dispose of the case on the ground that he could not have made such a contract, nor upon the ground that he had no power to make the contracts in question. The contracts provided that the carriers should not be liable for a greater sum per head than therein stated, though the real value might, as was shown to be the case, be more than the highest sum named. In

the absence of some law which authorizes a common carrier to relieve itself by contract from liability resulting from the negligence of itself or employees, it is well settled that this cannot be done. That the liability made the basis of this action resulted from the negligence of the employees of the Southern Pacific Company cannot be questioned, under the facts proved.

The next inquiry is, do the contracts in question, if given effect, operate as a limitation on the liability of the carriers? The liability of a common carrier is twofold in its nature, and involves, when brought in question, two inquiries: (1) Do facts exist which impose upon the carrier an obligation to make compensation for an injury to or loss of freight while in his possession as a carrier? The common law determines what facts will relieve a common carrier from liability; and, in the absence of these facts, no other law regulating the matter, the carrier is held responsible or liable for loss or injury to goods while in his hands, and any contract which declares the carrier not responsible when that state of facts exists, which fixes no responsibility under the law, is a contract limiting the carrier's liability. (2) The liability or responsibility of the carrier has relation to the extent to which he is under obligation to make compensation for loss or injury to goods, as well as to the mere existence of obligation. The common law, and all other laws, require the carrier to pay the full value of property lost or destroyed while in its possession, if lost or destroyed under circumstances which impose obligation, and a contract which provides that the carrier shall be freed from obligation on payment of a sum less than the value of the thing lost or destroyed is as much a limitation on the carrier's liability as is a contract that the carrier shall not be responsible for a loss resulting from a cause, not sufficient, under the law, to relieve it from obligation; but the reasons, founded, as they are, on public policy, for fixing obligation on the carrier under a given state of facts, do not apply with their entire force when applied to the extent to which compensation shall be made. If there be fraud or imposition in misrepresenting the nature or value of the thing to be carried, the shipper ought to be held to forfeit his right to indemnity, in case the carrier is thereby induced to bestow less care in its transportation than he would had he been advised of its true nature and value; but, when no misrepresentation is made or concealment practiced, and the carrier has means as ample as the shipper to ascertain its nature and value, and therefore to properly estimate the risk, can it be held that the carrier is misled as to any fact which ought to influence his conduct, toll his negligence, or shield him from full responsibility for his own failure to use due care? The cases which hold that the carrier may relieve itself from full responsibility resulting from negligence, by contract stipulating that, in case of loss, a sum less than

the true value shall be the maximum of the liability, so hold on the ground that the carrier is thus induced to fix a rate of freight lower than otherwise would have been done, and that to permit the shipper to recover the actual value would be unjust to the carrier. We have the very highest respect for the opinions of the courts that so hold; but it seems to us, in cases where there is no misrepresentation or concealment in which the carrier has ample opportunity to see and know the nature and value of the thing to be carried, that the reason for such a rule is not sufficient. It makes the degree of care requisite to depend, not on the nature of the thing to be carried, which ought to be the test of degree of care to be used by all persons or corporations pursuing the business of common carrier, and when a lawful contract limiting liability exists, but on the amount of compensation to be paid. That the value of a thing to be carried may be properly taken into consideration by the court, in fixing compensation to be paid, is true; but, when the carrier knows what the thing to be carried is, and, from its nature, what degree of care will be necessary to carry it safely, it seems to us that to permit the carrier to grade his care by his compensation contravenes the wholesome rule which denies the right of such a public agent to contract against full liability for a loss resulting from a failure to use at least ordinary care. It has in effect been said that such contracts do not induce a want of care, but exact from the carrier the measure of care due to the value agreed on; but would it not be a very dangerous rule which permits care to be measured by value? It would lead to the holding that the carrier owes but a slight degree of care when the thing to be carried is of small value intrinsically, or by an agreed valuation; and the rule would be as fluctuating as are the values of things carried. We understand the rule to be universal, except where some law exists which permits a common carrier to relieve himself by contract from liability resulting from his own negligence, that the carrier must, even when a valid contract limiting liability exists, exercise such care as prudent persons would ordinarily use for the safety of the thing shipped, looking to the nature of that. A different rule would make the measure of care required to depend on the adequacy of the sum paid for transportation, this to be determined by the value of the thing to be carried, which cannot be a correct rule, unless it be true that the degree of care to be used by a common carrier is to be measured by the compensation to be paid. We do not understand that such a rule ever has been or ever ought to be established. Followed to its legitimate result, such a rule would require the holding that a carrier, by agreeing to gratuitously transport freight, might by contract relieve itself from any liability whatever, and from obligation to exercise even the slightest care. In the case even of a gratui-

tous mandatary, not charged with any public duty, we understand such a rule to have been denied ever since the case of *Coggs v. Bernard*, 2 Ld. Raym. 909. It seems to us that such contracts do induce a want of care; for the highest incentive to the exercise of due care rests in a consciousness that a failure in this respect will fix liability to make full compensation for any injury resulting from that cause, and, if the meaning which we attach to the words "liability" and "exemption" be correct, the tendency of such contracts is to exempt for negligence. The common carrier is entitled to an opportunity to fix compensation, in view of the labor to be performed and the risk to be incurred in a given case, which must depend to some extent on the value of the thing to be carried, and its intrinsic qualities; but when this opportunity has been given, and the carrier receives the freight, any contract which relieves from liability for its full value, if lost through the carrier's negligence, in our opinion, violates the wholesome rule so long and well established in other cases, in which the carrier attempts by contract to relieve itself from liability for the negligence of itself or employees. In view of the intrinsic justice of such a rule, its easy and certain application, its avoidance of all necessity for inquiry whether a contract be fairly and understandingly made, or made under the influence of the unequal position the great carriers of the present time have and may too frequently exert, and in view of the conflict of authority, we feel constrained to hold that a common carrier cannot shield itself from responsibility for the full value of property lost through its negligence by such contracts as are before us in this case. This view of the case leads to the holding that appellees are entitled, by any proper evidence, to prove what the actual value of the mules was, and this to recover in accordance with the charge given, and, further, renders it unnecessary to consider whether, from the entire contracts and regulations with reference to which they were made, it does not appear that no real consideration existed to support them, if they were otherwise valid.

No question is raised as to the liability of the receiver under the contract for a loss occurring after the mules passed into the possession of the Southern Pacific Company. For the error noticed the judgment will be reversed, and the cause remanded.

#### HANBROCK v. AKE et al.

(Supreme Court of Texas. Nov. 19, 1889.)

##### CLERK OF COURT—FEES.

1. By agreement between the parties, one order was to be passed by the court changing the venue in 91 cases. Only one order was made applicable to all the cases, and only one order was actually entered in the minutes of the court. *Held*, under Rev. St. Tex. art. 2389, regulating the fees of clerks of court "for each order, judgment, or decree," that the clerk was entitled to one fee only for entering the one order changing the venue.

2. Prior to the order changing the venue, five orders had been made and entered, each of which

was by its terms made to apply to each of the ninety-one cases. *Held*, that the clerk was entitled to his fees for the five orders entered in each of the ninety-one cases, if they were entered in each case; but, if he only entered them once in one case, he would only be entitled to his fee for one order.

8. Pursuant to an order changing the venue in ninety-one cases, plaintiff, with the assistance of an employe of the clerk of court, made one written transcript, and had from it ninety-one copies printed. The clerk signed and certified, under the seal of the court, each printed transcript. *Held*, that the clerk was entitled to his fee for certifying each printed transcript, from which should be deducted reasonable compensation to plaintiff for the labor done by him, and accepted by the clerk, and the expenses necessarily incurred by him.

Commissioners' decision. Appeal from district court, Travis county; A. S. WALKER, Judge.

*Goodrich & Clarkson*, for appellant.

COLLARD, J. We think the court erred in allowing costs for 91 orders changing the venue in the 91 cases. By agreement the one order was to apply to each and all the cases. There was to be one order. Only one order was made, which applied, by agreement, to all the cases, and but one order was actually entered on the minutes of the court. The statute fixes the amount of the clerk's fee for "each order, judgment, or decree" at 75 cents, and, "when the judgment or decree exceeds two hundred words, the additional fee for each one hundred words in excess of two hundred is fixed at 15 cents." Rev. St. art. 2389, p. 350. The court below finds that, "prior to the order changing the venue, five orders had been made and entered, each of which, by its terms, was made to apply to each of the ninety-one cases." The clerk would be entitled to his fee for the five orders in each of the ninety-one cases, if he actually entered them ninety-one times. If he only entered them once, in one case, he would only be entitled to his fee for one order, under the foregoing statute, because in such case there would in fact be but five orders made by the court and entered in the minutes. There were 91 transcripts made and certified by the clerk pursuant to the order changing the venue, each signed by him in his official capacity, and attested by the seal of his office, and we think he was entitled to his fee for each transcript as made. It is true plaintiff, with the assistance of the clerk's employe, made one manuscript copy, and had from it 91 copies printed, so that, to complete the transcript in each case, nothing was to be done but to write in the style and number of each case; and it is true that plaintiff paid for the printing. But, suppose plaintiff had made out in writing all the transcripts, what would be the respective rights of the parties? Clearly the plaintiff would be entitled to compensation for labor performed for the clerk with his knowledge and consent, and the clerk would be entitled to the fees of his office allowed by law for each transcript certified and attested. The fees of an office belong to the officer, and one doing the labor for him would not, on that account, be entitled to his fees. The extent of

the officer's liability, when the labor is done by another, would be reasonable compensation for the labor done. The right to the fees is a franchise which belongs to the officer, and does not go to the person who merely performs the work. The rights of the person doing the work would be a subject of contract, or, in the absence of a contract, a *quantum meruit*. We conclude that the clerk should be allowed his fee for only one order changing the venue; for the five orders entered in each case, if they were entered in each, but in one case only, if only entered in one; and for the ninety-one transcripts; from which should be deducted reasonable compensation to appellant for labor done by him in that behalf, and accepted by the clerk, and necessary expense incurred. Because of the error of the court's judgment as herein pointed out, we conclude it ought to be reversed, and the cause remanded.

STATON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

#### TRADERS' NAT. BANK v. CRESSON.

(*Supreme Court of Texas*. Dec. 3, 1889.)

BANKS—SET-OFF AGAINST DECEASED DEPOSITOR.

A bank, when sued by the administrator of a deceased depositor for the amount of his deposit, may set off the amount of a note of the intestate held by it which was due at the time of his death.

Commissioners' decision. Appeal from district court, Bexar county; GEORGE H. NOONAN, Judge.

*Simpson & James*, for appellant. *Tarleton & Kellar*, for appellee.

HOBBS, J. C. C. Cresson, administrator of the estate of Charles H. Nash, deceased, sued the Traders' National Bank of San Antonio to recover \$1,548.91, amount to the credit of said Nash on the books of said bank, it being the balance of a deposit made in said bank by Nash during his life-time, and which balance was held by the bank, to his credit, at his death. The bank answered that during the life-time of Charles H. Nash, and up to the time of his death, he was a depositor at said bank, and at the time of his said death had a balance to his credit of \$1,548.91; and, further, that the bank, "at the time of the death of said C. H. Nash, held a note of the said C. H. Nash dated February 8, 1884, in the sum of \$14,412.12, payable to the order of C. T. Parker four years after date, with eight per cent. per annum from its date, said interest payable on or before November 15, 1884, 1885, 1886, and at maturity; that said note was duly indorsed by the payee, Charles T. Parker, to this defendant, for valuable consideration, and was at the death of Charles H. Nash, and is now, held by defendant." The cause coming on for trial without a jury, thereupon the court, having heard the defendant's answer, read upon his (the

court's) own motion, held that the facts stated by defendant in his answer constituted no defense; and, the defendant refusing to amend, the court gave judgment for plaintiff, the court ruling that the principle of set-off did not apply with reference to estates of deceased persons, and that any claim which defendant had against plaintiff must be propounded and enforced in the probate court, to which the counsel for defendant objected, for the reason that "the set-off pleaded by defendant was a complete answer to plaintiff's demand, and a valid defense in this action."

The *first* assignment is that the court erred in declaring the facts set up in the amended original answer were no defense to plaintiff's claim. *Second*. The court erred in rendering judgment upon the facts, as shown by the petition and answer. *Third*. The court erred in ruling that the principle of set-off does not apply, between banker and depositor, upon the death of the latter. *Fourth*. The court erred in ruling that the bank could not assert the defense of set-off against the plaintiff's demand, but was required to assert its claim in the county court. The debt pleaded in set-off appears from the answer to have been due from the appellee's intestate, at the time of his death, to the appellant, and having, therefore, been contracted in the intestate's life-time, it extinguished, as far as it went, the claim sued on; and, to the extent it so extinguished the claim sued on by the administrator, the defendant below was entitled to plead it in set-off. *Small v. Trammel*, 11 Tex. 11; *Mitchell v. Rucker*, 22 Tex. 66. The court, therefore, erred in holding that the facts stated by defendant in the answer constituted no defense. We think the judgment should be reversed, and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment is reversed, and cause remanded.

#### HAYDEN *et al.* v. MOFFAT *et al.*

(Supreme Court of Texas. Oct. 29, 1889.)

##### MARRIED WOMEN—DEEDS—ACKNOWLEDGMENT.

1. Rev. St. Tex. art. 4313, provides that the certificate of acknowledgment of a married woman must show substantially that the person making the acknowledgment is personally known to the officer taking the same, or is proved on oath to be the person who signed the instrument; that she was examined privily and apart from her husband, and the instrument being fully explained to her, she acknowledged the instrument to be her act and deed, and declared she had willingly signed the same for the purpose and consideration therein expressed, and that she did not wish to retract it. *Held*, that a certificate is insufficient which states that a deed executed by husband and wife "was produced to [the officer,] \* \* \* and was acknowledged by the grantors to be their act and deed, and, said instrument of writing being shown and explained to [the wife] separate and apart from her husband, she acknowledged the same freely and willingly, without fear or undue influence of her said husband, and desired the same certified and recorded."

2. The record of an instrument, the acknowl-

edgment of which is so certified, will not operate as notice to third persons.

Commissioners' decision. Appeal from district court, Bell county.

Action of trespass to try title, brought by John J. Hayden and others against J. W. Moffat and others. There was judgment for defendants, and plaintiff appealed.

*Barry & Etheridge*, for appellant. *Harris & Saunders*, for appellees.

ACKER, P. J. Appellants sued in trespass to try title to, and for partition of, certain lands granted to John M. Lemon, who died leaving seven heirs, Mrs. M. A. Barbee being one of them, and both parties claim under her. The case was disposed of before trial as to all defendants excepts appellees, Finnell and Clayton, who pleaded not guilty, and filed special answer not necessary to consider. The trial was without a jury, and resulted in a judgment in favor of appellees. Appellants claim the land under a deed from Mrs. Barbee, and her husband, Joseph A. Barbee, to them, executed in August, 1885. This deed was executed, acknowledged, and certified in the manner required by law for the conveyance of land by married women, and recited that it was executed in the place of a deed made by the same vendors to John M. January, the ancestor of appellants, in December, 1859, the deed to January having been lost. Appellees claim the land under a deed from the same parties, of date April 12, 1882, to which the officer's certificate of Mrs. Barbee's acknowledgment is as follows: "State of Kentucky, Harrison county. I, Perry Wherritt, clerk of said county court, do certify that this deed from Margaret A. Barbee and Joseph A. Barbee, her husband, to Sarah T. Tingle, was produced to me in my office this day, and was acknowledged by the grantors to be their act and deed; and, said instrument of writing being shown and explained to Mrs. M. A. Barbee separate and apart from her husband, she acknowledged the same freely and willingly, without fear or undue influence of her said husband, and desired the same certified and recorded. Given under my hand and seal of court this 12th day of April, 1882. P. WHERRITT, C. H. C. C. [Seal.]" Appellants objected to the introduction of this deed, upon the grounds that the certificate of acknowledgment does not show that Mrs. Barbee ever signed it for the purposes and consideration therein expressed; the certificate does not show that the deed was fully explained to her; and it does not show that she declared that she did not wish to retract it. The objection was overruled, and the deed admitted in evidence, to which appellants excepted, and the correctness of this ruling is questioned by the first assignment of error.

Our Revised Statutes provide: "Art. 4313. The certificate of acknowledgment of a married woman must be substantially in the following form: The state of ———, county of ———. Before me (here insert

name and character of officer) on this day personally appeared —, wife of —, known to me (or proved to me on the oath of —) to be the person whose name is subscribed to the foregoing instrument, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said —, acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it."

We think it evident, from even a casual and superficial comparison of the certificate of acknowledgment with the form prescribed, that the certificate is not in substantial conformity to the statute. It is not shown by the certificate that the officer either knew Mrs. Barbee, or that she was proved to him to be the person whose name is subscribed to the deed. It is not shown that she was examined by the officer, and the deed explained to her by him privily and apart from her husband, nor does the certificate state that Mrs. Barbee declared that she had willingly signed the deed for the purposes and consideration therein expressed. Unless it appears from the certificate that Mrs. Barbee was known, or proved in the manner prescribed, to the officer to be the person whose signature is subscribed to the deed, and, being so identified, that the officer made the privy examination and explanation, and that, being so examined and having the deed so explained to her by the officer, she declared that she had willingly signed the same for the purposes and consideration therein expressed, the certificate is fatally defective, and insufficient to entitle the deed to registration. Unless she willingly signed the deed for the purposes and consideration therein expressed, in contemplation of the statute, she has not signed it at all; and the certificate failing to show her identification, and failing to show that she declared that she had willingly signed the deed, we think it fails to show that Mrs. Barbee ever signed it for the purposes and consideration therein expressed. Rev. St. art. 4309. The certificate states that "she acknowledged the same freely and willingly," but this language is certainly not substantially the same as "acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same." She might "acknowledge the same willingly" without having signed it willingly. Without such acknowledgment as the statute prescribes, there can be no conveyance of the lands of a married woman; and, before such conveyance can be so recorded as to operate as notice, there must be attached to it a certificate of her acknowledgment in substantial conformity to the prescribed form. Having signed the deed willingly, she must acknowledge the fact in the manner required by statute. When such acknowledgment is made to the proper officer in the manner and under the circumstances prescribed by the

law, the deed takes effect and conveys the title. The statute prescribes that the proper certificate of the officer shall be sufficient evidence of the proper execution of the deed to admit it to record, and give it the effect of notice to subsequent purchasers. If the certificate of acknowledgment does not state the facts essential to the conveyance, the registration of the instrument is illegal, and does not constitute notice. The conveyance depends upon the proper acknowledgment of the execution of the deed, while the registration depends upon a proper certificate of the facts of acknowledgment. Appellees may be able, in a suit brought for that purpose, to prove the proper acknowledgment by Mrs. Barbee of the deed to Mrs. Tingle, and obtain judgment correcting the certificate; but such proof and judgment would not validate the registration, and give it effect as notice to appellants. Rev. St. art. 4353; Johnson v. Taylor, 60 Tex. 361; Davis v. Agnew, 67 Tex. 206, 2 S. W. Rep. 43, 376. We deem it unnecessary to consider the other ground of objection to the certificate, or to discuss other assignments. We are of opinion that the court erred in overruling the objection and admitting the deed, for which the judgment should be reversed, and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

PFEIFFER *et al.* v. McNATT *et al.*

(Supreme Court of Texas. Oct. 29, 1889.)

BUSINESS HOMESTEAD.

Defendant owned two adjoining store buildings, connected by archways through the partition wall. The east building was occupied by him as a law-office, and also for his court-room, as mayor of the town. A portion of it was used for a post-office, defendant acting sometimes as deputy postmaster. The west building was rented to defendant's brother for a store, under an agreement by which he was to pay defendant a certain sum for the use of the building, and for such services as defendant might render him when his other business would permit of it. Defendant was also a notary public and conveyancer, and had a desk and a case in the back part of the west room, where he kept the papers pertaining to that branch of his business. *Held*, that defendant could not, by dividing his business between the two buildings, hold them both as a business homestead, but his exemption should be held to be limited to the east building.

Commissioners' decision. Appeal from district court, Montague county.

Action of trespass to try title, brought by P. Pfeiffer & Co. against McNatt & March. There was judgment for defendants, and plaintiffs appealed.

*Stephens & Herbert*, for appellants. *Davis & Garnett*, for appellees.

COLLARD, J. McNatt & Marsh, merchants, were closed out by attachment November 19, 1884, and still owe about \$10,000, which they are unable to pay. Appellants obtained judgment against them

for \$1,603.91, and on October 9, 1886, levied execution on both the lots and houses in controversy, the same being the individual property of L. O. McNatt. The appellants bought the lots at sheriff's sale for \$100, crediting the amount on the judgment, and had deed made to them by the sheriff, January 4, 1887. They brought suit for the lots. McNatt set up that the houses on the lots was his business homestead. The case was tried October 21, 1887, the court sustaining the plea of homestead. McNatt had a residence homestead in another part in the town of Burlington, was a married man, and the head of a family.

The question of homestead presents more than usual difficulty, on account of the indefiniteness of the facts. The two buildings claimed as a business homestead—the west one, two stories; the east one, one story—are each 20 feet front on the public square, and run back 70 feet. They are frame, wooded buildings; have a partition wall lengthwise between them, in which there are two archways connecting the rooms. They were so constructed for the business of McNatt & March, and were used by them until they were closed out by attachments. McNatt has not used them for such purposes since. At the time the business was closed out, McNatt was mayor of the town of Burlington, which has a population of about 300, and has since been acting as mayor. He was also a notary public and conveyancer, and did about all the conveyancing for the town and vicinity. He had no other place of business except these two houses. As mayor, he had to furnish his own office, and for this purpose used the back end of the east room, except when the weather was very cold, when he held court in the west room, where there was a stove. For 18 months before the trial he permitted the postmaster to use the front end of the east room as a post-office, he himself sometimes acting as deputy postmaster. He charged no rent for the post-office. He has a desk and a spool-case in the rear end of the west room, where he keeps his notarial papers, does conveyancing, and such work. For six months prior to the trial he had special license to practice law, and kept his law-office in the buildings. He says: "In January, 1885, my brother, J. B. McNatt, being the owner of a stock of goods, made a contract with me by which he was to occupy such portion of the west room as I did not need for my office, and agreed to pay me for the use of the house, and for such services as I could render him when not engaged in discharging my duties as a notary public, conveyancer, and mayor, the sum of \$50 per month; and J. B. McNatt has ever since occupied said west room as a store, under said contract."

It is not an easy task to apply the principles controlling a business homestead to this condition of things. It was laid down in *Shryock v. Latimer*, 57 Tex. 677, that, "to preserve the place of business which is separate and

distinct from the home as a part of the homestead, two things must concur: *First*, the head of a family must have a calling or business to which the property is adapted, and reasonably necessary; *second*, such property must be used as a place to exercise the calling or business of the head of the family." The same doctrine has been expressed and applied in quite a number of cases. *Wynne v. Hudson*, 66 Tex. 1; *Hargadene v. Whitfield*, 71 Tex. 489, 9 S. W. Rep. 475. Appellee has several callings, and follows all of them for a living,—mayor, notary public, conveyancer, and sometimes deputy postmaster; but we cannot see that this fact should militate against his right to have some place protected by law from forced sale, where he can do business and support his family. It may be asked, however, should he have more than one such place, or should he have several places protected, for several avocations? Could he legally claim one house exempt for the transaction of business as mayor and deputy postmaster, and another as notary public and conveyancer? We must answer this question in the negative. But we are met by the fact in this case that these two houses are connected by archways through the partition wall running between them, from which it is suggested that there are not two distinct places used in the exercise of the several callings. We do not think that the fact that the houses were connected by these openings should necessarily control the case. Suppose a man should in this way try to protect a block of business houses, by doing a conveyancing business in one corner of one of them. This would be an absurdity. It would be too unreasonable to admit of discussion. The law is intended as a protection to a fair and reasonable claim falling within its provisions, not an unfair and an unreasonable claim. Here we recur to the distinction guarded in the case of *Shryock v. Latimer*, that, to entitle the place of business to protection, "the head of the family must have a calling or business to which the property is adapted, and reasonably necessary." This expression, and other parts of the opinion of the same purport, apply with peculiar force to the case before us. It would be unreasonable to protect McNatt's homestead claim to both of the houses in controversy. They are unreasonably disproportioned to the character of his business, and are in fact unnecessary. Admitting that he has shown a fair claim to the east one-story house, used by him as a court-room, his claim to the other, the west two-story house, should not be upheld merely because he has a desk and a spool-case in the back end of it, where he keeps his notarial papers, and does conveyancing. Such a claim is unreasonable, and both places are not necessary to his business. He has designated the front part of the west house, by renting it as a store-house to his brother, to purposes inconsistent with its use as an office for a notary public and a conveyancer. *Hargadene v. Whitfield*, supra. This is shown to be no temporary renting.

It had continued for 18 months before the trial, and something over 6 months before Pfeiffer & Co. levied their execution upon it. It was not a suitable place to do conveyancing; at least, not as much so as the east room. The east room was large enough for all his purposes as a place of business. To allow him both houses would be to exceed the limits of justice and common sense. We are therefore of the opinion that the judgment of the court below should be reversed, and here rendered, protecting to L. O. McNatt the east house, and the part of the lot on which it stands, to-wit, 20 feet front on the east part of lot 4, in block 43, in the town of Burlington, Montague county, and running back to the north end of the lot; and adjudging, in favor of P. Pfeiffer & Co., the two-story house and the ground on which it stands, to-wit, 20 by 70 feet, that is, 10 feet front on the west side of said lot 4, and 10 feet front on the east side of lot 3, in said block, making 20 feet front, and running back 70 feet, so as to include all the ground upon which is erected the said two-story frame house.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment reversed, and here rendered in accordance with the opinion.

#### JONES v. MATTHEWS.

(*Supreme Court of Texas*. Nov. 5, 1889.)

##### PLEA IN ABATEMENT—EXEMPLARY DAMAGES.

1. A plea in abatement in an action for damages for injury to property, and personal wrongs, that plaintiff had no interest in the suit, or in the recovery sought, but that it was agreed between him and his attorneys that they should bring the suit and prosecute it in plaintiff's name, and pay all costs, and have the whole amount recovered, is not sufficient, as the claim for damages to the person cannot be assigned.

2. Where a petition states a claim for damages both actual and exemplary, a verdict for exemplary damages cannot be sustained, unless there is also a verdict for actual damages.

Commissioners' decision. Appeal from district court, Lamar county.

R. Wooldridge, Hale & Hale, and J. M. Long, for appellant. Sturgeon & Sturgeon, E. D. Scales, and John S. Stone, for appellee.

AKER, J. W. R. Matthews brought this suit against S. Jones to recover \$2,000 for permanent depreciation in value of property; \$288, loss of rents; \$1,000 for bodily discomfort and loss of sleep; aggregating \$3,288, actual damages, and \$1,000, exemplary damages, for outrages done to the feelings of plaintiff and his family by reason of defendant's having rented a house belonging to him, situated in the vicinity of plaintiff's homestead and his four tenement houses, to prostitutes, for purposes of prostitution; and also to perpetually enjoin defendant from renting to said characters. Defendant pleaded specially that plaintiff had no interest in the suit, or in the recovery sought; that it was agreed between plaintiff and his attorneys in

this case that they should bring the suit and prosecute it to judgment in plaintiff's name, and have the entire recovery, and they were to pay all costs, if any were to be paid, and in no event was plaintiff to receive anything from the suit, or from any compromise that might be made thereof, nor be liable for any costs; that said attorneys are the real parties in interest. Defendant also answered by general denial and special answer, not necessary to notice further. Plaintiff moved to strike out the special plea upon the grounds: (1) It shows no reason why the suit should abate; (2) it is immaterial, irrelevant, and incompetent; (3) because it is no concern of defendant's what contract plaintiff has made with his attorneys; (4) because said plea does not show sufficiently that plaintiff has no interest; (5) "because the pleadings show that no fact could be alleged, the proof of which could show that plaintiff had no interest in the suit;" (6) because the law of champerty does not obtain in this state. The motion was sustained, and the plea stricken out; to which appellant excepted. The jury returned the following verdict: "We, the jury, find for the plaintiff the sum of \$700, exemplary damages;" and judgment was rendered against appellant for that amount, from which this appeal is prosecuted.

Under the first assignment of error it is contended that the court erred in rendering the judgment because no actual damages were found by the jury, and the verdict for exemplary damages alone cannot support the judgment. The petition stated the claim for damages, actual and exemplary, with clearness and precision, showing the several items which make up the \$3,288, actual damages claimed, and in a separate item claimed \$1,000, exemplary damages, for outrages done to the feelings of plaintiff and his family. The jury could not have misunderstood the plaintiff's claims for both actual and exemplary damages, for the court, after correctly instructing the jury as to the law applicable to the claim for actual damages, gave the following charge: "If you find in favor of plaintiff actual damages under the foregoing instructions, and believe from the evidence that defendant knew," etc., "you would be authorized, in addition to the actual damages aforesaid, to allow such sum as exemplary damages as you may deem right and proper, by way of punishment to defendant." We think it evident that the jury deliberately declined to find any actual damages, and intentionally returned the verdict for exemplary damages alone. Mr. Sutherland, in his work on Damages, (volume 1, p. 748,) says: "Where there is provocation or other mitigation which reduces the actual damages to a minimum, there is generally no ground for punitive damages." We are of opinion that some actual damage must be found as a predicate for the recovery of exemplary damages.

The second assignment relates to the ruling of the court in sustaining the motion to



strike out the special plea. It is believed that the facts stated in the plea did not constitute a transfer or assignment of any part of the plaintiff's claims for damages. Had the facts stated in the plea shown a contract of transfer or assignment by plaintiff of his entire cause of action to his attorneys, such contract would have been void as to the claim for damages for injury to the person. It seems to be well settled that a claim for damages to the person from a tort cannot be assigned. *Railroad Co. v. Freeman*, 57 Tex. 156; *Stewart v. Railway Co.*, 62 Tex. 246; *Greenh. Pub. Pol.* 490. We think the court did not err in striking out defendant's special plea.

Because the verdict and judgment award exemplary damages alone, we are of opinion that the judgment of the court below should be reversed, and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment is reversed, and the cause remanded.

#### JONES *et uxo.* v. ROBBINS *et al.*

(Supreme Court of Texas. Oct. 29, 1889.)

MARRIED WOMEN—DEED—ACKNOWLEDGMENT—  
HOMESTEAD—ABANDONMENT.

1. Under Rev. St. Tex. art. 4813, relating to certificates of acknowledgment of a married woman, and providing that such certificate must show that the person making the acknowledgment was examined by the officer privily and apart from her husband, and, after the instrument was fully explained to her, she acknowledged the same to be her act and deed, and declared that she had willingly signed the same for the purpose and consideration therein expressed, and that she did not wish to retract, a certificate of acknowledgment which does not state substantially all the facts prescribed is not sufficient to give validity to the instrument.

2. Under Rev. St. Tex. art. 4814, relating to the proof of instruments by a witness to the signature, a declaration by such witness that the grantor signed the instrument in his presence is equivalent to a declaration that the witness saw the grantor sign it, and it is not necessary that the witness should further declare that he signed the instrument at the request of the grantor.

3. When a husband and wife leave their homestead, and go to another state, for the declared purpose of a mere visit, rendered necessary because of ill health of the husband, and during their sojourn in such state repeatedly declare their intention to return, even though their absence extends over several years, it is not such an absence as would constitute an abandonment of the homestead.

4. In Texas the homestead of the husband and wife may be alienated under a power of attorney duly executed.

Commissioners' decision. Error to district court, Bell county.

*John L. Croom, Jr.*, for plaintiffs in error.  
*Roseborough Bros. and Monteith & Furman*, for defendants in error.

HOBBY, J. W. S. Jones and his wife, Rosa, brought this action of trespass to try title against appellee Robbins and another, in the district court of Bell county, in April, 1886, to recover 38 and a fraction acres of

land, a part of the Lewis Walker survey. The land was alleged to have been owned and occupied by plaintiffs as a homestead. In addition to the plea of not guilty, the answer alleged the legal and equitable title to be in defendants, and an adverse possession of the premises in good faith for one year prior to the suit, under a deed from said W. S. Jones, and claimed compensation for valuable improvements made thereon. H. N. & S. M. Beckwith, it was agreed upon the trial, were the common source of title. There was no controversy as to the fact that the title was in appellants on the 29th day of November, 1883. It appears also from the evidence that they used and occupied the premises as a homestead up to that date. Appellees offered in evidence a power of attorney executed by appellants W. S. Jones and his wife, Rosa Jones, to W. J. Jones, dated November 29, 1883, authorizing him to convey the land in controversy and to execute title. This power of attorney recited that the appellants were about to leave the state. The certificate of the officer attached to this instrument is as follows: "The state of Texas, county of Galveston. Before me, Wm. R. Johnson, a notary public in and for the above state and county, on this day personally appeared Elizabeth Jones, known to me to be the person whose name is subscribed as a witness to the within power of attorney, and, being by me duly sworn, on oath declares that Wm. S. Jones and Rosa Jones, his wife, signed and acknowledged the said power of attorney in her presence, for the purposes and considerations therein set forth; and that the said Rosa Jones, wife of the said Wm. J. Jones, did so willingly, and of her own free will and accord, without any fear or compulsion on the part of her husband, Wm. S. Jones, and for the best interests of herself and children. ELIZABETH JONES. Sworn to and subscribed before me this 21st day of December, 1883, by said Elizabeth Jones, as witness my hand and official seal. WM. R. JOHNSON, Notary Public for Galveston Co., Texas. [L. s.]"

Appellants objected to the introduction of the power of attorney—*first*, because it was not legally of record; *second*, because the homestead cannot be legally conveyed by an agent or attorney; *third*, because the power of attorney was defectively proven up, both as to the husband and wife, and was not certified to according to law; *fourth*, because the wife, Rosa Jones, did not sign and acknowledge her signature to the same privily and apart from her said husband; *fifth*, because the officer did not certify that the wife declared to him that she did not wish to retract it; *sixth*, because the proof of the signatures of W. S. Jones and wife was not made in the manner and form required by law, in this: that the officer did not certify that the witness Elizabeth Jones, who proved said signatures, swore to him that she signed said instrument as a witness at the request of the grantors, or that she signed said instrument at all; *seventh*, because it does

not appear, from the proof of said power of attorney, whether said Rosa Jones was the wife of Wm. S. Jones or of Wm. J. Jones,—she is therein described as the wife of Wm. S. and afterwards as the wife of Wm. J. Jones. These objections were overruled, and the power of attorney and the deed from W. J. Jones to appellee Dan Robbins, dated January 1, 1884, executed under the authority thereof, was also admitted, over the appellants' objection, as follows: Because Rosa Jones, wife of W. S. Jones, did not sign said deed, and did not acknowledge the same separate and apart from her husband, and was not examined before the officer, as required, privily and apart from her husband, and did not have said instrument or deed fully explained to her, and because no legal conveyance and sale of the homestead can be made under a power of attorney. An explanatory note is added by the presiding judge to the bill of exceptions, to the effect that they (the instruments) might be "admitted and considered when the jury were considering the question of improvements in good faith, and, in the event the jury should find the property was not a homestead, then the instrument would be admissible against the husband; but in no other event to be considered by the jury." There was proof of the payment to appellants by Robbins of the purchase money, \$1,000, none of which was tendered by appellants. There was also evidence tending to show an abandonment of the property by appellants as a homestead in 1884, 1885, and 1886, and their removal to residence in the state of Florida during those years. On the other hand, there was evidence to the effect that appellant W. S. Jones and his wife were on a visit to their relatives in said state, and their intention was to return. Value of improvements was about \$59. Trial by jury on December 15, 1886, resulting in verdict and judgment for defendants. Plaintiffs filed their motion for new trial on December 16, 1886, which was overruled, and plaintiffs thereupon excepted, and gave notice of appeal in open court.

The errors assigned are that the court erred in admitting, over plaintiffs' objections, the instruments referred to. The assignments are, in effect, that the homestead of husband and wife cannot be alienated under a power of attorney. The statute makes no provision whatever for the wife to enter into agreements or executory contracts to convey the homestead. The sole and only mode prescribed by the statute is by conveyance, in which she joins the husband, and which she acknowledges privily and apart from him. No acknowledgment of a married woman to any conveyance, or other instrument purporting to be executed by her, shall be taken unless she has had the same shown to her, and then and there fully explained by the officer taking the acknowledgment, on an examination privily and apart from her husband; nor shall he certify to the same, unless she thereupon acknowledges to such officer

that the same is her act and deed, that she has willingly signed the same, and that she wishes not to retract it. Even though the premises in controversy was not the homestead of plaintiff, and could have been conveyed by the husband only, even then said power of attorney was inadmissible in evidence, because the proof of the signature of the husband, W. S. Jones, was insufficient, in this: that the witness who proved said signature did not swear (and the officer did not certify) that she signed the same as a witness at the request of the grantors, or that she signed it at all.

The court erred in admitting in evidence, over plaintiffs' objections made at the time, the deed executed under said power of attorney from William J. Jones, as agent of W. S. and Rosa Jones, plaintiffs, to Dan Robbins, defendant, first, because Rosa Jones, the wife of said plaintiff W. S. Jones, did not sign said deed, and did not acknowledge same separate and apart from her said husband, and was not examined before the officer as required by law, privily and apart from her husband, and did not have said instrument or deed fully explained to her. There are several other assignments contained in the brief of appellants, relating to the supposed errors in court's charge, but, under the view we take of the case, it will not be necessary to consider any save those above set forth, as the final disposition of the cause is involved in this determination.

The title of the appellees to the land in controversy depends exclusively upon the validity of the power of attorney executed by the appellants, husband and wife, on the 29th November, 1883, authorizing W. J. Jones, as their agent and attorney in fact, to sell and convey this land, which then constituted their homestead, in Bell county. The proof of the execution of this instrument, as shown by the official certificate, is as follows: "The state of Texas, county of Galveston. Before me, Wm. R. Johnson, a notary public in and for the above state and county, on this day personally appeared Elizabeth Jones, known to me to be the person whose name is subscribed as a witness to the within power of attorney, and, being by me duly sworn on oath, declares that Wm. S. Jones and Rosa Jones, his wife, signed and acknowledged the said power of attorney in her presence for the purposes and considerations therein set forth; and that the said Rosa Jones, wife of the said Wm. S. Jones, did so willingly, and of her own free will and accord, without fear or compulsion on the part of her husband, Wm. S. Jones, and for the best interests of herself and children. [Signed] ELIZABETH JONES. Sworn to and subscribed before me this 21st day of December, 1883, by said Elizabeth Jones, as witness my hand and official seal. [Signed] Wm. R. JOHNSON, Notary Public for Galveston Co., Texas." Pursuant to the power vested in him by this instrument, W. J. Jones, on January 1, 1884, undertook to convey by deed to the appellee

Robbins the homestead of W. S. Jones and his wife, Rosa, for the sum of \$1,000, which sum it appears has been paid to appellants.

One of the propositions urged under the assignments is that the homestead of the husband and wife cannot be alienated under a power of attorney. In support of this we are referred to the case of *Jones v. Goff*, 63 Tex. 253. In that case the contract to convey consisted of a bond for title executed by both husband and wife, and privily acknowledged as prescribed by law for the conveyance of the homestead, and it was held to be an executory contract for the conveyance of the homestead, which our courts could not enforce. In a later case, (*Warren v. Jones*, 69 Tex. 467, 6 S. W. Rep. 775,) the case of *Jones v. Goff* was commented upon, and it was said that "the only question in that case was as to the power of the district court to decree, as against a married woman, a specific performance of an executory contract for the conveyance of the homestead." In the case of a bond for title, it was further stated the wife did not consent to an absolute conveyance, but only to a contract for such conveyance, and that she would be deprived of her right to retract, in case the bond should be enforced against her. Not so in reference to a power of attorney. In *Patton v. King*, 26 Tex. 686, it was held that, the acknowledgment being for the wife's protection, when that is made to the power of attorney the object of the statute is as effectually attained as if made to her deed of conveyance. The power of attorney, when followed by the deed of her agent, is treated as the conveyance itself. In a bond for title she has to execute another instrument before the legal title passes from her. The conveyance is not fully made until she acknowledges the deed she has bound herself to execute, and this must be done in accordance with the statute. She must be allowed the privilege of retracting before the deed is made or the statute is not fulfilled. In case of a power of attorney, she has that privilege, and may withdraw her consent at any time before the deed is made by her attorney. In the case of *Patton v. King*, supra; *Cannon v. Boutwell*, 53 Tex. 626; and *Warren v. Jones*, supra,—the question was directly before the court as to the validity of the conveyance of the homestead made under a power of attorney executed and properly acknowledged by the husband and wife, and in those cases such a conveyance was upheld for the reasons given, of which nothing we might say can add to the force.

It avails nothing to the appellees, however, in the present case, that the homestead may be conveyed by virtue of a power of attorney acknowledged by the wife in the manner prescribed by the statute; for it is manifest, from an inspection of the certificate, that none of the essential requirements of the wife's acknowledgment have in this case been complied with. It does not appear from the certificate that Mrs. Jones was examined privily and apart from her husband, nor that

the instrument was explained to her by the officer. That such an instrument is absolutely void, and could not affect the wife's title to the homestead, has been repeatedly decided in this state. *Johnson v. Bryan*, 62 Tex. 624; *Langton v. Marshall*, 59 Tex. 296; *Ruleman v. Pritchett*, 56 Tex. 488.

It is contended in this case that even though the premises in controversy was not the homestead of plaintiffs, and could have been conveyed by the husband only, said power of attorney was inadmissible in evidence, because the proof of the signature of the husband, W. S. Jones, was insufficient, in this: that the witness who proved said signature did not swear, and the officer did not certify, that she signed the same as a witness at the request of the grantors, or that she signed it at all. The statute (article 4314) regulating the mode of proof by a witness makes a distinction in those cases where the witness is present, and sees the instrument signed, subscribed, or executed, and those when he was not present at the time, and was subsequently requested to witness the acknowledgment of the party who executed the instrument. In the former, where the witness is present at the execution, and signed as a witness, it is not necessary that he should swear he signed at the request of the grantor. *Dorn v. Best*, 15 Tex. 65. In the case cited a certificate was objected to upon the ground above stated, and it was similar to the one under consideration, in so far as the proof is made by the witness of the execution of the power of attorney by appellant W. S. Jones, and it was held to be a valid certificate. See, also, *Downs v. Porter*, 54 Tex. 59; *Sowers v. Peterson*, 59 Tex. 216. We think the authentication of the power of attorney as to the husband, W. S. Jones, was sufficient. It was not necessary that the witness should have sworn that "she signed at the request of the grantor," when she stated that he "signed and acknowledged the said power of attorney in her presence." The latter phrase we also believe to be equivalent to the declaration that she saw the party sign it. Although the power of attorney was void as to the wife, still, if the evidence had established the fact that appellants had abandoned their homestead at any time up to the date of the execution of the deed under the power, on January 1, 1884, the power being valid as to W. S. Jones, the conveyance by his agent and attorney in fact, on that day, would have vested the title, as the property in controversy would have become community estate after such abandonment, and as such would have been subject to conveyance by him or his duly-empowered agent. Whatever abandonment, if any, it can be said was shown in this case, occurred subsequent to the 1st of January, 1884, the date of the deed. The testimony establishes the fact that the property was the homestead of appellants in 1883; that they moved from their home to Harris county in the fall of 1883, for the purpose of placing appellant W. S. Jones under medical

treatment. The power of attorney was executed on the 29th November, 1883, just prior to their departure on a visit to the relatives of the wife in Florida. This visit, it is fully explained by the evidence, was rendered necessary by reason of the physical and mental condition of appellant W. S. Jones. The evidence, which is uncontradicted upon this point, shows that their intention was to return to Texas, and this purpose was repeatedly expressed by appellant W. S. Jones during the sojourn in Florida. It is not made to appear at what time they arrived in the latter state, but it is quite clear that the visit was intended to be temporary. Such is appellants' explanation of their sojourn in Florida, and its cause. What purports to be the evidence of their abandonment, and by virtue of which the appellees claim through the husband, W. S. Jones, under the deed of January 1, 1884, consists of the testimony of the clerk of the circuit court of Escambia county, Fla., who was the custodian of the list of registered voters in that county. He states that the name of one W. S. Jones appears on that list as having been registered October 9, 1884; that under the law of that state a voter was required to reside one year in the state, and six months in the county, but he is not required to declare his intention to permanently reside in the state and county. This witness had no knowledge as to whether the residence of Jones was temporary or permanent. This is followed by the evidence of the assessor of taxes of the same county, who also testifies that he does not know whether the residence of Jones in Florida was temporary or permanent. He thinks they have resided there about three years; that, in 1885, W. S. Jones returned a tract of land, which he occupied. In 1886 he returned land as agent for one W. S. Jones. Does not know whether W. S. Jones owned the land he returned in 1885. If the registration of the appellant Jones can be regarded as an evidence of his intention to abandon his home in Texas, and become a citizen of and reside permanently in Florida, it is quite clear that this did not occur until October 9, 1884, more than nine months after the acquisition of title by the appellees under the power of attorney. There is no proof of the acquisition of another homestead. In view of the uncontradicted testimony of appellants explaining the cause of their visit to and sojourn in Florida, and their expressed intention to return, repeated subsequent to their arrival in that state, can it be said that the testimony of the clerk and assessor of Escambia county, Fla., to the effect that one W. S. Jones resided there, (but whether permanently or temporarily they could not say,) is sufficient evidence of the fact of the abandonment of the homestead by appellants? There being in this case no proof of abandonment of the homestead by the appellants on or before the 1st of January, 1884, the date of the execution of the deed under the power of attorney, and that deed, constituting appellees' title,

being under a power of attorney void as to the wife, the judgment should not have been for the appellees. We think the judgment should be reversed, and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

#### LONG v. CUDE.

(Supreme Court of Texas. Nov. 5, 1889.)

##### REMOVAL OF FENCE.

1. In an action for damages for removal of a fence, originally brought in justice's court, upon an account consisting of the following items, viz., "To actual damages for removing a certain fence from around a certain growing crop, etc., and to exemplary damages for the wrongful and malicious removal of the aforesaid fence," the account thus filed is sufficient to support a judgment for the value of the fence that was removed.

2. In an action for damages for the removal of a certain fence, where it appears that the defendant had originally erected the fence on the plaintiff's land under the mistaken belief that he was building it on his own land, the plaintiff, in order to maintain his action, must show that he did not consent to the fence being placed on his land, or that he, as well as the defendant, was mistaken as to the location thereof.

Commissioners' decision. Appeal from district court, Frio county.

Action by N. W. Cude against J. E. Long for damages for the removal of a fence. There was judgment for plaintiff, and defendant appealed.

R. W. Hudson, for appellant.

COLLARD, J. Suit originally brought in the justice's court, and appealed to the district court, upon the following filed account: "J. E. Long to N. W. Cude, Dr. Feb'y, A. D. 1884: To actual damages for removing a certain fence from around a certain growing crop in Frio county, Texas.....\$100 To exemplary damages for the wrongful and malicious removal of the aforesaid fence... 100

To total amount of damages, &c.....\$200"

The account was sworn to. The cause was submitted to the district judge upon the facts and the law; and he rendered judgment for plaintiff, the appellee, and the sureties on his appeal-bond, for \$60 actual damages, from which judgment Long appealed. Upon request of defendant the trial judge filed conclusions of fact and law, as follows: *First.* That plaintiff and defendant were proprietors of adjoining farms, with a common division fence between them, which was on plaintiff's land, the fence about one-half mile long. Defendant, without plaintiff's consent, about the last of January or first of February, 1884, removed 600 yards of the fence, and appropriated it to his own use and benefit, which required plaintiff to build another fence, but of different value and kind, at cost, approximately, of about \$160. Defendant moved the 600 yards of fence by setting it back on his own land. "I find that the value of the 600 yards of fence so removed and appropriated by defendant was at the time worth

sixty dollars. I find plaintiff's corn had been planted in the field, but was not up at the time. No special damage or injury to crop or in loss of time to plaintiff was proven, nor was malice sufficiently proven. I award exemplary damages, defendant having removed the fence under the mistaken belief that he was entitled to do so, as he had built the fence several years previous, thinking it to be on his own land." As conclusions of law, "I find that the plaintiff is entitled to recover, as actual damages, the value of the fence removed, etc., \$60; and this would be the case whether the fence was entirely on his land, as was the case, or partly on it and the defendant's, it being a division fence between the parties." "There is no appreciable variance between the proof and the complaint." There is no statement of facts in the record, nor is there any brief for appellee. Appellant, by motion in arrest and for new trial in the lower court, and by assignment of errors in this court, contends that the judgment of the court below is erroneous, because the account sued on, being the only pleading in the case, did not claim the fence or its value, but only damages for removing the same from around a growing crop, and because the fence was built by Long, by mistake, upon plaintiff's land, and he had the right to move it upon his own land upon discovery of his mistake.

The proposition of the appellant, defendant below, that the pleadings of the appellee did not justify the court's finding for plaintiff the value of the fence removed by defendant, is not tenable. It would be too exacting, as a rule of pleading in a justice's court. The court found as a fact that the defendant put the fence on plaintiff's land by mistake, in the belief that it was his own land. The court does not say that this was done with plaintiff's knowledge or acquiescence, but that it was a partition fence between the two parties; and from this fact it might be inferred that it was with plaintiff's knowledge, at least. The court found that there was no damage to plaintiff's crop as a consequence of moving the fence, which was done about February 1, 1884, under the impression that it was his own. Under these circumstances, if it is true that plaintiff allowed defendant to build the fence on his land under the mistake, as found by the court, on the part of defendant, knowing of it, or if both the parties were so mistaken, and believed, at the time the fence was built, that it was on defendant's land, the plaintiff would not be equitably entitled to the value of the fence. 8 Pom. Eq. Jur., note to § 1241; *Matson v. Calhoun*, 41 Mo. 368. Our statute, in allowing compensation for valuable improvements by the defendant in actions of trespass to try title, is based upon an equitable right, an equity jurisprudence, the question always being one of good faith. *Saunders v. Wilson*, 19 Tex. 194; *Thouvenin v. Lea*, 26 Tex. 612; *Harrell v. Houston*, 66 Tex. 280. Such equitable right will be pro-

tected, whether it arise in a suit of trespass to try title, an independent action for the purpose, or in defense of a suit for removing the improvements. We are not satisfied that it was the intention of the court to include in its findings that plaintiff knew, consented to, acquiesced in, the placing of the fence on his land, or that he was also mistaken, as well as the defendant, about its being on his land. If the fact distinctly appeared, our conclusion would be that the judgment should be reversed, and here rendered for the appellant; but, under the circumstances of uncertainty on this point, we think the judgment should be reversed, and the cause remanded for a new trial.

STAFFORD, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment is reversed, and the cause remanded.

#### MISSOURI PAC. RY. CO. v. HENRY.

(Supreme Court of Texas. Nov. 26, 1889.)

##### DEATH BY WRONGFUL ACT—PARTIES—DAMAGES.

1. A married woman, in an action for damages for negligence in causing the death of her son, who had for many years supported her, alleged that her husband had abandoned her, and for many years contributed nothing to her support; that her son had supported her, but had never given anything towards the support of his father; and asked to be permitted to prosecute the action in her own name, and for her own benefit; but, if it should be held that her husband was entitled to any benefit, that she might be permitted to prosecute the action in her own name for the benefit of both. Held that, under Rev. St. Tex. arts. 2908, 2904, giving a right of action, for death caused by negligence, for the benefit of the surviving wife, child, or parents, and authorizing suit by all, or by any one for the benefit of all, plaintiff was entitled to maintain the action without joining her husband.

2. The court instructed the jury that, if it was shown that the husband would have received any pecuniary benefit from the son during his life-time, they should return a verdict for the amount the father and mother would both have received, and apportion it between them, and if the father would not have received any pecuniary benefit from the son, if he had lived, not to find any amount for him. The jury rendered a verdict for the mother alone. Held, that the instruction was proper, and that the verdict should be sustained.

3. Defendant asked the court to specially charge "that plaintiff must show, in order to recover on account of a defective engine, causing the death of deceased, that the engine was defective, and defendant knew it, and deceased did not know it, and he had not equal means of knowing it with defendant." The court refused this instruction, but instructed the jury: "If you so find the facts, and find that such injuries and death were the result of defect or defects in engine No. 47, as alleged; that the company operating the road knew of such defects, or might have known of them by the use of such care as a person of ordinary prudence would have used under similar circumstances; and if you find that deceased did not know of such defects, and could not have known of them by the use of that degree of care that a person of ordinary care and prudence would have used in this situation,—plaintiff will be entitled to recover." Held not error.

4. Where a mother who is 60 years old, and in good health, had for many years been supported by her son, who was killed by the negligence of a railroad company at the age of 23½ years, and who at the time of his death was earning from \$60 to \$85

per month, one-half of which he had been in the habit of giving to his mother, a verdict against the company for \$3,550 damages for negligently causing his death is not excessive.

Commissioners' decision. Appeal from district court, Robertson county; GEORGE H. NOONAN, Judge.

*F. H. Prendergast* and *T. J. Simmons*, for appellant. *Scott Field* and *O. D. Cannon*, for appellee.

ACKER, P. J. Isabella Henry sued the Missouri Pacific Railway Company to recover damages for the death of her son, John Henry, who was killed on the 6th day of June, 1886, while employed by defendant as a switchman in its yard at Tayler, Tex. It was alleged that the death was occasioned by the unskillfulness of the engineer in charge of the switch-engine, and by the defective condition of the engine, and that the defendant was guilty of negligence in the employment of the engineer, and in furnishing machinery for the use of deceased. It was also alleged by plaintiff that the deceased left no wife nor children, but left plaintiff, his mother, and his father, James Henry, surviving him; that James Henry, the father of deceased, and husband of plaintiff, permanently abandoned her more than six years before the filing of this suit, moved to a distant state, and she had not heard from him, or held any communication with him, for several years; that he had contributed nothing to her support, or the support of the family; that the deceased had contributed to her support since he was 11 years of age; that he was over 22 years of age when killed, and had never contributed anything to the support of his father; that no pecuniary injury resulted to her husband by the death of the son; and that he is not entitled to any benefit of this action; "wherefore she asks to be permitted to prosecute this suit in her own name, and for her own benefit; but, if it should be held that her said husband is entitled to any of the benefit of this action, then she prays that she may be permitted to prosecute this suit in her own name for the benefit of herself and her husband." Defendant answered by general denial; special exception, "because James Henry, the husband of plaintiff, is a necessary party plaintiff to this suit, and he is not made party plaintiff;" and specially pleaded exercise of due care in employing the engineer and furnishing machinery, and that deceased was fellow-servant with the engineer, and was himself guilty of contributory negligence. The demurrer for non-joinder of the husband was overruled, and the trial by jury resulted in verdict and judgment for appellee for \$3,550, and that the husband, James Henry, recover nothing.

Under the first and second assignments of error, it is contended that the court erred in overruling the special demurrer to the petition, and in permitting appellee to sue alone, without making her husband a party either plaintiff or defendant. It was the evident

intention of the legislature, in enacting the statute under which this suit was brought, that there should be but one suit for the benefit of all parties to whom the right of action is given, (article 2904); and it has been decided that, where the objection for non-joinder is made at proper time, the suit should be abated until proper parties are joined in the action, either as actual parties, or included by proper allegations in the benefit of the action, (*Railway Co. v. Moore*, 49 Tex. 81; *Railway Co. v. LeGierse*, 51 Tex. 189.) The right of action is given by the statute (article 2908) "for the sole and exclusive benefit of the surviving husband, wife, children, and parents" of the deceased; and the statute provides that "the action may be brought by all of the parties entitled thereto, or by any one or more of them for the benefit of all," (article 2904.) Now, it seems to us that the language of this statute expressly authorizes the mother to bring this action in her own name, without regard to whether she be a married woman or not, and that, too, without accounting for the non-joinder of the husband, provided she bring the action for the benefit of all parties entitled to it, and in good faith prosecutes it for the benefit of all. The petition alleged that the deceased had never contributed anything to the support of his father, and that the father had not sustained any pecuniary loss by the death of the son. Following these averments, plaintiff stated in her petition: "But if it should be held that her said husband is entitled to any of the benefit of this action, then she prays that she may be permitted to prosecute this suit in her own name, for the benefit of herself and her husband." The court instructed the jury to the effect that, if it was shown that the father of deceased and husband of plaintiff would have received any pecuniary benefit from the son during his life-time, then to return a verdict for the amount the father and mother would both have received from the deceased son if he had lived, and apportion the amount between them according to the amount each would have received; and if the father would not have received any pecuniary benefit from the son if he had lived, then they would not find any amount for him. Plaintiff had the right to bring the suit for the benefit of herself and her husband, and the court correctly instructed the jury in the law applicable to his rights. The right to recover in actions of this character depends upon pecuniary injury sustained by the parties to whom the right of action is given. Nothing is allowed as a *solatium*. The recovery rests solely upon the doctrine of compensation. While the relationships named in the statute give the right of action, they do not of themselves give the right of recovery. It must be shown that the parties to whom the right of action is given have sustained some pecuniary injury by the death, and whether they have or not is a question of fact for the jury. *Rev. St. 2909; March v. Walker*, 48 Tex. 375; *Railroad Co. v.*

Cowser, 57 Tex. 808; 2 Thomp. Neg. 1289, 1290; Pierce, R. R. 398. We think the verdict and judgment, on the pleadings, evidence, and charge of the court afford ample protection to appellant against a suit by the father, even if limitation has not supervened. We think the court did not err in overruling the special demurrer.

The third assignment of error is: "The court erred in refusing special charge No. 1, asked by defendant, to the effect that plaintiff must show, in order to recover on account of defective engine, that the engine was defective, and defendant knew it, and deceased did not know it, and he had not equal means of knowing it with defendant." The court gave the following instruction: "\* \* \* If you so find the facts, and find that such injuries and death were the result of defect or defects in engine No. 47, as alleged; that the company operating the road knew of such defects, or might have known of them by the use of such care as a person of ordinary prudence would have used under similar circumstances; and if you find that John Henry did not know of such defects, and could not have known of them by the use of that degree of care that a person of ordinary care and prudence would have used in this situation,—plaintiff will be entitled to recover." We think the charge given sufficiently instructed the jury on the points covered by the special instructions asked, and that the court did not err in refusing to give it.

Under the fourth assignment of error it is contended that the verdict is excessive. The verdict was for \$3,550. The plaintiff was 60 years old, in good health, and strong and vigorous. Deceased was 22 years and six months old; had contributed to his mother's support since he was 11 years old, to the time of his death. He gave her all he could spare of his salary. His salary was \$60 or \$65 per month, and it did not take half of it for his expenses, and the balance he gave to his mother. We find in the record nothing tending to show that the jury, in finding the amount of damages, were influenced by passion or prejudice, or that they were actuated by any motive other than to award to plaintiff reasonable compensation for the pecuniary loss she had sustained. Under the previous decisions of this court, we cannot say that the verdict was excessive. Railroad Co. v. Smith, 65 Tex. 173.

The remaining assignments of error question the sufficiency of the evidence to sustain the verdict, and are as follows: "The verdict is contrary to the evidence, in this: The evidence showed that the deceased, John Henry, and the engineer, James Henry, were fellow-servants, and, if the said James Henry was an incompetent engineer, the deceased knew it, and the defendants did not know of his incompetency. The court should have granted a new trial because the evidence showed that if the engine was defective the deceased, John Henry, knew it, or ought to have known it, and had equal means of knowing it with

defendant, and the defendant did not know it. The evidence did not show any defect in the engine that caused the death of John Henry, and the charge of the court on that subject misled the jury." In regard to the matters embraced in these assignments, we deem it sufficient to say that they are questions of fact upon which it was the peculiar province of the jury to pass, and, as there was evidence to support conclusions adverse to appellant upon all of the questions raised, we cannot disturb the verdict. Upon a careful consideration of the whole case, we are of opinion that the judgment of the court below should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

### GOULDY v. METCALF et al.

(Supreme Court of Texas. Dec. 17, 1889.)

#### ASSIGNMENT FOR BENEFIT OF CREDITORS—POWER OF ATTORNEY.

1. In Texas an assignment for benefit of creditors may be made by an agent or attorney in fact authorized thereto.

2. A power of attorney authorizing the attorneys "to buy, sell, or exchange property, to receive and receipt for money, to sell and dispose of property, to give bills of sale thereto, or to sell and transfer real estate, and execute deeds thereto, or to do and perform any lawful act in or about or concerning my [the principal's] business, as fully and completely as if I were personally present," does not authorize the attorneys to execute an assignment of the principal's property for the benefit of his creditors.

Commissioners' decision. Appeal from district court, Bosque county; J. M. HALL, Judge.

J. Jenkins, for appellant. W. M. Knight and Cram & Ramsey, for appellees.

ACKER, P. J. W. H. Turner, by properly executed power of attorney, granted to H. E. Turner and A. P. Bell authority and powers as follows: "In and about my business, to buy, sell, or exchange property, to receive and receipt for money, to sell and dispose of property, to give bills of sale thereto, or to sell and transfer real estate and execute deeds thereto, or to do and perform any lawful act in or about or concerning my business, as fully and completely as if I were personally present, and I herein and hereby confirm all their lawful acts and deeds that they perform in any manner connected with my business." Under this instrument the attorneys in fact executed a statutory deed of assignment of Turner's property for the benefit of his creditors. Appellant, Gouldy, was named as assignee, and he took possession of the assigned estate as such. Appellees Reeder and Pool were creditors of Turner, and sued out an attachment against him, under which appellee Metcalf, as sheriff, took from the possession of Gouldy the stock of merchandise, books, and accounts, etc., which he had received as assignee of Turner. Gouldy brought this



suit as assignee against the sheriff and plaintiffs, in attachment to recover damages for the wrongful seizure and conversion of the property. On the trial, plaintiff, having introduced in evidence the power of attorney, offered the deed of assignment, which was objected to by defendants upon the ground that "the power of attorney did not authorize the attorneys in fact to make the deed." The objection was sustained, and there was no other evidence offered. The court, trying the case without a jury, rendered judgment for defendants. The only question presented is, did the trial court err in holding that the power of attorney did not authorize the attorneys in fact to execute the deed of assignment? That a deed of assignment for the benefit of creditors may be executed by an agent or attorney in fact, especially authorized thereto, we think has been settled by the decision in *McKee v. Coffin*, 66 Tex. 307, 308, 1 S. W. Rep. 276, where it is said: "It is now urged that the court below erred in admitting in evidence the deed of assignment, because there is no sufficient evidence that it was ever executed by S. W. Kniffin. The evidence shows that he was not present when the deed was executed, but that prior to its execution he had directed this to be done by those who did execute it, upon the happening of a then contemplated contingency." And again: "What a person under no disability may do in person he may ordinarily do through an agent, but it is claimed that this is not true under the act \* \* \* regulating assignments; that the deed of assignment must be the personal act of the owner of the property assigned; and, as an evidence of this, it is urged that the assignor must make oath to the schedule." "It is true that the second section of the act does require that the inventory and schedule shall be verified by the oath of the debtor, but this is not essential to the validity of the assignment; for the tenth section declares that 'no assignment shall be declared fraudulent or void for want of any inventory or list, as provided herein; but if such list and inventory be not annexed and verified, as provided in this act, it shall be *prima facie* evidence that the assignor has secreted and concealed some portion of the property belonging to his estate from his assignee, unless,' etc. It is said 'that the processes provided against the assignor, and the penalties denounced against him, are all personal, and cannot be transferred to and performed by, or enforced against, an agent.' If an agent makes a false oath in the course of the business of his principal, he may be indicted and convicted for false swearing or perjury, as the case may be, as though the false oath were taken in his own business." We think it clear, from the foregoing quotation, that an assignment for the benefit of creditors may be made by an agent or attorney in fact authorized thereto. The instrument under which the power was exercised in this case does not, in terms, grant the authority. The language used in

the grant of general power is certainly very comprehensive, but the established rule of construction limits the authority derived by the general grant of power to the acts authorized by the language employed in granting the special powers. "When an authority is conferred upon an agent by a formal instrument, as by a power of attorney, there are two rules of construction to be carefully attended to: (1) The meaning of general words in the instrument will be restricted by the context, and construed accordingly. (2) The authority will be construed strictly, so as to exclude the exercise of any power which is not warranted either by the actual terms used, or as a necessary means of executing the authority with effect." *Ewell's Evans*, Ag. 204, 205; *Reese v. Medlock*, 27 Tex. 123, 124. Applying these rules to this case, and none of the circumstances under which the power was executed being shown, we are of opinion that the attorneys in fact did not have the power to make the assignment, and that the court did not err in so holding. We are therefore of opinion that the judgment of the court below should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

#### GUEST v. GUEST.

(Supreme Court of Texas. Nov. 1, 1880.)

#### TRUSTS—ESTOPPEL—TRESPASS TO TRY TITLE—PLEADING.

1. In trespass to try title, where plaintiff claims under an executor's deed executed by defendant's father, declarations by plaintiff to defendant that he bid the land in at the executor's sale for defendant's father are admissible in evidence against him.

2. Plaintiff never paid any taxes on the land, and made no claim to it for over 10 years. *Held* that, under these circumstances, and in view of his declarations that he bid in the land for his grantor, the failure of plaintiff to testify that he paid for the land justified a finding that no consideration passed, although the deed expressed a consideration, and reserved a vendor's lien for its payment.

3. Plaintiff advised defendant to take possession of the land and fence it, and defendant did so, and made improvements. *Held*, that plaintiff was estopped from claiming the land, as against defendant.

4. An estoppel may be established under a plea of not guilty.

Appeal from district court, Red River county; E. D. McCLELLAN, Judge.

*Chambers & Doach*, for appellant. *Stims & Wright*, for appellee.

GAINES, J. This was an action of trespass to try title brought by appellant against appellee. The defendant pleaded not guilty. The case was tried by the court without a jury, and the judge filed his conclusions of fact as follows: "(1) The court finds from the evidence that the land in controversy is a part of a tract of 324 acres, described in the deed from Martin Guest, executor of the estate of Isaac Guest, deceased, which deed is in evidence in this cause. (2) That the

plaintiff bid in the land at the executor's sale for the executor, and had the deed made to himself; and that he paid no consideration therefor. (3) That the plaintiff did not claim the land in controversy until about two years ago, and never did pay taxes on it. (4) That defendant, J. M. Guest, is the son and heir of Martin Guest, who is now deceased; and that plaintiff, prior to claiming the land, by representing to defendant that it belonged to his (defendant's) father's estate, induced the defendant to have the same improved, and by his own admissions and declarations showed that he had no title to the land. (5) That defendant's father, Martin Guest, was one of the heirs of Isaac Guest, deceased; and that defendant's mother, the widow of Martin Guest, has paid taxes on the land for twelve or fifteen years." The court concluded, as a matter of law, that no title passed by the deed from Martin Guest, executor, to plaintiff; and that the plaintiff was estopped by his conduct from claiming the land against the defendant.

During the progress of the trial, defendant was permitted to testify that the plaintiff told him that he bid the land in at the executor's sale for defendant's father, Martin Guest. The evidence was objected to, and an exception reserved. The ruling is here assigned as error. We are of opinion that there was no error in the admission of the evidence. It is not competent to vary the terms of a written contract by parol evidence; but it is competent by such evidence to show that the party who has the legal title holds in trust for another.

It is also assigned as error that the court erred in finding as a matter of fact that no consideration was paid by plaintiff for the land. The deed expressed a consideration, and a vendor's lien was reserved for its payment. The plaintiff never paid any taxes on the land. He received his deed in 1870, and yet testified that he had never claimed the land until two years before the trial. Defendant testified that plaintiff told him he bid in the land for the executor. Under these circumstances, plaintiff's failure to testify while on the stand that he paid for the land ought to be deemed conclusive.

It is also assigned that the court erred in permitting the defendant to introduce evidence of an estoppel, in the absence of a special plea. But any mere matter of defense may be passed under the plea of not guilty, except the statute of limitations, (Rev. St. art. 4793;) and it has been expressly held that an estoppel may be established under such plea, (Mayer v. Ramsey, 46 Tex. 371; Johnson v. Byler, 38 Tex. 610; Wright v. Doherty, 50 Tex. 34; McDow v. Rabb, 56 Tex. 154.)

It is further assigned that the court erred in concluding, as a matter of law, that plaintiff was estopped. It appears from the evidence that, before the declarations relied upon by defendant, his father had conveyed the land to him. This was after the deed by the father, as executor, to plaintiff. It follows

that the declarations of plaintiff did not affect that sale. But the defendant testified that, after the plaintiff had told him he had bought the land for his (defendant's) father, and had advised him to take possession of the land, and fence it, he had taken possession of the land by a tenant, and had caused the same to be improved. It is not a mere case in which the owner sees another improve his land in ignorance of the true state of the title, and remains silent; but here plaintiff directly induces the defendant to take possession, and to improve the land, not only by representing facts tending to show that defendant's grantor had the equitable title at the time of the conveyance to defendant, but by directly advising him to that course of conduct. Under such circumstances, it would be a fraud to permit plaintiff to recover the land. We take it, the equities of a donee, in a parol gift, who has taken possession and made improvements, are no better than those of defendant in this case; and they have been held sufficient to defeat the claims of the donor. *Willis v. Matthews*, 46 Tex. 479, and cases there cited. It is expressly held in other courts that the owner of land who induces another to improve it as his own will be estopped to claim it. *Miller v. Miller*, 60 Pa. St. 16; *McKelvey v. Truby*, 4 Watts & S. 323; *Godeffroy v. Caldwell*, 2 Cal. 489.

In this view of the case, it seems to us unnecessary to inquire whether or not the deed from Martin Guest, executor, to plaintiff, passed the title to the land or not. The question is unimportant, so far as the parties to this suit are concerned. There is no error in the judgment, and it is affirmed.

#### JONES *et al.* v. HUNT.

(Supreme Court of Texas. Nov. 1, 1889.)

#### TROVER AND CONVERSION—SET-OFF—UNLIQUIDATED AMOUNTS.

1. Plaintiffs' agent, intending to be absent on the arrival of a package of money belonging to plaintiffs, requested defendant to receive it from the express company, for the purpose of safely keeping it until his return, and defendant consented, and the money was delivered to him, on the written order of the agent. *Held*, that defendant's refusal to deliver it upon demand was a conversion of the money.

2. The amount which plaintiffs are entitled to recover for the conversion is not "unliquidated or uncertain," within Rev. St. Tex. art. 649, which provides that, "if the plaintiff's cause of action be a claim for unliquidated or uncertain damages, founded on a tort or breach of covenant, the defendant shall not be permitted to set off any debt due him by plaintiff."

Appeal from district court, Cass county; JOHN L. SHEPPARD, Judge.

O'Neal & Eberhardt, for appellants.  
O'Neal & Sons, for appellee.

HENRY, J. This suit was brought by appellants to recover from appellee damages for wrongful conversion by defendant of a sum of money belonging to plaintiffs. It appears that a package of money containing \$1,761.29, belonging to plaintiffs, was received by an

express company, to be transported and delivered to an agent of plaintiffs' at Queen City. The agent, intending to be away on the day that the money was expected to arrive at its destination, and having been informed by the agent of the express company that, having no facilities for keeping it safely, it could not hold the money until his return, he requested defendant to receive the money from the express company for the purpose of safely keeping it for plaintiffs until the return of the agent. Defendant consented, and, on the arrival of the money, received it from the express company, on a written order given him by plaintiffs' agent. The absence of the agent was only temporary, as it was expected to be, and on his return he demanded of the defendant the delivery of the package of money, which was refused by defendant, except on condition of the payment by plaintiffs of certain moneyed demands claimed by defendant to be due him by them. The cause was tried with a jury, resulting in a verdict and judgment for plaintiffs for \$381.30, to reverse which they prosecute this appeal. The defendant pleaded in reconvention that plaintiffs were indebted to him for goods, wares, and merchandise sold to Rice & Bros. at the instance and request of plaintiffs, a bill of particulars of which was made part of his answers; that he had paid an indebtedness of Rice & Bros. to another party, amounting to \$100, at the request of plaintiffs; that he was the owner, by transfer, of one promissory note executed by plaintiffs to Rice & Bros., and of an interest in another; and that he was the owner of a draft drawn by himself, payable to his own order, addressed to plaintiffs, and accepted by them; all of which were made exhibits to the answer. Plaintiffs replied to these allegations that, if they ever made the promises charged, or executed said acceptance or promissory notes, they did so conditioned upon defendant's promise and undertaking to procure from said Rice & Bros. a deed of trust upon their property, to secure the payment of the aforesaid debts, which he failed to perform.

The assignments of error, in various forms, present for our decision but two questions: *First*, that plaintiffs' cause of action, being founded in a tort and breach of covenant for uncertain damages, cannot be offset with the debts set up by defendant; *second*, that the verdict of the jury was contrary to the law and evidence, for that, if plaintiffs ever became responsible to defendant for any sum of money by reason of advances made at their request, it was upon the express stipulation that Rice & Bros. would secure the debts by a deed of trust on their property, which they never did.

As to the existence of any such condition as is mentioned in the second objection, the evidence is conflicting; but we think it fully sustains the finding of the jury. There was an implied contract upon the part of defendant to deliver to plaintiffs, upon their demand, the money received from the express

company. His refusal to deliver it on demand was a breach of the contract, and conversion of the money, giving to plaintiffs the right to recover by suit a judgment for the money, with legal interest from the date of its conversion.

The other question presented for our consideration depends upon the proper construction of the first clause of article 649 of our Revised Statutes, reading: "If the plaintiff's cause of action be a claim for unliquidated or uncertain damages, founded on a tort or breach of covenant, the defendant shall not be permitted to set off any debt due him by the plaintiff." *Rapalje & Lawrence's Law Dictionary* defines a tort to be "the infringement of a right created otherwise than by a contract." *Abbott's Law Dictionary* gives the word "liquidated" the meaning: "Adjusted, certain, or settled, in respect to amount." In the case of *Hargroves v. Cooke*, 15 Ga. 332, it is declared: A debt is said to be liquidated "whenever the amount due is agreed upon by the parties, or fixed by the operation of law." *Wat. Set-Off*, 337. In the case before us, we do not think the amount that plaintiffs were entitled to recover, on the establishment of their cause of action, was either uncertain or unliquidated. The amount was fixed by the law. It could be precisely ascertained by a mathematical calculation, and did not depend upon the evidence of witnesses. *Duncan v. Magette*, 25 Tex. 245; *Riddle v. McKinney*, 67 Tex. 29, 2 S. W. Rep. 748; *Howard v. Randolph*, 11 S. W. Rep. 495. The judgment is affirmed.

#### MISSOURI PAC. RY. CO. v. CALLAHAN.

(*Supreme Court of Texas*. Nov. 5, 1889.)

#### CARRIERS—INJURY TO PASSENGER—PLEADING—EVIDENCE—DAMAGES.

1. Where the petition, in an action against a railroad company for injuries sustained by plaintiff while traveling on its train, in charge of cattle, alleges that, when the train stopped to take water, plaintiff, as was customary, left the caboose to look after his cattle; that the train started without giving him time to re-enter the caboose, and he was compelled to climb up on the train, rather than be left behind; that on the invitation of the conductor he started towards the caboose; and that, as he was in the act of entering it from the top of the car, he was struck by a water-pipe attached to a tank, and injured,—exceptions to so much of it as alleges why plaintiff went on the top of the train rather than the caboose, and that he entered the caboose from the top of the car at the request of the conductor, are properly overruled.

2. Evidence that, after plaintiff reached the car top, and was sitting down, the conductor sent for him to sign a statement that the cattle were in good order at the end of defendant's line, which they were then nearing, is admissible, as having some bearing on the question of contributory negligence.

3. So, also, is evidence that no notice of the movement of the train was given plaintiff, to enable him to reach the caboose before the train started.

4. Nor is it error to permit plaintiff to state the position of the water-pipe when it struck him, and that it would not have struck him had it been placed in its usual position when not used to conduct water.

5. The evidence showed that plaintiff was at-

tempting to enter the caboose at the place fixed for employees, and there was nothing to show that it was obviously dangerous so to enter, or that plaintiff was negligent in the manner of his attempt to enter. *Held*, that a verdict in his favor would not be disturbed.

6. The opinion of a physician as to the nature and extent of personal injuries is admissible, although formed from an examination made two years previous to the trial.

Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

*Finch & Thompson*, for appellant. *Wynne & Stedman*, for appellee.

STAYTON, C. J. Appellee brought this action to recover damages for an injury alleged to have been received by him through negligence of the employees of appellant while traveling on its train, attending to cattle he had shipped. The contract provided that he should take care of his own cattle while in transit; and his proper place while the train was in motion was shown to be in the caboose, which was the rear car in a long train. The injury occurred while he was on the top of the cars; and, no doubt for the purpose of relieving himself from the charge of contributory negligence, he alleged: "That on the 28th day of June, 1886, during the transportation of said cattle from Hodge station to Chicago, and when the train on which said plaintiff and said cattle were being conveyed had reached Missouri river, on defendant's line of railway, said train stopped at said Missouri river for the purpose of taking water. That, when said train stopped for said purpose, plaintiff, as is customary when cattle trains so stop, got out of the caboose of said train, for the purpose of punching up said cattle with a prod; and that, soon after he had gotten out of said caboose for said purpose, said train suddenly started, without giving him sufficient notice to enable him to re-enter the caboose, and he was compelled to climb up on the train, rather than be left behind. That, after having climbed up on said car, plaintiff sat down on the top of said car; and that, after having sat there for a few minutes, upon invitation of the conductor in charge of said train, he started towards the caboose. That he reached the cupola of the caboose in safety, and proceeded to enter the door of the cupola, with the view of descending the steps leading into the caboose. In order to safely enter said cupola, and get on the steps leading into the caboose below, plaintiff, with both hands, seized an iron rod provided for the purpose, above the door, to turn around; that being the customary and proper manner of getting into the cupola, and descending into the caboose from the outside. That, as plaintiff was in the act of entering the cupola and descending into the caboose, having turned around, as aforesaid, he was stricken in the breast with a large water-pipe, then and there attached to a water-tank, known as 'Burton Water-Tank,' on defendant's railway." He then alleged the nature and extent of his injury.

Exceptions were filed to so much of the pe-

tition as alleged why he went on top of a car rather than the caboose, and that he went to and was entering the caboose from the top of the car at the request of the conductor. The court overruled the exceptions, and in this there was no error.

A physician who attended him while under treatment for the injuries, about two years having elapsed, testified to the nature and extent of his injuries, and gave it as his opinion that they were permanent. This evidence was objected to on the ground that too great a length of time had elapsed between the time of the injury and the time the testimony was given for the physician to have sufficient knowledge to give an opinion. It was not necessary, to entitle the opinion of the physician to admission, that he should have examined appellee recently; and he could as well form such an opinion from what he saw soon after the injury was inflicted as from recent observation. An opinion formed from a recent examination might be of more value than one formed from an examination two years before he testified by deposition, but this would not affect the admissibility of the evidence.

There was evidence admitted to show that after appellee reached the car top, and was sitting down, the conductor, while the train was in motion, sent a request to him to come to the caboose in order to sign a statement that the cattle were in good order at the end of appellant's line, which they were then nearing, as evidence that appellant had complied with the shipping contract,—the cattle soon to pass into the hands of another carrier. This evidence was objected to, but we do not see that it was error to receive it. It had some bearing on the question of contributory negligence, but would not relieve appellant if the act which he did at request of conductor was one obviously dangerous, if done in the exercise of proper care. It is claimed that the court should not have admitted evidence to show that no notice of the movement of the train was given to enable appellee to reach the caboose before the train started. It appears to have been usual and proper for appellee to alight from the train when it stopped, to look after his cattle; that he did so; that his cattle were in cars near the center of the train, which at first moved slowly, but would probably so accelerate its speed before the caboose reached him as to make it unsafe to attempt to board it, while he might safely board the car which he did; that he was under obligation to be with, and attend to, his cattle. Under this state of facts, we are not prepared to say, as matter of law, that notice was not required to be given before the train moved. If, by the failure of appellant to exercise proper care, appellee was put to his election to go on top of a car or to be separated from his cattle, we are not prepared to say that it was not proper to show the facts which forced such election upon him, with a view to relieve him from the charge of contributory negli-

gence in reference to a matter having a remote bearing on the accident. It certainly was proper for appellee to state the position of the water-pipe when it struck him; and it was not error to permit him to state that it could not have struck him, had it been placed in its usual position when not used to conduct water from the water-tank to a tender.

The court correctly instructed the jury as to the degree of care necessary to be used by appellant to relieve it from liability for an injury to appellee while a passenger, and also as to the effect which the failure of appellee to use due care would have upon his right to recover, and did not err in refusing to give the several charges asked by appellant, and referred to in assignments of error. All but one of these charges were either erroneous or misleading; and the one presented nothing not substantially given in the main charge, in language clear and appropriate. The charges of the court, given at request of appellee, did not assume that the failure of the conductor to give some signal before starting the train was negligence, but left the jury free to determine whether, under all the facts in evidence, the injury resulted through the want of due care on the part of the servants of appellant. Nor did the charges tend to induce the jury to believe that the failure to give such notice was the proximate cause of the injury. In the main charge the court had instructed the jury that appellant would be liable only in the event of such negligence on its part as was the proximate cause of the injury; and, further, that, even if such negligence existed, that would not entitle appellee to recover, if he was guilty of contributory negligence. The charge also informed the jury what was meant by "proximate cause," and defined the term "contributory negligence." The starting of the train without notice had but a remote bearing on any question involved in the case, but it was a fact which might be looked to in determining whether appellee was guilty of contributory negligence in being on the car top, and especially so when it was contended that appellant owed him no duty when outside of the caboose. The court, with propriety, might have refused to give the charges complained of, after giving the main charge; but the giving of them furnishes no ground for reversal, as they were neither erroneous nor misleading. It is contended that the verdict of the jury is contrary to the evidence, in that the evidence clearly showed that appellee failed to use due care in attempting to enter the caboose from its top. The evidence shows that appellee was attempting to enter the caboose at the place fixed for employees to enter from the top; and there is no evidence tending to show that it was obviously dangerous so to enter, nor that appellee was negligent in the manner of his attempt to enter. The injury did not occur by reason of any danger necessarily attending an attempt to enter the car from above; nor, so far as the

evidence shows, from the negligent manner in which the entry was attempted, but from the water-pipe, which overhung the top of the cars; which it would not have done had it been in its proper position. Whether appellee ought to have seen it, and protected himself from injury from it, was a question for the jury.

The verdict seems large; but, looking to the nature of the injuries shown to have been received by appellee, we cannot say that the damages are excessive. There is no error in the judgment, and it will be affirmed.

### MISSOURI PAC. R. CO. v. WILLIAMS.

(Supreme Court of Texas. Nov. 5, 1889.)

#### FELLOW-SERVANTS — NEGLIGENCE OF VICE-PRINCIPAL — MODIFICATION OF INSTRUCTIONS.

1. A foreman in the repair department of the shops of a railroad company, with power to employ and discharge hands, is not the fellow-servant of those under his control, but the representative of the company.

2. In an action against a railroad company for personal injuries sustained by plaintiff while repairing a car, where plaintiff testified that, before he went under the car, H., his foreman, promised to watch and see that he was not injured, defendant requested an instruction that if the jury found that H. "abandoned the watch with plaintiff's knowledge," and then plaintiff continued the work relying on the promises of two of his fellow-servants to keep a lookout, and was hurt by their failure to do so, then they must find for defendant. The court refused to give the charge as requested, but of his own motion added, by interlineation, after the word "knowledge," the following: "And that plaintiff knew, or ought to have known, that H. would not, by himself or others, protect him." *Held*, that the court did not err in its ruling; for, even if H. had abandoned the watch with plaintiff's knowledge, of which there was no evidence, the jury might reasonably have concluded that plaintiff still relied upon him to take other steps for his protection.

3. A charge that, if the jury found that plaintiff relied on the assurances of protection made by a yard-master and a switchman, and that the former was not in a common employment with plaintiff, but promised to look out for plaintiff, at his request, then they must find for defendant, was rightly refused; for, if the foreman promised to protect plaintiff, and plaintiff relied on his promise, and the foreman failed to keep it, it was no excuse for his failure that plaintiff asked others to watch, also.

4. Though the judge should give or refuse a charge asked in the very terms of the request, and, if he wishes to give it with a qualification, he should rewrite the instruction embodying the qualification, yet, when a modification is appended to a requested charge in such a manner as to show the precise charge asked, and the precise modification, and the whole is intelligible to the jury, no injury results to the party making the request.

Appeal from district court, Anderson county; F. A. WILLIAMS, Judge.

*Whitaker & Bonner*, for appellant. *Gregg & Reeves*, for appellee.

GAINES, J. This suit was brought by appellee against appellant to recover damages for a personal injury. The uncontroverted evidence shows that plaintiff was a car-repairer in the shops of the defendant company, at its yard in Palestine. One Monroe was master car-builder, with general supervision of the repair department at that point.

One Holmes was foreman of the car-repairers under him. Plaintiff was ordered by Holmes to go under a car to repair it, which was not upon a repair track, but upon a track used in the transportation department, in connection with the main track. Plaintiff obeyed the order of Holmes, and went under the car to repair it, as it was necessary for him to do. While lying under the car, it was struck by another car, and the wheel of the car he was repairing, driven upon his heel, inflicting a serious injury. The plaintiff testified that, before he went under the car, Holmes promised him to watch, and to see that he was not injured. He also asked two other employes to watch. He relied upon the promises both of Holmes and of another employe of defendant to protect him. He also testified that he was a car-repairer in the employment of the defendant company, in connection with others who were under the direct orders and control of Holmes; and that Holmes had the power to employ and discharge the hands under his control. Other witnesses testified to the same facts, as to Holmes' power to employ and discharge hands. The defendant introduced testimony tending to show, that Holmes did not have the power, but that it was lodged with Monroe, the master car-builder.

The first error assigned by appellant is as follows: "The verdict and judgment are contrary to law, and unsupported by the evidence, in that the facts clearly show that Holmes, foreman, etc., did not sustain the relation of vice-principal to appellee, but was only a fellow-servant in respect to the alleged negligence whereby appellee received his injuries. And the facts clearly show that appellee did not rely on the promises of Holmes to protect, but on the promise of Colby, a volunteer and fellow-servant, and Morris, a switchman and fellow-servant; and that his injuries were not the proximate result of appellant's negligence, but were the result of appellee's own want of due care, or of the negligence of his fellow-servants, for which appellant is not legally liable." The evidence was sufficient to warrant the finding by the jury that Holmes had the power to employ and discharge hands, and the verdict is conclusive upon that point. The question therefore arises whether he is to be deemed the representative of the company, or a fellow-servant, as to the employes under his control. Upon this question the authorities are conflicting. The courts of many of the states hold that it is only when an employe is charged with a duty which, by its implied contract, a railroad company has undertaken towards its employe, such as furnishing a safe track and machinery, and the employment of careful and skillful servants, and the injury results to another employe from his neglect to perform that duty, that he is deemed the vice-principal of the company, and not the fellow-servant of the injured party. On the other hand, there are numerous cases which hold that the employe

who has charge of a special department of a company's business, with power to employ and discharge the servants in his department, is not to be deemed the fellow-servant of those under his control. This rule has been recognized and followed by this court. *Wall v. Railway Co.*, 4 Tex. Law Rev. 37. A servant who has the authority to employ other servants, under his immediate supervision, exercises an important function of his master, and has as full control over them as the master would have, were he present, acting in person. The subordinate, in such a case, is as much the servant of the agent who employs and controls him as he would be of the master, were the latter discharging the functions of his agent. It seems, therefore, that there is as much reason for holding that a servant assumes the risk of the master's negligence as for holding that he assumes the risk of the negligence of such a superior employe of his master. He may be presumed to exercise an influence over a co-employe who did not employ and has no power to discharge him, calculated to promote care and vigilance on part of the latter, which he cannot or dare not exercise towards one who has the right to terminate his employment. There is reason, therefore, for adhering to the previous ruling of this court, and for holding that if the plaintiff in this case was under the immediate control of Holmes, and Holmes had the power to employ and discharge the servants under him, Holmes is to be treated as the representative of the company, and not the fellow-servant of the plaintiff.

The court was asked by defendant to give the following charge: "(No. 3.) If you find that Holmes was not a fellow-servant of plaintiff, but was the representative of the company, but you further find that, although Holmes promised to watch for plaintiff, yet he abandoned the watch with plaintiff's knowledge, and then plaintiff continued the work, relying on the promises of Colby and a switchman to keep a lookout, and protect him, and Colby and the switchman were fellow-servants of the plaintiff, and plaintiff was hurt by failure of Colby and the switchman not keeping proper watch, then you will find for defendant." The court refused to give said charge as requested, but of his own motion added, by interlineation, after the word "knowledge," the following: "And that plaintiff knew, or ought to have known, that Holmes would not, by himself or others protect him," and then gave the said charge as so modified. The refusal to give the charge as requested, and the modification, are assigned as error. We think the court did not err in its ruling, for two reasons. In the first place, while there was evidence showing that Holmes had left the car under which plaintiff was working, and that plaintiff knew this, there was none to show that plaintiff knew that he had abandoned the watch. The plaintiff testified, that when Holmes left the car he went across the track to some

others, about 50 feet distant, to rub off some marks upon them. It was not shown that he could not have watched as effectually in that position as when he was standing near the car. Plaintiff testified distinctly that he relied both upon Holmes and Colby to protect him, and did not at any time say that he ceased to rely upon Holmes. In the second place, even if it had appeared that Holmes had abandoned the watch with plaintiff's knowledge, the jury might reasonably have concluded that, although plaintiff knew it, he still relied upon him, as his superior, who had promised him protection, to take other steps to secure the object, as effectual as his own personal attention to the matter.

An objection is made to the mode in which the modification of the charge was made. In *Manufacturing Co. v. Bradley*, 52 Tex. 587, it is said that the judge should give or refuse a charge asked in the very terms of the request, and that if he wishes to give it with a qualification he should rewrite the instruction embodying the qualification. We think, however, that when a modification is appended to a requested charge in such a manner as to show the precise charge asked, and the precise modification, and the whole is intelligible to the jury, that no injury results to the party making the request. The action of the court shows that the charge as requested is refused; and, if the modification be proper, there is no good ground of complaint. It would be different, however, should the trial judge insert words in a request for instructions without showing in a statement connected therewith the precise change he has made. Otherwise, a charge not requested might appear in the record as being given at the request of a party who was prejudiced by the instruction.

The third error assigned is that the court erred in charging that "if plaintiff relied and acted, not on orders and promises of Holmes, but those of other employes of defendant, then he could not recover, such other employes being fellow-servants of his; but, if plaintiff received and acted upon Holmes' orders and promises, and was hurt in consequence of Holmes' negligence, without his own negligence contributing to it, he could recover, if otherwise entitled, notwithstanding he may have asked and received promises of other employes also,"—because said charge was on the weight of evidence, and assumed that Holmes was a vice-principal, and because said charge was misleading, and not warranted by the pleadings or evidence, and in effect authorized the jury to find for appellees although he may have in fact relied on the promises of Colby or Morris to keep watch. And the court erred in refusing special charge No. 2, asked by appellant. If that portion of the charge of the court which is copied into the assignment stood alone, it would be manifestly erroneous. But we are of opinion that, taking the charge as a whole, the jury could not have been misled by the language quoted. The entire charge put the plaintiff's case

upon the hypothesis that he could not recover unless, at the time of the injury, he was under the control of Holmes, and acting under his orders, and Holmes had the power to employ and discharge the servants under him. After having so clearly and unmistakably stated this as a proposition of law, the jury could not have been misled by the failure to repeat it, in presenting every distinct phase of the case made by the testimony upon other issues.

The special charge No. 2, which is referred to in the assignment, is as follows: "If you believe from the evidence that plaintiff, when he went to work under the car, relied on the assurances of protection made by Colby, the yard-master, and a switchman, and Colby was not in a common employment with plaintiff, but promised to look out for plaintiff, at his request, then you will find for defendant." There was no error in refusing the charge. If Holmes promised to protect plaintiff while at work under the car, and if plaintiff relied upon such promise, and Holmes failed to do this, we think it is no excuse for his failure that plaintiff, in the abundance of his caution, asked others to watch, also, and see that he was not injured. There is no error in the judgment, and it is affirmed.

*BOHN et al. v. DAVIS et al.*

(*Supreme Court of Texas. Nov. 5, 1889.*)

TRUST-DEED—PURCHASE BY TRUSTEE—DEEDS—EXHIBITION—EVIDENCE.

1. The trustee in a deed of trust executed for the benefit of certain creditors of the grantor may purchase the property at his own sale, made at public auction, under a power contained in the deed.

2. The grantor in a deed may testify to its execution in any case when it is offered in evidence.

. Appeal from district court, Camp county; *FELIX J. McCORD*, Judge.

*Petst & Crosby* and *J. W. Hooper*, for appellants. *H. A. King*, for appellees.

HENRY, J. On the 5th day of December, 1884, G. W. Davis, being then insolvent, executed a deed whereby he conveyed to L. G. Davis several tracts of land, to secure the payment of certain debts specified in said deed, one of them payable to himself, and with authority to the trustee, if the debts secured should not be paid at maturity, at the request of the secured creditors to advertise and sell the incumbered lands at the courthouse of the county in which they are situated, at public auction, to the highest bidder, for cash. Following the directions of the trust-deed, the lands were sold by the trustee to himself, and he made a deed conveying them to himself. He paid part of the proceeds of the sale to the creditors, whose claims were secured by the deed of trust, and for the balance he executed to each creditor his note for so much of the balance as was due to him. The creditors accepted, without objection, the notes in lieu of cash, and do not now complain. Appellants, who were



unsecured creditors of G. W. Davis, recovered judgment against him, and purchased the lands sold under the trust-deed at a sale made by virtue of an execution issued on said judgment. This suit is brought by them against G. W. Davis, and the purchasers of the land through the trustee's sale, for the recovery of the lands. The petition is in the usual form of an action of trespass to try title, and defendants, among other things, pleaded not guilty. No issue of fraud was tendered by the pleadings. Judgment was rendered on the verdict of a jury in favor of defendants. The deed to L. G. Davis was from himself, as trustee, to himself, as an individual. It was not witnessed, and at the trial he was permitted, over defendants' objection, to testify to the fact of its execution. The following are the only errors assigned: (1) The court erred in permitting L. G. Davis to testify to the execution of the deed. (2) The court erred in refusing to charge the jury, at plaintiffs' request, that, in order to enable a trustee to convey any title by virtue of a sale made by him under a deed of trust, the proof should show that all material directions as to the mode and manner of executing the trust were complied with by him. (3) The court erred in failing to charge, as requested by plaintiffs, that a deed made by a trustee to himself individually is null and void.

We find no error in any of these proceedings. It was held by this court in the case of *Howards v. Davis*, 6 Tex. 183, and the doctrine has been approved in subsequent cases, that a mortgagee with power to sell may purchase at his own sale, made at public auction. In that case it is said: "A mortgagee is a trustee, but in a qualified sense. He does not hold for the benefit of others, but for himself. He is a *cestui que trust* as well as trustee. He has an interest in the property. It is pledged expressly to secure his claim, and, were he deprived of the power to purchase, he might suffer great loss by its sale at a low price. He has an interest that the bid shall amount to his incumbrance, and that the property be not sacrificed, to the injury, as well of the mortgagor as the defeat of his own claim, as this may be the only fund for the discharge of his debt. Sales at foreclosures, whether under a power or by decree, are open and public, and are made after long notice, and it is to the interest of the mortgagor that the mortgagee shall enter into the competition at the sale." The only distinction between this case and others on the same subject is that, while in the others only a debt to the mortgagee making the sale was secured, in this other creditors are also secured, and interested in the property. We see no substantial reason why the rule should not embrace such cases as this. If by any means the trust is abused as to the other beneficiaries by the trustee, they have their remedy. In this case they make no complaint. The same may be said about the execution to the other beneficiaries by the trustee and

purchaser of his notes for their shares in the proceeds of the sale, instead of paying them in money. They do not complain, and other creditors cannot. There is no reason why the grantor in a deed may not testify to its execution in any case when it is offered in evidence. The judgment is affirmed.

#### MISSOURI PAC. RY. CO. v. LEHMBERG.

(Supreme Court of Texas. Nov. 8, 1889.)

#### NEGLECT OF MASTER—RAILROAD EMPLOYE—EVIDENCE—INSTRUCTIONS—DAMAGES.

1. In an action against a railroad company to recover for the death of a track repairer run over by a switch-engine, evidence that another man, who was working by the side of deceased, came so near being run over that the engine struck his foot, is admissible, as tending to show that the peril of deceased was not brought about by his own negligence.

2. The testimony showing that the engine in question would have been safer if it had had a sloping tank instead of a square one, evidence that the company used an engine with a sloping tank in one of its yards is admissible, as indicating that it had knowledge of that fact.

3. An instruction that if the jury believed from the evidence that the injury was caused both by the defective construction or unfitness of the engine for the purposes for which it was then used, and the negligence of the engineer and yard foreman, combined with the defect in the engine, the company would be liable, is not obnoxious to the objections that it assumed as a fact that the engine was defective and unsuitable, and was a charge upon the weight of the evidence.

4. A charge requested by defendant that if there were any patent defects in the engine or tank, and deceased knew, or might by ordinary diligence have known, of the same, and said defects caused or contributed to the injuries, the jury should find for defendant, is properly refused, the evidence failing to show that deceased understood the danger to himself from the use of the square tank.

5. A verdict of \$10,000 will not be set aside as excessive, in view of testimony that deceased was a "stout, healthy, and sober" laborer, about 35 years old, earning \$1.25 a day, and that he left a widow and two infant children.

Appeal from district court, Tarrant county; CHARLES J. EVANS, Special Judge.

*Finch & Thompson*, for appellant. *Ball, Wynne & McCork*, for appellee.

HENRY, J. This suit was brought by Pauline Lehmborg, for the benefit of herself and the two minor children of herself and her husband, Gustave Lehmborg, for damages growing out of the death of the husband and father while in the employment of defendant. The petition charges that the said Gustave Lehmborg was engaged in repairing defendant's railroad track in the city of Fort Worth, and that while he was so engaged, without fault on his part, he was run over and killed by one of defendant's engines. The petition alleges that the death was caused by a switch-engine which was unfit and dangerous to persons working in the said yard; and that its defects were well known to defendant, but unknown to deceased. Defendant pleaded contributory negligence, and negligence of fellow-servants. There was a verdict for plaintiffs for \$10,000 divided between

them equally, upon which judgment was rendered.

The evidence shows that the deceased was working with a shovel in repairing the Y of the defendant railroad, in its yard in the city of Fort Worth. Some other hands were engaged in the same work, one only of them very near him. His death was caused by an engine then being used in the yard for switching purposes. It was a road engine, and had been brought into the yard not long before. It had a square tank. The evidence shows that when an engine with such a tank is backing, if the engineer controlling it is 40 or 50 feet from a man on the track, he can see him; but, within 10, 20, or 30 feet, he cannot see him, if the engineer is standing on his engine. The statement of facts shows that as a general thing engines with sloping tanks are used for switching purposes by railroads. The object of having a sloping tank is to give the engineer a better view of the track, and of the men that are working with the engine on the track. A sloping tank is one that slopes from the front part of the tank, and comes to a sharp point at the end furthest from the engine. A man on one of them can see another man who is standing on the ground until the tender is right up to him. The engine was backing when it came in collision with the deceased. An employee of the railroad company was standing on a foot-board on the rear end of the engine, but which was in front, as the engine was then going. He was placed there for the purpose of giving warning to people who were on the track, and to give to the engineer proper signals for his guidance. He could not, from his position on the engine that was being used, see the engineer, or give him signals; and, in order to do that, he had to move to one side of the engine, and lean out. As the engine went on to the Y where the injury occurred, the whistle was blown and the bell was ringing. The engineer, a witness for defendant, testified: "When I got within about forty feet of the Front-Street crossing, I noticed a man working by himself, about fifteen feet north side of Front street, smoothing off the track. When I noticed him he was looking right at me. I paid no further attention to him. I got on the crossing then, and got a signal from the section foreman on the bridge to slow up; that it (the bridge) was not ready for us to go over yet. I reversed my engine, and was nearly stopped, right on the crossing. I reversed her again, to let her roll up a little closer to the bridge; and we rolled probably fifteen or twenty feet. The switchman jumped off behind, and hollered me to stop, to slack ahead. I reversed my engine again, thought there was something wrong and pulled her open. We went ahead a car-length before I got her stopped. I looked back on the rail, and saw the hind truck wheel run on a man. A man cannot stand up in an engine of that particular kind, and handle her, and see a man on the track, say twenty feet from the

hind end of the tank, because it is too high. The regular switch-engine tank is sloping. This was the regular switch-engine of the T. & P. It would not be considered a switch-engine built from the locomotive works. It is built for road purposes, not built for switching in the yard. It would not be considered safe as a switch-engine. There was a good deal of traffic at the time in that yard, requiring constant switching. If it had been a sloping tank, such as they build regularly for switching purposes, I could have seen the man in time to have stopped the engine. As it was, I did not see him, and could not have seen him, had I been looking that way. I could have stopped in two, three, or four feet." The servant of the railroad company who was stationed in front of the engine, to look out and give signals to the engineer, testified that when he saw the imminent danger of the deceased he gave to the engineer a signal to stop, just before it struck the man, and then he jumped off, and gave him another signal, and told him to stop, which he obeyed; but by that time the engine had run over the man.

A witness for plaintiff was permitted to testify, over the objection of defendant, that he saw another man, who was working by the side of the deceased, "when he made a jump, and the engine struck his left foot, caught his foot, turned him around." Another of plaintiff's witnesses was asked the question, "Do they not use on defendant's road a regular switch-engine in Marshall?" Defendant's counsel objected; but the court permitted the witness to answer the question, and he replied: "They are used in Marshall. Yes, when I was there they used a switch-engine with sloping tank, same as the Santa Fe." It is insisted that the evidence should have been excluded in both instances. We do not think so. Under the peculiar circumstances of this case, we think that evidence that another man, at the same place and in the same peril that the deceased was, came so near being run over, is a circumstance tending to show that the peril of the deceased was not brought about by his own negligence. The fact that two men remained on the track without being aware of the approaching danger tends more strongly to indicate that from some cause they must have had a sense of security than would the fact that one alone so remained. The testimony clearly shows that an engine with a sloping tank was greatly safer to use for switching than one with a square tank. Evidence that defendant used a sloping one in its yard at Marshall or elsewhere indicated that defendant had knowledge of that fact, and tended to show that it could have no good and proper reason for not using everywhere in that business the safer appliance. We do not see that the evidence on either point was very important, or likely to influence the result of the trial.

The court, in charging the jury, informed them that plaintiff sought a recovery on ac-

count of the negligence of defendant in the use of an engine for switching purposes which was unfit for such purposes. It is contended that it erred by omitting from the charge in that connection the further allegation contained in plaintiff's pleadings, that the deceased was ignorant of such unfitness. The judge is not required to recite to the jury any more of the pleadings than he deems necessary. In this case, all of the issues made by the evidence were presented to the jury by the charge. It was not necessary to do that in the way of a recital of what the pleadings contained. It was the right of the defendant's counsel to request a charge to supply an omission in this or any other respect, if one existed that should have been supplied. In fact, the court did charge, at the request of defendant, that "defendants are not liable unless you believe from the evidence that the deceased did not know of the defective condition of the engine, if any there was."

It is insisted that the court erred in giving the following charge: "If you believe from the evidence the injury was caused both by the defective construction or unfitness of the engine for the purposes for which it was then used, and the negligence of the engineer and yard foreman, combined with said defect in the engine, the defendants will be liable." The objection urged to this charge is "that it assumed as a fact that the engine was defective and unsuitable for the purposes it was used for, and was a charge upon the weight of the evidence." We do not agree with this criticism. The charge does not assert the existence of any fact, but leaves everything for the determination of the jury.

It is also complained that the court failed in this part of its charge to present to the jury the question of the knowledge of deceased of the defects in the engine. That question was, as we have said, presented to the jury in the very language asked by defendant's counsel. It was unnecessary to repeat it everywhere. We do not think it would have been proper to apply it as a qualification of the charge now under consideration. Its too frequent repetition could only have had the effect to confuse the minds of the jury, and obscure other issues. If that defense was omitted anywhere, when it ought to have been included, the error was cured when it was afterwards included in a proper charge.

It is also insisted that the court erred in refusing to charge, at defendant's request, that if there were "any patent defects in the engine or tank, and deceased knew, or might by ordinary diligence have known, of same, and said defects caused or contributed to the injuries complained of, the jury should find for defendants." Without now considering the question whether the rule in this respect charges an employe with knowledge of defects, except with regard to such appliances or instruments as he is engaged himself in using, we think it sufficient to say that the law does not under any circumstances exact

of him the use of diligence in ascertaining such defects, but charges him with knowledge of such only as are open to his observation. Beyond that, he has the right to presume, without inquiry or investigation, that his employer has discharged his duty of furnishing him with safe and proper instruments and appliances. The evidence discloses that the deceased could see that the engine had a square tank, but it fails to show that he was aware of the different degrees of danger between the use of that and one with a sloping tank, or that he understood the nature of the danger to himself from the use of the square tank. We think the charge was properly refused.

With the exception of one, the remaining assignments of error are to the effect that the verdict, in a number of particulars, is unsupported by the evidence. To the contrary, we think the verdict is fully supported by the evidence in all respects.

The last objection is that the verdict is excessive. The deceased was a laborer, aged about 85 years, and earning \$1.25 a day. One of his children was four years old at the time of the trial, and the other one was born a month after his death. His chief qualifications for earning money, as disclosed by the evidence, were that he was "stout, healthy, and sober." If it was our duty to calculate from these facts the pecuniary value of his life to his wife and children at the date of his death, we would not be able to make it reach near the sum given by the verdict. While the law does not, in this character of action, intend to give compensation for anything but pecuniary loss, by estimating the money value of the life of the relation, and while it necessarily results that regard must in each instance be paid to such facts and conditions as cast light upon the subject, it yet must be admitted that the inquiry is not intended to be narrowed down, by the law, to a result that can be exactly accounted for by the facts in evidence. Every parent and husband has for his wife and children a pecuniary value beyond the amount of his earnings by his labor or vocation. That value may to some, but not to every, extent, be susceptible of allegation and proof; and, to the extent that it can be alleged and proved, it ought to be done. The difficulties of proof are known to the law-maker. In some states an attempt has been made to remove them, to some extent, by placing limits to the amount that may be recovered. In establishing such rules the idea of making compensation in each instance for the pecuniary value of the lost life is necessarily abandoned. When no amount is fixed by law, and no rule is prescribed for making the calculation, upon facts capable of exact ascertainment, it necessarily follows, we think, that the law-maker intended that, having reference as far as practicable to conditions existing at the time of the death, juries, from their own knowledge, experience, and sense of justice, should fix and assess the proper sum. They are expected to act unini-

fluenced by passion, prejudice, or partiality, and to pay due regard to the ascertained facts and conditions surrounding the subject. When it appears to the court that they have disregarded these requirements, their verdict should be set aside. On the other hand, when the court is unable to determine that these things have not been observed by the jury, and when it does not appear that the verdict is not the result of the honest endeavor of the jury to follow their own convictions, in the exercise of a power not precisely defined, we think the law intends that the jury's estimate, rather than the equally undefined one of the judges, shall prevail. In the case of *Railroad Co. v. State*, 24 Md. 271, there was no proof of what the deceased was earning at the time of his death. It was proved that he was one of the hands in the boiler-shop of the defendant railroad company, and was at the time of his death 30 to 36 years of age, and was a sober, moral, industrious man, enjoying good health. The suit was for the use of his widow, mother, and a son about five years old. The jury gave them \$5,000. The court says: "The prayer goes on the theory that the rate of wages paid at the time of the death was the true and exclusive standard of the damages sustained, and, in the absence of proof on that point, that nominal damages only could be recovered. So far as we have been able to learn, this proposition is not only unsupported by any direct authority, but is too strict in its character to admit of general application." In the case of *McIntyre v. Railroad Co.*, 37 N. Y. 289, it is said: "The jury are to give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death. They are not tied down to any precise rule within the limit of the statute, as to amount and the species of injury sustained. The matter is to be submitted to their sound judgment, and sense of justice. They must be satisfied that pecuniary injuries resulted. If so satisfied, they are at liberty to allow them from whatever source they actually proceeded which could produce them. If they are satisfied, from the history of the family, or the intrinsic probabilities of the case, that they were sustained by the loss of bodily care, or intellectual culture, or moral training, which the mother in that case had before supplied, they are at liberty to allow it." The statute has set no bounds to the sources of these pecuniary injuries." The judgment is affirmed.

#### BROWN v. WHEELOCK.

(*Supreme Court of Texas*. Dec. 19, 1889.)

#### SPECIFIC PERFORMANCE—HABITUAL DRUNKARD.

An instruction that "a specific performance of a contract is not enforced or decreed as a matter of course, but only in the exercise of a sound legal discretion. The plaintiff must present a contract which is fair, just, and reasonable, entered into upon an adequate consideration, and free from fraud, and not hard, unequal, and unconscionable.

Therefore, if you believe from the evidence that, at the time the contract was made by the defendant's intestate \* \* \* that he [said intestate] was an habitual drunkard, and that he had only recently had his disability of minority removed, and that the price agreed upon for the purchase of said property was inadequate, or not a fair price for said property, and that from these facts and circumstances he, the said [intestate,] was not on equal footing at the said time said contract of sale was made with said [plaintiff,] but that he was overreached, and advantage taken of his condition, by said [plaintiff,] to make said contract, you will find for the defendant."—If ever correct, is misleading, where the issues relied on by defendant were mental incapacity of intestate, resulting from continued drunkenness, and inadequacy of price.

On rehearing. For former report, see ante, 111.

*Wright & Wright*, for appellant. *Morgan & Freeman*, for appellees.

GAINES, J. At the Austin term, a judgment was rendered reversing the decree of the lower court in this case, and remanding the cause for a new trial. In the former opinion it was held that the court below erred in charging the jury that the order of the district court of Dallas county removing the disabilities of minority of Briscoe B. Smith was final, and could not be inquired into in this suit. Our conclusion was based upon the ground that the transcript offered in evidence failed to show that the county judge had been served with a copy of the minor's petition as required by the statute. It did, however, appear to us from the record that the county judge had probably accepted service; and we deemed it proper, therefore, to decide whether or not such acceptance was equivalent to service in such a proceeding. The question was decided in the affirmative. In a motion for a rehearing, our attention was called to the fact that the appellant, who was defendant in the court below, had pleaded that the county judge had accepted service, and had filed no general denial. The fact being thus alleged by the defendant, it was not necessary for the plaintiff to prove it; and the rehearing was accordingly granted. The acceptance alleged was in the following words: "I, R. E. BURKE, judge of Dallas county, Texas, hereby accept service of process in the within cause, and I enter appearance in the same; and I agree that the said cause may be set for trial and tried at the present term, or at any time the court and petitioner may desire." This shows that the county judge had informed himself of the nature of the petition; and we think, therefore, that his acceptance of notice and waiver of process was as effectual as if a copy of the petition had been actually served. We see no reason why the application could not be heard and determined at the term during which it was filed. The proceedings are special; and the provisions of our statutes which regulate suits within the ordinary jurisdiction of the district courts do not apply. For these reasons, in connection with those stated in the former opinion, we think we were in error in holding that the court below should not have given.

the charge complained of in appellant's third assignment.

This renders it necessary to pass upon appellant's other assignments of error, except the third, which is virtually disposed of by what has already been said. The first is that the court erred in refusing the following instructions: "A specific performance of a contract is not enforced or decreed as a matter of course, but only in the exercise of a sound legal discretion. The plaintiff must present a contract which is fair, just, and reasonable, entered into upon an adequate consideration, and free from fraud, and not hard, unequal, and unconscionable. Therefore, if you believe from the evidence that, at the time the contract was made by the defendant's intestate, Briscoe B. Smith and W. K. Wheelock, that he (Briscoe B. Smith) was an habitual drunkard, and that he had only recently had his disabilities of minority removed, and that the price agreed upon for the purchase of said property was inadequate, or not a fair price for said property, and that from these facts and circumstances, he (the said Briscoe B. Smith) was not on equal footing, at the said time said contract of sale was made, with said W. K. Wheelock, but that he was overreached, and advantage taken of his condition, by said W. K. Wheelock, to make said contract, you will find for the defendant. (2) If you believe from the evidence that the judgment of the district court removing Briscoe B. Smith's disabilities of minority was rendered, and the matter tried, in the absence of Judge R. E. BURKE, county judge of Dallas county, then the judgment of the court removing said disabilities is null and void, and you will find for the defendant." In our opinion, the charge given by the court correctly and clearly presented to the jury the law applicable to the facts of the case. The jury were told, in effect, to find for the defendant if they believed that, at the time the contract was entered into between Briscoe B. Smith and the plaintiff, Smith's mind had been so impaired by the use of intoxicating liquors that he did not fully understand the effect of the contract, or was not competent to know or appreciate the value of the property. They were also instructed, in effect, that, if the inadequacy of price was not such as to shock the sense of justice, they could still look to the price paid, or agreed to be paid, for the property, together with all the surroundings of Smith, and his mental condition at the time, in determining whether or not he was incompetent to understand and appreciate the nature of the contract he made. The two leading issues of fact relied on by the defendant were as to mental incapacity of Smith, resulting from continued drunkenness, and as to the inadequacy of price. Upon both questions so presented by the evidence and pleadings, the testimony was conflicting. The first instruction requested, if it could be deemed correct as applicable to any case, contains expressions well calculated to mislead the jury, under the evidence in

the case before us; and we think, therefore, it was not error to refuse it. The question of the correctness of the second charge requested is determined in the negative by the conclusions reached in this and the former opinion. The same may be said of the second error assigned. The fourth assignment complains, the court erred in overruling the motion for a new trial. The ground of the motion here relied on is that the verdict is contrary to the evidence upon the questions of the mental capacity of Smith at the time he made the contract, and the inadequacy of price. We deem it sufficient to say, in regard to this assignment, that the evidence was conflicting upon these points, and that under such circumstances a verdict cannot be disturbed in this court. The judgment is affirmed.

**ST. LOUIS TYPE FOUNDRY v. INTERNATIONAL LIVE-STOCK JOURNAL PRINT. & PUB. Co.**

(Supreme Court of Texas. Oct. 29, 1889.)

**EXEMPTIONS—PARTNERSHIP PROPERTY.**

Rev. St. Tex. art. 2337, reserving to persons not constituents of a family, as exempt from attachment, all tools, apparatus, and books belonging to any trade or profession, applies to property owned and held in partnership, as well as to property owned in severalty.

Commissioners' decision. Appeal from district court, El Paso county.

*Blocker & Clardy* and *Brock & Neill*, for appellant.

**HOBBY, J.** The appellant having brought suit against Whitmore & Kibbee, as partners, in the district court of El Paso county, for the sum of \$992.31, caused an attachment to be issued out of said court, pending the suit, and seized by virtue thereof the press, type, and material belonging to a printing-office, as the property of said Whitmore & Kibbee. The appellee claimed the property under a purchase from said Whitmore & Kibbee, prior to the levy of said attachment, alleging that at the time of said purchase it was the exempt property of said Whitmore & Kibbee. Appellant admitted that at the time of the purchase by appellee the property belonged to the printing-office of Whitmore & Kibbee, and was used by them in their business as printers and publishers of a newspaper in the city of El Paso, Tex., but denied that it was exempt. The judgment of the court was, in effect, that the property was exempt from attachment. The question raised in the case is whether, under our statute (article 2337, Rev. St.) reserving to persons not constituents of a family, exempt from attachment, etc., "all tools, apparatus, and books, belonging to any trade or profession," applies to and protects such property when held and owned by partners. We are not aware of any case in our state in which the question has been decided, and in the other states the decisions are conflicting. In our state it has been held that a homestead may be es-

<sup>1</sup> Publication delayed by failure to receive copy

established on property held by tenancy in common. *Clements v. Lacy*, 51 Tex. 151. So, too, it was held in *Swearingen v. Bassett*, 65 Tex. 267, that a partner in a solvent firm may designate his interest in partnership realty as a part of his homestead, and thus secure it from forced sale. But the precise question now before us has not heretofore been determined in Texas. It often happens, says Mr. Freeman, "that property designated as exempt by statute belongs to two or more persons, either as co-tenants or co-partners. The question, then, arises whether this property must be treated as exempt to the same extent as if held in severalty. The answers are irreconcilable, and the opposing opinions are both supported by very respectable authorities. On the one hand, it has been insisted that the terms of the exemption statutes \* \* \* indicate that the legislature proposed to deal with estates in severalty. \* \* \* On the other hand, \* \* \* co-tenants and copartners have been placed on the same footing in a majority of the states, and both have been given the full benefit of the exemption laws. This position, even where the words of the statute do not clearly indicate an intent to deal with undivided interests, is made tenable by the general rule that these statutes must be liberally construed, so as to promote the policy on which they are based, and accomplish the purposes to which they are directed. Prominent among these purposes is the protection of the poor by allowing them the implements of their trades, and the other means essential to enable them to gain a livelihood." Section 221, *Freem. Ex'ns*. The leading cases which announce the doctrine that the statute does not include partnership property are *Pond v. Kimball*, 101 Mass. 105, and *Guptil v. McFee*, 9 Kan. 30. These cases appear to be based upon statutes exempting tools, implements, etc., not to exceed in value a certain sum. In the Massachusetts case, tools, etc., are not to exceed \$100 in value; and in the Kansas case, "stock in trade, not exceeding \$400 in value." One of the prominent reasons assigned in the opinions in these cases was that the statute limiting the exemption as to tools, etc., to \$100, and that limiting the stock in trade to \$400, did not apply to property owned by partners, because of the difficulty of determining, in case of numerous partners, whether each should have the right to claim as exempt \$100 worth of materials or \$400 stock in trade, or was the whole firm to be considered as one debtor only? No such reason would apply with us, as "all the tools, apparatus, and books belonging to any trade or profession" are exempt without reference to their number or value. The cases holding the contrary, and we believe the better, doctrine, proceed upon the theory that the law should be liberally construed. It is almost unnecessary to say that that mode of construction has always obtained with respect to exemption laws in our state. Where a person owns property exempt under the

statute, as for example the property involved in this proceeding, he ought not to forfeit this valuable right, because he forms a partnership, and unites the property with that of another person equally exempt. If in this case either Whitmore or Kibbee had owned individually this property, it would have been exempt from execution, attachment, etc. The fact that, while so owning it, a partnership is formed, would furnish no good reason for so changing the law as to make that property subject to attachment which prior to the partnership was exempt in the hands of the individual. If each owned one-half of the property, it would be exempt, and because both own the whole, by reason of the formation of the partnership, affords no reason why the same property should not continue to be exempt. *Stewart v. Brown*, 37 N. Y. 850, and cases cited in section 221, *Freem. Ex'ns*. One of the principal purposes of the statute is to protect whatever interest or title would be subject to seizure under execution or attachment. The partnership interest is liable to the levy of such writs, and is therefore entitled to the protection which the statute affords. We think that "all tools, apparatus, and books belonging to any trade or profession," although they may constitute partnership property, are entitled to the exemption. We are of opinion that there is no error in the judgment, and that it should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

#### GULF, C. & S. F. RY. CO. v. McLEAN.

(*Supreme Court of Texas*. Oct. 29, 1899.)

##### RAILROAD COMPANIES—FIRES.

1. In an action against a railway company for negligently allowing fire to escape from its train, whereby a number of cedar posts belonging to plaintiff were burned, it appeared that plaintiff had placed the posts on defendant's right of way without the authority of defendant, but that it was the custom to place freight for shipment over defendant's railway on the right of way, and defendant had always acquiesced in the custom. *Held*, that plaintiff was not guilty of contributory negligence.

2. Where the court finds from the evidence that the fire escaped from defendant's train, which had stopped opposite the posts, by reason of defendant's negligence, and that by defendant's negligence a large quantity of bark had been allowed to accumulate in that place, by which the fire was communicated to the posts, and that plaintiff was not guilty of negligence in placing the posts on the right of way, it is the province of the court to say that plaintiff was not guilty of contributory negligence, and a judgment based on its findings will not be disturbed on appeal.

Commissioners' decision. Appeal from district court, Lampasas county.

Action by Joseph McLean against the Gulf, Colorado & Santa Fe Railway Company for damages for the destruction of certain cedar posts. There was judgment for plaintiff, and defendant appealed.

*Matthews & Wood*, for appellant.

**COLLARD, J.** We cannot agree to the proposition of appellant that appellee was a trespasser, and that the posts were wrongfully on the right of way. There is no statement of facts in the record; and of course the appellant relies upon the conclusions of fact as found by the court, and accepts them as true. The court found that the appellee, "on the 18th day of March, 1886, had piled a large lot of cedar posts on appellant's right of way at Lometa; that he had contracted to sell the cedar posts to a party at Santa Anna, but did not on that day have as many as the party wanted,—was expecting to secure more posts, and, as soon as he received the balance, he expected to ship them over defendant's railway, and on that account had piled them within twenty feet of the track; that plaintiff had not been directed or authorized by defendant to pile the posts on the right of way, but it had been customary to pile posts on the right of way for shipment." We infer from these findings that there was a general permission of defendant to shippers of such freight to use the right of way as plaintiff used it, and that the company received such freight from its right of way. It is not shown that there was any other place appointed by the company to receive such freight. If the company allowed the custom, acquiesced in it, or received the freight from such place, its consent would be implied. There could hardly be such a custom, without its acquiescence. In the absence of proof that the custom was without the company's authority, or that there was some other place fixed to receive such freight, it would not be presumed that it was not recognized by the company.

The court also found that the fire came from one of defendant's trains that stopped opposite the posts; that there was considerable cedar bark on the ground between the track and the posts; that the fire started from where the train-hands were working on a "hot box," and was communicated to the posts by the scattered bark, and destroyed 859 of them; that it was by defendant's negligence the fire escaped; by its negligence that the cedar bark was allowed to remain on its right of way which communicated the fire to the posts; and that plaintiff was guilty of no negligence in placing the posts on the right of way. It was the province of the court, trying the facts as well as the law, to say whether or not plaintiff was guilty of contributory negligence, from all the facts and circumstances. *Railway Co. v. Bartlett*, (Tex.) 6 S. W. Rep. 549. We presume, from the court's findings, that other cedar timber had been placed near the same point, from which the bark had been scattered, and left on the ground, as found by the court. We find no error in the judgment of the court apparent from its conclusions of fact, and are of opinion it should be affirmed.

**STAYTON, C. J.** Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

**LEMBERG et al. v. CABANIS et al.**

(Supreme Court of Texas. Nov. 19, 1890.)

**PUBLIC LANDS—CERTIFICATES—NAMES.**

1. In trespass to try title, where it appears that plaintiffs' title to the land in controversy was based upon a certificate issued to their ancestor as a colonist, their right of recovery cannot be defeated by showing that they also received a certificate to other lands, not in controversy, and located in another county.

2. The fact that plaintiffs received a certificate for the land in controversy is sufficient to authorize a decree in their favor, in the absence of any showing that they had parted with the title, or that defendants had a better title.

3. The fact that there was a difference of one letter in the spelling of the name of their ancestor in the two certificates, but which did not change the pronunciation of the name, is not sufficient to raise the question of identity.

**Commissioners' decision.** Appeal from district court, Mason county.

Action of trespass to try title brought by R. H. Cabanis and others against Lemberg & Allen. Judgment for plaintiffs, and defendants appealed.

*Marshall Fulton*, for appellants. *H. M. Holmes* and *J. M. Moore*, for appellees.

**HOBBS, J.** Appellees, who were the plaintiffs in the court below, proved that the certificate was issued, and the land patented, to the heirs of Albert Cabanis, who, as one of the colonists of Fisher & Miller's Colony, was entitled thereto. They established the further fact that they were the heirs of said Cabanis. This constituted a *prima facie* case which authorized a decree in their favor for the land sued for, in the absence of proof by the defendants that the plaintiffs or their ancestor had parted with the title, or that adverse rights had been acquired by limitation.

Appellants claim that the finding of the court in favor of appellees is not supported by the testimony, because the certificate issued to the heirs of Albert Cabanis, and they (the plaintiffs) as well as their ancestor, spelled the name "Cabanis" terminating the surname with two s's, instead of one. This assignment, we think, is untenable. Similarity in names is said to afford proof of identity, especially in the absence of evidence raising a doubt as to such identity of the person. 1 Greenl. Ev. § 575, and note; *Chambliss v. Tarbox*, 27 Tex. 145; *McRee v. Brown*, 45 Tex. 506; *Shields v. Hunt*, Id. 424.

The theory of appellants seems to be that, as the heirs of Albert Cabanis were entitled to only one certificate, for 640 acres of land, by reason of the fact that their father was one of the colonists of Fisher & Miller's Colony, and the evidence showing that two certificates, each for 640 acres, had been issued to them as such heirs, plaintiffs (the heirs) did not show to which they were entitled. The evidence showed that in 1850 a certificate (No. 497) for 640 acres was issued to the plaintiffs, as the heirs of Albert Cabanis, a German colonist of the colony referred to. This was located upon the land in controversy. Subsequently, it appears from the evidence, another certificate for 640 acres was



issued, in 1854, to said heirs, which was located in Mason county. This latter tract is not involved in this suit, and the plaintiffs' title to it is not established by the judgment herein. If more than the quantity of land was granted to appellees than they were entitled to under the law, that fact would not affect their right to such portion of the land as they showed themselves justly entitled to in this suit; and this is not a question the appellants could inquire into, in the absence at least of some evidence of right or title to the land in controversy in them. We see no error in the judgment, and think it should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment is affirmed.

**DE CORDOVA et al. v. BAHN.**

(*Supreme Court of Texas. Oct. 29, 1889.*)

**APPEAL—WEIGHT OF EVIDENCE.**

Where there is a direct conflict of evidence, a judgment will not be disturbed on appeal on the ground that the evidence does not support the judgment.

Commissioners' decision. Appeal from district court, Blanco county.

Action by De Cordova & Son against A. Bahn to recover commissions for the sale of certain real estate. There was judgment for defendant, and plaintiff appealed.

*R. H. Ward*, for appellants. *Carlton & Buggles*, for appellee.

HOBBS, J. Suit by appellants to recover \$1,000 commissions alleged to be due them by appellee for the sale of lots 1, 2, 3, and 4, in block No. 30, in the city of Austin, owned by appellee. Appellants' case, as made by the testimony, is that appellee, some time prior to May 10, 1886, entered into a verbal contract with them, by the terms of which lots Nos. 1, 2, 3, and 4, in said block, were placed in appellants' hands for sale, without limitation as to the time in which sale was to be made. If appellants sold lot 4 for \$5,000, they were to be allowed 5 per cent. commission. If all the lots were sold by appellants so as to realize for appellee \$20,000, they were to receive as commissions all in excess of said \$20,000. Appellants found a purchaser, about the 10th day of May, 1886, who was able, ready, and willing to pay \$21,000 for the property, and to whom they agreed to sell the same for the sum of \$21,000. Appellants wrote appellee on the 10th May of the sale, which letter was inclosed by them in a letter to the postmaster of Round Mountain, Blanco county,—appellee's post-office,—with the request to deliver to appellee. This letter, it appears, did not reach appellee until about the 22d May, 1886. In the mean time, appellee had sold the property, and refused to make a deed to the purchaser found by appellants. The material difference as to the contract between the appel-

lants and appellee, as shown by the testimony of the latter, is that appellee limited appellants to the 1st day of May, 1886, within which to sell the lots. If they sold by that date, appellee agreed to allow them all in excess of \$20,000 the lots were sold for. No exclusive right to sell was given the appellants, but appellee reserved the right to himself to sell. He told G. A. Bahn, his son, to sell the property for \$25,000, if he could. On the 11th day of May, 1886, J. M. Day began negotiating with Bahn, the son, for the purchase of one of the lots, which resulted in the purchase of the four on May 12, 1886, for which he paid \$22,000. About the 15th May, 1886, appellee executed a deed to Day for the property. On the 22d May, he notified appellants, through his son, that if he had received the letter informing him of the sale made by appellants for \$21,000 by the 15th May, he would have given them the preference. Such is the conflicting evidence in the case. Appellants base their right to recover the \$1,000 upon a contract claimed to have been made with them by appellee,—a contract by the terms of which they say they were not limited to any specified time within which to effect the sale of the lots. This is controverted by appellee's testimony, to the effect that under the contract the sale was to be made on or before the 1st day of May, 1886.

There is no doubt that the authorities are that where an agent employed to sell land complies with the contract of employment, and the owner refuses, without sufficient reason, to fulfill the agreement the agent has made with the party desiring to purchase, if such party be able, ready, and willing to purchase, the agent has a right to demand compensation, to be regulated either by the terms of the contract, or by established usage in such cases, if there be no contract. *Kock v. Emmerling*, 22 How. 72; *Harrell v. Zimpelman*, 66 Tex. 292. In this case, if the evidence of the appellee is to be believed, no such contract as that upon which appellants seek a recovery was entered into. This evidence was believed by the court below, and we cannot say that it is not sufficient to support the judgment. Consequently, the well-known rule applies that in such a case the judgment will not be disturbed. We think the judgment should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

**ROY v. CLARK.**

(*Supreme Court of Texas. Nov. 5, 1889.*)

**VENDOR AND VENDEE—EJECTMENT—HOMESTEAD.**

1. In ejectment by the vendee against his vendor, and for damages for trespass and breach of warranty, the fact that the petition shows that one of the purchase-money notes for which a vendor's lien was retained is past due, but makes no offer to pay the same, does not render the petition de-

fective. If the vendee's claims are sustained, they may constitute a valid set-off against the note.

2. Where notes given for the purchase of land, and secured by a vendor's lien, are assigned for value, the original holder does not retain an equity in the land, by virtue of such lien, which can be set up as a defense in an action of ejectment brought against him by the purchaser of land.

3. It appeared that the vendor held the land under a verbal contract for its purchase from W.; that he made a small payment thereon, but, being unable to pay the balance, contracted to convey the land to the vendee as soon as he should receive a deed from W. Thereupon the vendee paid him a sufficient portion of the purchase money to enable him to pay W. the amount due on the land, W. then giving the vendor a deed, and the latter at the same time deeded the land to the vendee. Held, that the vendee, by furnishing the money to be paid to W., became subrogated to whatever rights W. had in the land, and that no homestead right could be set up by the vendor's wife to defeat his title.

Commissioners' decision. Appeal from district court, Hays county.

Ejectment by Mark Clark against W. C. Roy and others. Verdict for plaintiff, and Mrs. S. A. Roy appeals.

*L. W. Moore and W. P. Bacon*, for appellant. *Wood, Fisher & Ford*, for appellee.

**HOBBY, J.** The first error assigned relates to the action of the court in overruling the exceptions to the plaintiff's first amended and first supplemental petitions. The substance of these exceptions was that as it appeared from the face of the petition that the last purchase-money note was in the hands of Roy, the defendant, and there was no offer to pay the same, there could be no recovery. The suit was for the recovery of the possession of the land which appellee had purchased from Roy, and which possession Roy had contracted to deliver by the 1st of November, 1884, a date prior to the maturity of the note, and also to recover damages for destruction to timber, cedar rails, buildings, etc., and to recover a certain sum which the plaintiff had paid as taxes on the land, and which Roy admitted he was liable for in event of a recovery by plaintiff. The damages sought to be recovered amounted to about \$700. It is true the petition showed that the \$500 purchase-money note, representing the last payment to be made, was due in April, 1885, and was in the hands of Roy, but it was alleged to be held by him subject to whatever equities the plaintiff Clark had against the defendant. If the damage was done as alleged, and a recovery was had by Clark against Roy for that amount, it would have constituted an offset to the note held by Roy. It would have been inequitable to have required Clark to pay the \$500 note referred to, in the hands of Roy, if the proof authorized a recovery in favor of Clark against Roy for \$700 for the trespass, and the taxes paid by Clark, which Roy admitted he was liable for in event of a recovery by Clark. There was no error, we think, in overruling the exceptions.

The third and fifth assignments, which relate to the same subject-matter, may be appropriately considered together. They are, in substance, that the court erred in the first

paragraph of the charge, in this: that the charge informs the jury "that the legal title to the land is in W. C. Roy, but that plaintiff can recover notwithstanding;" because Roy had transferred the vendor's lien note yet due. The charge complained of is that "the conveyance from Roy to appellee, expressly retaining the vendor's lien, was an executory contract, the legal title remaining in Roy; but that the undisputed evidence showed that all of the purchase money (amounting to \$5,500) had been paid, except a note for \$500, which Roy alleges, he transferred to an innocent purchaser, before maturity, for value, and that, upon such state of facts, Roy could not make whatever legal title remained in him available to defeat this suit." The appellant requested a special charge, announcing the converse of the foregoing principle, which was refused, and the refusal of which is made the basis for the third assignment. The appellant, defendant below, alleged in his answer "that the note mentioned had been transferred by him, before maturity, to an innocent purchaser for value, who is now the owner of the same." But he does not ask that the assignee of the note be made a party. Such assignee we do not think would be a necessary party. Whatever rights Roy may have been clothed with, by reason of the fact that the note had been executed to him, no longer existed; these rights were transferred to the assignee with the note. As to Roy, the note had been paid when he received its value from the assignee. Whatever may have been the rights vested in the assignee of the note by its transfer, they could not be in any manner injured or affected in this case. If the judgment had been for the appellant, that would not have affected the right of the holder to the lien acquired by the transfer of the note. There was no error in the charge given, nor in refusing that requested.

Theseventh, eighth, and ninth assignments are that the court erred in the charge, in this: the charge informs the jury that "defendant, W. C. Roy, could convey the homestead without the wife's consent, to pay the purchase money on same, unless such conveyance was made for the purpose of defrauding the wife, and, even if done with a fraudulent purpose, yet such conveyance would pass the title, unless the purchaser was charged with notice of such fraud;" and that "possession of the homestead by the wife, and her refusal to sign a deed of conveyance therefor, both facts being known to one who purchases said homestead from the husband alone, does not charge said purchaser with notice of any fraudulent purpose of the husband in making such conveyance." The charge informed the jury that the evidence showed that the land was occupied by appellant and Roy under a verbal contract with Williams; that improvements were made thereon, and part payment was made, which facts vested an equitable title in appellants sufficient to give them a homestead estate, if they actually occupied it

as such, subject to unpaid purchase money; and that if 200 acres of the land had been selected and taken possession of by defendants as their homestead, prior to the sale to appellee, a temporary removal of the family would not destroy the homestead estate, unless such removal was with the intention of abandonment. The jury were also told that if this homestead estate existed it could not be conveyed by Roy without the concurrence of his wife, in the manner and form required by law, and that the deed of Roy to appellee was void as to such estate of appellant, (Mrs. Roy,) if it existed, unless the evidence showed that the conveyance to appellee, Clark, was executed for the purpose of adjusting the paying off the incumbrances of the land by reason of the unpaid purchase money due Williams by Roy; and that, if the conveyance was so made, it would be valid unless Roy made such conveyance to defraud his wife of her homestead rights, and Clark had notice of that fact, or knowledge of such facts as would put a reasonably prudent man upon inquiry. The jury were also told, in effect, that if the conveyance by Roy to Clark was made for the purpose of paying the balance of the purchase money due Williams, the fact that Mrs. Roy was in possession of the land, and knowledge of her failure or refusal to join in the conveyance, would not charge Clark with notice of Roy's purpose to defraud his wife of her homestead rights. The evidence is uncontroverted that appellants had only a verbal contract with H. G. Williams for the purchase of the land, and had paid comparatively a small portion of the purchase money, and were unable to or did not comply with the contract. A large sum (about \$4,000) was still due on the land. No title to the land was obtained by them until Clark, under the contract made with W. C. Roy, long prior thereto, paid or furnished the purchase money, about \$4,000, with which to pay, Williams, and discharge the incumbrance then existing, which stood in the way of the acquisition of title by Roy. When this payment was made, with Clark's money, Williams executed title to Roy, who at the same moment executed title to appellee. There never had been any title in appellants, divested of incumbrances, until then; nor had they, as far as is disclosed by the evidence, ever been in a position to assert homestead rights to the land until the payment made by Clark.

The legal question arising out of this state of facts is, did Roy have the power to make the sale to appellee, and were the homestead rights of appellants subject to such sale, made to discharge the existing incumbrances? That the husband is clothed with this power, in the absence of any intention to defraud the wife of her homestead rights, appears to be well settled. *Clements v. Lacy*, 51 Tex. 160. And this we understand to be the principle declared in the instructions given by the court, and which are controverted by the assignments last referred to. There is no evidence which we can discover in the record of any

intention whatever upon the part of Roy to defraud his wife. If there was such evidence, there is none from which it can be reasonably inferred that appellee ever knew that appellant, Mrs. S. A. Roy, claimed a homestead interest in the land, or that she ever refused to sign the deed, as there is nothing to indicate that appellee had made any request of that character until the refusal to deliver the possession to appellee in accordance with the original agreement. The reason of the rule, that homestead rights cannot be asserted in a case like the present, is that no such rights are acquired as against the person to whom the purchase money is due for the homestead. This rule we understand has been long recognized in this state. *Farmer v. Simpson*, 6 Tex. 303; *Stone v. Darnell*, 20 Tex. 14; *Flanagan v. Cushman*, 48 Tex. 247. See, also, *Thomp. Homest. & Ex. § 331 et seq.* Clark, when he made the payment of \$4,000 to Williams, which enabled appellants to acquire title from Williams, became subrogated to the rights Williams had. If appellee was thus subrogated to the rights possessed by Williams, then appellants could assert no stronger or better homestead rights against appellee than they could have done against Williams, so long as the incumbrance existed and the purchase money was unpaid. If, at the time of the payment by Clark to Williams of the purchase money due, the appellants had executed to Clark a mortgage on the land to secure the amount paid by him of the purchase money, instead of an absolute deed in accordance with a prior contract, the homestead rights could not have been asserted against the mortgage. Neither do we think they can be heard as against the appellee, claiming under an absolute title, under the facts of this case. Until the purchase money is paid, the purchaser has not such an estate as will support the homestead right against the person to whom such purchase money is due. *Thomp. Homest. & Ex. § 330*. This disposes of the material questions raised by the assignments. The *remittitur* entered by the appellee of the judgment for \$100 damages dispenses with the necessity for considering any other questions. We think there is no error in the judgment, and that it should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment is affirmed.

#### GAY et al. v. HALTON.

(*Supreme Court of Texas*. Nov. 26, 1889.)

#### HOMESTEAD—INCUMBRANCE.

A debtor conveyed his land to one C., to delay creditors. Afterwards, under a power of attorney from C., he conveyed the land by deed to one of his creditors, taking an agreement for reconveyance to C. on payment of the debt. The debtor remained in possession of the land until his death. *Held* that, as the title of the land always remained in C., the latter conveyance was not void, under the constitution, as being a mortgage of the debtor's homestead.

Appeal from district court, Rusk county; BOOTY, Judge.

**Action by R. R. Halton against America Gay and Jasper Gay, her son, on notes made by them, and to enforce a lien on the land for the purchase of which they were given. The other children of H. M. Gay, the father of Jasper Gay, intervened. The defendants and the intervenors appeal from a judgment for plaintiff.**

*Buford & Hall, for appellants. G. H. Gould, for appellee.*

**GAINES, J.** The facts of this case are fully shown by the findings of the judge before whom the case was tried without a jury. They are as follows: In 1853, one H. M. Gay became the owner of a tract of land of which that in controversy forms a part. He was never married. In 1858, in order to hinder and delay his creditors, he conveyed the entire tract to one Campbell, who lived in the state of Georgia. Campbell never intended to claim the land against Gay, but the land was never reconveyed to the latter. Gay remained in possession until the year 1881 or 1882, when he died insolvent. In 1878, Gay, acting under a power of attorney executed to him by Campbell, made a deed to the premises in controversy to Still & Lacy, in payment of a debt of \$300 due by Gay to them, and for \$100 to be paid in future. At the same time, Still & Lacy executed and delivered to Gay their promise in writing to reconvey the land to Campbell on the payment to them of the \$400 and interest within three years from date. For a long time previous to his death, and up to that time, H. M. Gay cohabited with America Gay, one of appellants. The other appellants are the children of H. M. and America Gay, the fruit of their illegitimate cohabitation. After the death of H. M. Gay, America Gay and Jasper Gay occupied the premises in controversy, paying rent to Still & Lacy, until the 1st day of January, 1884, when they bought the land of their landlords, and in consideration thereof executed the notes described in the petition in this case. The notes were transferred to appellee, Halton, for value, before maturity; and he brought this suit against the makers to enforce their payment, claiming a lien upon the land. The other appellants intervened in the suit, claiming that the premises in controversy were the homestead of H. M. Gay; that the transaction between him as attorney of Campbell on the one part and Still & Lacy on the other was but a mortgage, and therefore void under the constitution; and that, as surviving members of the family for whose protection the land was exempt from forced sale, they were entitled to have it decreed to them. The defendants set up a similar claim.

In *Lane v. Phillips*, 69 Tex. 240, 6 S. W. Rep. 610, this court held that a father and his illegitimate children, who lived together, constituted a family, whose homestead would be protected from forced sale. It may be, therefore, that, if H. M. Gay had been the owner of the property at the date of the deed

from him, as attorney of Campbell, to Still & Lacy, and had been the grantor in that deed, the transaction, being but a mortgage, would have been void; and the question might then have been presented whether, after the death of the father, the illegitimate offspring had any rights in the homestead. But the court below concluded that Campbell was the owner of the property, and hence that the defendants and intervenors were without any right in the premises whatever, except such as defendants derived from their conveyance from Still & Lacy. We think the court correct in this conclusion. The conveyance from H. M. Gay to Campbell, being in fraud of creditors, was good as between the parties; and, although Campbell may have intended that Gay should enjoy the use of the land, this did not alter their legal or equitable rights. The title remains wholly in Campbell. Under the evidence adduced, judgment was properly rendered for appellees.

The defendants and intervenors offered in evidence during the progress of the trial a deed, executed in 1873 by one Jimmerson and wife to H. M. Gay, to 60 acres of the land in controversy, which upon objection was excluded by the court. It does not appear whence Jimmerson and wife derived their title, if any they had; and therefore the evidence was irrelevant. We do not consider it necessary to pass upon the question whether or not, under the agreement to read the records, the appellants had a right to read a record which was not made until the trial had begun. We find no error in the judgment, and it is affirmed.

#### MORRISON v. HAMMER.

(Supreme Court of Texas. Dec. 3, 1889.)

##### PAYMENT.

Where the widow of a deceased owner of cotton delivers the cotton to one having a verbal lien thereon, for supplies furnished in raising the crop, in payment thereof, she cannot, by an order to another lienholder, divest the first of his title.

Commissioners' decision. Appeal from district court, Shelby county; **DRURY FIELD**, Special Judge.

Replevin for a bale of cotton.

*E. B. Wheeler and R. S. Bryarly, for appellant. M. W. Wheeler, for appellee.*

**HOBBY, J.** The record contains no bill of exceptions, nor objections in any form, if any were made, to the rulings of the court below on the trial. Looking to the assignments, the only question which seems to be raised is the sufficiency of the evidence to support the judgment of the court. The appellant claimed the bale of cotton in controversy, and levied upon it a writ of sequestration while in appellee's possession. His claim was based upon a parol contract made with Rial Darnall, by the terms of which appellant was to have a "verbal lien" on the cotton, in consideration of supplies furnished to raise the same. The supplies were fur-

nished. Darnall died before the crop was gathered. Appellee had made a similar contract with Darnall, and had furnished supplies for the same purpose. When the crop was gathered, Mrs. Darnall, the widow of Rial Darnall, delivered the cotton to appellee in payment of the supplies furnished by him. Subsequently she gave an order in writing to appellant for the cotton, which, when presented to appellee, he refused to comply with. Upon the delivery of the cotton to appellee by Mrs. Darnall in payment of the debt due the former by her deceased husband, for supplies furnished by appellee, appellee's title vested, and the subsequent order of Mrs. Darnall to appellee to deliver it to appellant could not impair or defeat that title. There was evidence, we think, sufficient to support the judgment in favor of appellee, and, as no other question is presented, we think the judgment should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

#### BELLAMY v. MCCARTHY.

(Supreme Court of Texas. Dec. 8, 1889.)

##### VENDOR AND VENDEE—DEFECTIVE TITLE.

1. In an action for the price of land sold in gross, and described by metes and bounds, allegations in the answer that the vendor represented that the tract contained so many acres, and that the vendee purchased relying on such representations, whereas it in fact contained a lesser quantity, do not raise the issue that part of the land described was held by an adverse superior title, whereby its possession was lost to the vendee.

2. If the vendee desires relief in such a case, on the ground of mistake or fraud, the quantity conveyed by the deed must be determined by the calls in the deed, regardless of conflicts with adverse titles.

Appeal from district court, Panola county; J. G. HAZLEWOOD, Judge.

*Drury Field*, for appellant. *J. G. Hazlewood*, for appellee.

HENRY, J. Appellant sued to recover the balance of the purchase money of a tract of land, and to foreclose a vendor's lien. The land sold is described in the deed by metes and bounds, and the number of acres conveyed is designated as 170 acres, "more or less." The deed contains a clause of general warranty of title. The defense set up by the answer was that at the time of the purchase of the land plaintiff represented to defendant that the tract contained 170 acres; that defendant was ignorant of the quantity, and relied on plaintiff's representations, and purchased it believing that it contained 170 acres, whereas in fact it only contained 128 27-100 acres; that the purchase money ought to be abated \$137.38 on account of the deficiency, which, with the payments made by defendant, will reduce the amount due to plaintiff to \$19, which defendant offers in full discharge of plaintiff's demand. In this

state of the pleadings, the court, at the instance of the defendant, made an order for a survey of the land, and, when it had been made, admitted a report of it in evidence, over the objections of plaintiff.

In the case of *Wheeler v. Boyd*, 69 Tex. 294, 6 S. W. Rep. 614, this court decided that the law only authorizes that proceeding in actions of trespass to try title. The record before us shows that the surveyor did not survey the tract of land described in the deed from plaintiff to defendant, but surveyed only part of it, for the reason, assigned by him, that if he had followed the calls of the deed the land would have conflicted with land owned and in the possession of other parties; wherefore he only surveyed so much of the land described in the deed as was unclaimed by other parties. From which proceeding the result followed that the land, as surveyed by him, fell short of the quantity described in the deed.

On the verdict of a jury, the court entered judgment in favor of plaintiff for \$28, and foreclosing vendor's lien on the land described in the report of the surveyor. The defendant was adjudged to pay cost of filing petition, issuing and serving citations, entering final judgment, "and all the ordinary costs of this suit;" and plaintiff was adjudged to pay all other costs, including cost of making and executing order of survey, and witness fees. This was error. Plaintiff was entitled to a judgment for all costs.

We think the case was tried upon an entire misconception of the issue involved. It is clear that the land was sold by the tract, or in bulk, and not by the acre. But, notwithstanding this, if part of the land included in the description of the deed from plaintiff to defendant is held by an adverse and superior title, so as that the title and possession is lost to defendant, he may obtain relief, if he will properly make that issue in his pleadings, and sustain it by testimony. His answer, on which he went to trial, contained no such allegation; and, if it had been pleaded, the evidence fails to show that part of the land included in his deed is held by a superior, adverse title. As the deed shows a sale in gross, and not by the acre, if the defendant desires to bring his case within the rules that grant relief in such cases on account of fraud or mistake, he may do so; but then the quantity conveyed by the deed must be determined by the calls in the deed, unaffected by the question whether the land described conflicts with a better title. If, on the other hand, the defense desired to be made is not that there is a deficiency in the quantity of land described in the deed, but that, by reason of the land so described being in conflict with land held by a better title, part of the land conveyed is lost to the defendant, the facts should be alleged and proved entitling defendant to relief in that character of case. The judgment is reversed, and the cause is remanded.

**MOORE v. BAYNE et al.**

(Supreme Court of Texas. Jan. 23, 1890.)

**COSTS ON APPEAL—DESTROYED TRANSCRIPT.**

Where, pending an appeal, the original transcript is destroyed by fire, and the appellant has another made out, the cost of such second transcript is taxable as part of the costs to be paid by appellee on reversal.

Appeal from district court, Houston county.

*J. R. Burnett*, for H. W. Moore, appellant. *Nunn & Nunn*, for Susan Moore, appellee.

**GAINES, J.** This is an appeal from a judgment on a motion to retax the costs in the case of *Moore v. Moore*, which has been several times before this court on appeal, and which was finally determined at the last term. 11 S. W. Rep. 396. At the October term, 1880, of the district court of Houston county, the present appellant, who was defendant below, obtained a judgment in that court, from which the plaintiff, George F. Moore, appealed. While that appeal was pending the records of this court at this place were burned, and the transcript in that case destroyed. The clerk of the district court was directed to make out another transcript, which he did, and charged therefor the sum of \$84.50, which he entered on the bill of costs. The judgment was reversed upon that appeal. The defendant paid all the costs of the appeal, except the cost of the second transcript. The clerk having issued an execution against the defendant for this as well as other costs, the defendant filed this motion to retax and obtained an injunction. The court below held that he was liable for the costs of the second transcript, and from that ruling this appeal is taken. We are of opinion that the court did not err in its ruling. It was not the fault of the appellant on the former appeal that the transcript was destroyed. In order to prosecute his appeal, it became necessary for him to apply to the clerk for another transcript, and we think it was properly taxed as a part of the costs, to abide the decision of this court on the appeal. It is argued that costs are only recoverable by force of the written law, and that the statute only provides for the cost of one transcript. The same may be said in reference to the provisions for costs for other services of the clerk. He is allowed a fee for a citation, and a fee for issuing an execution. Nothing is said of any charge for an *alias* or *pluries* writ of either character, and yet it cannot be doubted that, where a second or third writ is necessary, he is allowed to charge for it in the same manner as for the original. There is no error in the judgment, and it is affirmed.

**SILBERBERG et al. v. PEARSON et al.**

(Supreme Court of Texas. Dec. 3, 1889.)

**CANCELLATION OF DEEDS—PARTIES—PLEADING—INSTRUCTIONS.**

1. In an action by grantors in a deed against their grantees to set the deed aside, a vendee of the grantees is not a necessary party defendant.

2. Although a plaintiff in his special prayer may mistake the relief to which he is entitled, he may, in response to a prayer for general relief, be awarded the relief to which the pleadings and evidence may entitle him.

8. Where a charge of the court is conceived to be insufficient, the party objecting to it should ask for a special charge upon the subject. If he does not do so, and the general law applicable to the case is given to the jury, there is no ground for complaint.

Commissioners' decision. Appeal from district court, Red River county; **PRES. C. THURMOND**, Special Judge.

*Swain & Burdette* and *Hale & Hale*, for appellants. *Chambers & Doak*, for appellees.

**ACKER, J.** Silas Pearson brought this suit for himself, and as next friend for his and his deceased wife's minor children, against George Silberberg, Leopold Silberberg, and J. C. Brewer, to cancel a deed made by Silas Pearson and wife to George and Leopold Silberberg; to remove clouds from their title, and to be quieted in their possession of the lands described in the petition; to recover rent for about 50 acres of the land, which they alleged they had been ejected from by the defendants. Plaintiffs sought to cancel the deed to defendants Silberberg upon the grounds that it was obtained by fraud, and, although it was a deed in form, it was intended to be, and was in fact, but a mortgage on the homestead of the vendors. Defendant Brewer disclaimed any interest in the land. Defendants George and Leopold Silberberg answered by general denial, and specially pleaded title in themselves under the deed from Pearson and wife, describing it, and prayed for damages and restitution of the premises. There was verdict in favor of plaintiffs, against all defendants, "for the land described in their petition, and for them against defendants Silberberg for one hundred and fifty dollars as rent for fifty acres of land for the year 1889;" upon which judgment was rendered for the land, canceling the deed under which defendants claimed, removing all cloud from plaintiffs' title, and for \$150 rent. On the trial defendants offered in evidence a deed of trust from themselves to Isidor Silberberg, conveying the land in controversy for the benefit of their creditors. The assignment of error states that this instrument was offered "to show that a necessary party was not before the court." It was objected to upon the ground that "Isidor Silberberg was not a necessary party." The objection was sustained, and this ruling is assigned as error. The defendants had no right to have their vendee made a party defendant, even if their answer had specially set up the conveyance to him, and asked that he be made a party. Plaintiffs might have joined him as defendant, if they had seen proper to do so, but he was not a necessary party, and his rights, if he had any, are not affected by the judgment. *Chapman v. Lacour*, 25 Tex. 94; *Wood v. Loughmiller*, 48 Tex. 205.

We think the court did not err in excluding the deed of trust. The second assignment of error is: "The court erred in the third paragraph of the charge in instructing the jury to find for plaintiffs for the premises in controversy, if it is shown that the deed from Pearson and wife to Silberbergs was intended as a mortgage, because the pleadings and prayer do not authorize such a charge, but the jury ought to have been instructed to find whether the instrument was intended to be a deed or a mortgage, and the court apply the law." The third paragraph of the charge is as follows: "If the evidence shows you that, at the time of the execution and delivery of said deed from Pearson and wife to defendants Silberberg, the premises conveyed thereby were the homestead of the said Pearsons, and if it further shows you that when said deed was executed and delivered it was procured to be so executed and delivered upon the understanding and agreement that it should be taken by defendants Silberberg as security for the indebtedness of said Pearsons to defendants, said deed is null and void, and you will find for plaintiffs the premises in controversy; but if the evidence does not show you that said deed was not made or procured to be made to said defendants, under such agreement and understanding, you will find for defendants Silberberg." If the case made by the plaintiffs' petition was not technically an action to try title, it was substantially; and, if it lacked any of the essential characteristics of such action, we think they were supplied by the answer of defendants. The answer set up title in defendants, and asked affirmative relief by having the land decreed to them. Plaintiffs claimed that, while the instrument under which defendants claimed the land was in form an absolute deed, it was in fact but a mortgage upon the land which was their homestead, and that it was so understood and intended by the parties at the time it was executed. Defendants claimed that the instrument was an absolute deed, executed upon a valuable consideration, and that they acquired title to the land thereby. The pleadings made the title to the land the very gist of the action, dependent upon a question of fact, which we think the court fairly and clearly submitted to the jury. It is true that the special prayer of the petition is not for judgment for the premises, but there is a prayer for general relief, which we think authorized the charge. The charge was not inconsistent with the case made by the pleadings nor with the special prayer. Although the plaintiffs, in their special prayer, may have mistaken the relief to which they were entitled, in response to the prayer for general relief they may be awarded the relief to which the pleadings and evidence may entitle them. *Trammell v. Watson*, 25 Tex. Supp. 217. We think the paragraph of the charge now being considered leaves to the jury, in very explicit language, the important and controlling question of fact whether the instrument under which defendants claimed was

a deed or a mortgage; and instructs them to "find for plaintiffs the premises in controversy," if they should find that the land was homestead and the instrument a mortgage. We think the effect of the language of the charge is no more than telling the jury they should, if they found the land was homestead and the instrument a mortgage, return their verdict for plaintiffs. We think the second assignment of error is not well taken.

It is contended, under the third assignment of error, that the court erred, in the third paragraph of the charge above quoted, in charging the jury, "If the evidence shows you" that the instrument was intended to be a mortgage, etc., instead of charging them that they ought to believe from the evidence such fact. We do not think it probable that the jury were misled by the language here complained of. "If the evidence shows you," we think means nothing more than, "if you see or believe from the evidence;" and the ordinary mind would receive substantially the same impression from one expression as from the other. In the same paragraph the court instructed the jury, "But, if the evidence does not show you" that the instrument was intended to be a mortgage, "you will find for defendants;" thus properly placing the burden of proof upon plaintiffs all the way through. If defendants thought the charge given insufficient, they should have asked a special charge upon the subject. As they did not do so, and as the general law applicable to the case was given to the jury, we think their complaint should not be sustained. *Johnson v. Granger*, 51 Tex. 42; *Railroad Co. v. O'Donnell*, 58 Tex. 27; *Hays v. Hays*, 66 Tex. 610, 1 S. W. Rep. 895. Under the fourth and fifth assignments it is contended that "the pleadings do not justify the verdict, and the verdict is not responsive to the issue in the case, and the judgment is not authorized by the pleadings, and the verdict and judgment are contrary to the evidence." What we have said in discussing the second assignment of error disposes of most of these objections, and we deem it sufficient to say, in this connection, that we think the pleadings and the evidence abundantly support the verdict, and that the verdict authorized the judgment. We are of opinion that the judgment of the court below should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

#### TEMPLETON v. GIDDINGS *et al.*

(*Supreme Court of Texas*. Dec. 6, 1889.)

#### JUDGMENT—DISQUALIFICATION OF JUDGE.

A judge is disqualified to render judgment upon a note which has been assigned as collateral to secure a debt, owed by a firm of which he is a member; and such a judgment is absolutely void.

Appeal from district court, Ellis county; ANSON RAINY, Judge.



**Action for partition.***F. P. Powell, for appellant.*

**GAINES, J.** The land which is the subject-matter of this suit belonged in common to Robert Young and his wife, Sarah B. Young, both of whom died intestate. This action was brought for a partition, each of the parties claiming as an heir, or under an heir, of such decedents. J. T. Young inherited an interest in the property; and this interest is claimed both by appellant and by appellee Nancy J. Hines, both of whom were made parties defendant to the suit. The only controversy in the case, as here presented, is in regard to the right of these two parties to the interest named. The court below adjudged that interest to Nancy J. Hines. She claimed under a deed executed to her by J. T. Young on the 23d day of October, 1886, and recorded on the 30th of that month. Appellant claimed under a judgment, execution, and sheriff's sale and deed. The judgment was rendered in the county court on February 21, 1877. Execution issued thereon March, 1877, and an *alias* issued November 23, 1886. However, on the 29th of October, 1886, an abstract of the judgment was duly recorded in the office of the county clerk. Appellee Nancy J. Hines contended in the court below—*First*, that the judgment was void; and, *second*, that, if valid, the plaintiffs therein acquired no lien by filing the abstract. The court found in her favor upon both propositions. If either finding be sustained, the judgment now appealed from must be affirmed.

Appellant, Templeton, was the judge of the county court when the judgment was rendered, and presided upon the trial. The court below found that he was interested in the cause of action, and concluded, as a matter of law, that the judgment was a nullity. This finding of fact and this conclusion of law are separately assigned as errors. The cause of action upon which the judgment in the county court was rendered was a promissory note executed by J. T. Young to John D. Templeton & Co., a firm of which appellant was a member. It had been indorsed without recourse, by the payees, to Hayner & Co., who brought the suit and obtained the judgment. The appellee Nancy Hines offered evidence tending to show that the transfer of the note was not absolute, but was made for the purpose of securing a debt owed by the payees to Hayner & Co. This was disputed by appellant, who offered testimony to prove that the transfer of the note was unconditional. We deem it sufficient to say, without discussing the evidence, that there was evidence to sustain the finding of the court below, and that, the testimony being in conflict, we cannot disturb the finding. It has as conclusive an effect as the verdict of a jury. If the note was assigned as a collateral to secure a debt owed by John D. Templeton & Co. to Hayner & Co., then the appellant, as a member of the former firm,

who were the payees of the note, had an interest in it, and the appellant was disqualified to render a judgment upon it. The court, therefore, did not err in concluding that the judgment was a nullity. The judgment being void, the appellant acquired no title by virtue of the sheriff's sale made under it, and it is therefore unnecessary to inquire whether or not, if valid, the recording of the abstract fixed a lien upon the tract of land. The judgment is affirmed.

**FINN et al. v. WILLIAMSON et al.***(Supreme Court of Texas. Dec. 6, 1889.)***TRESPASS TO TRY TITLE — COMMUNITY PROPERTY.**

In trespass to try title by persons claiming an undivided interest in land through a conveyance from L. to their mother in their father's lifetime, against those claiming under a conveyance from the mother after the death of the father, defendants proved a regular chain of title, in which a conveyance to L. was not a link, from the sovereignty of the soil to one F., and a conveyance from her husband to one of them. It did not appear whether F. was living at the time her husband conveyed to one of the defendants, but she was dead at the time of the trial. *Held* that, if F. was living at the time her husband conveyed to one of the defendants, then title vested by that conveyance in that defendant, and in such of the other defendants as held under him. If she was dead at the time her husband conveyed, then one undivided half of the lot passed by the conveyance. If the title rested in F. in her separate right, then, as outstanding title, it was a good defense to plaintiffs' action.

Appeal from district court, Hopkins county; E. W. TERHUNE, Judge.

*Easley & Scott*, for appellants. *A. A. Henderson, V. H. Blocker, J. H. Dinsmore*, and *B. W. Foster*, for appellees.

**STAYTON, C. J.** Appellants seek to recover an undivided interest in a town lot, and base their claim on a conveyance made by E. S. Luther to their mother, made during the life of their father, who has since died. The evidence shows, and the court found, that whatever title passed by the deed from Luther vested in the mother a community right. After the death of the father of appellants, their mother conveyed the lot to persons under whom appellees claim, and by reason of this fact appellants rely upon a common source of title for a recovery, it not being shown that Luther had title. Appellees proved a regular chain of title, in which a conveyance to Luther is not a link, from the sovereignty of the soil to Emily A. Frost, and a conveyance from her husband, A. B. Frost, to one of them. The inference from the record is that Emily A. Frost was the wife of A. B. Frost at the time the conveyance was made to her, and, in the absence of evidence to the contrary, the presumption is that it became the community property of herself and husband. The record does not show whether Mrs. Frost was living at the time her husband conveyed to one of appellees, but does show that she was dead at the time of the trial. If Mrs. Frost was living at the time her husband conveyed to one of appellees, then title vested

by that conveyance in that appellee, and in such of the other defendants as held under him through warranty deeds. If she was dead at the time her husband conveyed, then one undivided half of the lot passed by that conveyance, and one of appellees, at least, so connects himself with the title as to entitle him to set it up as outstanding title, even if the title of Mrs. Frost could, in any sense, be termed an equity, as the court below seems to have thought might be true. If the title vested in Mrs. Frost in her separate right, then, as outstanding title, it is good defense to this action. The judgment of the court below was correct, and will be affirmed.

MISSOURI PAC. RY. CO. v. EDWARDS.

(Supreme Court of Texas. Dec. 6, 1889.)

APPEAL—PREJUDICIAL ERROR.

Where no statement of facts is furnished by appellant, a judgment will not be reversed unless it appear, not only that the lower court erred, but that such error must, with reasonable certainty, have produced a substantial injury to appellant.

Appeal from district court, Tarrant county; R. J. BOYKIN, Special Judge.

*Finch & Thompson*, for appellant. *D. F. Templeton, W. E. Singleton, and Ball, Wynne & McCart*, for appellee.

STAYTON, C. J. This action was brought by appellee to recover damages for injury to cattle shipped by him from a point in Texas to a point in New Mexico, and it resulted in a judgment in his favor. There is no statement of facts, and but two questions are presented.

From a bill of exceptions, it appears that appellant proposed to introduce in evidence one clause in a shipping contract, which provided that, in event of total loss, the measure of damages should be the value of the cattle at time and place of shipment. This was objected to on the ground that there was no pleading to authorize the introduction of such evidence, and on the ground that such a contract was contrary to law; and the objections were sustained. Appellant's pleading consisted of a general demurrer, plea of not guilty, and the further plea, alleging, if the cattle were injured, this resulted from the negligence of appellee. Neither party pleaded a written shipping contract. If appellant wished to rely on the matter proposed to be proved for the purpose of fixing the measure of damages, it would seem that it ought to have been pleaded, in view of the fact that pleadings of appellee stated facts which would have entitled him to compensation, to be measured by the value of the cattle at place of destination, and time when they ought to have reached that place. In the absence of a statement of facts, or a further statement than the bill of exceptions contains, we cannot know whether the evidence, if admitted, could possibly have changed the result. The proof offered had application only to such cattle as were wholly lost, but the petition

claimed damages for the value of cattle alleged to have been killed, and also for damages for injuries done to cattle not killed, as well as for extra expenses incurred by delay in transportation, and we cannot know, from the record before us, that any cattle were totally lost, and the evidence offered had application only to such a loss. Nor can we know that the value of the cattle, at the time they should have been delivered at destination, was there greater than at the place and time of shipment. This being true, appellant does not show that it was in any way prejudiced by the ruling of the court. "To reverse the judgment, in the absence of a statement of facts, on such grounds, this court should ordinarily be able to see, not only that the court had erred, but that such error must, with reasonable certainty, have produced a substantial injury to the party in his cause. An abstract error, upon a point of law applicable to the evidence, is not enough. It should appear manifestly to have been a wrongful error in reference to the cause of action or defense." *McCarty v. Wood*, 42 Tex. 99; *Lockett v. Schurenberg*, 60 Tex. 610. Without a statement of facts, we cannot know that the injury occurred under such circumstances as would justify the enforcement of such a contract.

The other objection relates to the charge of the court as to the measure of damages; and, without a statement of facts, we are unable to pass on its correctness, when applied to the case made by the pleadings and evidence. The petition made a case in which the charge given would be correct; and in the absence of a statement of facts, the presumption is that the evidence justified the charge given. We find no error in the judgment, and it will be affirmed.

CRAWFORD v. SANDIDGE.

(Supreme Court of Texas. Dec. 10, 1889.)

JUSTICE OF THE PEACE—JURISDICTION—REFORMATION OF CONTRACT.

A justice of the peace has jurisdiction of a suit, the object of which is to ascertain and fix the amount justly due, for which there is a lien upon land, and to reform the contract as to the amount secured by the lien.

Commissioners' decision. Error to district court, Tarrant county; R. E. BROOKHAM, Judge.

*C. C. Cummings*, for plaintiff in error.

COLLARD, J. Plaintiff in error sued in the district court, by amended petition, against defendant in error, for \$175, alleging deficiency in quantity of land sold him by defendant by general warranty; the deed purporting to convey 17 acres of land, more or less. It was alleged that there was a mistake of 7 acres less in quantity than the deed called for, arising from a conflict with adjoining surveys; that it was expressly agreed that plaintiff should have 17 acres of land, computed at the rate of \$25 per acre, and that by said computation \$425 were paid, and to be

paid, defendant for the land; that plaintiff paid \$106.25 in cash, and executed his three notes for \$106.25 each, with interest for the balance, the notes and the deed expressly retaining a vendor's lien to secure the unpaid balance; that the notes were payable to defendant, and that he was still the owner and holder of them; that the deficiency, at the contract price, amounted to \$175, and plaintiff had made repeated demands upon defendant to pay the same, or allow a credit for the amount on the notes, which was refused. The prayer was for judgment for \$175, or, in the alternative, that the notes be credited with the amount. Plaintiff asked for an order of survey, which was granted; and the surveyor's report showed that there were but 10 acres in the survey sold. Upon demurrer to the jurisdiction of the court because of insufficiency of amount, the court below dismissed the case, and plaintiff has brought it up by writ of error.

The object of the suit was to have notes given for land corrected as to amount, or for judgment for such sum as the deficiency of land amounted to at the contract price. Suits for cancellation of contracts, or to reform them, are cognizable by courts of equity; but a justice's court has power to hear and determine such cases, when it has jurisdiction in other respects. A justice of the peace cannot exercise the extraordinary powers of a chancellor in granting injunctions, but he can try cases involving equitable rights as well as legal. Article 5, § 19, State Const.; Rev. St. art. 1589; *Gibson v. Moore*, 22 Tex. 611. There is no question involving title to land in this case. The suit is not to establish a disputed boundary of land between parties claiming title thereto. It is not for specific performance of a contract to convey land, to enforce a lien upon land, but to ascertain and fix the amount justly due, for which there is a lien upon land. It is not to vacate the lien or cancel it, but to reform the contract as to the amount so secured by lien. The justice's court only had jurisdiction of the amount involved in the suit. There was nothing alleged which would give the district court jurisdiction. *Mixan v. Grove*, 59 Tex. 574. We conclude the judgment of the lower court should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

#### SIMMONS v. TERRELL *et al.*

(*Supreme Court of Texas*. Dec. 8, 1889.)

PROMISSORY NOTES—ATTORNEY'S FEES—JURISDICTIONAL AMOUNT.

1. Where a note against the estate is presented for allowance, and the administrator allows the principal and interest, but rejects a claim of 10 per cent. attorney's fees, which the note stipulates shall be paid, such rejection of a part of the claim authorizes the holder to sue for the full amount of principal, interest, and attorney's fees; and, if the amount thereof be sufficient, the district court has

jurisdiction, though the claim for attorney's fees, which is the real amount in controversy, is not sufficient of itself to give the court jurisdiction.

2. The resort to the probate court for the collection of a note against an estate, by procuring its allowance by the administrator, and the approval of the county judge, is such a suit as will entitle the holder of the note to the allowance of attorney's fees, which the note stipulates shall be paid in case suit is necessary to collect it.

Commissioners' decision. Appeal from district court, Robertson county.

Action by A. H. Terrell and others against T. J. Simmons, administrator of the estate of H. D. Prendergast, deceased, to collect a note given by decedent. There was judgment for plaintiffs. Defendant appeals.

*Simmons & Crawford*, for appellant. *S. A. Posey*, for appellees.

HOBBY, J. The facts were as follows: The note sued on was introduced. It was dated, Austin, October 24, 1885; was executed by H. D. Prendergast, for the sum of \$2,000, due 12 months after date, payable to Mrs. A. H. Terrell, with 12 per cent. interest per annum, from date, till paid. It contained also this language: "And, in case of suit after maturity to enforce collection, ten per cent. attorney's fees additional." It recited that it was for borrowed money, and that it was secured by deed of trust of same date, executed to S. A. Posey, conveying 2,763 acres of land in Milam county. There was a credit on the note for \$240 interest, October 12, 1886. Posey, as attorney for Mrs. Terrell, presented the note to T. J. Simmons, administrator of the estate of H. D. Prendergast, on November 1, 1887, for allowance; and the following indorsement was entered on said claim by the administrator: "Examined and allowed for the sum of two thousand dollars, with interest thereon from October 24th, 1886, at the rate of 12 per cent., to be paid in due course of administration. Claims for attorney's fees disallowed this November 7th, 1887." The deed of trust referred to was in evidence. The suit was on the note for \$2,000, with 12 per cent. interest and 10 per cent. attorney's fees, less a payment of \$240 interest. This note, when presented to the administrator, was allowed for the principal and interest due, but rejected for the \$228.80 attorney's fees.

It is claimed by appellant that, as the administrator allowed all of the claim save the 10 per cent. attorney's fees, this suit was to establish the claim for that sum only, and was therefore not within the jurisdiction of the court, and that the plea to the jurisdiction should have been sustained. We do not think there was error in overruling the plea to the jurisdiction. The rejection of the claim in part authorized the holder, if not satisfied with such rejection, to bring suit on the claim for the full amount, which was a sum within the court's jurisdiction. *Gibson v. Hale*, 57 Tex. 406. This disposes of the first error assigned.

The remaining assignments relate to the conclusion of law found by the court, which

was to the effect that the resort to the probate court for the collection of the claim by procuring the allowance by the administrator, and approval of the county judge, which must have followed, in order to collect the claim, was such a suit as was contemplated by the parties, and covered the terms of the contract of deceased as contained in the note, and plaintiff was entitled to the allowance of 10 per cent. attorney's fees by the administrator, and upon his refusal to allow the same he could bring suit in the district court for the amount of the note, including such fees, and to enforce the deed of trust. It is contended by the appellant that the proceeding required of a creditor by our probate laws, in having his claim against an estate allowed by the administrator and approved by the probate court, does not come within the most comprehensive definition of a suit. It is also urged that a civil suit in the district and county courts must be commenced by petition filed, etc. Although the presentation of the claim to appellant may not have been a suit, within the technical meaning of that term, or as defined by the statute, still it was a resort to a judicial tribunal, rendered necessary by the death of Prendergast and administration on his estate, to enforce a demand. The collection of the appellee's claim by due process of law, as provided and required by articles 2015, 2018, 2020, 2022, 2024, 2026, of the Revised Statutes, through the probate court, would require as much the services of an attorney as would the enforcement of a demand against an individual by the filing of a petition in an ordinary suit. The language used in the note, and which provided for the payment of 10 per cent. attorney's fees additional, in case of suit after maturity to enforce collection, we do not think, should be restricted to a suit in equity or an action at law. By this language, we think the parties contemplated that such fees should become payable if, in order to collect the debt, the services of an attorney become necessary, to apply to a court, having jurisdiction of the subject-matter, to secure the payment of the claim. In this case, it appears from the record that an attorney was employed for this purpose. We think there is no error in the judgment, and that it should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

#### GULF, C. & S. F. RY. CO. v. REDEKER.

(Supreme Court of Texas. Dec. 8, 1889.)

#### PARENT AND CHILD—INJURY TO MINOR SERVANT—REMITTITUR.

1. Where the parents of a minor child are living together, the consent of the father to the employment of the minor is necessary to relieve the employer from liability to the father for loss to him of the child's services, arising from injuries received in the employment. The mother's consent is not sufficient.

2. The facts that the father had given a general permission to the minor to engage in railroad-ing, and had consented to his employment as a fireman, do not affect his right to recover for injuries received while he was employed, without the father's actual consent, as brakeman; nor is the father bound to notify the company that he does not consent.

3. Where it may be determined by fixed rules and principles of law how much a verdict is excessive, a *remittitur* of the excess may be received in answer to a motion for a new trial on the ground of excessive damages.

Commissioners' decision. Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

*Shepard & Miller*, for appellant. *Wm. McLaurie* and *Ball & McCart*, for appellees.

COLLARD, J. This action was brought by the appellee, Louis Redeker, for loss of services of his minor son, J. W. Redeker, expenses, etc., resulting from an injury received while the minor was engaged as an employe of the Gulf, Colorado & Santa Fe Railway Company, on a construction train, in the capacity of a brakeman. On the former appeal of the case the court, Mr. Justice GAINES delivering the opinion, laid down the following propositions of law. He said: "There can be no question that if the injury was the result of negligence, as alleged in the petition, the father was entitled to a judgment for damages for loss of service and incidental expenses accruing from the injury. *Railroad Co. v. Miller*, 49 Tex. 322. We are also of opinion that when one knowingly engages a minor in a dangerous employment, without the father's consent, and the minor is injured in such employment, he is responsible to the father for any consequent loss of the son's services to him. \* \* \* This is the rule when the minor is employed by another with the parent's consent, and, without such consent, is put by his employer at a more dangerous business, and thereby receives an injury. \* \* \* and we see no reason why one less stringent should be applied in case the minor is knowingly engaged in a perilous occupation in the first instance, against the parent's will." 67 Tex. 191, 2 S. W. Rep. 527. The case was reversed and sent back for another trial on the ground that it did not appear from the testimony that defendant knew that the son was a minor, or that it ought to have been known from his appearance. On the last trial this evidence was supplied to this extent, that the fact was made known to the conductor before the injury,—the conductor who had employed him, under whom he served, and who had authority to employ and discharge such employes of the company. On this appeal other questions are at issue. It was shown on the last trial that the father, plaintiff, was only occasionally at home; was employed as engineer on the same road running between his home at Ft. Worth and Temple; came into Ft. Worth in the evening, and would go right out again, laying over at Temple; stopped in Ft. Worth just about long enough to go

home; came in sleepy, and would lie down. Under these circumstances, the father being absent, young Redeker, by his mother's permission, left home to get a position on a railroad, (had been idle about six weeks,) having been, by his father's consent, previously at work as a fireman on the "T. P." road, both parents having consented that he should follow railroading for a living; went to Houston, and was employed by defendant's agent as a wiper or watchman, and was in a few days put to work as a brakeman on a construction train. While employed as a watchman, he wrote his mother of the fact, but she did not know the character of his work had been changed. His father did not consent to his taking employment with defendant at all. He says he did not know where he was, or what he was doing, but his wife testified that when "he came home and found John had gone to Houston, into the railway service, he was not to say angry, but he did not like it." The defendant asked the court to charge the jury that, if the son went away from home, with his mother's consent, to enter into railway service, and no notice was given to defendant that he was not permitted to take employment as a brakeman, the plaintiff could not recover. The court refused to give the charge, and in the general charge informed the jury that the father's consent to the employment was necessary. The court also told the jury that, if he entered upon the service of defendant with his mother's consent, and his father was informed of it, and of the character of service he had taken, and then consented to or acquiesced in it, the verdict should be for defendant. The refusal of the court to give the requested charge is assigned as error.

Appellant argues that the mother's consent was sufficient authority for defendant to employ the minor. If this is correct, the case must be reversed, because the court made the right to recover depend on the father's consent or acquiescence. We cannot agree to the legal proposition contended for by appellant. In case the husband abandon the wife, and the necessities of the family demand it, she can act as a *feme sole* in the management and disposition or sale of the community property. See *Wright v. Hays*, 10 Tex. 135; *Cheek v. Bellows*, 17 Tex. 617; *Fullerton v. Doyle*, 18 Tex. 12; *McAfee v. Robertson*, 41 Tex. 358; *Lodge v. Levertton*, 42 Tex. 20; *Heidenheimer v. Thomas*, 63 Tex. 289. These authorities are cited in support of the doctrine contended for by appellant in this case; but an examination of them will show that two things must concur to give the wife the power to sell the community property: (1) There must be an abandonment by the husband of the wife of a permanent character, or such desertion or protracted absence as leaves to her the necessary responsibility of maintaining the family; and (2) the necessity must exist to require the exercise of the power. Under the facts of this case, it will be seen at once that this principle cannot be

invoked to authorize Mrs. Redeker to act independently of her husband, if the question were one of her right to sell or charge community property. However, we do see from these cases that there are circumstances under which the wife may, from necessity, become the managing head of the family, and may so act without the concurrence of her husband. The husband is by law the managing head of the family, except in extreme cases. At common law he has the right to the custody of the children, except in cases of misconduct, or where the welfare of the child demands that such custody be taken from him and given to the mother, in which case the courts of proper jurisdiction will so direct. *Schouler, Dom. Rel. §§ 246-248, inclusive*. When the parents live together, the father, under our statute, is made the natural guardian of the persons of the minor children; where they do not live together, their rights are equal. *Rev. St. arts. 2494, 2495*. The status of the father in the family is then fixed beyond controversy by our statute. As natural guardian of the children he has the right to their custody and control. We think that his authority and dominion are exclusive, at least to the extent that in general, in all matters of such importance that the consent of the parent is required to legalize or justify an act or transaction with or concerning a minor, and the parents are living together, the consent of the father is required, and the consent of the mother will not suffice. There are no facts in this case that should make it an exception to the rule. The parents were living together. The father was necessarily absent from his home the most of his time, following his occupation of engineer, but stopping at home when his business did not call him away. We do not see any fact in the case that would change his ordinary relations with his family, or affect his rights and privileges with them. Hence, we conclude that Mrs. Redeker's permission to her son, if it had been full and complete, that he could take employment with defendant as a brakeman on a construction train, did not justify defendant in making the contract, or in retaining the minor in such employment, after information that he was a minor. When it was ascertained that he was a minor, it was the duty of defendant to obtain the father's consent. Defendant's agent, who employed the minor, and had authority to discharge him, knew his father, and had been at his house. He took the risk for his company when he retained the son in his employment without the father's consent, after notice of the fact of minority. By general permission, plaintiff had consented that his son could follow railroading for a living, and had consented to his employment on another road as fireman. But it was in proof that firing was not as dangerous as braking, and that braking on a construction train was more dangerous than on a completed road. He had the right to direct his son in taking employment, and to select

the kind of employment he should take. He had done so in the instance given. The general permission that he could follow railroad-ing for a living did not deprive the father of specifying how and where he should work. Had the father actually consented that his son could be employed by defendant as a wiper or watchman or fireman, and without his consent defendant had changed the employment to be the more hazardous one of braking on a construction train, the change would have been at the peril of the company. Plaintiff was not required to give defendant notice that his son was not permitted to serve as a brakeman. It is not shown that plaintiff knew he was in defendant's employ, and if he did it was not his duty to give the notice. If plaintiff knew of the employment of his son as a brakeman, and acquiesced in it, his acquiescence would be equivalent to consent. The court instructed the jury that this was the law, and that, if they should find such acquiescence, the plaintiff could not recover. We think this was all that was required. The case did not call for a charge of notice to defendant. In the opinion on the former appeal of this case the court said: "If the employer knew of the minority, it is his duty to ascertain whether the infant have a parent, or be an apprentice, and if so, to obtain the consent of such parent or the master, before making the employment." 67 Tex. 192, 2 S. W. Rep. 528. While the parent may consent by acquiescence, no notice to defendant is required. If defendant have knowledge of the facts, defendant must obtain the consent of the parent. The verdict was "for \$3,032 damages, and \$826 interest." Pending the motion for a new trial, plaintiff entered a *remittitur* for all the judgment but \$2,100, when the motion for new trial was refused.

Defendant claims that the court erred in overruling the motion for a new trial on the ground that the verdict was excessive, and that, after plaintiff had remitted, he was entitled to a new trial, because he was entitled to a verdict of a jury as to the amount due, and the effect of the court's action in accepting the *remittitur* of the excess was to deprive defendant of a trial by jury. In support of this assignment of error we are cited to the case of *Railway Co. v. Coon*, 69 Tex. 790, 7 S. W. Rep. 492. That was a suit for damages for injuries to the person, and it required the intervention of a jury to estimate the damages, which were left, to a great extent, to their sound judgment and discretion. It was held that the law in such cases furnished no measure by which the court could determine how much of the verdict was excessive. In *Thomas v. Womack*, 18 Tex. 585, the correct rule is given as follows: "Where the law recognizes some fixed rules and principles to regulate the measure of damages by which it may be determined in how much the verdict is excessive, as in actions on contracts and for torts done to property, the value of which may be ascertained

by evidence, a *remittitur* of the excess may be received as an answer to a motion for a new trial on the ground of excessive damages." Where the verdict of a jury is required to fix the amount of damages, and they fix them at an excessive amount, neither the court nor counsel can tell how much should be deducted to make the verdict a proper one, because the jury alone has the right to fix such uncertain damages. In this case, there was evidence showing a proper account between the parties, the principles of which are fixed by law. It was proved that the father lost 22 months' wages of his son, and that these wages were of a certain value,—at least \$60 per month,—and that the father got from his son before he was hurt \$40 to \$50 per month,—say \$40,—which would for 22 months be \$880. The trip to Houston cost the parents \$29. They paid out for him at Houston \$49. The father was receiving \$75 to \$80 per month at the time of the injury, which he lost for six months, while necessarily waiting on his son,—say \$75, the least amount proved. He had to pay out at least \$300 for medicines and medical attention after his son was removed from the hospital to Ft. Worth. His mother nursed him 18 months, and it was shown that a nurse would have cost \$2 per day, or \$60 per month, \$1,080 for the item of the mother's nursing, of which, if one-half only be allowed, the item would be \$540. All of these items of expense, loss of time, and outlay were necessary, and would not have occurred but for the injury. So we see that the verdict might have been for at least \$2,248, and that the evidence furnishes the means of ascertaining the amount at the lowest estimate. The *remittitur* was for \$143 more than was necessary. Plaintiff remitted more than could have been demanded. We do not see that for that reason the verdict so reduced should not be allowed to stand. Our conclusion is that the court did not err in refusing a new trial because the verdict was excessive, or because an amount of it was remitted, since the evidence is conclusive that at least the amount for which judgment was entered was clearly authorized by the evidence. We conclude the judgment of the lower court should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

#### WESTERN UNION TEL. CO. v. ADAMS.

(Supreme Court of Texas. Dec. 30, 1889.)

#### TELEGRAPH COMPANIES—DELAY IN DELIVERING MESSAGE—ACTIONS—PARTIES.

1. A telegraph company is not relieved from liability for damages resulting from delay in the transmission and delivery of a message calling a sister to her dying brother by the fact that at the time it contracted to deliver the message it was not informed of the relation of the parties by its contents, or otherwise.

2. Though evidence is not necessary to aid the

jury in estimating damages for mental anguish, its admission is not reversible error.

8. The husband of the person for whose benefit the message was sent, and who was injured by the delay, may sue, irrespective of the questions of agency and payment; and the fact that the company had no notice that she was plaintiff's wife, or that the contract was made for her, is immaterial.

4. As a prompt delivery of the message was of the essence of the contract, a failure in that respect is such a breach as authorizes the recovery back of the consideration paid for it.

Appeal from district court, Henderson county; F. A. WILLIAMS, Judge.

*Stemmons & Field*, for appellant. *Richardson & Watkins*, for appellee.

HENRY, J. Appellee brought this suit to recover damages for defendant's delay in delivering the following message: "Waco, Oct. 12th, 1887. To F. E. Adams, Athens: Clara, come quick. Rufe is dying. [Signed] O. M. SIMMONS." His allegations are that said message was delivered to appellant's agent at Waco about 10 o'clock of said day, and that the message was not delivered to appellee until shortly before noon on the 13th day of October, 1887. That appellee was a merchant, in Athens, residing there, doing business in the post-office building, within 100 yards of defendant's office, and on the public square; and that his residence was within 100 yards of defendant's office. That appellee was well known to the residents of said town. That there were two trains daily from Athens to Waco,—one at 10:50 in the evening, the other at 7:05 in the morning; and that on the morning of the 13th of October there was an accommodation train which left Athens for Waco at 10 o'clock. That appellee's wife took the first train going to Waco after receiving said message, arriving at Waco on the morning of October 14th. That when she reached Waco her brother was dead, and his body had been sent to a distant part of the state for burial. That they were compelled to take another train to the place of burial. Her brother died about 6 o'clock in the evening of the 13th. That, had the message been promptly delivered, appellee's wife could have reached her brother in time to have been with him 14 hours before his death, and, if the message had been delivered before either of the trains on the morning of the 13th, she could have been with him at least 6 hours before his death. That by reason of appellant's failure to promptly deliver said telegram, and of her being deprived of being with her brother in his last sickness, she suffered great anguish, pain of mind, and was prostrated and broken down in body and mind, and was damaged in the sum of \$5,000. That plaintiff repaid Simmons the amount he paid for transmitting the telegram. To this appellant answered by general demurrer and general denial. The general demurrer was overruled. The trial resulted in a verdict and judgment in favor of appellee for the sum of \$2,000.40. The evidence supported the pleading. Appellant's proposition, under its first three assignments, is "that the

message did not disclose that the relation of brother and sister existed between Rufe and Clara, nor do the allegations in the petition disclose that appellant had notice of the relationship existing between them at the time it contracted to transmit said message; and, by reason of the want of notice of this fact, appellant cannot be held liable for the damages sued for herein."

The rule insisted upon by appellant is too restricted to be safely applied to communications sent by the electric telegraph. Plaintiff seeks to recover damages on account of mental pain suffered by his wife because of her inability to be with her brother when he was dying. The allegations and the evidence show that her failure to be with him was on account of her failure to receive information of his condition in time to reach him by the means of conveyance that were at her command. It is difficult to conceive of any form of expression that would have more accurately conveyed to her the information intended than would that used in the telegram, had it been delivered to her. If any diligence had been used for its delivery when it reached its destination she would not only have known the condition of her brother, that it was intended to communicate, but would have known it in ample time to have reached him while living and conscious. The mental pain suffered by her on account of being deprived of this privilege is recognized by the law as a ground for the assessment of damages against defendant, if it was induced by its negligence. The contention of defendant, in effect, is that it can only be held liable for such damages as may be supposed to have been in the contemplation of the parties if the telegram was delayed in its delivery, and that no damage can be held to have been in contemplation of the defendant not suggested by the language of the dispatch, and that all that could be gleaned from this dispatch by its agents was that some person at Waco wanted some person at Athens, named "Clara," to come quickly to Waco, because some person named "Rufe" was dying. It seems to be well settled that telegraph companies are not charged with knowledge of the importance of delivering cipher dispatches. As, in the nature of things, they cannot know the contents of such telegrams,—that mode of expression being adopted to keep them from knowing,—the rule is a just one that preserves them from the responsibility that such knowledge would impose on them. There seems to be an effort to extend this rule beyond the occasion for it, and to practically make all telegrams expressed in abbreviated language cipher dispatches. We think a distinction in this respect must be made between messages couched in terms intended to conceal their meaning and such as have no such purpose, but are intended to convey information by the use of no more words than are necessary, when given their accustomed meaning. It is well known to the public, and cannot be unknown to telegraph com-



panies, that the utmost brevity of expression is cultivated in correspondence by telegraph. It is as well known that that mode of communication is chiefly resorted to in matters of importance, financially and socially, requiring great dispatch. When such communications relate to sickness and death, there accompanies them a common-sense suggestion that they are of importance, and that the persons addressed have in them a serious interest. It would be an unreasonable rule, and one not comporting with the uses of the telegraph, to hold that the dispatcher will be released from diligence unless the relations of the parties concerned, as well as the nature of the dispatch, are disclosed. When the general nature of the communication is plainly disclosed by its terms, instead of requiring the sender to communicate to the unwilling ears of the operator the relationship of the parties concerned, a more reasonable rule will be, when the receiver of the dispatch desires information about such matters, for him to obtain it from the sender, and, if he does not do so, to charge his principal with the information that inquiries would have developed.

A witness was permitted to testify that Mrs. Clara Adams, while waiting for a train to Waco, after the message had been delivered to her, seemed to be in great distress, and said that she would give everything that she possessed to see her brother, and talk to him, before he died. As the jury would be instructed that they might, in assessing damages, include her mental anguish in their estimate, it was doubtless thought that evidence of her mental condition, including expressions of it, at the time, might be given. As juries may, from their own knowledge and experience of human nature, estimate damage proceeding from that cause without any evidence, it is not important to produce it, and when produced it ought not, as a general rule, to have a controlling effect; and yet we are not able to see why the fact that mental anguish was felt, and was exhibited by speech or otherwise, may not be proved for what it may be worth. It at least furnishes no ground for setting aside a verdict that might be sustained without any evidence as to the existence or degree of mental pain. 1 Greenl. Ev. § 102; 1 Whart. Ev. §§ 268, 269.

It is urged that "the court erred in that part of its charge wherein it instructed that if such telegram was sent by Simmons for the benefit of Mrs. Clara Adams, and that she has paid back the charges for sending it, then the husband would have a legal right to sue for a breach of the contract," etc., "because—*First*, defendant had no notice that the contract was made for Clara Adams; and, *second*, it had no notice or information that 'Clara,' named in said message, meant 'Clara Adams,' the wife of the plaintiff." If, in fact, the message was sent for the benefit of Mrs. Adams, and she was the damaged party, we can see no good reason why her husband may not maintain the suit. *Aiken v. Tele-*

*graph Co.*, 5 S. C. 369; *Telegraph Co. v. Dryburg*, 35 Pa. St. 303; *Ellis v. Telegraph Co.*, 13 Allen, 226; *Shear. & R. Neg.* 642. The party to be in fact accommodated, benefited, or served holds the beneficial interest in the contract. When that one sustains damage from its breach, a right of action arises in his favor. We do not attach importance to the reimbursement of the fee for sending the dispatch to the party who paid it. Unless a right of action exists independently of that, it cannot be maintained. If a person sending and paying for the dispatch was not, at the time of performing those acts, the agent of the sender, he cannot be afterwards made such, so as to give a right of action for large damages, by being refunded the fee paid for the dispatch. At most, all that that transaction can amount to in any case will be to give to the party that refunds it a cause of action for the amount refunded, in a court having jurisdiction of it. If it is paid under such circumstances as to become a debt from the person for whose use the dispatch is sent to the sender, the collection of it will be between themselves; and with that the corporation can have no concern. If it is refunded by the party having otherwise a cause of action against the corporation, it may be included and recovered in the suit brought for the other cause. We think the question as to who may maintain a suit for damages for the breach of contract does not depend upon the payment of the fee, nor upon the question whether the sender had been previously constituted an agent for that purpose by the party to whom the dispatch is sent, but upon who in fact was to be served, and who is damaged. If it was intended to serve the receiver, and he accepted the act, we are unable to see why the telegraph company should be excused from the consequences of its neglect to discharge its own duty by reason alone of its ignorance of the relations that may exist between the sender and the receiver of the message. If the sender, from motives of friendship or any other cause, is willing to confer upon the receiver a benefit, and he is willing to accept it, and out of the transaction there results damage for some one to receive, and for the corporation to pay, the want of the technical relationship of principal and agent between the other parties ought not to inure to the benefit of the telegraph company, to the exclusion of the only party for whose use the other parties intended the transaction.

A charge to the jury that plaintiff could recover the toll paid for transmitting the message is objected to upon the ground that, as defendant performed its contract for transmission and delivery of said message, a delay in its execution does not authorize a recovery of the money paid for the performance of the contract. No authorities are quoted in favor of this proposition, and we know of none. A prompt delivery was of the essence of the contract; and a failure in that respect was such a breach of it as to authorize the recovery

back of the consideration paid for it, if a right to do so could be maintained in other respects.

It is contended that "the court erred in not setting aside the verdict because it is excessive in amount; because, if the telegram had been promptly delivered, plaintiff's wife could not have reached her brother until after he became unconscious." The facts do not sustain this assignment, and it therefore becomes unnecessary to comment upon it in other aspects. We find no error in the proceedings for which we think the judgment ought to be reversed, and it is affirmed.

#### WESTERN UNION TEL. CO. v. FEEGLER.

(Supreme Court of Texas. Dec. 30, 1889.)

#### TELEGRAPH COMPANIES—DELAY IN DELIVERING MESSAGE.

A telegraph company is not relieved from liability for damages resulting from delay in the transmission and delivery of a message calling a mother to her dying son by the fact that at the time it contracted to deliver the message it was not informed of the relation of the parties by its contents. Following *Telegraph Co. v. Adams*, ante, 857.

Appeal from district court, Tarrant county; R. J. BOYKIN, Judge.

*Stemmons & Field*, for appellant. *Byron Johnson*, for appellee.

HENRY, J. Plaintiff's petition charges: That on the 22d and 23d days of July, 1887, his wife, S. A. Feebles, was at her home in Fort Worth, Tex., and on the same day her son by a former marriage, Lee Mahone, and his wife, Bertha Mahone, were residing in the town of Malvern, in the state of Arkansas. That on the night of July 20th of said year said Lee Mahone was fatally wounded in said town of Malvern, and he grew suddenly worse on the morning of the 22d day of said month. That before that time the wife of plaintiff had requested the wife of her son to promptly notify his mother of any sickness, accident, or misfortune that might befall her son during his absence from Fort Worth, in order that she might have the consolation of being with him under such circumstances, or attend his burial, should he die; and that the son's wife promised to give his mother such information. The petition avers that, in compliance with said request and promise, the said Bertha Mahone, as the agent of said S. A. Feebles, on the 22d July, 1887, caused to be delivered to defendant, at the telegraph office in Malvern, for transmission and delivery to S. A. Feebles, at her place of residence in Fort Worth, a telegram in the following words and figures: "Malvern, Ark., July 22, 1887. To S. A. Feebles, cor. Seventeenth and Calhoun Sts., Fort Worth, Texas: Come to Malvern first train. Lee is very dangerously wounded. [Signed] BERTHA MAHONE." That the telegram was filed with defendant, in its telegraph office in Malvern, at 7 o'clock A. M., July 22, 1887, and the fee for its transmission and delivery

was paid by the sender; and the defendant, in consideration of the premises, promised to immediately transmit and deliver the message. Plaintiff represents that the son died at 11 o'clock A. M. on the day the message was sent, from the effects of his wounds; and that, failing to receive an answer to her telegram, and believing, therefore, that the mother of her husband was away from her home, and had not received her telegram, and being "justified" by the warmth of the weather, and the absence of any necessity for delaying it, the body was interred at 10 o'clock P. M. of the day of the death. That if the telegram had been promptly transmitted and delivered, and within a reasonable time for it to be done, the mother could and would immediately have notified the wife of her son of the receipt of her message by another dispatch, and would in that way have let her know that she would go to Malvern on the first train; and the mother would have done so, and would have reached there about 12 o'clock of the night of the day on which her son died, or by about 12 o'clock M. of the next day, and in time to be present at the burial, as in that case it would have been delayed for her arrival. The petition charges that defendant, by its want of care and gross negligence, failed to deliver the telegram until nearly noon of the day following its receipt to be transmitted; that after the receipt of said telegram, and before the departure of the next train in the direction of Malvern, plaintiff's wife received another telegram from her son's widow, informing her of the burial of the body. The petition avers that defendant was duly notified of plaintiff's claim for damages, and that the wife of plaintiff suffered great mental pain and anguish as the consequence of defendant's neglect, etc. The overruling defendant's demurrer to plaintiff's petition is assigned as error, on the ground that "there is nothing in the face of the message by which we could, in contracting to transmit and deliver it, contemplate that the relation of mother and child existed between the parties, and that a mother's feelings would be injured by a failure upon appellant's part to perform the contract."

We think there was no error committed in overruling the demurrer. *Telegraph Co. v. Edsall*, 12 S. W. Rep. 41; *Telegraph Co. v. Adams*, ante, 857, (decided at present term.) The other errors properly assigned relate to the same question, stated in different forms, that the first one does, and are involved in its decision. The judgment is affirmed.

#### INTERNATIONAL & G. N. R. Co. v. McDOWALL et al.

(Supreme Court of Texas. Nov. 5, 1889.)

#### DEATH BY WRONGFUL ACT—DAMAGES.

1. Under Rev. St. Tex. § 2901, providing that, in actions for injuries resulting in death, exemplary damages may be recovered when the death is caused

by the willful act or omission or gross negligence of the defendant, in order to support a recovery of exemplary damages from a railway company for death, it must appear that there was some willful act or omission or gross negligence on the part of the officers of the corporation.

2. Such corporation can be held in exemplary damages for the negligence of a servant only when it appears that the act causing death was performed by the direction of the employer, or that the employer ratified and adopted the act after it was performed.

3. The mere fact that the defendant retained the servant in its employ after the act was performed does not constitute a ratification.

4. In an action against a railway company for the death of plaintiff's husband, the court charged that "if the jury find the employees on the train failed to ring the bell and blow the whistle, and that the train was running at a high rate of speed, and that deceased knew, or by the reasonable use of his eyes might have known, of the approaching train, and its danger, and did step upon the track in front of the approaching train, and so near to it that it was impossible, by the use of any effort, to stop the train, and prevent it running upon him, the jury will find for defendant." *Held*, that the instruction was erroneous, as it required the defendant's employees to exercise a degree of care greater than ordinary.

5. Where the plaintiff sues for herself and for the minor children of the deceased, and claims certain specified sums as damages for each of them, the verdict and judgment must follow the pleadings, and a judgment for an amount in excess of that claimed for any one of them cannot be sustained.

Commissioners' decision. Appeal from district court, Williamson county.

*Maxey & Fisher*, for appellant. *A. S. Fisher and W. M. Key*, for appellees.

**ACKER, P. J.** Mrs. Mary McDonald brought this suit for herself, and as next friend of her minor children, Susan, Sallie, Alexander, Durham, John, and Lee McDonald, against the International & Great Northern Railroad Company, to recover \$15,000 actual, and \$10,000 exemplary, damages, for the death of Dr. McDonald, husband of Mrs. Mary McDonald, and father of the other plaintiffs. Dr. McDonald was killed by a locomotive on defendant's road in June, 1886, and plaintiffs alleged that his death was caused "through the willful and wanton acts and gross negligence of defendant in operating and running its freight engines and cars." Defendant answered by general denial, and pleaded contributory negligence on the part of deceased. By trial amendment, plaintiffs claimed actual damages as follows: Mrs. McDonald, \$7,500; Sallie, \$1,000; Alexander, \$1,000; Lee, \$1,000; Durham, \$1,500; John, \$1,500; Susan, \$1,500,—and asked that the exemplary damages be partitioned among them in the same proportion. The jury returned a verdict for \$15,000 actual and \$2,500 exemplary damages, apportioned as follows: Mrs. McDonald, \$5,000 actual and \$350 exemplary; Sallie, \$1,400 actual and \$350 exemplary; Alexander, \$1,400 actual and \$350 exemplary; Lee, \$1,550 actual and \$350 exemplary; Durham, \$1,550 actual and \$350 exemplary; John, \$2,000 actual and \$350 exemplary; Susan, \$2,100 actual and \$400 exemplary. Judgment was rendered in accord-

ance with the verdict. This action was brought under the following provisions of our Revised Statutes: "Art. 2899. An action for actual damages, on account of injuries causing the death of any person, may be brought in the following cases: (1) When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer, or hirer of any railroad, steam-boat, stage-coach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, gross negligence, or carelessness of their servants or agents." (This article was amended by the twentieth legislature so as to omit the word "gross." Laws 1887, p. 44.) "Art. 2901. When the death is caused by the willful act or omission or gross negligence of the defendant, exemplary, as well as actual, damages may be recovered." The court gave the following charge to the jury: "If the jury find for the plaintiff, and further find that the act of killing the deceased was gross negligence on the part of the defendant, then they will further find exemplary damages, to be apportioned by the jury among the plaintiffs."

It is contended that this charge is erroneous, because exemplary damages cannot be recovered in this case. Our state constitution (section 26, art. 16) requires that the death be caused by the willful act or omission or gross neglect of the person, corporation, or company, before the liability for exemplary damages arises. We think the language of the statute admits of but one construction. The action is given for actual damages alone, and, where there is no evidence tending to show that the death was occasioned by the willful act or omission or gross negligence of defendant company, acting by and through its corporate officers, exemplary damages cannot be recovered. It is not claimed by appellees that Dr. McDonald's death was caused by the willful act or omission or gross negligence of the defendant, or that it was caused at all by the negligence or carelessness of the proprietor of the road. There was no evidence that any corporate officer of defendant company was in any way connected with the killing, or that such officer was even present. Under the law as it existed at the time Dr. McDonald was killed, to make the defendant liable for actual damages, resulting from the death occasioned by the acts of the servants or agents of the corporation, it must be shown by the evidence that such servants or agents were unfit for the duties they were employed to perform, or that the death was occasioned by the gross negligence or carelessness of such servants or agents. In the case of *Railroad Co. v. Cowser*, 57 Tex. 306, the supreme court uses the following language: "The statute clearly draws the distinction between an act done by the proprietor, owner, charterer, or hirer of a railroad, and one by their servants or agents, and also between actual and exemplary damages. In our opinion, under its proper construction, although actual damages may be given for death caused by the unfitness, gross negli-

gence, or carelessness of such servant or agent, as well as for the negligence or carelessness of the proprietor, owner, charterer, or hirer himself, yet that exemplary damages are allowed only for the willful act, omission, or gross negligence of the 'defendant' to the suit; if a corporation, for the willful act, omission, or gross negligence of one representing it in its corporate capacity, as a corporate officer, but not of the mere servant or agent." As before stated, it is not claimed that any corporate officer of defendant company had any connection whatever with the acts that caused the death of Dr. McDonald, and we think the charge wholly inapplicable to the case made by the evidence, and therefore error. Exemplary damages are awarded upon principles of public policy, and not as compensation to the plaintiff; and we think the law is now well settled that, before either an individual or corporation can be punished in any case for the good of the public by being mulcted in exemplary damages for the act of a servant or agent, it must be shown that the act complained of was performed by direction of the employer, or that the employer has adopted and ratified such acts as his own, or that he has been guilty of negligence in the selection and employment of the servant whose act is complained of. *Hays v. Railroad Co.*, 46 Tex. 272; *Railroad Co. v. Moore*, 6 S. W. Rep. 688; *Railroad Co. v. Garcia*, 70 Tex. 207, 7 S. W. Rep. 802.

But it is contended by appellees that appellant ratified the acts of its servants who were in charge of the train that killed Dr. McDonald by retaining them in its service. We do not believe the doctrine of ratification has any application to this case; but, if it had, we do not think that the fact that the servants are continued in the employ of the company sufficient of itself to establish ratification. The continued employment may be wholly without reference to, or connection with, the acts of the servant in the matter about which complaint is made. We are unable to discover anything in this case that called for or justified a charge upon exemplary damages. The court charged the jury as follows: "(13) If the jury find from the testimony that, at the time and place as alleged, the employees on the train failed to ring the bell and to blow the whistle, and that the train was running at a high speed, and they further find that at the time Dr. McDonald knew, or by the reasonable use of his eyes might have known, of the presence of the approaching train and its danger, and did step upon the track of the road in front of the approaching train, and so near to it that it was impossible, by the use of any effort upon the part of the employees of the defendant, to stop the train and to prevent it running upon him, then, and on such finding, the jury will find for the defendant." Appellant contends that the court erred in giving this charge, because it imposed upon the employees of defendant a higher degree of care than the law requires. With respect to

the degree of care required by the employees of a railroad company to prevent an injury, after the situation of peril is known to them, our supreme court has said: "If, after the impending danger becomes known to the defendant, he should then fail to use such ordinary care as would have prevented the injury, and the same results as a consequence thereof, then another principle of law governs, and the defendant would be liable." *Railroad Co. v. Smith*, 52 Tex. 184. And again: "We are inclined, however, to the opinion that the charge given by the court in this case may have led the jury to believe that they could only find for defendants, should they think that the engineer 'could not and did not discover plaintiff on the track in time to stop without running over him.'"

\* \* \* We call attention to it because of our opinion that the watchfulness required depends all on the circumstances, having reference to all the duties of the engineer, and that it is for the jury to say whether, under the circumstances, he not only could, but should, have discovered the plaintiff in time to have stopped the train. In other words, that the engineer, had he been exercising that ordinary and proper care which under the circumstances was his duty, would have discovered the plaintiff in time." *Railroad Co. v. Sympkins*, 54 Tex. 622. And again, it has been said by this court that "whether applied to the negligence of a defendant, or the contributory negligence of a plaintiff, we believe the correct definition of the degree of care to be exercised by either, in determining whose negligence occasioned the injury, is expressed in these words: 'Such care and caution as an ordinarily prudent person would exercise under similar circumstances.'" *Railroad Co. v. Beatty*, 11 S. W. Rep. 860. Under the charge complained of here, the jury were required to believe, before they could find a verdict for the defendant, that it was impossible for the employees of defendant, by the use of any means or effort, to prevent the injury after they discovered the peril of the deceased. We think the employees were required to use only such care as ordinarily prudent persons would exercise under like circumstances,—that is, ordinary care,—and that the court erred in requiring a greater degree of care upon their part. The verdict of the jury and judgment of the court gave to the plaintiffs, respectively, except Mrs. McDonald, larger amounts of damages than were claimed for them, respectively, in their pleadings. We believe it to be an elementary principle that the verdict and judgment must follow the pleadings, and that a judgment for an amount in excess of that claimed in the pleadings cannot be sustained. We deem it unnecessary to consider other assignments of error, as we think it probable that many of the matters complained of will not occur upon another trial. For the errors indicated we are of opinion that the judgment of the court below should be reversed, and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment is reversed, and the cause remanded.

**SCHWARTZ v. B. C. EVANS CO.**

(*Supreme Court of Texas.* Nov. 20, 1889.)

**COMPROMISE—TENDER.**

A plea alleging an agreement to compromise a disputed claim, part payment of the agreed amount, and tender of the balance, is good on general demurrer, though the time of the part payment and of the tender is not stated with certainty; it not appearing that time was of the essence of the contract.

Commissioners' decision. Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

Action by the B. C. Evans Company against Henry Schwartz on several promissory notes. Henry Schwartz appeals from a judgment sustaining a general demurrer to his answer.

*Hoggett & Greene*, for appellant.

ACKER, P. J. Suit by the B. C. Evans Company against Henry Schwartz on several promissory notes, aggregating over \$1,000, all dated June 25, 1884. Defendant answered, interposing several defenses, and specially pleaded "that in November, 1885, plaintiff claimed to have and hold a balance of indebtedness against defendant by reason of the notes sued on, and for merchandise sold to defendant, of about five hundred dollars; that defendant claimed that the amount he owed plaintiff on said matters was a sum much less than five hundred dollars; that, for the purpose of settling said dispute and controversy, on the said date it was mutually agreed by and between plaintiff and defendant that defendant should pay plaintiff two hundred and fifty dollars, which sum should constitute and be a payment in full of all demands, including all claims by reason of any balance on the notes here sued on; and that afterwards, in pursuance of said agreement, and in part payment of said two hundred and fifty dollars, defendant paid and delivered to plaintiff a fine gold watch, at and for the agreed price of one hundred and twenty-five dollars, which was by plaintiff taken and accepted in pursuance of said agreement; and that defendant afterwards tendered to plaintiff one hundred and twenty-five dollars, and interest thereon from the date of said settlement, but plaintiff refused to receive the same." Plaintiff presented a general demurrer to this special plea, which was sustained; and there was verdict and judgment for \$685, from which defendant appealed. The transcript contains no statement of facts, and there is no appearance here for appellee.

The only assignment of error is that the court erred in sustaining the general demurrer to the special plea. The demurrer admits the truth of the matter stated in the

plea; and in passing upon the sufficiency of the plea, as against a general demurrer, every reasonable intendment arising upon the averments of the plea will be indulged in favor of its sufficiency. The question raised by the demurrer is whether the plea discloses a defense to the case made by the petition. If it does, it must be held sufficient, although it may appear defective in the manner in which the defense is stated. Rule 17; *Prewitt v. Farris*, 5 Tex. 376; *Robinson v. Davenport*, 40 Tex. 341. The plea does not state with certainty the time of the alleged part performance, and tender of performance, of the balance of the contract of settlement by defendant; but it does not appear from the plea that time was of the essence of the contract. We think the plea set up a good defense, and was sufficient as against the general demurrer. We are therefore of opinion that the judgment of the district court should be reversed, and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment is reversed, and the cause remanded.

**CAMPBELL et al. v. TRIMBLE.**

(*Supreme Court of Texas.* Nov. 20, 1889.)

**TRESPASS—VENUE—VICIOUS ANIMALS—INSTRUCTION—TORTS OF SERVANT.**

1. Under Rev. St. Tex. art. 1198, subd. 8, the district court has jurisdiction of an action for a trespass charged to have been committed in the county, though none of the defendants reside in that county.

2. An instruction that if the jury find that defendants' horse was vicious, and that their servant knew or by reasonable diligence could have known it, "then leading the horse so close to plaintiff's colt that he kicked the colt would constitute such negligence on the part of the servant as would make the defendants liable," is erroneous, as withdrawing from the jury the question, what constitutes negligence?

3. The fact that at the time when a vicious horse kicked a colt the owners' servant had, without their knowledge or consent, temporarily placed the horse in charge of another person, does not relieve the owners from liability.

Appeal from district court, Navarro county; RUFUS HARDY, Judge.

Action by Frank Trimble against W. T. Campbell, J. T. O'Connor, W. M. C. Hill, and Kit Davis, to recover the value of a colt which died in consequence of being kicked by defendants' horse. Defendants appeal from a judgment for plaintiff. Rev. St. Tex. art. 1198, subd. 8, provides that, where the foundation of the action is a trespass for which a civil action in damages may lie, the suit may be brought in the county where the trespass was committed, or in the county where the defendant has his domicile.

*Lee, Call & Greer*, for appellants. *Craft & Craft*, for appellee.

HENRY, J. This suit was brought in the district court of Navarro county, by Frank Trimble, against W. T. Campbell, J. T. O'Connor, and W. M. C. Hill, who reside in

Dallas county, and Kit Davis, who resides in Denton county, Tex., for damages for the value of a certain colt, owned by plaintiff, and alleged to have been kicked by defendants' horse, on the fair grounds in the city of Corsicana, from which injury said colt afterwards died. The defendants, by demurrer, objected to the jurisdiction of the court, on the ground that the petition showed that none of them resided in Navarro county. As a trespass charged to have been committed in said county was the foundation of the suit, the jurisdiction existed, and the demurrer was properly overruled.

The court charged the jury as follows: "If you find that said horse was a vicious animal, and that defendants owned said animal, and that said animal was, at the time of kicking the plaintiff's colt, in charge of the servant of defendants, and that said servant knew, or by reasonable diligence could have known, of said vicious character of said animal, then the leading by said servant of such animal within a few feet of, or very close to, plaintiff's colt, whereby said animal kicked said colt, and broke the leg of said colt, would be such negligence and carelessness on the part of said servant as would make the defendants liable." The objection to this charge is that it decides, as matter of law, what facts constitute negligence, when, under repeated decisions of this court, that question ought to have been left to the decision of the jury, under proper instructions. *Railway Co. v. Murphy*, 46 Tex. 356; *Railway Co. v. Hill*, 71 Tex. 459, 9 S. W. Rep. 851.

Appellants contend that the verdict is not sustained by the evidence, because it was proved that at the time the injury was inflicted their horse had been temporarily put in charge of another person, by their servant, who had charge of him, without their knowledge or consent. We do not think this fact should in any manner affect the result. The judgment is reversed, and the cause remanded.

#### FORT WORTH & N. O. RY. CO. v. PEARCE.

(Supreme Court of Texas. Dec. 8, 1889.)

#### EMINENT DOMAIN—OWNERSHIP OF PROPERTY—COMPENSATION.

1. In an action by a guardian for damages to the fee of his ward's estate by location and operation of a railroad in front of the land, it appeared that the guardian had a life-estate in a third of the land. There was, however, no plea in abatement for non-joinder of the life-tenant, nor any request for a special charge limiting the recovery to the interest of the minor. *Held*, that a charge which limited the recovery to the permanent injury to the land, though referring to the property as "plaintiff's property," was not prejudicial to the company, as there were no issues as to the right of the life-tenant to recover; besides, he was estopped to claim any interest by the allegation of the petition that his ward was the owner of the land.

2. Where, in an action for damages to vacant property caused by the location and operation of a railroad in the street in front of it, the petition alleges that it was valuable only for residence property, and the evidence shows that it would probably be used for this purpose and none other, there is no error, after charging that the measure of

damages, if any, would be the difference in the value of the property immediately before and immediately after the construction and operation of the road on said street adjacent to the property, to further charge that, in estimating the depreciation in value of the property, "if you believe there was any such depreciation under the foregoing instructions, you may take into consideration the depreciation, if any, that may have been caused by the excavation of the street, and also any depreciation you may believe was occasioned by the probable fact that defendant, in operating and using its road, would make unusual and loud noises, such as ringing of bells and blowing of whistles, and would emit from its engines smoke and cinders, and would cause other like annoyances naturally incident to the operation and use of cars on said railway."

8. When, in an action for damages to property, plaintiff has introduced evidence showing title, in the absence of conflicting evidence error cannot be predicated of a charge for assuming that the property belongs to plaintiff.

Commissioners' decision. Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

*Templeton & Carter*, for appellant.

AKER, P. J. W. W. Pearce brought this suit, as guardian of the estate of his minor daughter, Nannie Pearce, against the Fort Worth & New Orleans Railway Company, to recover damages for the injury done to block 45, in Tucker's addition to the city of Fort Worth, situated on Jones street, alleged to be the property of said minor. It was alleged that the block was only valuable for residence purposes, and had been permanently injured and depreciated in value to the amount of \$3,000, in consequence of defendant having constructed its road-bed along Jones street, adjacent to the property, and occupying and using Jones street as its right of way; operating trains thereon; emitting sparks of fire from its locomotives, endangering any buildings that might be erected on the block; emitting smoke and cinders from passing locomotives; making harassing noises, by ringing bells, blowing whistles, and the rumbling and jarring of passing trains. The defendant answered by general denial, and, specially, that it constructed its railroad along and upon Jones street under an ordinance of the city of Fort Worth authorizing it to do so, and constructed its road with care, so as to injure abutting property as little as possible. There was verdict and judgment for plaintiff for \$1,600. There is no appearance here for appellees. No special charges were asked, and no exceptions were taken to the admission or exclusion of evidence on the trial. The assignments of error presented, relate to the charge given. Under the first assignment it is urged that the court erred in charging the jury: "You are instructed that if you believe from the evidence that plaintiff's property, at or about the time alleged in the petition, was damaged by defendant," etc.; "because the charge assumed that the property described in the petition had been proven to be the property of plaintiff, and did not submit to the jury the question of ownership of said property, nor the extent of the interest of said minor in said property, at the time of the construction of said railroad." Plaintiff

proved a connected chain of title from the government, all of the links being shown by written muniments, except two,—one of which was a deed from the patentee, E. S. Terrell, to Julian Field, the execution and delivery of which was proved by the testimony of Julian Field, without objection; and the other, plaintiff's heirship to her mother, Nannie J. Wesley, to whom the last conveyance was made, was admitted by defendant. This evidence was not controverted. There can be no charge upon the weight of evidence, when there is no conflict in the evidence. Under the evidence in this case, the court might properly have charged the jury that plaintiff had proven title to the land. *Teal v. Terrell*, 58 Tex. 261.

The second assignment of error is: "The court erred in the following portion of said charge: 'In estimating the depreciation in value of plaintiff's property, if you believe there was any such depreciation under the foregoing instructions, you may take into consideration the depreciation, if any, that may have been caused by the excavations on Jones street, and also any depreciation in value of said property you may believe was occasioned by the probable fact that defendant in operating and using its road would make unusual and loud noises, such as ringing of bells and blowing of whistles, and would emit from its engines smoke and cinders, and would cause other like annoyances naturally incident to the operating and using cars on said railway;' because said charge, in connection with the first paragraph of the charge of the court, conveyed to the jury the opinion of the court that the plaintiff had shown that she was the exclusive owner of the property described in her petition, and entitled to recover damages as such exclusive owner, whereas the proof showed, upon the trial of the cause, that W. W. Pearce was the plaintiff's father, and that the property in controversy was purchased by Nannie Wesley while a *feme sole*, and before her marriage with W. W. Pearce, *alias* Bill Pearce, and that Nannie Wesley had died, leaving the plaintiff, Nannie Pearce, her sole child, and the said W. W. Pearce, her husband, who, under the laws of descent, was entitled to a life-estate of one-third in said block of land, and a corresponding amount of the damages, if any, that might be recovered for damages and depreciation to said property or its use and occupancy." This assignment admits that the proof showed that the minor plaintiff owned the fee-simple estate in the land, and what has been said in discussing the first assignment disposes of the first ground of objection to this portion of the charge. The suit was to recover damages for injury to the fee or reversion, and the court in its charge limited the recovery to permanent injury to the land. There was no plea in abatement for the non-joinder of the tenant for life in one-third of the block. The land was not in the actual use and occupancy of the surviving husband, and the recovery was sought for in-

jury to the reversion alone. We think there is no doubt that the tenant for life, in possession, might have his action for damages resulting to his possession, use, and occupancy of one-third of the land for life, and defendant might have compelled his joinder in this action by proper plea in the court below, or should have asked a special charge limiting the recovery to the interest of the minor, if it was desired to present the question of the right of the tenant for life to recover. The charge was correct in terms, and applicable to the case made by the petition. The suit was to recover damages for injury to the minor's estate, brought by the tenant for life, who was the father and guardian of the minor. He expressly alleged in the petition that his ward was the owner of the block, and we think he is thereby estopped to hereafter assert damages to his estate in the land. We think the charge could not have operated prejudicially to appellant. It filed no plea in abatement, asked no special charge, and besides, as we have seen, the judgment is conclusive of the rights of the tenant for life.

The third assignment of error is: "The charge was wrong and erroneous, in this: In telling the jury they might take into consideration the damages, in addition to the depreciation in value of the property, by the probable fact that the defendant, in operating and using its road, would make unusual and loud noises, such as ringing of bells and blowing of whistles, and would emit from its engines smoke and cinders, and would cause other like annoyances naturally incident to the operation and use of cars on said railway; because the proof showed that the block in question was a vacant block, unoccupied and uninclosed, and there was no proof showing that it was ever contemplated to use it as residence property, or make such use of it as that unusual and loud noises and other like annoyances, naturally incident to the operation and use of cars on said railway, would depreciate the value of said property for such use." The record does not sustain this assignment. The court did not charge the jury that "they might take into consideration the damages, in addition to the depreciation in value of the property, by the probable fact that the defendant, in operating and using its road, would make unusual and loud noises," etc. After charging the jury, "The measure of such damages, if any, will be the difference in the value of plaintiff's property immediately before and immediately after the construction and use and operation of its road on said Jones street, adjacent to plaintiff's property," in immediate connection therewith the following charge was given: "In estimating the depreciation in value of plaintiff's property, if you believe there was any such depreciation under the foregoing instructions, you may take into consideration the depreciation, if any, that may have been caused by the excavation of Jones street, and also any depreciation in the value of said property you may believe was occasioned by



the probable fact that defendant, in operating and using its said road, would make unusual and loud noises, such as ringing of bells and blowing of whistles, and would emit from its engines smoke and cinders, and would cause other like annoyances, naturally incident to the operation and use of cars on said railway." It appears from the evidence that the property is situated in that part of the city occupied by residences, and that it is valuable principally for residence purposes. The defendant's road-bed is situated in a cut or excavation, made by it for that purpose, from eight to twelve feet deep, extending along Jones street on the entire east side of the block. The road-bed is evidently permanently located there, over which defendant's locomotives and cars have been regularly operated ever since its construction. The evidence tended strongly to show that the property would be used for residences, and that it would probably not be used for any other purpose. Under this state of facts, and in view of the averments of the petition, we think the charge here complained of was proper, and in no way prejudicial to defendant. Upon a careful consideration of the entire case, we find no error, and are of opinion that the judgment of the court below should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

#### WHITE v. MATADOR LAND & CATTLE CO.

(Supreme Court of Texas. Dec. 10, 1889.)

##### CONTRACT—CONSTRUCTION—MEASURE OF DAMAGES.

1. Plaintiff entered into the following contract with defendant: "Whereas, W. [plaintiff] has between 85 and 100 head of saddle-horses in a pasture, near the town of H., which have been examined by the said C., [defendant's] agent, and said C. having decided to take a certain lot of said horses, it is hereby agreed and understood that the said C. is to receive the said horses between the 1st and 5th of April following, and is to be allowed to cut back all horses not desired, and he hereby agrees to take all the remainder, and pay therefor the sum of \$55.00 per head for the same at the time of receiving." Held, that plaintiff's recovery for a breach of this contract should be based upon the number of horses shown by the evidence to have been examined and accepted by the agent, C., at the time of the execution of the contract, and which the defendant refused to receive at plaintiff's pasture on April 5th.

2. Plaintiff was entitled to recover, as the measure of damage, the difference between the contract price agreed to be paid for such horses and the net proceeds realized from the sale of the same at the nearest market to the place of delivery, as shown by the evidence.

Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

J. A. Holland, for appellant.

HOBBY, J. The plaintiff, C. W. White, brought this suit, in the district court of Tarrant county, against the Matador Land & Cattle Company and H. H. Campbell, (there was a dismissal as to Campbell,) and alleged

that H. H. Campbell, as agent of said company, entered into the following contract in writing: "Fort Worth, Texas, March 15th, 1884. This agreement, made this day, by and between C. W. White and H. H. Campbell, for the Matador Land and Cattle Company, is to the following effect: That whereas, C. W. White has between (85) eighty-five and (100) one hundred head of saddle-horses in a pasture near the town of Henrietta, which have been examined by the said Campbell, agent, and said Campbell having decided to take a certain lot of said horses, it is hereby agreed and understood that the said Campbell is to receive the said horses between the 1st and 5th of April following, and is to be allowed to cut back all horses not desired; and he hereby agrees to take all the remainder, and pay therefor the sum of \$55.00 per head for the same at the time of receiving. Signed this the 15th day of March, 1884. C. W. WHITE. H. H. CAMPBELL, for the Matador Land and Cattle Co." A full compliance with the contract by plaintiff, and a breach thereof by defendant, was alleged, and the damages laid at the sum of \$1,814. The evidence before the court was that the contract was made on March 15, 1884, at Fort Worth. From 85 to 100 head of horses were sold to defendant at the contract price of \$55 per head. They were examined by the agent before the contract was made, who reported them all right, and that they would be accepted, except eight or ten, which were rejected, or cut back; and that privilege was inserted in the contract. They were to be delivered between the 1st and 5th of April, 1884, at the pasture, about three miles from Henrietta, Tex. On the 5th April the company's agent came to the pasture, and refused to take them. He assigned no reason for such refusal. The horses were ready for delivery. They were kept in the pasture from 15th of March, 1884, to 5th April, 1884, as per contract. After the refusal to accept them they were kept until June 1, 1884, in the same place, at an expense of \$250. Plaintiff tried hard during that time to sell them. Could not. "Moved them to Abilene and Waco at an expense of \$251.50, where I sold them." Abilene is about 200 miles from Henrietta. Twenty-two head shipped to Waco sold for \$40 per head. Fifty-three of those shipped to Waco sold for \$30 per head. The market value of the horses at the time of the sale to the cattle company was good. There was no demand at the time fixed for delivery for horses. The market value at Waco and Abilene was \$30 and \$40 per head. The decline in the value between the time of sale to defendant and the sale at Waco and Abilene was from \$15 to \$20 per head. There was evidence that when the defendant's agent went to the pasture near Henrietta, to get the horses, if they were suitable, he found none of them in a condition for delivery, and did not accept them. Campbell testified that he was superintendent of the cattle company, and made the contract with White for the

company; had bought horses for the company every year before, which the company accepted, and paid for. The company had never before refused to ratify any contract made by him. The court found that Campbell was the agent of the company, and authorized to, and did, make the contract with the plaintiff, as already set forth; that plaintiff kept the horses in his pasture near the town of Henrietta until April 5, 1884; that defendant sent an agent to inspect the horses, who, upon inspection, desired none, and declined to take them; that the expense to plaintiff for pasturing the horses was \$154; that plaintiff, being unable to sell at the price named in the agreement, shipped the same to Abilene at a cost of \$164, and subsequently sold 63 head at \$40 per head, and 22 head at \$30 per head; that there was no evidence of the market value of the horses at Henrietta, the place of delivery, if accepted by defendant; that the term "cut back," used in the contract, was admitted to mean "to reject." The conclusions of law upon these facts were that by the terms of the agreement defendant had the right to reject any number of the horses mentioned, upon further inspection, and that by said terms the defendant was under no obligation to take any number of horses; that there was no evidence of market value of the horses at the time and place of delivery, and nothing upon which damage to plaintiff could be estimated, even if the defendant, under the agreement, was bound to receive any number of horses; and that the plaintiff was not entitled to recover. And judgment was rendered in favor of the defendant, from which plaintiff appeals. The errors assigned are: *First*. That the court erred in giving judgment for the defendant. The proposition under this assignment is: That if the contract was broken by appellee the appellant would be entitled to nominal damages, if it be admitted that the evidence failed to show what the market value of the property was at the place of delivery; and, further, if there were no sales at the place of delivery, evidence of the market value at other places would be sufficient, under the facts of this case. *Second Assignment of Error*. The court erred in its conclusions of fact, in that the evidence showed that a certain lot of the horses had already been decided to be taken when the contract was reduced to writing. This is in the nature of a proposition. *Third Assignment of Error*. The judgment of the court is contrary to the law, and not supported by the evidence, because one clause in the contract is made to destroy all the rest.

The legal conclusion found by the court from the facts, to the effect that the defendant was authorized to reject all of the horses upon a subsequent inspection, and was under no obligation to accept any of them, seems to be predicated upon the written contract exclusively. We are not prepared to say that this construction of the instrument is correct. If so, however, we do not think that when

it is read in the light of the plaintiff's testimony it supports the finding referred to. Looking to the agreement, as supplemented by the other evidence, it seems clear that the lot of horses, 85 or 100, in plaintiff's hands, were examined by defendant, and a certain number of them agreed or decided to be taken by him. This number is ascertained by plaintiff's evidence to be the lot so examined, except 10, which were rejected or "cut back."

It appears, further, that April 5, 1884, was the time, and plaintiff's pasture, near Henrietta, the place, of delivery. The contract price for the horses accepted was \$55 per head. These facts make a case of an executory contract for the sale of personal property, requiring a subsequent acceptance of the property by the purchaser. The rule as to the measure of damages for the failure of the vendee to receive the property contracted for is ordinarily the difference between the contract price and the market value at the time and place of delivery, with interest. 2 *Suth. Dam.* 359, and cases cited, p. 365. "When the vendor retains possession of the article, and the vendee refuses to receive it, the vendor is the agent of the vendee. At least, he may so elect to consider himself, and proceed to resell the property, or any part thereof, which the vendee refuses to receive; and the vendee is chargeable with any difference in the price agreed to be paid by him and the actual price realized on a resale, which was fairly conducted, if less than the contract price." *Field, Dam.* § 298. The market value may be arrived at by a resale of the property within a reasonable time after notice, etc., using all proper means to secure a fair sale; nor is the market value restricted to the place of the breach of the contract. The vendor may transport the property to another place, at the expense of the vendee, for a market. The plaintiff is not confined to any particular species of evidence for the purpose of showing his loss from the breach of the contract, in proving the value at the place of delivery. In the absence of a market at such place, the value may be shown by the proof of the market price at the nearest point where property of a like character could be bought and sold, with addition of cost of transportation. 2 *Suth. Dam.* 373; *Field, Dam.* 248. Applying these principles to the present case, we are of opinion that the recovery of plaintiff would be based upon the number of horses shown by the evidence to have been examined and accepted by the agent, Campbell, at the time of the execution of the contract, and which the defendant refused to receive at plaintiff's pasture on April 5, 1884; that he would be entitled to recover, as the measure of damage, the difference between the contract price agreed to be paid for such horses and the net proceeds realized from the sale of the same at the nearest market to the place of delivery, as shown by the evidence. We think the judgment should be reversed, and the cause remanded.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment is reversed, and the cause remanded.

#### GLADNEY v. STATE.

(Court of Appeals of Texas. Nov. 27, 1889.)

##### AGGRAVATED ASSAULT—DEADLY WEAPON.

An axe is not necessarily a deadly weapon; and on trial of an information for an aggravated assault alleged to have been committed "with an axe, the same being a deadly weapon," the state must prove that the axe was such a weapon as would be likely to produce death or serious bodily injury when used in the manner it was attempted to be used.

Appeal from Smith county court; B. B. BEAIRD, Judge.

Information against Ike Gladney for an aggravated assault. On the trial, the evidence showed that defendant ordered one Elias Jones out of his yard; and, on Jones' refusal to go, defendant seized an axe, whereupon Jones fled, and defendant pursued him some distance with the axe in his hands. There was a conviction, and defendant appeals.

*Onton & Rice*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. This is a conviction for aggravated assault; the information alleging the aggravation to be that the assault was committed with an axe, the same being a deadly weapon. It devolved upon the state to prove, not only that the assault was committed with an axe, but that the axe was such a weapon as would be likely to produce death, or serious bodily injury, when used in the manner it was attempted to be used. An axe is not necessarily a deadly weapon. Its character in this respect depends upon its size, manner of use, etc. *Hilliard v. State*, 17 Tex. App. 210; *McGrew v. State*, 19 Tex. App. 802; *Willson, Crim. St. § 844*. There is not sufficient proof in the record before us that the axe attempted to be used by the defendant was a deadly weapon, as charged in the indictment. We must hold, therefore, that the conviction is not warranted by the evidence. Reversed and remanded.

#### BEACH v. STATE.

(Court of Appeals of Texas. Nov. 14, 1889.)

##### ACCOMPLICES—CORROBORATION.

On a trial for burglary, P. and T., on behalf of the state, testified that defendant confessed to them that he committed the burglary. There was evidence tending to show that said witnesses were accomplices in the crime, and the only material corroboration of their testimony was the fact that shortly after the burglary a gun taken at the time was found in defendant's possession; but defendant testified that he purchased it from T., and that the latter had it in his possession soon after the burglary, and before defendant had it. *Held*, that the court should have charged that, unless the jury were satisfied from the evidence, beyond a reasonable doubt, that defendant did not purchase the gun from T., or that T. did not have possession of said gun before it was found in defendant's pos-

session, they should not consider the circumstance of defendant's possession as corroborative of the testimony of said witnesses.

Appeal from district court, Erath county; O. K. BELL, Judge.

Cage Beach was convicted of burglary, and appeals.

*Frank & Devins, M. F. Martin*, and *J. C. Jenkins*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. Pate and Thompson, state witnesses, testified that the defendant confessed to them that he committed the burglary. There is evidence tending to show that said witnesses were accomplices in the crime, within the meaning of article 741, Code Crim. Proc. It was proved that recently after the burglary the defendant had in his possession a gun which had been taken from the burglarized house at the time of the burglary. This circumstance of the possession of the gun was the strongest, if not the only, material corroboration of the testimony of the witnesses Pate and Thompson. In explanation of such possession, the defendant proved that he purchased the said gun from said Thompson; that said Thompson had possession of said gun soon after the burglary, and before it was in defendant's possession. Instructions as to accomplice testimony were given the jury by the court, which, as far as they extended, were correct, and applicable to the evidence. In view, however, of the facts above recited, we think the court should have further instructed the jury that if they were not satisfied from the evidence, beyond a reasonable doubt, that defendant did not purchase the gun from Thompson, or that Thompson did not have possession of said gun before it was found in defendant's possession, then they should not consider the circumstance of defendant's possession of the gun as corroborative of the testimony of said witnesses Pate and Thompson. We think such an instruction was demanded by the peculiar facts of this case, and was material to the defendant, and that the failure to give them was calculated to and may have injured the rights of defendant. For this defect in the charge of the court, the judgment is reversed and the cause remanded.

#### ANDERSON v. STATE.

(Court of Appeals of Texas. Nov. 27, 1889.)

##### GAMING-HOUSE—EVIDENCE.

1. An instruction, on a trial for playing cards at a gaming house, defining a "gaming-house" as "a house or part of a house where gaming is carried on as a business," is correct.

2. A conviction for such offense is not warranted by evidence that at intervals several games had been played at the house in question.

3. Evidence that a person who played with defendant was a professional gambler is incompetent, where it does not appear that he was interested in keeping the house, or that the object of the evidence was to show the character of the house.

Appeal from Ellis county court; B. McDANIEL, Judge.

*D. F. Singleton*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. This conviction was upon an indictment for playing cards at a public house, to-wit, a gaming-house, commonly resorted to for purposes of gaming. To sustain a conviction upon the indictment it was essential that the state should prove that the house was a "gaming-house." Pen. Code, art. 356; *Tummins v. State*, 18 Tex. App. 13; *Bacchus v. State*, Id. 15; *Willson, Crim. St. § 574*. To this issue the jury was properly limited and restricted by the charge of the court, and a gaming-house was defined "as a house or part of a house where gaming is carried on as a business." We are of opinion that this definition is correct. As it is the occupation carried on in a house which constitutes it a public house, (*Willson, Crim. St. § 576*.) so it is the occupation or business of gaming carried on in a house which constitutes it a gaming-house. But it must be shown that gaming is carried on as a business or occupation in the house; and the house must be devoted to or used for the business of gaming. If used for other purposes mainly, then one or more acts of gaming, or, indeed, several acts of gaming, would not necessarily constitute it a "gaming-house." The gaming must be so continuous or frequent as that it can be said that that is the business or occupation carried on in the house. As to whether such business or occupation is carried on in a house is a question of fact to be found by the jury.

As presented by the record, the evidence in this case, so far as it relates to the character of the house, was substantially that the room in which the gaming was done was upstairs, over a brick blacksmith shop,—a room 18x20 feet,—which had in it a bed or cot, wash-stand, table, lamp, chairs, trunk, clothes, etc., and was such a room as boys about town usually have and occupy. As to the gaming done in the house or room, the evidence only shows several games played at intervals; and in our opinion it wholly fails to establish for the house the character of a gaming-house,—that is, a house where gaming was carried on as a business.

Again, the state was permitted to prove, over defendant's objection, that one Bullard, who played in the game with appellant, followed no occupation other than gambling. It was not shown that Bullard kept, or was in any way interested in keeping, the house. The fact that Bullard was a gambler would not of itself make any house in which he played cards a gaming-house. Of course, if gamblers were in the habit of playing at a house, this would be legitimate, as tending to show the character of the house as a gaming-house. In this particular case, however, it was both immaterial and irrelevant whether Bullard was or was not a gambler, and, doubtless, was prejudicial, in so far as defendant's guilt was concerned. It appears to have been the object of the testimony to show, not the character of the house, but the

character only of Bullard. Because the evidence before us is insufficient to establish the charge that the house at which the playing was done was a gaming-house, the judgment is reversed, and the cause remanded.

#### PARKS v. STATE.

#### WARTELSKY v. SAME.

(*Court of Appeals of Texas. Nov. 27, 1889.*)

Appeal from Ellis county court; B. McDANIEL, Judge.

*Groce & Templeton*, for Parks. *D. F. Singleton*, for Wartelsky. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. In all essential particulars which are necessary to their disposition in this court, these two appeals present the same matters, transactions, and questions as have just been decided in the case of *Anderson v. State*, ante, 868. All the cases were for playing cards at the same house. We have seen in *Anderson's Case* that the state failed to prove that the house was a gaming-house. In these two cases the evidence is equally as inconclusive and insufficient. In so far as other new questions, not raised and discussed in *Anderson's Case*, are presented in these records, the same will not be noticed, because not likely to arise on another trial. Because the evidence does not support the convictions, the judgment in each of these cases is reversed, and the cause remanded.

#### SMITH v. STATE.

(*Court of Appeals of Texas. Dec. 14, 1889.*)

#### THEFT—CIRCUMSTANTIAL EVIDENCE.

Though, on a trial for the theft of a cow, there are strong proximate circumstances tending to show that the stolen animal was the one which witness saw defendant drive into his field within a week before the stolen cow was missed and its beef and hide found at defendant's house, yet, as the witness did not see and identify the hide as of the cow he had seen defendant drive into his field, a failure to instruct on the law of circumstantial evidence is error.

Appeal from district court, Walker county; F. A. WILLIAMS, Judge.

Indictment of Jordan Smith for the theft of a cow. From the judgment entered on a verdict of guilty defendant appeals.

*Abercrombie & Randolph*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. The charge of the court was specially excepted to by the defense upon the ground that it did not submit the law with regard to circumstantial evidence. In explaining the bill of exceptions, the learned judge says: "I did not charge as to circumstantial evidence, because the case did not depend wholly upon that character of evidence." In this we differ with the learned judge. We concede that there are very strong proximate circumstances going to show that the red roan cow in Spillar's mark and brand, seen by the witness Bill Wilson when defendant drove and had her put into his field, inside of a week of the time Spillar's cow was missed, searched for, and the beef and hide found at defendant's house, was the alleged stolen animal. Still, this witness did not see and identify the hide as of the animal he had seen the defendant drive up and have turned

into his field. The identity of the animal was wholly an inference to be deduced from circumstances. It is unnecessary to discuss other questions, as they will not arise on another trial.

#### RICHARDSON v. STATE.

(Court of Appeals of Texas. Nov. 16, 1889.)

HOMICIDE—INSULTING WORDS—EVIDENCE—NEW TRIAL—INSTRUCTIONS.

1. Under Code Crim. Proc. Tex. art. 781, providing that where the truth of the causes set forth in the motion for a new trial is controverted the judge shall hear the evidence by affidavit or otherwise, and determine the cause, it is improper for the judge to base his decision on information obtained from private sources, as this is not legitimate evidence.

2. Evidence that defendant asked deceased if he had used certain insulting language concerning himself and family, and that deceased repeated the insulting language, which was such as was calculated to inflame the mind to such a degree of passion as to render it incapable of cool reflection, and that defendant, under the immediate influence of the sudden passion this insulting language aroused, slew him, raised the issue of manslaughter, and demands an instruction presenting the law on that subject.

3. Evidence of a witness that he had told defendant, shortly before the killing, that deceased had used such language, is material, as tending to show that the killing was on account of the insulting language, though between that and the killing defendant asked deceased if he had used the language.

4. A charge in a trial for murder which fails to define "malice" is fatally defective.

Appeal from district court, Hunt county; E. W. TERHUNE, Judge.

*Mr. Brooks, Mr. Stinson, and Sherrill & Austin*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. This appeal is from a judgment of conviction for murder of the second degree. Defendant made his first application for continuance on account of the absence of two witnesses, John Crane and W. E. Charlton. Defendant was arrested and placed in jail on July 5th. On July 8th, as soon as he had employed his counsel, he sued out process for his witness Crane, to Hunt county, the county of his alleged residence, and the county of the forum, which process was returned into court on July 12th, not executed, the witness not being found after diligent search. This application for continuance was presented to the court on July 15th, the day of the trial, and three days after the return of process. It is alleged that at that date Crane was temporarily absent from the state. As to the absent witness Charlton, the defendant sued out an attachment to Rains county, the county of the said witness' residence, on the 10th day of July, which attachment was returned on the 12th, not executed. After the return of process in both instances on the 12th, defendant took no other steps within the next three days to secure the testimony or the presence of said witnesses. It appears that the witness Crane, several weeks prior to the trial, started to Washington Territory with cattle, but whether to re-

main there and become a citizen permanently was not known, and the witness himself had not finally determined. In either event, it would have been impossible to take and return the deposition of the witness in time for the trial of the case. If it had been shown that the witness had permanently removed to and settled in Washington Territory, and this fact might have been ascertained by defendant, then indeed due diligence would require that the proper effort had been made to take his deposition, as authorized by the Code. Code Crim. Proc. art. 764 et. seq.; *Bowen v. State*, 3 Tex. App. 617. Such diligence, however, could be excused where it is made to appear that by the use of such due diligence the testimony by deposition of said witness could not have been obtained in time for the trial. *Hennessey v. State*, 23 Tex. App. 340, 5 S. W. Rep. 215; *Willson, Crim. St.* § 2164. This, we think, was apparent in this case, and the diligence was sufficient as to the witness Crane. As to the witness Charlton, the diligence was not perhaps as strict as it might and probably should have been; the fact being that another attachment, if sued out promptly after the return of the first, in all probability could have been or might have been served upon the witness, had he been in Rains county. *Jackson v. State*, 23 Tex. App. 183, 5 S. W. Rep. 371. Thus it appears that the diligence as to one witness was sufficient, while it was insufficient as to the other. When all the statutory requirements have been complied with in the application, a continuance is not, under our present law, (Code Crim. Proc. art. 560, subd. 6,) a matter of right, but its truth, merit, and sufficiency are, notwithstanding, still matters to be passed upon, and within the sound discretion of the court. But if the continuance be refused, and the defendant be convicted, the court is required to grant a new trial where the absent testimony appears material and probably true; and if the absent testimony, in view of the evidence adduced on the trial, appears material and probably true, the fact that the application failed to comply strictly with the requirements of the statute should not defeat the granting of the new trial. And especially is this so with regard to the strictness of the diligence used. *Willson, Crim. St.* § 2186; *Simmons v. State*, 26 Tex. App. 514, 10 S. W. Rep. 116; *McClintock v. State*, 25 Tex. App. 247, 7 S. W. Rep. 667. Of course, if there has been a total want or a gross neglect in the exercise of diligence, the defendant would not be entitled to have either his application for continuance or motion for new trial on this point considered. In such case he could have no ground of complaint. "Any material fact stated, affecting diligence in an application for a continuance, may be denied by the adverse party. The denial shall be in writing, and supported by the oath of some credible person, and filed as soon as practicable after the filing of the application for a continuance." Code Crim. Proc. art. 564. And "when a denial is filed \* \* \*

the issue shall be tried by the judge, and he shall hear testimony by affidavits, and grant or refuse the continuance, according to the law and the facts of the case." Id. art. 565. In this case the state did not controvert the diligence as above provided, nor in fact was the application controverted at all in the first instance. Still this did not preclude the state from controverting it as to diligence on the motion for a new trial. *Walker v. State*, 13 Tex. App. 618; *Jetton v. State*, 17 Tex. App. 311.

Where the truth of the causes set forth in the motion for new trial is controverted, the practice is for "the judge to hear evidence, by affidavit or otherwise, and determine the issue." Code Crim. Proc. art. 781. In this case the motion for new trial was controverted, and especially so with reference to defendant's application for continuance. Defendant saved a bill of exceptions to the overruling of his application, to which the learned trial judge appends a lengthy explanation of the reasons which actuated him in his ruling in refusing the new trial, in so far as it was based upon this application for a continuance. After he had overruled the application, and during a recess of court, he says he saw and conversed in person privately with the father of the absent witness, Crane, and the father told him (the judge) that he had heard his son tell what he knew, and that his son did not see the difficulty, nor any part of it. The judge says he did not believe the witness Crane would testify as set out in the application, and, if he did, he did not think such testimony would be true, or probably true. We are not satisfied, even, as to the propriety of a judge privately seeking information as to a matter of fact pending before him for decision. Such statements are hearsay, and are not legitimate evidence. His decision on the motion for new trial should be based upon the evidence he has heard by affidavit or otherwise. Id. It must be evidence testified or sworn to on the hearing before him, and where the witness' statements, credibility, and means of knowledge can be fully and legally ascertained. *Ex parte*, independent, and unsworn statements should not be allowed to override a defendant's sworn statement. The judge might, if he deemed proper, have called Crane's father to the stand, if he knew or had any reason to believe that said Crane knew facts important and pertinent to the issue, and thereby have given defendant a right to subject him and his statements to the legal tests applied generally to witnesses and their evidence, if he had so desired. We have only animadverted upon this matter because the trial judge in his explanation has expressed a desire that we should prescribe some rule in the premises. We have no hesitancy in saying, however, that in so far as the absent witness Crane was involved in the contest over the motion for a new trial, in our opinion, his decision holding that the said testimony would not be given by the witness if

present, and that if given it would not probably be true, is correct, and fully supported by the affidavits of the witnesses Jackson, Kinsingham and Harlow.

As to the absent witness Charlton, by whom defendant proposed to prove that late in the evening before the homicide said witness told defendant of insulting language used by deceased towards the mother of defendant, in his explanation the learned judge, as one of his reasons for not believing that the proposed testimony was probably true, or that Charlton ever had such conversation with defendant, says that the accused testified in his own behalf, and that he does not testify that Charlton told him anything. In this the learned judge is certainly mistaken, because in the statement of facts, approved by him as correct, we find in the testimony of the defendant that he speaks of going to Black Jack Grove, and says: "I also had a talk with W. E. Charlton, who told me about the same thing that John Smith did about Ladd's talk concerning me and my mother." And in the contest over the new trial two of defendant's witnesses, Halbrook and Parham, state in their affidavits that they were at Black Jack Grove, and defendant was there until late in the afternoon, and that they saw him in conversation with Charlton. But the court further says that said testimony, if true, was not material, because the evidence in the case failed to show that defendant killed the deceased upon his first meeting with him after he had been informed of the insulting language used by deceased towards his mother, and that therefore defendant could not legally avail of such "adequate cause" to reduce the killing to manslaughter. Pen. Code, art. 598; *Melton v. State*, 24 Tex. App. 47, 5 S. W. Rep. 652; *Parker v. State*, 24 Tex. App. 61, 5 S. W. Rep. 658; *Norman v. State*, 26 Tex. App. 221, 9 S. W. Rep. 606; *Willson*, Crim. St. § 1022.

In his testimony the defendant says: "I left town, and went to Mr. Cal Rippey's, where there was a party. I did not know that Ladd would be at the party, but after I had been there for quite a while I saw him. Some time after I got there Ladd came to me, and said he wanted to see me. I told him to wait a minute. At that time I was talking to some one in the hall. After a few moments, when the conversation was concluded, I turned and said to him I was ready, and what did he want. He said he wanted to see me, and I went out of the north hall door with him. He went in front of me, and, as he walked off the steps leading to the cistern, he put his right hand under his coat about his hip pocket. We walked out close to the cistern, and stopped, and when I said to him, 'Do you mean all you have been saying about me and my mother?' and he replied, 'Yes, I mean every d—d word of it;' and immediately drew his pistol, cocked it, and presented it, and snapped it at my head. I knocked the pistol up with my left hand,

and I think I knocked it out of his hand, and stabbed him with my right. I do not know whether I knocked the pistol out of his hand or not. When I stabbed him he turned and ran round the house. I left soon thereafter." The state's witness Huff says that a short time before the difficulty, while he and defendant were out in the yard together, the defendant said: "I see John Ladd here. I am going to ask him if he means what he has been saying about me and my family." State's witness Love testified that he saw defendant walk up to Ladd, touch him, and tell him he wanted to see him, and they went out together. Thomas Center, defendant's witness, relates the matter pretty much as defendant does, and he says that, after they had walked out and off the gallery, he heard defendant say, "John, do you mean all you have been saying about me and my folks?" and Ladd replied, "Yes, I mean every damned word of it;" and he says he heard a pistol click and snap. The insulting language used by deceased was that defendant's mother "was a part negro, a whore, and had raised a family of bastard children, and that defendant was a half negro." Several witnesses testified to having heard deceased use this language, and the application for continuance stated that the absent witness Charlton had told defendant about dark, at Black Jack Grove, that deceased had used this language, and that such would be his testimony.

The court says the testimony became immaterial, because defendant did not kill deceased as soon as he met him. Suppose he did not kill him as soon as he first met him, but suppose that he doubted that deceased had or could have used such language, notwithstanding he had been so often told that he had, and that he determined to satisfy his own mind by asking him in person about it, and that upon his doing so the deceased repeated the language to him in person. Was not that a new and aggravating insult, and one doubly calculated to inflame his mind to such a degree of passion as to render it incapable of cool reflection? And suppose he acted upon that, and not upon the previous provocation, was that any the less an adequate cause because it was repeated to him in person? A man may well doubt that it is possible that another could have defamed his wife or mother until he has it confirmed from his own lips, and to hear him utter the defamatory language with his own lips is far more insulting than to have reports of such insults come at second hand from a thousand reliable sources. Some men, perhaps, under the circumstances, would not have waited as defendant did, but would have slain deceased upon the information he had already received. This does not alter the question. If defendant asked the deceased out of the house for the purpose of ascertaining from him whether or not he had used the insulting language about his mother as he had been informed, and deceased, in reply to his question, stated that he had said and meant every word im-

puted to him, and the defendant, under the immediate influence of the sudden passion this insulting language aroused slew him, he would only be guilty of manslaughter, provided the jury believed the passion was such as to inflame his mind so as to render it incapable of cool reflection. Willson, *Crim. St.* § 1022; *Williams v. State*, 24 Tex. App. 637, 7 S. W. Rep. 833; *Eanes v. State*, 10 Tex. App. 421. As tending to show that the killing was on account of the insulting language to his mother, and for no other cause, we are of opinion that the proposed testimony of the absent witness Charlton was both material and probably true, in the light of the other evidence in the case.

We are also of opinion that the charge of the court failed and omitted pertinently and affirmatively to instruct the jury upon that phase of the law of manslaughter which we have above indicated. Nowhere in the charge were the jury told what would be the law if defendant called deceased out, or went out on invitation of deceased, and then asked him concerning the insulting language, and deceased repeated the same in person to him, thereby offering a new insult; nor was this precise phase of the case presented in any of the refused instructions.

Again, defendant has been found guilty of murder of the second degree. Now, while malice does not enter into nor become an element of manslaughter, it is one of the main constituents of all murder, and the rule is well settled that in all trials for murder the charge of the court should explain the term "malice." *Babb v. State*, 12 Tex. App. 491; *Caruthers v. State*, 18 Tex. App. 339; *Willson, Crim. Forms*, 708, 709. The learned trial judge has omitted to explain the term "malice" to the jury in his charge, and the charge is therefore defective. For the several reasons above indicated, the judgment is reversed, and cause remanded.

#### GREEN v. STATE.

(Court of Appeals of Texas. Dec. 20, 1889.)

##### CRIMINAL LAW—VENUE—EVIDENCE.

1. Act Tex. April 4, 1889, (Gen. Laws 21st Leg. p. 87,) entitled "An act to create articles 2164 and 2165 of Code Crim. Proc. Tex. tit. 4, c. 2, merely added two articles to chapter 2, which prescribes the venue of offenses, and did not operate as a repeal thereof.

2. Though it is error to permit the state to show that the reputation of the prosecuting witness for truth and veracity was good when his credibility has not been attacked, a new trial will not be granted on this ground alone.

3. On a trial for an assault with intent to commit murder, evidence of the good or bad character of the prosecuting witness for chastity is irrelevant, though the alleged cause of the assault was insulting words or conduct of the prosecuting witness to the wife or daughter of defendant.

4. Where the evidence shows, without conflict, that the assault was premeditated, deliberate and with a formed design to kill, the giving of an instruction on the law of manslaughter is an error of which defendant cannot complain.

5. Defendant cannot complain of improper questions by the state that were answered favorably to him.



• Appeal from district court, Lampasas county; W. A. BLACKBURN, Judge.

Indictment of C. R. Green for an assault with intent to commit murder. He was convicted, and appeals.

*Mathews & Wood*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. 1. It is claimed for the defense that chapter 2, tit. 4, of the Code of Criminal Procedure, prescribing the venue of offenses, was repealed by the act of April 4, 1889, (Gen. Laws 21st Leg. p. 37.) That act merely adds to said chapter two articles, and does not repeal, or in any manner affect, the other articles of said chapter. That such was the legislative intent is manifest from the title of said act, which is: "An act to create articles 216a and 216b of title 4, chapter 2, of the Code of Criminal Procedure of the State of Texas." But, even if said chapter had been repealed, it would not avail the defendant, because the venue of his offense would be fixed by the common law in Lampasas county, that being the county in which the offense was committed.

2. Conceding that the credibility of the witness Jasper Graey had not been attacked, and that it was error, therefore, to admit testimony on behalf of the state that his general reputation for truth and veracity was good, (*Rushing v. State*, 25 Tex. App. 607, 8 S. W. Rep. 807.) we do not think this error alone should reverse the conviction, because it is not an error calculated to injure the rights of defendant. It is a presumption indulged by the law that a witness unimpeached is credible; and it could not, therefore, injure the rights of the defendant to prove that which the law presumed. We apprehend that no case can be found wherein it has been held that for such error alone a conviction should be set aside.

3. Without objection of defendant, the state was permitted to prove the good character of the prosecuting witness, Jasper Graey, for chastity. In our opinion, the character of said witness for chastity was not a legitimate issue in the case. We cannot perceive what legal bearing it could have upon the main issue. If he was, by general reputation, a most beastly libertine, his life was still under the protection of the law; and a murderous assault upon him by the defendant could not be excused, justified, or even mitigated by reason of such bad reputation. On the other hand, if his general reputation for chastity was good, yet, if defendant had reason to believe, and did believe, that his wife or his daughter had been debauched or insulted by him, such general good reputation could not render more criminal an assault committed upon him by defendant. We are of opinion that all testimony admitted, and all rejected, bearing upon the general reputation for chastity of said witness, was irrelevant and inadmissible; and this view of the matter disposes of several of defendant's bills of exception.

4. Counsel for the prosecution propounded some improper questions to witnesses, and should have been severely reprimanded for doing so. These questions, however, were answered by the witnesses favorably to the defendant; and hence we do not see that he could have possibly been prejudiced thereby.

5. As we view the evidence, the charge of the court is applicable to it, and is full, fair, and correct upon every phase of the case. Instructions upon the law of manslaughter were given the jury, when such instructions might well have been omitted, because the facts proved do not fairly raise the issue of aggravated assault. There is no conflict in the evidence as to the character of the assault. It was premeditated, deliberate, and with a formed design to kill. It was not committed under the influence of sudden passion. It was committed without adequate cause. If the cause of the assault was insulting words or conduct of Jasper Graey to the wife or daughter of defendant, then the evidence conclusively shows that defendant did not assault Graey at his first meeting with him after being informed of such insulting words or conduct. We find no error in the conviction. We think the defendant has had a fair and impartial trial, and the judgment is affirmed.

#### DUNCAN et al. v. TUFTS.

(*Supreme Court of Arkansas. Jan. 18, 1890.*)

##### CHANGE OF VENUE.

Under Mansf. Dig. Ark. § 6483, providing that, if the clerk's fees on order for a change of venue are not paid by the party asking the order within 15 days, the order shall be void, where such order is made, and the parties thereafter voluntarily go to trial in the court in which the action was first brought, it will be presumed that the fees were not paid.

Appeal from circuit court, Jefferson county; JOHN A. WILLIAMS, Judge.

Action by J. W. Tufts against T. B. Duncan & Co., to recover the price of soda-water apparatus. From a verdict and judgment in favor of plaintiff, defendants appeal.

*N. T. White*, for appellants. *W. S. McCain* and *John W. Crawford*, for appellee.

PER CURIAM. An order for a change of venue in a civil case is made upon the condition that the clerk's fees shall be paid by the party in whose favor it is granted within 15 days from granting the order.<sup>1</sup> If the clerk is not satisfied within that time, the order becomes void, and the court making it retains jurisdiction of the cause. *Haglin v. Rogers*, 37 Ark. 491. It is incumbent upon the appellant, who relies upon the failure of the jurisdiction of the court in which the order is made, to show affirmatively the facts which deprive it of jurisdiction; and, where the record shows only that an order for a change of venue was made, and thereafter a voluntary submission to trial by the parties, it will be presumed that the conditions upon which

<sup>1</sup> Mansf. Dig. Ark. § 6483.

the order was made have not been complied with. Under the issues made by the pleadings in this case, the only question for the jury's consideration was whether the defendant was entitled to a deduction from the amount sued for. The question was submitted to them under fair instructions from the court, upon conflicting evidence, and the jury found for the plaintiff. Affirm.

#### HILL *et al.* v. BATES.

(*Supreme Court of Arkansas.* Jan. 18, 1890.)

##### VACATION OF JUDGMENT.

In an action to foreclose a vendor's lien on land, plaintiff alleged that some of the defendants who were non-residents had obtained judgment against the vendee, and had sold the land under execution, but failed to allege who became the purchaser, or what interest these defendants had in the land. The record shows no warning order against these defendants, and no appearance by them except through an attorney *ad litem* appointed by the court. Held, that the judgment will be vacated and the complaint dismissed as to them.

Appeal from circuit court, Saline county; J. B. WOOD, Judge.

Action by George H. Bates against J. W. G. Wierman and Hill, Clarke & Co., to foreclose a lien on certain property in which Hill, Clarke & Co. had obtained an interest by virtue of a judgment and sale under execution. A decree was entered for plaintiff for the sum claimed by him, which was made a lien on the premises, and a sale of the property ordered, from which Hill, Clarke & Co. appeal.

Cohn & Cohn, for appellants. Geo. W. Shinn, for appellee.

PER CURIAM. The complaint to foreclose a vendor's lien alleged that the appellants, who were non-residents, had obtained judgment against Wierman, the vendee, and caused the land which the complaint sought to condemn to be sold under execution. It was not alleged who became the purchaser at the sale, or what interest the appellants have in the land. The record shows no warning order against the appellants, and there was no appearance by them, except through an attorney *ad litem* appointed for them by the court. The judgment was therefore without warrant as to them, and, as the complaint does not disclose that they have any interest in the premises, instead of remanding the cause for further proceedings the judgment will be vacated, and the complaint dismissed, as to the appellants. It is so ordered.

#### DYAL v. HAYS.

(*Supreme Court of Arkansas.* Feb. 1, 1890.)

##### SEPARATE DEMURRER.

Where the separate demurrer of one of several defendants is sustained, and the action dismissed, it is dismissed as to him, and left pending as to the defendants not demurring.

Appeal from circuit court, St. Francis county; M. T. SANDERS, Judge.

Action by M. J. Dyal against C. C. Winfrey, and E. Hays, as surviving partner of Littlefield & Hays, (a firm composed of J. S. Littlefield and E. Hays,) to enforce vendor's lien for purchase price of mill, and for judgment against defendants; and from a judgment on demurrer in favor of Hayes, and an order refusing to permit plaintiff to file amended complaint, plaintiff appeals.

George Stibly, for appellant.

PER CURIAM. Hayes' separate demurrer was sustained, and thereupon the action was dismissed. The legal effect of this was to dismiss as to Hayes, and leave the action pending as to the other defendants. As no cause of action was stated against Hayes, and no vendor's privilege against the property claimed by him shown, the judgment of dismissal as to him was right. Affirm.

#### ST. LOUIS, I. M. & S. RY. CO. v. ADCOX.

(*Supreme Court of Arkansas.* Jan. 18, 1890.)

##### CARRIERS—REGULATIONS—FAILURE TO STOP TRAIN.

1. It is not an unreasonable regulation for a railway company to refuse to designate as a flag station for through trains an unincorporated town, situate within three miles of a regular station, and containing only a few houses.

2. Where trains habitually stop at a certain station, and an agent of the company sells a return ticket to that station to a person who has been informed of the custom, and relies on it, and the agent knows that the purchaser intends to use the ticket to return on a train which does not stop at that station, but does not inform him of the fact, the company is liable.

Appeal from circuit court, White county; M. T. SANDERS, Judge.

Action by J. E. Adcox against the St. Louis, Iron Mountain & Southern Railway Company, to recover the damages sustained by reason of defendant's train having refused to stop at a station to take on plaintiff after it had been flagged. From a judgment in favor of plaintiff, defendant appeals.

Dodge & Johnson, for appellant. T. J. Oliphint, for appellee.

PER CURIAM. 1. The refusal of a railway company to designate as a flag station, for its through trains, a place which is not an incorporated town, which contains only a few houses, and is situated within three miles of a regular station, is not an unreasonable regulation. The facts being uncontroverted, it was the province of the court to declare the regulations reasonable. To submit the question to the jury for determination, under such circumstances, was simply to leave the matter to their discretion, which was error.

2. If the plaintiff, without fault of his, was misled by the company's custom into believing that the place was a flag station for night passenger trains, then his right to recover was the same as though he had been misdirected by its authorized agent. *Railway Co. v. Atchison*, 47 Ark. 74; *Hobbs v. Railway Co.*, 49 Ark. 357, 5 S. W. Rep. 586; 2 Wood, Ry. Law, 1174. It would be oth-

erwise if he was not informed of, or had not relied upon, the custom, or if the stoppage of the trains was only casual, and not habitual. The charge upon that phase of the case was too restricted. If the company's agent, from whom the plaintiff purchased his return ticket, was informed and understood that the plaintiff purchased the ticket with the intention of using it to return from his destination on the night train, it was the agent's duty to notify him that the train would not stop at his destination; and the court so instructed the jury. If it were certain the agent had knowledge of the plaintiff's intent, and permitted him to act when it was his duty to speak, we would affirm the judgment, notwithstanding the errors pointed out; but the evidence is conflicting upon that point, and we cannot say how far the jury were misled by the false charge. The judgment must be reversed, and the cause remanded, for a new trial.

#### MARVIN v. MARVIN.

(Supreme Court of Arkansas. Feb. 1, 1890.)

##### MARRIAGE UNDER DURESS.

Marriage cannot be avoided on the ground of duress, where a man is lawfully arrested on process for seduction, and marries the woman to procure his discharge. The fact that he subsequently discovers that he could not have been convicted will not alter the case, if the prosecution was on probable cause, and not from malice merely.

Appeal from Franklin chancery court; CUNNINGHAM, Chancellor.

Action by William Marvin against Edna Marvin to have the bonds of matrimony annulled on the grounds of duress, claiming that plaintiff was arrested on charge of seducing defendant, of which he was innocent, and, under advice of neighbors, married defendant to secure his release from such arrest and prosecution. The chancellor dismissed the bill for want of equity, and because no cause for divorce was charged or proven; from which judgment of dismissal plaintiff appeals.

*Ed. H. Mathes*, for appellant.

**PER CURIAM.** A man lawfully arrested on a process for seduction cannot, if he marries the woman to procure his discharge, have the marriage avoided upon the ground of duress. The fact that he subsequently discovers that he could not have been convicted will not alter the case, if the prosecution was upon probable cause, and not merely from malice. *Bish. Mar. & Div. § 212; 2 Kent, Comm., \*453; Honnett v. Honnett, 38 Ark. 156.* The prosecution of the appellant was upon probable cause. Let the decree be affirmed.

#### GARIBALDI v. WRIGHT.

(Supreme Court of Arkansas. Feb. 1, 1890.)

##### TROVER—CONFLICT OF JURISDICTION.

An action for the conversion of property may be brought in a court of law, though the cus-

tody of the property is in a chancery court, in a suit between the same parties.

Appeal from circuit court, Pulaski county; J. W. MARTIN, Judge.

S. H. Wright against James Garibaldi in conversion. Plaintiff and defendant were partners in a stock farm and stock, and, pending a suit in the Pulaski chancery court to dissolve the partnership, plaintiff brought this action for the conversion of a part of the personal property; and from a judgment in favor of plaintiff, defendant appeals.

*S. R. Allen and E. W. Kimball*, for appellant. *Sanders & Watkins and Blackwood & Williams*, for appellee.

**HEMINGWAY, J.** Although property of which conversion is alleged is in the custody of a chancery court, an action for its conversion may be brought in a law court, since it does not affect the possession of the property, or interfere with its custody. If the chattels belonged to the appellee, and were converted by the appellant, this was a wrong for which a right of action arose to the appellee individually; and, although there was a pending suit in chancery between the parties for an account and settlement of partnership affairs, the appellee could bring a separate action for the conversion, and was not required to litigate this claim in the chancery suit. If the objects of two suits are different, they may progress at the same time, although the thing about or in reference to which they are brought is the same in each case. *Wilmer v. Railway Co., 11 Myer, Fed. Dec. § 300; Buck v. Colbath, 3 Wall. 334.* The charge of the court fairly submitted the cause to the jury, under the law as we have stated it, and the judgment will be affirmed.

#### FOX v. ARKANSAS INDUSTRIAL CO.

(Supreme Court of Arkansas. Feb. 1, 1890.)

##### ATTACHMENT FOR PRIOR OF PERSONALTY.

The privilege granted to vendors of personal property by *Mansf. Dig. Ark. § 4393*, to sue out a specific attachment without imposing the usual conditions, does not take precedence of the rights of a prior attaching creditor of the vendee.

Appeal from circuit court, Jefferson county; JOHN A. WILLIAMS, Judge.

*U. M. & G. B. Rose and M. L. Bell*, for appellant. *M. A. Austin*, for appellee.

**COCKRILL, C. J.** The appellee company sued out a general attachment against the property of C. M. Neel, and caused it to be levied upon a lot of loose railway rails, and other material used in the construction of railroads. Subsequently, in a suit against Neel for the purchase money of the same property, the appellants sued out a specific attachment under sections 4398, 4399, *Mansf. Dig.*, and caused it to be levied thereon. The question is, does the privilege granted to the vendor of personal property by the statute take precedence of the rights of a prior attaching creditor? It is the settled construction of the statute under which the appellant

claims priority that it was not intended to give the vendor of personal property a lien upon the property sold, but only a remedy for impounding it, to prevent the vendee from putting it beyond his reach *pendente lite*. Swanger v. Goodwin, 49 Ark. 290, 5 S. W. Rep. 319; Bridgeford v. Adams, 45 Ark. 136; Friedman v. Sullivan, 48 Ark. 215, 2 S. W. Rep. 785; Creanor v. Creanor, 86 Ark. 91. The syllabus of the case of Creanor v. Creanor, *supra*, is misleading. The opinion does not refer to the vendor's privilege as a lien, but denominates it an action of attachment only. All of the cases recognize that the vendor's action is instituted, not to enforce a lien, but to create one by way of attachment. The privilege of sequestration exists so long as the vendor is unpaid, and the property remains in the power of the vendee. "In possession of the vendee," is the language of the statute; but the possession is the vendee's, within the meaning of the act, so long as it is subject to his control, and the rights of third parties have not intervened. Erwin v. Torrey, 8 Mart. (La.) 90; Henning v. The St. Helena, 5 La. Ann. 849. After the levy of the appellee's attachment, the sheriff was in possession of the property, and Neel, the vendee, no longer had power of dominion over any part of it. The vendor's privilege could not, therefore, be exercised to acquire any right other than is acquired by a second attaching creditor. The right of stoppage *in transitu*, which is not defeated by the levy of process against the buyer, is appealed to by the learned counsel for the seller in this case as a controlling analogy; but the analogy is only apparent, not real. While the purchased goods are in the hands of the seller, the common law affords him a safe remedy against them for the collection of the unpaid purchase price. The remedy is lost by delivery. Delivery to the carrier for the buyer is technically delivery to the latter; but, as it is not actual delivery into his hands, the seller is permitted, by a stretch of judicial favor, to disregard the technical delivery on discovering that the buyer is insolvent, and treat the goods as undelivered. When the right of stoppage *in transitu* is exercised, it is, in contemplation of law, as though the seller had never parted with possession. But the statute does not pursue the analogy of the common law in this regard by extending the right to retake the goods to a time after delivery into the manual possession of the buyer. It does not undertake to restore the seller to the position he held before the delivery. The common law is therefore no guide to the meaning of the statute; nor is there any feature of the statute which indicates the intention to give the seller a preference of payment over other creditors. It gives him the right to sue out a specific attachment, without imposing the conditions which attach in other cases where that remedy is granted, and, in obedience to the mandate of the constitution, prohibits the debtor from claiming the property as exempt. To that extent is

the unpaid seller favored over other creditors, but not further. It is argued that the proof establishes the fact that the property is not Neel's, but that of a railway from whom the appellant claims by purchase since his attachment; but, as the evidence is conflicting upon that point, the finding of the court that the property belonged to Neel is conclusive upon us. The judgment must therefore be affirmed.

HEMINGWAY, J., disqualified.

FORD *et al.* v. JUDSONIA MERCANTILE CO. *et al.*

(Supreme Court of Arkansas. Feb. 1, 1890.)

EQUITY—JURISDICTION.

Where property is in the custody of a sheriff under a writ of attachment from the circuit court, a court of chancery cannot acquire jurisdiction of the same property, so as to take it from the possession of the sheriff into the custody of its receiver. Such powers appertain only to courts of supervisory or appellate jurisdiction.

Appeal from White chancery court; D. W. CARROLL, Chancellor.

Judsonia Mercantile Company, G. W. Henson, *et al.*, against J. H. Ford, sheriff of White county, Standard Shoe Company, *et al.* The Judsonia Mercantile Company, a private corporation doing business in White county, Ark., being insolvent, on the 27th day of September, 1887, conveyed all of its real and personal property, notes and accounts, to G. W. Henson, in trust for the benefit of the plaintiffs, (except the Judsonia Mercantile Company and G. W. Henson,) who were creditors of said company in the sum of \$5,530.87. By the stipulations of the deed the trustee was authorized to sell the stock of merchandise at retail, at private sale, for 20 days, and then, upon 20 days' notice, sell the remainder of the stock of merchandise remaining unsold, together with all the other property mentioned in the deed, at public auction, collect the notes and accounts, and apply the proceeds of the sale and collection to the payment of appellees' debts, the cost of the trust, and the taxes remaining unpaid, and the residue, if any, to be turned over to the treasurer of the Judsonia Mercantile Company, for the care and benefit of the other creditors. The deed was filed for record on the day of its execution, the trustee took possession, and began to sell at private sale. Defendants, with exception of J. H. Ford, sheriff, were creditors of said corporation; their claims, in the aggregate, amounted to more than \$5,000, and they instituted, in the White circuit court, suits by attachment upon their respective claims. Orders of attachment were issued thereon, delivered to the sheriff of White county, and by him levied upon all of the real and personal property in said deed mentioned which had not been sold by the trustee, the sheriff taking the property into his custody. While said property was in the custody and possession of the

sheriff by virtue of said orders of attachment, on the 1st day of October, 1887, without notice of any kind to defendants, plaintiffs presented their complaint to Hon. D. W. CARROLL, chancellor for the first district of Arkansas, at chambers, in the city of Little Rock; who thereupon indorsed his fiat thereon, appointing the trustee in said deed receiver, and directing that, upon said receiver's executing bond in the sum of \$10,000 for the faithful performance of his duty as receiver, he take possession of the property described in the deed, and sell and dispose of the same according to the provisions of the deed, and the notices given by him as trustee; and the sheriff was ordered to release and turn over to said receiver all the property in his possession by virtue of the levy of said attachment, which was accordingly done. At the December term, 1887, of the White chancery court, said cause was docketed, but no notice of any kind had been given to defendants by subpoena, summons, or otherwise of the pendency of this suit; and defendants, to protect their rights, were compelled to appear to said cause, and they filed their joint demurrer to plaintiffs' complaint, which was overruled by the court, to which they excepted; and declining to answer further, and electing to stand upon their demurrer, the court rendered final decree in said cause, to which defendants excepted, and prayed an appeal to this court, which was granted.

*McRae & Rice* and *J. W. House*, for appellants. *W. R. Coody*, for appellee.

HEMINGWAY, J. When the complaint was filed, and the application to appoint a receiver presented, the property involved was in the custody of the sheriff, who had seized and held it under writs of attachment from the White circuit court against the property of the Judsonia Mercantile Company. It appears from the complaint that the property belonged to the defendant in the writs. It was therefore rightly seized in obedience thereto. In this respect, the facts differ from those presented in the case of *Willis v. Reinhardt*, ante, 241, (decided during the present term,) in which we ruled that a stranger to an attachment might maintain replevin against an officer, who seized his goods under a writ against the goods of the defendant in the writ. The goods, belonging to the defendant in the writs, and being properly held by the sheriff thereunder, were in the custody of the court from which they issued, and under its control. The sheriff held them subject to the order of that court, and his possession could not be disturbed without interfering with that court, in the exercise of its jurisdiction. But authority to do this appertains only to courts of supervisory or appellate powers, and, as the chancery court has no supervisory control over the circuit court, it follows that it could not take this property from the sheriff into the custody of its receiver. Such a practice would cause an un-

seemly clash of jurisdiction, that should be exercised in perfect harmony; and there is neither reason nor authority to justify it. *Buck v. Colbath*, 3 Wall. 334; *Thompson v. Van Vechten*, 5 Duer, 618; *Veret v. Duprez*, L. R. 6 Eq. 329; *Hitchen v. Birks*, L. R. 10 Eq. 471; *Wilmer v. Railway Co.*, 11 Myer's Fed. Dec. § 300. Such a bill might be entertained if all parties representing the conflicting interests consented, by so drafting orders as to avoid the improper interference by one court with property in the custody of another. We are advised that such a practice has prevailed, and observation satisfies us that it has proven salutary; but it can only be approved where the consent of parties obviates the difficulty indicated. The bill presents no other ground for equitable relief, and, for the reasons indicated, the demurrer to the complaint should have been sustained. The judgment will be reversed, and the cause remanded, with direction to sustain the demurrer.

#### PERRY COUNTY v. CONWAY COUNTY.

(*Supreme Court of Arkansas*. Feb. 1, 1890.)

##### COUNTIES—ACTIONS—DIVISION—LIABILITIES.

1. The general statute of Arkansas requiring ordinary demands against counties to be authenticated when presented for allowance in the county court has no application to a demand, the right to sue for which is given by special act.

2. Where a part of the territory of a county is separated from it and annexed to another, it is not necessary that the act of segregation should impose a portion of the debt of the old county on the county receiving the detached territory, but subsequent legislation may make the imposition.

Appeal from circuit court, Conway county; G. S. CUNNINGHAM, Judge.

Action by Perry county against Conway county. By an act of the legislature approved April 12, 1873, a large part of the territory of Perry county was detached from said county, and made a part of Conway county. There was no provision in this act by which any part of the then-existing indebtedness of Perry county should be assumed or paid by Conway county, as is usually done in such cases. In fact, there was no mention of Perry county in the title of the act, nor in that part of the body of the act by which Perry county lost about one-fifth in valuation of her taxable property. The legislature of 1885, endeavoring to remedy as far as possible the wrong inflicted upon Perry county by the act of 1873, passed an act by which Conway county was made liable to Perry county for a just *pro rata* of the indebtedness of Perry county existing at the time of the passage of the act by which her territory was divided; the act providing for filing a claim by Perry county in the county court of Conway county. Pursuant to the last-mentioned act, Perry county filed her claim in the county court of Conway county on the 6th day of July, 1885, for \$1,100. The county court heard the claim upon the evidence, and disallowed it. An appeal was

taken by Perry county to the circuit court of Conway county, and in that court a demurrer was sustained, and the case dismissed; and plaintiff appeals.

*J. F. Sellers*, for appellant. *E. B. Henry*, for appellee.

**SANDELS, J.** It is objected by defendant county that the claim of Perry county was not authenticated as required by the general statute in case of ordinary demands against counties. The special statute giving the right to sue upon this claim does not require it, and no principle of statutory construction makes it necessary.

The only other question presented is whether the act of 1885 is constitutional. The power of the legislature to alter and abolish counties; to erect new corporations in the place of the old; to divide and dispose of the property held by counties; to charge portions of the debt of the old county upon that receiving its detached territory,—is everywhere conceded, and nowhere more emphatically than in this state. *Eagle v. Beard*, 33 Ark. 497, and cases there cited. Upon general principles of law, if a part of the territory and inhabitants of a county be separated from it by annexation to another, or by the creation of a new county, the remaining part of the county retains all its property, and remains subject to all its obligations and duties. *Laramie Co. v. Albany Co.*, 92 U. S. 307, and cases cited; *Mount Pleasant v. Beckwith*, 100 U. S. 514. The only debatable question is as to whether the act segregating the territory must impose such proportion of the debt of the old county upon the new one, or upon the county receiving the detached territory, as is equitable and just, or whether, where such act is silent as to this, subsequent legislation may make the imposition. This has been ruled differently in the courts. The earlier doctrine, still followed by some courts, was that the act detaching the territory must apportion the debt, and that it could not be subsequently taken from the old and imposed upon the new county. *Hampshire v. Franklin*, 16 Mass. 75; *Bowdoinham v. Richmond*, 6 Greenl. 112. The better doctrine is that, the power of the legislature to impose the debt of the one county upon another depending upon the existence of a moral obligation from the new county, or the county receiving new territory, to pay part of the old debt, the legislature may so ordain, whenever it finds the moral obligation to exist. *Sedgwick Co. v. Bunker*, 16 Kan. 498; *Creighton v. San Francisco*, 42 Cal. 446; *Layton v. New Orleans*, 12 La. Ann. 515; *Laramie Co. v. Albany Co.*, 92 U. S. 307; *Lycoming v. Union*, 15 Pa. St. 166; *Guilford v. Supervisors*, 13 N. Y. 143; *New Orleans v. Clark*, 95 U. S. 654; 1 Dill. Mun. Corp. § 189. The act in this case is less open to objection than those usually passed, since it makes Conway county liable for only such equitable proportion of the debt as can be established by legal evidence. The field is open to show, as against a proportion

of the debt, the value of county property retained by the old county, and the equity of the imposition of any burden at all. The demurrer should have been overruled. Reverse, and remand for further proceedings.

#### SCHOOL-DISTRICT v. CROMER.

(*Supreme Court of Arkansas*. Feb. 1, 1890.)

##### LIMITATION OF ACTIONS.

When a school warrant has been destroyed by fire, and the school board issues a duplicate, as of the date of the original, with the word "Duplicate" written across the face, the statute of limitations begins to run from the date of the original, and not from date of the issue of the duplicate.

Appeal from circuit court, Carroll county; *J. M. PITTMAN*, Judge.

Action by Cromer against school-district on school warrants. From judgment in favor of plaintiff, defendant appeals.

*Crump & Watkins*, for appellant. *Appellee, pro se.*

**COCKRILL, C. J.** This was a suit by appellee on school warrants, bearing date July 4, 1882, more than five years before suit was instituted. The statute of limitations was interposed as a defense. The judgment was for the plaintiff, on the following special finding of facts by the court, viz.: "The court finds that the original warrants issued herein were issued by the board of directors on the 4th day of July, 1882; that afterwards they were destroyed by fire; that on the 30th day of May, 1884, [within five years of the institution of suit,] said board of directors being legally in session, and the fact that the original warrants had been destroyed being made known to said board, it was, by the proper ordinance of said board, ordered that duplicates of said original warrants be issued to take the place of the original warrants as duplicates; that, in pursuance of said ordinance, warrants were issued in favor of said plaintiff dated on the 4th day of July, 1882, with the word 'Duplicate' written across the face of each one in red ink." There is no bill of exceptions, and the only question is, does judgment for the plaintiff follow as a conclusion of law from the facts found? *Smith v. Hollis*, 46 Ark. 17. We take the finding of the court as embodying the true interpretation of the resolution of the board of school directors, and look to it, together with the indorsement upon the warrants, for the explanation of what the board intended in reissuing them. The inference cannot be fairly drawn therefrom that it was the intention of the board to enter into an independent contract by way of renewal of the old debt. Such a presumption is repelled by the terms of the resolution authorizing and explaining the existence of the new issue of warrants, when it is declared that they shall take the place of the lost originals, as duplicates thereof, as well as by the date, and indorsement of "Duplicate" upon the face of each warrant. The meaning is that the new

issue of warrants should stand as the evidence of the debt due the payee, just as if issued at the same time and with the like effect as the old ones; for a duplicate has no effect other than that imported by the original. A duplicate is essentially the same as the original in its essence and operation. In *Benton v. Martin*, 40 N. Y. 345, it was ruled that the proper construction of the word "Duplicate," written upon a draft which had been issued as a substitute for a lost one of similar import, was that it was made only to take the place of the lost original, and therefore created no new liability. The plaintiff in that case, having been guilty of laches in not presenting the original, was not permitted to recover upon the duplicate. If a debtor stipulate in writing that a demand made upon him is just; that he will take no advantage of the fact that the evidence of the debt is lost, and, as further assurance, acknowledge that it was represented by his note of a given date and amount; but gives his creditor to understand that he will stand upon his legal rights, whatever they may be,—that would not fix a new period for the statute to start from, because the acknowledgment is narrowed by a qualification which rebuts the inference of an unconditional promise to pay. The legal effect of what the directors did in this case is no more than the hypothesis stated. Moreover, when a new promise, or an acknowledgment from which a promise is implied, is made, the new promise, and not the old debt, is the measure of the debtor's liability. *Shepherd v. Thompson*, 122 U. S. 239, 7 Sup. Ct. Rep. 1229. If, therefore, the new issue of warrants be an acknowledgment of the old debt, the express condition of it was that the liability shall be just what the promise itself imported; that is, that the debtor should be bound according to the legal import of the promise, and not otherwise. The right to recover upon the duplicate warrants would therefore be barred.

The case of *Paul v. Smith*, 32 N. J. Law, 13, is in point, and sustains the conclusion we have reached. The action was upon a promissory note made in 1861, but antedated five years. Six years was the period of limitation. When suit was instituted, more than that time had elapsed from the date of the note, but not that much from the actual date of execution. The maker of the note had declined to make a general acknowledgment of the old debt, which was evidenced by his promissory note and was about to be outlawed, but agreed to give the note in question, which the creditors accepted, surrendering the old note, which would have been barred earlier than the one given in lieu of it. We quote the major part of the opinion: "A note may be antedated or post-dated, and in both cases is valid, if no statute exists to the contrary; and, where the purposes of justice require it, the real date may be inquired into, and effect given to the instrument. *Story, Prom. Notes*, § 48. The note in question was due immediately after

its delivery. It was not antedated by mistake, or for any unlawful purpose, but to carry into effect the object of the parties. To alter the date, or to give it a legal effect different from that expressed on its face, is not required for the purposes of justice, but would be to make a new bargain for the parties, and thus to do injustice. The consideration was the debt originally due, \* \* \* and the substance of the transaction disclosed by the evidence was that, by giving a new note, dated about a year later than that originally made, the defendant promised to pay the debt, and remains liable to an action six years from the time the new note becomes due, but not longer. The case thus comes within the established rule that the acknowledgment of a debt, if accompanied by a promise to pay conditionally, is of no avail, unless the conditions to which the promise is subjected by the defendant is complied with, or the event has happened upon which the promise depends." See *Sumner v. Sumner*, 1 Metc. 394. Conceding, without deciding, that the board of school directors had the authority to enter into a contract waiving the operation of the statute, we conclude that the court erred in holding they had done so. Reverse the judgment, and enter judgment here for the defendant upon the special finding.

#### STATE v. YOUNG.

(*Supreme Court of Missouri. Jan. 27, 1890.*)

#### HOMICIDE—EVIDENCE—INSTRUCTIONS—REMARKS OF COUNSEL—ACCUSED AS WITNESS.

1. Accused's affidavit for continuance at a former term is admissible to show an admission therein contained.

2. A statement to the officer that he had the right man, made in the presence of defendant, when under arrest, by a stranger to him, is not admissible, though not replied to.

3. On a trial for murder, where it appears that defendant and two others, while carrying a keg of beer at night, were met by a man who, after some words, struck defendant in the face with his lantern, and ran away, after which deceased came along and struck defendant, whereupon defendant out him with his knife, instructions should be given as to the lower grades of homicide.

4. Under Rev. St. Mo. § 4220, prohibiting the court in a criminal case from commenting on the evidence, and section 4218, making the accused or his wife competent witnesses, but allowing such facts to be shown for the purpose of affecting their credibility, the court may instruct the jury, in weighing their testimony, to consider that he is the accused, and she his wife. *SHERWOOD, J.*, dissenting.

5. Where the accused becomes a witness, it is not necessary, in order to make his written statement before a coroner admissible against him, to call his attention particularly to it. *RAY, C. J.*, and *SHERWOOD, J.*, dissenting.

6. It is error to permit the prosecuting attorney to state in his argument that "the defendant is a mean, low-down, wicked, dirty devil," and that "when we proved that defendant admitted the killing the presumption of innocence was overthrown," as this presumption continues till verdict, and an admonition by the court "to keep within the record" does not cure the error, where the obnoxious remarks were still persisted in. *BRACE and BARCLAY, JJ.*, dissenting.



Appeal from criminal court, Lafayette county; JOHN E. RYLAND, Judge.

The defendant, being convicted of murder in the first degree, and sentenced accordingly, appeals to this court, and assigns various errors as grounds for reversal of the judgment. The indictment charges that the defendant murdered Stephen Ferguson on the 10th day of December, 1887, by stabbing and cutting him with a knife; and there was evidence to establish the charge, consisting of direct testimony, as well as admissions made by the defendant, both orally and in writing. Ferguson was found the morning of the 11th of December dead, with his throat cut. His body was lying at a point about 65 yards west of where a north and south line, if drawn between defendant's house and Bime's saloon, would strike the railroad, and the saloon was about 40 yards north of the railroad. The distance between defendant's house and the saloon was about 160 yards. The killing is said to have occurred at about 11 o'clock on the night of the 10th of December. 'The most friendly relations were shown to have existed between the defendant and the deceased. The latter was left in the saloon when defendant, Henry Hoppe and Peter Forks with him, obtained a case of beer, and started to go to defendant's house. The defendant was absent when going after the beer only about 15 minutes, and when he returned home his face was wounded, cut in three places, and covered with blood. His wife, mother-in-law, and his brother washed the blood off his wounds, and put him to bed. There is no dispute as to the fact of the defendant returning home from the saloon with a bleeding face, since this is shown by witnesses on both sides; and the cuts on his face were plainly to be seen two days afterwards, as shown by the testimony of the prosecuting attorney. Indeed, the scars from those wounds were visible on the face of the defendant some 14 months after the homicide occurred. The admissions of the defendant touching the killing were as follows: When charged by the marshal, Wilson, who had him under arrest, with having killed Ferguson, "he said he was not the only one in it." To Jackson, the deputy-sheriff, when shown the corpse, and asked if he knew who it was, he said: "My God, what did I do that for!" Speaking further on the subject, he recognized as his the knife shown him by Jackson. Said he had it last night, and burst out crying, and, on Wilson returning, defendant made a further statement in reference to the occurrence. "He said he was going from the saloon with a keg of beer or case of beer, whatever it was, on his shoulder, and he met a man,—he did not know who it was,—and had some trouble with him, and the man struck him with a lantern. About that time Ferguson came along, and asked him what did he strike that man for; that man done nothing to him; and he said Steve struck at him with his open hand, and 'I stabbed him once.'" To the prosecuting attorney, Wilson, he made these statements: "I first asked him

what made the cuts, I think it was on his face, and he said a man by name of Hare had struck him with a lantern. I then asked him why he cut Steve Ferguson, and he said he did it because Steve Ferguson struck him, and that he called him a son of a bitch, or damned son of a bitch, and I asked him if he struck him with his fist or open hand, and he said he did not know, but he did not strike him very hard,—he did not knock him down; and he said that Ferguson, after he [Ferguson] had struck him, [Young,] turned around and started away from him, [Young,] and I asked him [Young] where the knife was at the time Ferguson struck him, [Young,] and he said it was in his [Young's] pocket. After Ferguson struck him, [Young,] he put his hand in his [Young's] pocket, and took the knife out of his pocket, and opened it, and followed after Ferguson, and, when he got up to where Ferguson was, that Ferguson turned around as if he was going to strike him again, and then he cut him. I asked him how far Ferguson was from him when he started to follow after him, and he pointed to the corner of the car" (a short distance.) And the following statement was also made by defendant at the inquest, in the presence of the coroner, and reduced to writing:

"We, Peter Fouks and Henry Hopple and myself, came out of the saloon. We met a man with a lantern, and asked him to show us the way across the railroad, down to my house. The man said he would not do it, 'you son of a b——.' I asked him, 'Who you call a son of a b——?' He drew back and struck me with the lantern in the face. Then he ran away, and I ran after him. Then Stephen Ferguson, the deceased, came and struck me. Then I opened the knife, and cut at him. I had the knife in my right hand. The man was standing in front of me. After I struck I fell down, too. I must have cut him, or there would not have been blood on the knife. I knew that I was striking Steve Ferguson at the time.

his  
"CHRIS X YOUNG.  
mark.

"In witness of us:

"J. M. LIVENGOD.

"W. R. JACKSON."

Other evidence of admissions of the defendant consisted of an application for a continuance made by him at a former term, in which he denied that he had any trouble with Ferguson on the night of the homicide; but stated that he and his companion, on leaving the saloon, left Ferguson there. In his testimony upon the trial, the defendant also denied that he had any difficulty with Ferguson on the night in question, or that he had any knife then; but stated that he had a difficulty with two strangers, one of whom struck him in the face with a lantern, and the other had knocked him down, or had struck him twice and he fell down. He also stated that he and Ferguson were on the

most friendly terms, and that he left the latter at the saloon when he started home.

*John S. Blackwell*, for appellant. *Atty. Gen. Wood*, for the State.

**SHERWOOD, J.** (*after stating the facts as above.*) 1. The affidavit for a continuance made by the defendant at a former term of the court was properly admitted in evidence, on the authority of *State v. Hayes*, 78 Mo. 307.

2. There was error in admitting testimony as to what Craft said to Wilson, the marshal, to-wit: "You have got your right man; you don't have to go any further to get him." There are two reasons why the ruling was erroneous: (1) Because the defendant was under arrest, and therefore in no position to make any denial as to what Craft said in his presence. His silence under Craft's remark will not warrant any inference against him. *Whart. Crim. Ev.* § 680; *Com. v. Walker*, 18 Allen, 570; *U. S. v. Brown*, 4 Cranch, C. C. 508; *Com. v. Kenney*, 12 Metc. 235; *Rex v. Appleby*, 8 Starkie, 83; *Bob v. State*, 32 Ala. 560. (2) Because the remark was made by a mere stranger in his presence, and not to him. *Com. v. Kenney*, supra; *Child v. Grace*, 2 Car. & P. 193; *Moore v. Smith*, 14 Serg. & R. 388; 1 *Greenl. Ev.* (14th Ed.) § 199; *Melen v. Andrews*, *Moody & M.* 336; *Com. v. McDermott*, 123 Mass. 440. The defendant had the right, therefore, to treat the remark of Craft as mere impertinence, and best answered by silence. See, also, *State v. Walker*, 78 Mo. 388; *State v. Glahn*, 97 Mo. 694, 11 S. W. Rep. 260; *State v. Hamilton*, 55 Mo. 522. It is unnecessary to decide whether the error in this regard, if it stood alone, would constitute ground for a reversal, but it has been deemed necessary to point it out.

3. The instructions given by the court, at the instance of the state, limited the jury to finding the defendant guilty of murder in the first degree, if found guilty at all. On the part of the defendant an instruction was given as to self-defense, as to which it is unnecessary to say anything, as the defendant is not complaining of that, nor could he do so after having asked it. But he complains, and justly complains, of the failure of the court to instruct the jury as to the lower grades of homicide. The admissions made by the defendant to Wilson, the prosecuting attorney, and that made to the coroner, certainly furnished ample basis on which to give instructions in regard to murder in the second degree and manslaughter in the fourth degree. No one can read this record without being fully impressed with the idea that the defendant, and possibly some of his companions, were considerably inebriated when returning to his house from the saloon; and, although this would not furnish him any extenuation for the crime, it certainly would furnish some ground of excuse for making a mistake as to who struck him, and as to whom he struck. But, be that as it may, the state,

having introduced in evidence the admissions of the defendant,—admissions which authorized instructions for lower grades of homicide; instructions more favorable, perhaps, to the defendant, in view of all the facts in the case, than his own testimony on the witness stand warranted,—cannot now insist that such instructions would have been erroneous; and, if the instructions asked by the defendant as to such lower grades of homicide were erroneous, it was the duty of the court to have given in their stead those which were correct expositions of the law of the case. *State v. Lowe*, 93 Mo. 547, 5 S. W. Rep. 889; *State v. Matthews*, 20 Mo. 55; *State v. Jones*, 61 Mo. 232.

4. Complaint is made that the court erred in giving on behalf of the state instructions 12 and 13, which read as follows: "The court instructs the jury that the defendant is a competent witness in this case; yet, in considering what weight and credibility you will give to his testimony in making up your verdict, you should take into consideration, as affecting his credibility, that he is the accused party on trial. You are further instructed that Kate Young, the wife of the defendant, is a competent witness in this case for the defendant; yet, in considering what weight and credibility you will give to her testimony in making up your verdict, you should take into consideration, as affecting her credibility, that she is the wife of the accused party." The ground of the complaint is that those instructions invade the province of the jury in regard to what weight should be given to certain testimony. Our statute, (section 4220, Rev. St. 1889,) which has remained unchanged on our statute-book for a great number of years, provides that "the court shall not, on the trial of the issue in any criminal case, sum up or comment upon the evidence, or charge the jury as to matter of fact." There have been numerous decisions on this statute, and many reversals of judgments have occurred, because of the failure of the lower courts to heed the statutory prohibitions. Touching on this point, and speaking of the instructions in a certain case, *SCOTT, J.*, said: "Some of them are mere comments on the evidence or charges to the jury as to matters of fact, which the law forbids being given without the consent of both parties. Rev. St. p. 882, § 28. What is striking in the instructions is the attempt of the court to prescribe rules to the jury by which they were to ascertain the credit due to a witness. When a witness testifies to jurors, they are the exclusive judges of the weight to be given to his testimony." *State v. Anderson*, 19 Mo. 241. In *State v. Cushing*, 29 Mo. 215, it was said: "The first is an instruction directing the jury to disregard the entire evidence of a witness, if they believe him false in any particular. Such instructions invade the province of a jury, whose business it is to determine the credibility of witnesses, and who are not to be hampered in exercising their judgment by any indexible rules on the

subject." In *State v. Schoenwald*, 31 Mo. 147, SCOTT, J., speaking for the court, said: "There was no error in the refusal of the court to charge the jury that if the testimony of any witness bore upon its face the mark of gross improbability it is not necessary that such witness should be impeached by other witnesses, but the jury may disregard the testimony of any such witness. This instruction, in effect, was given by the court in the direction made as to the rule by which the jury would be governed in ascertaining the weight to be given to the evidence. Although the instruction stands as an abstraction, yet, when it is applied to the evidence of any witness, it is nothing more than an attempt to control the jury in determining the credibility of the witnesses." In the same case the learned judge further remarked: "In my opinion, the court has no authority to prescribe any rules to the jury by which they are to determine the credibility of the witnesses. If the court can, by authoritative rules, direct the jury in weighing the credibility of witnesses, then the court, and not the jury, determines the weight to be given to the evidence,—a matter exclusively within the province of the jury. The jury, from their experience and knowledge of the common concerns of life, are presumed to be the best triers of facts. They take with them into the jury-box their experience in life, which has enabled them to form the rules by which they will ascertain the weight to be given to the evidence of any one who speaks in their sight and hearing, having due consideration of the circumstances by which he is surrounded, his character, if known, and any influences which may operate upon him. Thus the rules are formed which the law supposes that jurors will apply in making their verdict on the evidence. If the court has a right to instruct, then the jury are bound to obey. If their verdict is formed in pursuance to rules concerning the weight to be attributed to evidence, dictated to them by the court, is the verdict a judgment on the facts by the court or by the jury? In considering this subject, we overlook the difference between the system of practice now prevailing and that formerly in use. Our courts cannot now, as formerly, comment on the evidence. When the practice was for the courts to comment on the evidence, the jury were always made to understand the weight to be attached to such comments, and to the rules the judge might suggest for the weighing of the evidence. They were told that such comments were the mere opinions of the judge, who had no right to decide the facts, and were not binding on them; that they might disregard his opinion as to the weight of the evidence; it was mere advice; it was their province to find such a verdict as they deemed right, disregarding anything they might have heard from him. Now, because his right has been taken away from the courts, an effort is made to substitute for the advice formerly given to juries, which they would receive or reject as

they thought right, authoritative rules, by which the jury are bound to be governed in determining the weight to be given to the evidence. If they are not bound by the instruction, then it is a comment, and is not warranted by law. These instructions are generally asked by the counsel for the accused, and the motive to them is the hope that they may operate with the jury as an indorsement by the judge of an onslaught on the character of a witness, thinking that the jury will take such an instruction as an intimation from him that there is a ground for disbelieving the evidence." In *State v. Hundley*, 46 Mo. 414, similar observations are made as to the impropriety of instructions whose purport was to inform the jury as to the credibility to be given to the testimony of a certain class of witnesses. In *State v. Smith*, 53 Mo. 267, VORLES, J., in delivering the opinion of the court, observed: "The third instruction, given by the court on the part of the prosecution, tells the jury 'that it is not sufficient, to warrant an acquittal, for the defendant simply to show that at times he acted and talked strangely and singularly, but that the jury must believe from the testimony that he was insane at the very time he committed the offense, and that he was so insane that he could not distinguish right from wrong.' This instruction was clearly wrong. It is not the province of the court to select certain facts shown by the evidence, and tell the jury how much and what weight they shall give to such facts, or whether they shall give such evidence any weight at all. The court passes upon the legality or admissibility of the evidence, but, after the evidence is legally admitted, it is the exclusive provision of the jury to pass upon the weight of the evidence given, and give each part of the evidence such weight as in their judgment it is entitled to receive, without any interference or direction of the court whatever. Their minds ought to act freely on the facts of the case, without any other control than that of their own unbiased judgment. This instruction is a comment on the evidence, which is expressly forbidden by our statute. Wag. St. p. 1106, § 30. The statute provides that the court shall not 'sum up or comment on the evidence.' If the court can, under this statute, select certain portions of the evidence, and tell the jury how much weight to give, or whether they shall give the evidence selected any weight at all, then no reason can be perceived why the court could not select other parts of the evidence, or all of the facts in the case, and tell the jury what weight to give the same, and in effect tell what verdict should be found. To permit this would be to wholly destroy whatever value there is in the right of trial by jury."

It will thus be seen that the doctrine enunciated in the early opinions of this court, coming down, indeed, to a comparatively recent period, forbids, as does the statute already quoted, any interference by the courts with the province of the triers of the facts.

The only province of the court in instructing the jury is as to the law of the case, if certain facts are found by them to exist, *i. e.*, that, if the facts are so and so, then the law is so and so, upon those facts.

But reference is made to section 4218, where it is said that "no person shall be incompetent to testify as a witness in any criminal cause or prosecution by reason of being the person on trial or examination, or by reason of being the husband or wife of the accused, but any such facts may be shown for the purpose of affecting the credibility of such witness;" and this provision, it is argued, gives authority to the court to comment upon, and to instruct upon, the credibility of such witness! This, I take it, is a total misconception of the statute in question, and one which holds for naught the rigid provisions of section 4220 aforesaid. There are many instances where the relations of a witness towards one of the parties litigant may be shown in order to affect his credibility, yet this fact would not alter the statutory rule. Take, for instance, the case of a hostile witness, or of one closely related to the adverse party. No one would doubt that such bias or relationship might be shown in order that the jury might form the proper estimate of his testimony, yet no one would venture to contend that this fact would authorize an instruction to the jury pointing out and commenting on the fact of such relationship or bias. It is one thing to follow the statute, and show certain things to exist in order to call the attention of the jury to them,—this is legitimate; but it is another and quite different thing to invade the province of the jury, by giving an instruction to them based on the fact thus legitimately shown in evidence. For this reason I am of the opinion that those cases which announce a different conclusion were improvidently decided, and should no longer be followed. Of the number, see *State v. Cook*, 84 Mo. 40.

5. Was the written statement of the defendant made by him before the coroner admissible in evidence without laying the usual foundation? In the case of any ordinary witness,—one not a party to the record,—the rule undoubtedly is that such foundation must be laid by challenging his attention to particular circumstances and occasions. *Greenleaf* says: "This course of proceeding is considered indispensable from a sense of justice to the witness; for, as the direct tendency of the evidence is to impeach his veracity, common justice requires that, by first calling his attention to the subject, he should have an opportunity to recollect the facts, and, if necessary, to correct the statement already given, as well as by a re-examination to explain the nature, circumstances, meaning, and design of what he is proved elsewhere to have said." 1 *Greenl. Ev.* (14th Ed.) § 462. And the authorities make no distinction, in this regard, between verbal and written statements. *Id.*, and *State v. Grant*, 79 Mo. loc. cit. 132, and cases cited.

Now, if common justice and fair dealing require that a suitable foundation be laid in order to affect the credit of an ordinary witness,—one who only has his reputation for veracity at stake,—it would seem that enough of the commodity "common justice" should be left to bestow upon one acting in the double capacity of both party and witness, on trial for his life, to whom it is all-important that the little credit given to his story should not have its feeble force diminished by attacks upon his veracity which would not be tolerated in the case of any other witness. Surely, the fact of his being a party should not have the effect of denying to him whatever protection the law should accord to him as a witness. This view seems to be favored in *State v. Red*, 53 Iowa, 69, 4 N. W. Rep. 831, and *State v. Robertson*, 26 S. C. 117;<sup>1</sup> but, owing to the comparative recentness of the statutes on this subject, but few adjudications seem to have been made upon them. The constitutionality of the statute itself, however, has been doubted by eminent jurists, because it morally coerces a party defendant to take the witness stand. *Ruloff v. People*, 45 N. Y. 213; *Connors v. People*, 50 N. Y. 240. Mr. Bishop, touching such enactments, says: "Before these statutes were passed, it was a cherished principle of the common law, adopted generally in our constitutions, where it still remains, that no man shall be compelled to furnish evidence criminating himself. But these late statutes have violated that principle in spirit, perhaps in letter. Under them, a defendant cannot avoid electing to testify or not to testify. If the former, and he is guilty, he must declare his guilt or commit perjury. If the latter, he cannot escape from the inference of the jury that, therefore, he is guilty. He may choose in which of two forms the evidence against himself shall be delivered, but to furnish it or commit perjury he is compelled." 1 *Bish. Crim. Proc.* § 1186. Conceding, however, the constitutionality of the statute in question, and conceding, further, that the witness may be said to have done so voluntarily, still it should also be conceded that, in testifying as a witness, he lost none of the rights and privileges pertaining to other witnesses. *Connors v. People*, *supra*.

6. Some of the language of the counsel for the state in the closing argument cannot be sanctioned. It was as follows: "The presumption of law in this state is that when a charge is made against a party in his presence, and he does not deny it, he is presumed to be guilty." "The defendant is a mean, low-down, wicked, dirty devil,—that is the kind of man he is." "When we proved that defendant had admitted the killing, the presumption of his innocence was overthrown, and the presumption of guilt took its place; the two could not stand together." The first sentence copied above has been sufficiently commented on in the second para-

<sup>1</sup> 1 S. E. Rep. 443.

graph of this opinion. The second statement above copied was mere personal abuse of the prisoner, and not to be tolerated in any tribunal calling itself a court of justice. The third sentence above quoted was not law, and was at war with the presumption of innocence, which continues with the prisoner till the verdict of guilty overthrows that presumption. Such utterances as these have been so frequently, pointedly, and recently condemned by this court that it would seem high time that the prosecuting attorneys of this state should have heard of our rulings in this regard. *State v. Jackson*, 95 Mo. loc. cit. 652 et seq., 8 S. W. Rep. 749, and cases cited. See, also, *Brown v. Swineford*, 44 Wis. 282.

7. The remark made by the court to counsel for the state from time to time, "to keep within the record," had no appreciable effect, because he still kept up his line of obnoxious remarks, undeterred by anything the court had said. A more pointed and effective rebuke should have been administered. The judgment should be reversed, and the cause remanded.

RAY, C. J., and BLACK, J., concur in paragraphs 1, 2, 3, 6, and 7 of the foregoing opinion. RAY, C. J., also concurs in paragraph 5. No one concurs in paragraph 4. BRACE and BAROLAY, JJ., concur in paragraphs 1, 2, and 3, except that they think that the paragraph last named should have sanctioned, also, the giving an instruction for manslaughter in the third degree. They dissent as to paragraphs 6 and 7.

#### MOURNING v. MISSOURI COAL MIN. CO.

(*Supreme Court of Missouri*. Dec. 21, 1889.)

##### WILLS—ADMINISTRATORS—SALE TO PAY DEBTS.

The will of testator provided that all his property should go to his four daughters as long as they lived or remained unmarried, to be held jointly as an undivided estate. If any married, the remaining unmarried daughters might give them such portion of the estate as they saw fit, not exceeding one-seventh of the whole, which should be charged to their share in the final division, which should take place on the death or marriage of them all. Upon the death or marriage of them all, the estate should be divided among all of testator's children. Held that, as the surviving daughter took her share by inheritance, it was liable to sale at her death, for her debts.

Appeal from circuit court, Lincoln county; E. M. HUGHES, Judge.

Plaintiff brought ejectment for 80 acres of land in Lincoln county. After a general denial, the answer sets up, as an equitable defense, that the debts allowed against the estate of Elizabeth Mourning were an equitable charge against the land in litigation. The case was submitted to the court upon the following agreed statement of facts: "The following facts are agreed upon between the plaintiff and defendant: That the common source of title to the lands in dispute is Thomas Mourning, who died in Lincoln county, Mo., in the year of 1837, owning the

land in controversy. That said Thomas Mourning, Sr., left surviving him seven children, namely: Nancy Mourning, who died without issue, in the year of 1842; Thomas Mourning, Jr., who died without issue, in the year 1847; John Mourning, who died in the year of 1866, leaving four children; Louisa Mourning, who died without issue in the year of 1878; Susan Mourning, who died without issue, in the year 1881 or 1882; Elizabeth Mourning, who died without issue, in the year 1884; and William R. Mourning, the plaintiff in this cause. That said Thomas Mourning, Sr., left a will, which was duly probated in Lincoln county, Mo., a copy of which is hereto attached, and made a part of this agreed statement. That the value of the lands sued for does not exceed \$600, and that the rents and profits are \$24 per year. That the plaintiff is the surviving child of said Thomas Mourning, Sr., and claims title as such, and that the defendant claims title through a sale of said lands made by the administrator of the estate of Elizabeth Mourning for the payment of debts to the amount of \$272.10, allowed against her estate. The said Elizabeth Mourning was the surviving one of the four daughters of the said Thomas Mourning, Sr., mentioned in his last will, and was at the time of her death, in 1884, 71 years old. That for two or three years before her death the said Elizabeth Mourning was an invalid, and almost helpless, and that the debts so allowed against her estate, and for which said lands were sold by her administrator, were for board, clothing, support, and attention during said years, the rents and profits of said lands being insufficient to pay for the same. That said Elizabeth Mourning had no other property than her interest in said lands out of which said allowed claims could be paid. The will of Thomas Mourning is as follows: 'I, Thomas Mourning, of Lincoln county, Missouri, do on this 28th day of April, 1837, make this, my last will and testament, in manner and form as follows, viz.: (1) After all my just debts and funeral expenses shall have been paid, I do will and bequeath all of my real and personal estate to my four daughters, namely, Elizabeth Mourning, Nancy Mourning, Susan Mourning, and Louisa Mourning, to have and to hold the same so long as they live or remain unmarried, the whole to be jointly held in an undivided estate for their several support. (2) If either of them should marry, those remaining unmarried may give them such portion of the estate as they may think proper, not exceeding one-seventh of the whole value, to be charged to her or them at the final division, which shall take place at the marriage or death of them all. (3) It is my wish that at the death or marriage of my four daughters, that the whole of my estate then be sold, and an equal division made between my children, namely, John Mourning, Elizabeth Mourning, Thomas Mourning, Nancy Mourning, Susan Mourning, Louisa Mourning, and William Mourning, charging my son

John Mourning with one hundred and eighty-six dollars, with interest from the 1st day of November, A. D. 1830, the time I advanced it to him in Virginia. (4) And, lastly, I do hereby appoint my friend Macon A. Shelton my executor of this my last will and testament, hereby revoking all other or former wills by me heretofore made. In witness whereof," etc. This was all the evidence. No declarations of law were asked. The court gave judgment for the plaintiff for the whole land, and defendant appeals.

*Martin & Avery*, for appellant. *Geo. T. Dunn*, for respondent.

SHERWOOD, J., (*after stating the facts as above.*) The equitable defense set up in the answer amounts to nothing, because there was no charge or lien created on the property which authorized a sale of that property in discharge of such charge or lien; and it is unnecessary to discuss the share to which the children of John Mourning, who represent their father's title, are entitled. Incumbered as that share is by the early advancement made to their father in 1830, and the accumulating interest thereon, their share, in view of the estimated value of the land, is worthless. Under our statute of descents and distributions, Elizabeth, the last survivor of the four daughters, became entitled, by the law of inheritance, to her proportionate share of the land in dispute, and, being thus entitled, that share at her death, and independently of any provision in the will, became subject to administration sale for the payment of her debts; so that defendant is now the owner of that inherited interest. But the court allowed the plaintiff to recover the whole tract. This was more than he was entitled to recover, and for such error we reverse the judgment, and remand the cause. All concur.

#### BOOGHER *et al.* v. FRAZIER.

(*Supreme Court of Missouri. Dec. 21, 1889.*)

##### ESTOPPEL IN PAID.

Where the indorsee of one of several notes secured by a trust-deed obtains judgment against the indorser for the proceeds of the trust property derived from a sale to pay the notes retained by the indorser, he thereby elects to affirm the sale; and he cannot, after failing to obtain full payment of his note, resell the property for the residue, and, as purchaser, maintain ejectment for it against the former purchaser's grantees.

Appeal from circuit court, Carroll county; J. M. DAVIS, Judge.

Ejectment by Jesse L. Boogher and others against Milton E. Frazier. There was judgment for defendant, and plaintiffs appealed.

*W. C. Marshall, J. W. Sebrée, and Prosser Ray*, for appellants. *Hale & Sons*, for respondent.

BRACE, J. This is an action in ejectment to recover an 80-acre tract of land in Carroll county. On the 16th of September, 1873, James F. Chinn, who was then the owner in

fee of the premises, and under whom both parties claim, with his wife, executed a deed of trust, with power of sale, conveying the same to Samuel Winfrey in trust to secure Hardin Simpson in the payment of three promissory notes and interest,—two for \$300, each executed by said Chinn, payable to said Simpson; and one for \$1,000, executed by William M. Kendrick, payable to said Chinn, and by him assigned to said Simpson. On the 24th of December, 1873, the 1,000-dollar note of Kendrick was indorsed, without recourse, by Simpson to Henry Bell & Son, and deposited with Messrs. Hale & Eads, attorneys, upon the agreement and under the circumstances particularly set out in *Bell v. Simpson*, 75 Mo. 485, of which case the present one forms the second chapter and sequel. A controversy having arisen between Simpson and Bell & Son as to the terms upon which said note was to be delivered, Hale & Eads declined to deliver said note, and the same remained in their hands until after the decision in the above-cited case. On the 25th of October, 1875, the promissory notes secured by said deed of trust remaining due and unpaid, Winfrey, the trustee, at the request of Simpson, sold the land under the deed of trust, and Simpson became the purchaser thereof, for the sum of \$900, and afterwards, on the 14th of December, 1875, received the trustee's deed therefor. On the 26th of November, 1875, Simpson conveyed the land by warranty deed to Elihu Shannon, and on the 7th of February, 1876, Shannon and wife conveyed the land to John P. Minnis. On the 2d of June, 1877, Henry Bell & Son instituted in the Carroll circuit court the suit reported in 75 Mo., *supra*, against Simpson, Winfrey, and Hale & Eads, setting forth the facts substantially as stated in the opinion in that case, except that the sale of February, 1876, by Shannon to Minnis, was for \$2,000, instead of \$4,000, as in the report of the opinion. The conclusion of the petition and prayer in that case is as follows: "And plaintiffs charge that said defendant Winfrey is liable to the plaintiffs for the said amount for which he sold said real estate, as said trustee, to said Simpson, as aforesaid, and with interest thereon from date of sale, and for which they ask judgment; and said plaintiffs further charge that said defendant Simpson, by his said wrongful and fraudulent acts and conduct in the premises, and by his wrongful assumption of the control, title, and possession of said real estate, and the proceeds of the sale thereof, so realized by him as aforesaid, has made himself, and become, and now is, a trustee for these plaintiffs of the said proceeds of said sale of said real estate, to the extent and amount of said thousand-dollar Kendrick note, and the interest thereon, so realized and appropriated by him, as aforesaid, and for which they ask judgment against said defendant Simpson; and plaintiffs also ask that said defendants Hale & Eads may, by the order of the court, be directed and requested to deliver up to plaintiffs

the aforesaid Kendrick note, so indorsed to them, and so deposited with the said Hale & Eads, for their benefit as aforesaid; and grant to said plaintiff such other and further relief in the premises as may be just and equitable." On the trial in the circuit court the court found for the defendants, and dismissed the bill. On appeal to the supreme court, the judgment of the circuit court was reversed, and the cause remanded, "with directions to the circuit court to enter up judgment as prayed." *Bell v. Simpson*, supra. In obedience to the mandate of the supreme court, on the 25th of July, 1882, the following judgment was entered in the circuit court of Carroll county: "Now, at this day, comes said parties, by their respective attorneys; and, upon consideration of the mandate and opinion of the supreme court herein, it is ordered, adjudged, and decreed by the court that plaintiffs Jesse L. Boogher and John P. Boogher, surviving partners of Henry Bell & Son, recover of defendant Hardin Simpson one thousand nine hundred and eighty-three dollars and thirty-three cents, (\$1,983.33,) with interest thereon from date of this decree at rate of ten per centum per annum, and that said plaintiffs recover of defendant Samuel Winfrey one thousand two hundred and sixty-four dollars and fifty cents, (\$1,264.50,) with interest thereon from date of this decree at rate of six per centum per annum, and that said plaintiffs recover of said defendants Winfrey and Simpson the costs of this proceeding, and have execution in conformity with this decree, returnable to the next December term of this court; and it is further ordered and decreed by the court that, unless said sum of one thousand nine hundred and eighty-three dollars and thirty-three cents (\$1,983.33,) and said interest thereon, and said costs, shall be paid as above decreed within sixty days from the date of this decree, said defendants John B. Hale and William M. Eads shall then forthwith deliver to said plaintiffs the said Kendrick note described in the petition herein, which note is of date September 16, 1878, signed by Wm. M. Kendrick, for one thousand dollars and interest, and that said plaintiffs shall thereupon be at liberty to proceed to enforce their claim as owners of said note against the property described in the petition, or otherwise, as they may be advised, and as may be in conformity to law; and it is further ordered and decreed that upon payment to said plaintiffs of one thousand nine hundred and eighty-three dollars and thirty-three cents, and interest thereon, and said costs, by either of said defendants Simpson or Winfrey, this decree shall be satisfied." On the 27th of February, 1884, John P. Minnis conveyed the premises in controversy, except four acres, by warranty deed, to the defendant, for the consideration of \$1,500. The plaintiffs herein, as surviving partners of the firm of Henry Bell & Son, came into possession of the Kendrick note under the judgment aforesaid, collected \$1,200 from Winfrey on account of the proceeds of the sale of said real

estate under the deed of trust, and thereafter caused the land to be again advertised, and, on the 21st of September, 1885, sold, by the sheriff of Carroll county, acting as trustee, at which sale they became the purchasers, and thereupon began this suit in ejectment to recover the land. The judgment was for the defendant in the trial court, and plaintiffs appeal.

1. It will be observed from the foregoing that the position of the plaintiffs, briefly stated, is: Having sued the trustee, and the *cestui que trust*, and purchaser at the trustee's sale, for the proceeds of the sale, and of subsequent sales and conveyances made in pursuance and by virtue thereof; and having received judgment against them for such proceeds to the amount of their debt, which it turned out was secured by said deed of trust; and having, by virtue of such judgment, collected a large portion of such proceeds from the trustee, failing to get the remainder either from him or from the *cestui que trust* and purchaser,—they turn around, and say the sale by the trustee was void, passed no title, cause the land to be resold, and now ask the court to so hold in an action against a purchaser for a valuable consideration, who became such long after the plaintiffs had abandoned their security, instituted suit, and recovered judgment for the amount of the proceeds of the sale under the deed of trust, and, indeed, after the larger portion of such proceeds had been collected by them. And with these proceeds in their pocket, and after such action, urge, as defects in the trustee's sale and deed, that the sale was made solely at the request of Simpson, who was not the legal holder of the Kendrick note, although he was of two other notes secured thereby, and that the trustee's deed does not, directly and in positive terms, show that notice of the sale as required by the deed of trust was given. We will not inquire into the alleged defects. The plaintiffs, before bringing the first suit, regarding themselves as the legal holders of the Kendrick note, as they were afterwards found to be by this court, had their option either to disregard the foreclosure made by the trustee at the request of Simpson, and seek to enforce the lien of their security against the land either by suit or by advertisement and sale, or to affirm the foreclosure of the trustee, and go for the proceeds of the land which came into his hands, and into those of the *cestui que trust* Simpson, by means of such foreclosure. They chose the latter, and, by the very nature of the action brought, affirmed the validity of the trustee's sale, and its potency to pass the legal title, else they had no cause of action; and they are now stopped from denying these facts against one who had a right to rely upon them as verities, so far as the plaintiffs were concerned, by the very position which they had assumed in regard to them upon the records of the courts of the country.

2. Some stress seems to be laid in the argument of counsel upon the expression in



the judgment of the circuit court, "and that said plaintiffs shall thereupon be at liberty to enforce their claim as owners of said note against the property described in the petition, or otherwise, as they may be advised, and as may be in conformity to law." Whatever these terms may have been intended to mean, it must be conceded that it was not within the power of the circuit court to confer upon the plaintiffs, in entering up this judgment under the mandate of the supreme court, any right or remedy beyond the scope of the issues tendered by them in their pleadings, and passed upon by the supreme court, in which will be found no foundation whatever for any claim to have established any right or lien against the land in controversy. In fact, as we have seen, the position of the plaintiff was not only antagonistic, but inconsistent with, and antipodal to, such an idea. This expression in the judgment seems to be a mere *brutum fulmen*, without any particular meaning, the force of which must be sought for in the "otherwise" of the sentence; for it is certainly not "in conformity to law" that the plaintiffs should have the proceeds of the land, and the land also. The judgment of the circuit court is affirmed. All concur, except RAY, C. J., and BAROLAY, J., not sitting.

DAVIS *et al.* v. HENDRICKS *et al.*

(*Supreme Court of Missouri. Jan. 27, 1890.*)

CONTRACT TO MAKE A WILL.

Evidence that deceased, before adopting plaintiff, and procuring an act of the legislature changing her name and making her capable of inheriting from him, agreed to make her his heir, and entered into some written contract, which could not be produced at trial, with her father, and afterwards declared that she would have all his property, is not sufficient to show a contract to will to her all his property.

Error to circuit court, Marion county; THEO. BRACE, Judge.

H. M. *Boulevard*, for plaintiffs in error.  
M. G. *Reynolds*, for defendants in error.

BLACK, J. This was a suit in equity, brought by Mary E. Davis and her husband, for the specific performance of a contract alleged to have been made by her father, for her benefit, with John McCormick. The defendants are the widow, the administrator, and the devisees of said John McCormick. Dr. Campbell, the father of the female plaintiff, and John McCormick, with their families, resided in the town of Ashley, Pike county. Dr. Campbell's wife died on the 20th August, 1862, leaving a child named Anna, then about three months old. He had a family of 13 children, and was without property. Mr. McCormick was in good financial circumstances, and had no children. He and his wife adopted Anna as their own child in the manner hereafter stated, and changed her name to that of Mary E. McCormick, which was the name of Mrs. McCormick. The child continued to live with

them until she married her co-plaintiff, which was after the death of Mr. McCormick. He died in 1881, leaving a will, executed in 1875, and by which he devised his homestead in Ashley to his wife for life, and at her death to his daughter, Mary E., and to the descendants of her body. This is the only provision made for the adopted daughter. By the will he gave other specified property to his wife, and, after making a devise and bequest to the Palmyra Presbytery, made a nephew and two nieces his residuary devisees. The property devised consists largely of real estate. The widow renounced the will, and elected to take under the statute. The petition states that Dr. Campbell, for and in behalf of his infant daughter,—now Mrs. Davis,—and John McCormick entered into a contract whereby it was agreed that, in consideration that Campbell would surrender his daughter to McCormick, he (McCormick) would adopt her as his child, and "would make her his heir at law, and would grant and devise to her all his property, both real and personal, of which he should die seised and possessed." As bearing upon this alleged agreement, Dr. Campbell testified: "About three weeks after my wife died, Mr. McCormick asked me to step into his store. He said: 'Are you willing to comply with the agreement made by my wife and yours in relation to giving up the baby to my wife to adopt, raise, and educate?' I did not hear what had been said by Mrs. McCormick and my wife. I said to him: 'Whatever Mrs. McCormick says is true. If you are tired of keeping the child, I will take her home as soon as I make arrangements for the board of the children.' I said something about paying him for services, and he said: 'Don't mention that, for my wife wants to adopt the child, and change her name, and name her for herself. I will have to go to the legislature to have the name changed.' I said, 'I must know what you are going to do,' and he said: 'I intend to make your little daughter my heir.'" The witness goes on to say that after some reflection he agreed to the proposition; that they asked Mr. Pogue, who was present, to reduce to writing what had passed between them, which he did, and that Mr. Pogue was to hold the agreement until called for by one of the parties. Says he never asked for it, though written 21 years ago. Mr. Pogue, whose daughter is one of the residuary legatees, testified that he never saw the contract, and knew nothing about it, except from hearsay. A Mr. Keith testified that he was in Mr. McCormick's store when the latter received a copy of the act of the legislature; that Mr. McCormick produced from his desk what he said was a copy of the act, and also a copy of the contract between him and Dr. Campbell. Witness did not hear the contract read, and knows nothing about its contents. The act of the legislature was approved on the 9th February, 1863. It was passed at the instance and request of Mr.

McCormick, and is as follows: "Section 1. That an infant child, name Anna McClellan Campbell, daughter of Jerome B. Campbell, of Pike county, be declared to be adopted as the daughter of John McCormick and Mary E., his wife, of said county; and that the name of said Anna McClellan Campbell be, and the same is hereby, changed to Mary Elizabeth McCormick, and she is declared to be capable of inheriting from said John McCormick and Mary E., his wife, by will, devise, or descent, in the same manner, and with the same rights, as though she was their child."

There is other evidence, to the effect that the plaintiff grew up without any acquaintance with her brothers and sisters; that she was reared, treated, and spoken of by her adoptive parents as a natural child; that Mr. McCormick was fond and proud of her, and on various occasions made remarks to the effect that she was to share in his property when he died; that she would get all of his property, or inherit all of his property; that she was his sole heir, and would be worth \$10,000. A sister of the plaintiff testified that Mr. McCormick said, when he adopted the child: "I will and intend to make your sister my legal heir." The defendants offered no evidence whatever, and rested the case on that offered by the plaintiffs.

It is conceded on the part of the plaintiffs that the alleged contract cannot affect the rights of the widow of John McCormick; so that, as between the plaintiff and the widow, there is in reality no contest whatever. On the other hand, the other defendants do not dispute the right of the plaintiffs to have a contract like that set up in the petition enforced; but they do insist that the evidence fails to establish the contract alleged. It is not, and cannot be, maintained that the act of the legislature discloses any contract on the part of McCormick to give to the adopted daughter his property at his death. The alleged agreement must therefore be proved by other evidence, though the act is a circumstance in the case. As the evidence stands, we think it clearly established that there was some agreement between Dr. Campbell and Mr. McCormick, and that the agreement was reduced to writing, though it could not be found for use on the trial of this cause. The question then is, what were the terms of the contract? It is fair to believe the legislature would not have passed the special act without the consent of Dr. Campbell; and a very natural inference from all the evidence is that the agreement was but a consent on his part to the passage of the act to be placed before the legislature. But Dr. Campbell and his daughter, then about 22 years of age, testify that McCormick said he would make the child his heir. This is the most favorable statement of the contract for the plaintiffs to be found in the evidence. It is true there is evidence tending to show subsequent declarations of Mr. McCormick that his daughter would get all

of his property. Such may have been his intention when these statements were made; but they cannot be allowed to expand the contract as testified to by Mr. Campbell, who was a party to it, and was then, and is now, interested in the plaintiff's behalf. The strongest case made by the evidence for the plaintiffs is that McCormick agreed to adopt the child and make her his heir. Such an agreement falls far short of the one alleged, namely, that he agreed to grant and devise to her all of his property at his death. The proved agreement only places the adopted child in the position of a natural child. Its effect is no greater than a deed of adoption under the statute; and, had the adoption been made pursuant to the statute, Mr. McCormick could have still disposed of his property by will as he saw fit. We are cited to the cases of *Sutton v. Hayden*, 62 Mo. 101, and *Sharkey v. McDermott*, 91 Mo. 647, 48 W. Rep. 107. In the first the contract was that Mrs. Sutton should have all of the property of Mrs. Green at the death of the latter. In the other, the demurrer admitted that James and Catherine McLaughlin took the child, then four years old, and agreed to "provide and care for her, and adopt her as their child, and leave her their property at their death." The principles of law asserted in those cases are not questioned; but the cases made, on the proof in one and on the demurrer in the other, are unlike the one in hand. Here the proof fails to show any agreement on the part of McCormick to give his property to the adopted daughter. Her position, in respect of his property, is not unlike that of a natural child; and he could dispose of it as he saw fit by will.

There is much in the record to arouse the sympathy of the court in favor of the plaintiffs, and still more in the evidence said to have been excluded, and not preserved in the record before us; but courts sit to enforce, and not to make, contracts. The judgment, which was for defendants, is affirmed. All concur; BARCLAY, J., in the result.

#### GARDNER v. TERRY et al.

(Supreme Court of Missouri. Jan. 27, 1890.)

##### INJUNCTION—ADVERSE POSSESSION—APPEAL.

1. One who has been in adverse possession as against a trust-deed for the period of limitation may enjoin a sale under the deed, as such sale would cast a cloud on his title.

2. A suit for an injunction against a sale under a trust-deed, brought by one who alleges title by adverse possession which would defeat the deed, is one involving title to real estate, of which the Missouri supreme court has jurisdiction on appeal.

BARCLAY, J., dissenting.

Appeal from circuit court, Franklin county; A. J. SEAY, Judge.

John W. Booth, for appellant. Isaac T. Wise and John H. Pugh, for respondents.

BLACK, J. Gardner brought this suit against William M. Terry and the administrator of William H. Lamoreaux, to enjoin

the sale of two lots under a deed of trust in which Terry is the substituted trustee and the estate of Lamoreaux is the beneficiary. The court sustained a demurrer to the petition, and gave judgment thereon, to reverse which the plaintiff appealed.

The petition discloses the following facts: William H. Lamoreaux, being the owner of the two lots in question, conveyed them to Isaac Brooks by a deed dated 26th August, 1869. On the same day Brooks gave Lamoreaux a deed of trust on the lots to secure two notes, both payable to Lamoreaux,—one for \$500, payable in 10 days, and the other for \$625, payable on the 1st March, 1870. The \$625 note has never been paid, and from this averment it seems the other one had been paid. On the 29th February, 1872, Brooks conveyed the lots to Sarah V. Lamoreaux, and she at the same time executed a deed of trust thereon. The property was sold under this deed of trust, and Brooks again became the purchaser; and he conveyed to Hall in 1873, who conveyed to the plaintiff in 1882. The administrator of W. H. Lamoreaux caused the defendant Terry to be substituted as trustee in the deed of trust first mentioned, which was executed by Isaac Brooks, and advertised the property for sale under that deed of trust. 'This is the sale which plaintiff seeks to enjoin. He states in the petition that he and his grantors have been in the actual, open, notorious, adverse possession of the lots for more than 10 years, and that the deed of trust is barred by the statute of limitations; and this is the ground upon which he seeks to enjoin the proposed sale.

Although a note secured by a deed of trust may be barred by limitation so that no personal judgment can be had on it, it does not follow that the remedy on the deed of trust is barred. To defeat a foreclosure or other remedy on the deed of trust there must have been 10 years' adverse possession. These principles of law have been often asserted by this court. *Booker v. Armstrong*, 93 Mo. 53, 4 S. W. Rep. 727, and cases cited. On the facts, as they are stated in the petition in this case, it must be conceded that the deed of trust and all remedy thereon is barred by reason of the 10 years' adverse possession, and the question is whether this fact furnishes a good ground for injunctive relief. In general, the statute of limitations is in defense only, but 10 years' adverse possession of real estate will not only bar an action of ejectment, but it will confer title upon the possessor. A title thus acquired is as good as any other title, and ejectment may be maintained as well as defended upon such a title. *Nelson v. Brodhack*, 44 Mo. 596; *Fulkerson v. Mitchell*, 82 Mo. 20. It is therefore difficult to see why a title thus acquired is not entitled to the same protection as a title acquired in any other way. The objection made to the relief asked is that plaintiff can avail himself of the defense in an action of ejectment brought by the purchaser at the trustee's sale. That he could do this there

can be no doubt, but it is not a complete answer to the right to the relief asked. The relief is demanded on the ground that the sale will cast a cloud on the plaintiff's title. The jurisdiction and power of a court of equity to prevent a cloud being cast upon the title to real estate is as well established as is the jurisdiction and power to remove one already created. *McPike v. Pen*, 51 Mo. 63; *Martin v. Jones*, 72 Mo. 24; *Vogler v. Montgomery*, 54 Mo. 577. In *Harrington v. Utterback*, 57 Mo. 519, the plaintiff was the owner of a homestead which had been sold upon execution, and he brought his suit to remove the cloud this cast upon his title. The objection was there made that the plaintiff could, by the statutory proceeding, compel the defendant to bring a suit at law to try the title; but the objection was not allowed to prevail, and the petition, it was held, stated a cause of action. In *Vogler v. Montgomery*, supra, the question arose whether a sale under a deed of trust should be enjoined. The plaintiff was the owner of a homestead which had been sold under execution, and the purchaser at the execution sale made a deed of trust on the property thus purchased. It was held that the sale under the deed of trust should be enjoined. The court said: "It is the true policy of courts to prevent litigation, and a sale by the trustee would undoubtedly cast a cloud over plaintiff's title and embarrass a sale, if he desired to sell." See, also, *State v. Tiedemann*, 69 Mo. 306. Where the facts are such that a court would remove the cloud when cast, it seems clear the court should interfere by injunction to prevent its being cast. 1 High, Inj. (2d Ed.) § 872. The relief is granted in such cases upon the ground that the deed or other instrument constituting the cloud may be used to embarrass the plaintiff's title, and that, too, when the plaintiff's evidence is not at hand. As we hold in this state that one judgment in ejectment is not a bar to the prosecution of another like suit between the same parties for the same property, injunctive relief ought not to be withheld on the sole ground that the plaintiff may make his defense in an action of ejectment. The relief at law, to defeat the equitable jurisdiction, should be adequate and complete. The present invalidity of the deed of trust does not appear from the face of the records. It only appears by a resort to other evidence, and parol evidence at that; so that there can be no objection to the petition on the ground that the proposed sale will be void on the face of the records. It is to the interest of all parties that the present validity of the deed of trust should be settled before a sale thereunder, and our conclusion is that the demurrer should have been overruled.

The point is not made in the briefs, but the question has been properly suggested by members of this court, whether we have jurisdiction of this appeal. If this court has jurisdiction, it because the case is one "involving title to real estate," it not appearing that the

amount in dispute exceeds \$2,500. We have held again and again that suits for the enforcement of tax-bills, mechanics' liens, and vendors' liens are not suits involving the title to real estate. In such cases there is generally no contest about the title, and the question is one of the enforcement of a lien against a conceded title. In the case of *State v. Court of Appeals*, 67 Mo. 200, the relator had obtained a judgment enjoining a sale under execution on the ground that the sale would cast a cloud upon his title, from which an appeal was taken to the court of appeals, and it was held that the case was not one involving the title to real estate, and hence an appeal would not lie to this court. The facts of that case are not stated in the opinion, but it closes with these significant observations: "The real matters which the relator seeks to have determined in the suit for injunction are the validity and effect of the proceedings under which the execution sale is threatened to be made. He has, as yet, no contest with any one about the title to his property." In the case in hand the plaintiff says he has a title, though not of record, and not required to be made matter of record, which is superior to and cuts out the deed of trust, and he brings that title forward, and pleads it, relying upon the statute of limitations, which concerns real actions only, and bases his right upon that statute. The real issue which he tenders is the same that he would make in an action of ejectment brought by the purchaser at a trustee's sale, and surely this court would have jurisdiction of an appeal in such a case. We must look to the pleadings in this case to see what the real issues proposed to be made are, and in doing this we cannot escape the conclusion that the case is one involving the title to real estate. The judgment is reversed, and the cause remanded. All concur except BARCLAY, J., who dissents.

**WALTERS et al. v. HERMANN et al.**

(Supreme Court of Missouri. Jan. 27, 1890.)

**GUARDIAN AD LITEM—TAX-TITLES.**

1. The appointment, as guardian *ad litem* of infants in a tax-suit, of an attorney employed by the collector does not invalidate a judgment against them where he was not employed by the collector in that case, and the removal of the general guardian from the suit was not occasioned by fraud.

2. In an action to set aside a tax-deed and the deeds to subsequent purchasers, the latter are not shown to be connected with inadequacy of the price at the tax-sale, or affected with notice thereof, by an allegation that the considerations expressed in their deeds were "wholly false."

Appeal from St. Louis circuit court; **SHERARD BARCLAY**, Judge.

The petition in this case, as found in plaintiffs' abstract, is as follows: It sets forth, in substance: That appellants, in 1870, were minors, ranging from four to eight years in age, and in 1871 one Ott was by the probate court appointed their guardian; they having in 1870 inherited from their parents a lot in St. Louis, and nothing else; and that during

their minority their only income was rental derived from the property until 1880, when it was sold by the sheriff for back taxes, and the wages they earned, which sufficed for their support, and no further. That in 1875, while they were still minors, general taxes on said lot, in the sum of \$69.52, were assessed, and became payable. That their guardian, for a long time prior thereto, and a long time thereafter, and at the time of suit, had money enough to pay said taxes, but he failed to do so. In consequence, in 1878 the collector brought suit against them and their guardian on the tax-bill, which came on for trial in November, 1879, when the appellants were still minors. That the suit was dismissed by the collector as to their guardian, and the court appointed Frederick Spies guardian *ad litem* for appellants, which Spies was at the time an attorney of the collector, under contract with him for the prosecution of tax-suits; but Spies was not his attorney in the suit against appellants. That Spies accepted the appointment; filed a general denial. The case was submitted, and judgment rendered in favor of the state for \$90.30. Execution issued, and appellants' lot sold, in April, 1880, to respondent Hermann for \$210, who transferred the bid, and had deed made to respondent Short. Short sold to respondent Robertson in July, 1881, for \$2,500; Robertson, to respondent Terminal Railroad Company, for \$4,000,—which considerations, except that of the sheriff to Short, are alleged to be wholly false. Appellants allege that the failure of their guardian to pay the taxes, and the dismissal of the suit as to him, and the appointment of the collector's attorney, were a fraud, by reason of which they lost their lot. Appellants allege, further, that the selling price of the lot, \$210, was wholly inadequate, in comparison to the true market value thereof at the time, that is, \$5,000. Wherefore they ask that the sheriff's deed, and other deeds following, be canceled, and the title to the lot vested in appellants, upon such conditions as the court may impose, and for other relief. The several defendants demurred on the grounds of no equity in the bill, and no statement of cause of action. Judgment for defendants on demurrers, final judgment, and appeal.

*H. A. Loevy*, for appellants. *S. M. Breckenridge* and *M. F. Watts*, for respondents.

**SHERWOOD, J.**, (after stating the facts as above.) There is nothing in common between this case and that of *Sargeant v. Rowsey*, 89 Mo. 617, 1 S. W. Rep. 823, relied on by plaintiffs. The difference is just this: In that case the title depended upon proceedings in another cause, where an attorney for a party plaintiff was appointed guardian *ad litem* for a minor defendant; and it was ruled that, as the interests the attorney represented were all antagonistic to those of the minor, the appointment was invalid, and the decree based thereon void. Here, however, in the tax proceedings, although Spies was the attorney of the

collector, yet he was not employed in that case, and of course had no interests to represent which were hostile to those of the infants. For this reason the case of *Sargeant v. Rowsey* does not apply to the case at bar; and the petition does not allege that the dismissal of the general guardian of the minors was occasioned by fraud. Lacking this charge, it will be presumed that the substitution in this regard was properly made. So far, then, as concerns the judgment in the tax-suit, its validity must stand unquestioned. The only thing left, therefore, for consideration, is as to the sale, and the rights of the subsequent purchasers.

Mere inadequacy of price is insufficient to set aside a judicial sale. There must be some fraud in the transaction, as a general rule, where the sale is open, and no improper practices are shown on the part of purchaser, unless the inadequacy is so gross as *per se* to amount to prove fraud in one of its numerous manifestations on the part of the purchaser. *Phillips v. Stewart*, 59 Mo. 491, and cases cited; 2 Pom. Eq. Jur. §§ 926, 927; *Davis v. Dresback*, 81 Ill. 393. But, granting that there was inadequacy of price at the tax-sale, and gross inadequacy at that, there is nothing in the allegations of the petition which connects the subsequent purchasers with that inadequacy of price, or with notice thereof. The statement made, that the various considerations mentioned in the other deeds, also sought to be set aside, were "wholly false," certainly has no such tendency. Such an allegation is a long shot away from charging that the subsequent purchasers were mere volunteers, paying no consideration whatever for their purchases. Very often a larger consideration than that actually given is frequently inserted in instruments of conveyance with the view to obtain a larger price from some future purchaser; but there is no fraud in that, as against the former owner. Therefore, judgment affirmed. All concur, except BARCLAY, J., not sitting.

#### POPE v. KANSAS CITY CABLE RY. CO.

(*Supreme Court of Missouri. Jan. 27, 1890.*)

##### CABLE ROADS—INJURY TO PERSONS ON TRACK.

1. A petition alleging that deceased, in the exercise of due care, was crossing defendant's track, "when the defendant, by its agents and servants, negligently, carelessly, and wrongfully ran its car against the wagon of [deceased], overturned the same, and killed him," is sufficient when first objected to on appeal.

2. Where plaintiff's evidence, in an action against a cable-road company, shows that defendant was operating the railway in the month previous to the accident, and defendant does not stand on its demurrer to plaintiff's evidence, but gives evidence tending indirectly to show that it was operating the road at the time of the accident, and conducts the case as if that fact were conceded, the overruling of the demurrer is not error.

3. Where plaintiff's evidence tends to show that the gripman saw deceased crossing the track when at such distance that he could have avoided collision by using promptly the appliances at his command for checking the train, the case is properly submitted to the jury.

4. An instruction assuming that defendant's servants were operating the cars is not erroneous, where plaintiff's evidence tends to show that fact, and it is not denied by defendant, but is treated as conceded by both parties.

5. An instruction requiring a vigilant watch of the "track ahead" is not confusing, though there were several parallel tracks.

6. An instruction requiring the gripman to exercise ordinary care to prevent the injury is not erroneous as requiring him to stop his train without regard to the safety of the train or its passengers.

Appeal from circuit court, Jackson county: J. H. GLOVER, Judge.

*Johnson & Lucas*, for appellant. *John W. Beebe*, for respondent.

BRACE, J. The plaintiff is the widow of Nelson M. Pope, who was killed in a collision between a wagon and team that he was driving and a train of cable-cars, near the corner of Ninth street and Grand avenue, in the City of Kansas, on the 1st day of July, 1886. In this action she seeks to recover \$5,000 damages for his death, alleging as a cause of action that defendant was operating said cars at the time of the accident, and that her husband, in the exercise of proper care and caution, was crossing its railway track, "when the defendant, by its agents and servants, negligently, carelessly, and wrongfully ran its car against the wagon of said Pope, overturned the same, and killed him."

1. The sufficiency of the petition is questioned for the first time in the brief of counsel in this court. In the trial court no objection was taken to it, either by demurrer or objection to the introduction of evidence, nor was there a motion in arrest of judgment. That it states a cause of action there can be no doubt. Further than to ascertain this fact, we will not look into it. The objection urged against it, however, that it does not specify the particular act of negligence which it is claimed caused the injury, is answered by the cases of *Sullivan v. Railway Co.*, 97 Mo. 118, 10 S. W. Rep. 852; *Johnson v. Railway Co.*, 96 Mo. 340, 9 S. W. Rep. 790.

2. It is urged that the demurrer to plaintiff's evidence ought to have been sustained, because there was no testimony showing that the defendant was operating the train by which the deceased was struck. On the trial neither this nor any other reason was assigned as ground of the demurrer to the evidence. The defendant did not stand on its demurrer, but proceeded to introduce its evidence on the merits. It did appear, however, from plaintiff's testimony that in the month of May or June, just before the accident, the defendant was operating the cable train on this railway; the evidence of the defendant indirectly tended to show that they were operating the road at the time of the accident; and the whole examination by defendant of its witnesses, as well as the instructions it asked of the court, treated the case as if it was a conceded fact that the defendant's servants were operating the cars on this railway on the day the accident happened.

In such state of case justice and fair dealing in the trial of cases between parties litigant and the trial court require us on appeal, where such a defect is first specifically pointed out, to make every reasonable and fair inference in favor of the sufficiency of the evidence to prove such fact. The principle that a state of facts once shown to exist will be presumed to continue until the contrary is shown is fairly applicable to this objection, and disposes of it, in connection with the defendant's evidence and its conduct of the trial, and no further consideration need be given it under the instruction of the defendant, in the nature of a demurrer to the sufficiency of the whole evidence at the close of the case, which the court refused to give. *Winters v. Railway Co.*, ante, 652.

3. It is contended that this instruction ought to have been given, however, for another reason,—that, upon the whole evidence, the plaintiff failed to make out her case on the merits. The evidence for the plaintiff tended to show that the gripman of the train which ran into the deceased's wagon, and thereby killed him, discovered the plaintiff in the act of crossing the track on which the train was running when the train was at such a distance from the wagon that, if he had promptly used the appliances at his command for checking or stopping the train, the train could have been so stopped or retarded that the collision would have been avoided, and the deceased would have gotten safely across the track without injury, and that he failed to so promptly use such appliances, or to stop or check the train, thus causing the accident and the death of the deceased. That this evidence made out a case on which the plaintiff was entitled to recover, if the jury believed the facts which it tended to prove, is no longer open for argument in this state, (*Jennings v. Railroad Co.*, 98 Mo. —, 11 S. W. Rep. 999; *Sullivan v. Railway Co.*, 97 Mo. 114, 10 S. W. Rep. 852; *Kelly v. Transit Co.*, 95 Mo. 279, 8 S. W. Rep. 420, and cases cited; *Guenther v. Railway Co.*, 95 Mo. 287, 8 S. W. Rep. 371, and cases cited;) and the court committed no error in overruling the demurrer to the evidence on this ground.

4. The evidence for the defendant tended to show that when the gripman discovered the deceased in the act of crossing the track on which the train was running he promptly used all the appliances at his command to check or stop the train, but that the train was so near to the wagon that the collision could not be avoided. On this state of evidence the court submitted to the jury, on one instruction for the plaintiff and three for the defendant, the issue whether the defendant's servants could have avoided the injury by the exercise of reasonable care after the perilous situation of the deceased was discovered, and the jury found for the plaintiff. The instruction given for the plaintiff is subjected by counsel to the following criticisms: (1) That it assumes that defendant's servants were operating the cars. The answer is that

plaintiff's evidence tended to prove, and there was no evidence tending to contradict, the fact assumed. The tendency of defendant's evidence was to confirm it, and it was treated during the whole trial as a conceded fact by both parties. (2) That the instruction was calculated to confuse the jury, inasmuch as there were two tracks in the street, from three to five feet apart, and, as the instruction simply told the jury it was the duty of defendant's servants to keep a vigilant watch of the track ahead, perchance the jury may have thought they were instructed that it was the duty of defendant's servants to keep a vigilant watch of the track aside of that on which the car was traveling. It does not strike us that any serious confusion could have arisen in the minds of an ordinarily intelligent juror as to which track the court meant, specially when, in connection therewith, the object of the watch is directly stated to be in order to discover the plaintiff's husband on the track in time to have prevented the train whose machinery they were operating from running into and killing him. (3) That it required the gripman to stop the train, if he could do so without regard to the safety of the train or its passengers. This is a mistake. The instruction did not require the train to be stopped at all. It merely required that the gripman should exercise ordinary care to prevent the injury. The evidence was not such as to introduce the element of hazard to the train or its passengers into the case, nor did the instruction require that the train should have been slacked up or stopped by "any means in the power" of those managing it, thereby making necessary the introduction of the qualification "consistent with the safety of the train," as was the case in *Bell v. Railroad Co.*, 72 Mo. 50, to which we are cited in support of this point.

The objections urged against the instructions are not well taken, and we fail to find in the record any error requiring a reversal of the judgment herein. It is therefore affirmed. All concur.

#### MAVERICK v. HEARD.

(*Supreme Court of Missouri*, Feb. 10, 1890.)

#### ASSIGNMENT FOR BENEFIT OF CREDITORS—ALLOWANCE OF CLAIMS.

The assignee of an insolvent mailed to plaintiff a printed notice of the time and place designated by him for the presentation of claims against his assignor. Plaintiff failed to receive the notice, and did not know of the time fixed for the allowance of claims, but, knowing of the assignment, had previously sent his claim to his attorney to have it allowed by the assignee. From a conversation between the attorney and the assignee about the claim, before the time was fixed for the allowance of claims, it appeared that the attorney was led to believe that the assignee would notify him of the time when fixed, and that notice was not given. Held, that good cause was shown for the failure to present the claim on the day designated, within Rev. St. Mo. 1879, § 878, which provides that a creditor who fails to present his claim at the time designated, on account of sickness, absence

from the state, or any good cause, may do so any time before the declaration of the final dividend.

Appeal from circuit court, Pettis county;  
JOHN P. STROTHER, Judge.

*Louis Hoffman and E. J. Smith*, for appellant. *Geo. P. B. Jackson*, for respondent.

BLACK, J. The plaintiff presented a demand for \$4,470, evidenced by a promissory note, to defendant as the assignee of Baldwin for allowance. The assignee disallowed the claim, and the plaintiff appealed to the circuit court, where the demand was allowed. The assignee appealed to the Kansas City court of appeals, and the cause was transferred to this court because the amount in dispute exceeds \$2,500. That the claim is a just one, and should be allowed, if presented in time, is not questioned. The only objection made to it is that it was not presented in time. It is admitted that the assignee designated the 10th day of March, 1885, as the day for the presentation of claims for allowance at his office in Sedalia; that he gave due notice thereof by newspaper publication, and in due time sent to plaintiff by mail a copy of the printed newspaper notice; and that the demand was not presented for allowance to the assignee until the 17th March, 1885. Plaintiff resided in St. Louis, and knew that Baldwin had made an assignment, and on the 24th January, 1885, he sent the note to Mr. Jackson, an attorney at Sedalia, for the purpose of having it allowed by the assignee. The plaintiff states, in positive terms, that he did not receive the notice mailed to him by the assignee, and did not know what day the assignee had designated for the presentation of demands. The evidence of the attorney and the assignee shows that they had a conversation concerning the note about the time the attorney received it, and from this conversation it appears the attorney was led to believe the assignee would notify him of the time fixed for the allowance of demands, and that the notice was not given. The statute makes it the duty of the assignee to give notice of the time and place of adjusting demands both by newspaper publication and by a letter addressed to the creditor, when his place of abode is known. Creditors who are thus notified, and fail to present their claims at the appointed time, are precluded from any benefit of the assigned estate: "provided, that any creditor who shall fail to lay his claim before said assignee during said term, on account of sickness, absence from the state, or any good cause, may, at any time before the declaration of the final dividend, file and prove up his claim, and the same may be allowed, and the remaining dividends paid thereon, as in the case of other allowed claims." Section 373, Rev. St. 1879. What will constitute any good cause, within the meaning of this statute, must be determined from the facts in each particular case. We think it going too far to say that the claimant must make a showing equal to that required to set aside a default in a court of rec-

ord after an assessment of damages. Of course, negligence of the claimant or his attorney is not a cause contemplated by the statute. Here the plaintiff did not receive the notice addressed to him, and which the law contemplates he will receive, and neither he nor his attorney had any actual notice of the time which had been designated by the assignee. While the evidence does not show that the assignee in terms agreed to give the attorney notice, still it is quite clear the attorney understood the assignee would inform him of the time when fixed. There was but a few days' delay, and looking to what we conceive to be the object of the presentation and allowance of these demands, and the spirit of the statute, the claim was properly allowed by the circuit court. The judgment is therefore affirmed. All concur.

### BOBB *et al.* v. BOBB *et al.*

(*Supreme Court of Missouri. Feb. 10, 1890.*)

#### CREDITORS' BILL—ESTOPPEL.

B., who held land in trust for his father, conveyed it, at his father's request, in trust for his half-sister, who was about to be married, and for whom his father wished to make some provision. B. drew up the conveyance himself, and at his instance his sister gave a receipt for the value of the property, as an advance from her father; the receipt setting forth that the property had belonged to the father, and was conveyed at his request. B., when he made the deed, was conversant with his father's affairs and financial condition, and there was no evidence of fraud on his father's part in causing the conveyance to be made. Held, that he was estopped to attack the deed by a creditors' bill against the father.

Transferred from St. Louis court of appeals.

*Hitchcock, Lubke & Player*, for appellants.  
*Jeff. Chandler and S. A. Young*, for respondents.

SHERWOOD, J. The purpose of this equitable proceeding, instituted in 1878, is to subject to sale, as the property of Charles Bobb, certain real estate in the city of St. Louis, to judgments recovered in 1878 against Charles Bobb; executions on such judgments having been returned *nulla bona*. The suits which resulted in the judgments aforesaid were instituted in 1869. Prior to February 8, 1865, Charles Bobb, the father of John Bobb, and of the other children, owned a certain piece of property in St. Louis, and was desirous of exchanging it with one Weaver, for a piece he had; and this was effected by Charles Bobb conveying his piece to Weaver, and the latter, his piece to John H. Bobb, for the use of his father. This was done for convenience of transfer. In 1865, Cora Bobb, the half-sister of John H. Bobb, was about to be married to her present husband, James K. Taylor, and her father, Charles Bobb, being desirous of advancing her such property, and of setting her up in the world, caused John H. Bobb to convey it to Jamison as trustee for his sister. At that time it was supposed that Cora was an equal beneficiary with the



other children; but afterwards it was decided she was not. John H. Bobb drew the deed of conveyance himself; and it was at his instance that the following receipt was given: "\$3,500.00. Saint Louis County. Received of Charles Bobb, as an advance, property to the amount and value of the sum of thirty-five hundred dollars, being the same property conveyed to Cora Taylor's trustee by John H. Bobb, by deed bearing date —, and which said property in reality belonged to the said Charles Bobb, although the legal title was vested in said John H. Bobb, and said conveyance was made at the special instance and request of the said Charles Bobb. CORA TAYLOR. 8th Feb'y, 1865." As appears from the receipt, the property thus bestowed on the daughter was no part of the trust property, of which Charles Bobb was the trustee. There was testimony that at the time of this conveyance John H. Bobb was thoroughly conversant with the trust property, its books of account, its situation and surroundings, and had been for years previous; and there was testimony of a contrary effect. There were also sundry admissions made by defendants during the progress of the cause which will accompany this opinion. At the conclusion of the testimony the circuit court dismissed the bill, and the propriety of its action is questioned by this appeal.

Various grounds were urged by the defendants in the court below in support of the ruling above alluded to, but the particular ground upon which the court acted in the ruling made is not disclosed. There is not a particle of testimony tending to show any fraudulent conduct on the part of Charles Bobb, the father, in causing the conveyance to be made. It was made out of motives of affection, in order to make provision for the daughter, thus constituting a good consideration in law. Considering the circumstances already detailed, does it lie in John Bobb's mouth to impeach and overthrow the deed which he then made? We are not of opinion that it does. This must be so, if, with full knowledge of the state of the trust property, its accounts, etc., and his father's financial condition at the time, he made the conveyance now sought to be set aside, and held for naught. A court of equity will certainly not assist him to undo what he did with his eyes open, or, what amounts to the same thing, with full opportunity to have them open. And there is sufficient testimony in this record to sustain this view of the case.

Again, it appears from the receipt drawn by John H. Bobb, already set forth, and by other testimony, that the purpose of the receipt was to swell the trust fund by the amount the receipt called for, and thus benefit himself correspondingly. If this be true, we are not of opinion that John H. Bobb can, by a creditors' bill, attack the transaction, and overthrow it. If he has any remedy at all, as to which no expression is nec-

essary, he certainly has not availed himself of it. For these reasons, we affirm the judgment.

#### WALKER v. CITY OF KANSAS.

(*Supreme Court of Missouri*. Feb. 10, 1890.)

##### MUNICIPAL CORPORATIONS—BRIDGES.

A city which opens a bridge for public travel is liable for injuries caused by the defective condition of one side of the bridge, though the other side is perfectly safe for travel. *Overruling* *Tritz v. City of Kansas*, 84 Mo. 682.

Appeal from circuit court, Jackson county; TURNER A. GILL, Judge.

Action by William Walker against the City of Kansas, for damages for injuries received by him by a fall from one of defendant's bridges. From a judgment in favor of plaintiff, defendant appeals.

R. W. Quarles and W. A. Alderson, for appellant. Jewell & Thompson, for respondent.

BRAOE, J. The plaintiff recovered judgment in the circuit court for \$5,000 damages for injuries received by him by a fall from a bridge across a ravine in Flora avenue, in said city. The only errors assigned are the refusal of the court to give instruction No. 1 for the appellant, and the giving of instruction No. 2 for the respondent, as follows: "The appellant offered the following instruction, which was refused: '(1) You are instructed that negligence is the omission to discharge a duty, and you are instructed that it was not necessarily the duty of the defendant to keep both sides of said bridge complained of in a safe condition, but it was its duty only to keep as much thereof in such condition as was necessary to render it reasonably safe for travel; and you will find for the defendant, although you may believe that one side of said bridge was defective, and in a dangerous condition, provided you further believe from the evidence that only one side or a part of said bridge was in such condition, and that the remaining part was sufficient and reasonably safe and convenient for travel thereon.' At the request of the respondent, the court gave the following instruction: '(2) In determining the question as to the safety of the bridge in question, and the necessity for a railing or other guard to said bridge or its abutments, or the necessity of remedying the unevenness in the lengths of the planks constituting the floor of said bridge, the jury will take into consideration the width and height of the bridge, its situation, and the danger, if any, incident to falling therefrom.'"

1. There was no error in refusing appellant's instruction, by which the court was asked to declare, as matter of law, that, although one side or part of the bridge was in a dangerous and unsafe condition, yet, if the remainder was sufficient and reasonably safe and convenient for travel thereon, the plaintiff could not recover. The defect in the

bridge was that the ends of the planks on the west side were not even, some projecting from one to two feet further out than the others, and that there was no railing on that side. Originally a railing had been put up on each side, but several months before the accident that on the west side had been taken away, and of its absence the defendant had notice. It was while pursuing the usual course of travel on the west side of the street, on a dark and slippery night, that the plaintiff reached the north-west corner of the bridge going south, and, in endeavoring to cross over it, fell off on the west side at or near that corner, and was injured. There was some evidence tending to show that at the time of the accident the railing on the east side was still there. The only application the jury could have made of the instruction, if it had been given, would have been to have found that the defendant was not negligent in not having a railing on the west side, where plaintiff was traveling, and on which side he fell off, if they should find it had one on the east side, on which he was not traveling; for there was no other evidence of the condition of any part of the bridge, except that of the west side, to which it could have applied. On the west side of the street there was a sidewalk; on the east there was none. This bridge was the only way provided whereby foot-passengers could safely pass over the ravine. Coming to the bridge from the north, as plaintiff was, from the only sidewalk, that on the west side of the street, across which a barrier had been erected to turn the travel in this direction, such passengers would naturally reach the north-west corner of the bridge, and undertake to cross on the west side. On that side the ravine was 11 feet deep, requiring a bridge nearly 17 feet to cross it. Ordinary care and regard for human life and limb would seem, beyond question, to require that such passengers should, in the darkness of night, have been protected either by a railing on that side of the bridge that would have prevented them from falling into the chasm, or by signal lights by which they might see the danger to which they were exposed; and it can be no answer, to one who has received serious injury for the want of such protection, that upon the other side of the bridge, where he had no occasion to go, there was a railing which would have prevented him from falling off on that side. The only reason urged, and the only one that we can see that could be given, why it was error in the court to refuse this instruction, is that in the case of *Tritz v. City of Kansas*, 84 Mo. 632, a similar instruction was refused, and it was held in the opinion of Commissioner EWING that it should have been given. The facts in that case do not sufficiently appear in the opinion to enable us perhaps to fully appreciate its exact force and bearing upon the merits of that particular case; but, considered in the abstract, we have no hesitation in saying that the proposition that, as matter of

law, it can or ought to be declared that a city is not responsible for injuries resulting from the defective and dangerous condition of its streets or sidewalks, which it has prepared for the use of the traveling public, to which injury the party injured has not contributed by his own negligence, if a part of such street or sidewalk is reasonably safe and convenient for travel thereon, is not sound; and if that case is to be understood as sanctioning that doctrine, in so far as it can be said to do so, it is not sustained by the authorities cited, and ought to be overruled. *Bassett v. St. Joseph*, 53 Mo. 290; *Brown v. Glasgow*, 57 Mo. 156; *Craig v. Sedalia*, 63 Mo. 417; *Staples v. Town of Canton*, 69 Mo. 592; *Brennan v. City of St. Louis*, 92 Mo. 482, 2 S. W. Rep. 481; *Streeter v. City of Breckenridge*, 23 Mo. App. 244; *Taubman v. City of Lexington*, 25 Mo. App. 218. A city is not necessarily required to open or put all of its streets in a condition for public travel, or all parts of its streets in such condition; but when it does open and undertake to put a street in condition for such travel as a whole, or a part thereof, it must keep such street, or such part thereof as it does undertake to open and put in such condition, in its entirety, reasonably safe for such travel. In this case the city had prepared this bridge for public travel, and it was its duty to keep it, as a whole, in a reasonably safe condition for such travel, and for its neglect in not doing so, in that it failed within a reasonable time after notice to restore the railing on the west side, it became liable for damages for the injuries to the plaintiff, a traveler exercising ordinary care in attempting to cross it, resulting from such neglect as was found by the jury.

2. In regard to the error assigned upon the second instruction given for the respondent, it is only necessary, in addition, to say that if, read in connection with the other instructions in the case, it can be said that any fact is therein assumed, it is a fact about which there was no dispute or conflict in the evidence, and the defendant has suffered no injury thereby. *Carroll v. Railway Co.*, 88 Mo. 239, and cases cited. The judgment is affirmed. All concur.

STATE *ex rel.* WITHERS, Pros. Atty., Use of  
BELT, v. STONESTREET.

(Supreme Court of Missouri. Dec. 21, 1889.)

#### OIL INSPECTOR—TERM OF OFFICE.

1. Rev. St. Mo. 1879, § 5633, providing for the appointment by the governor of an inspector of oils in certain cities, prescribes that such inspector shall hold his office for two years, or until his successor is appointed and qualified. *Held*, that the date of the beginning of the term of office of the first inspector appointed under the statute determined the limits of the terms of all subsequent appointments.

2. In an information in the nature of *quo warranto* to determine plaintiff's title to the office, it appeared that relator's predecessor in office had been appointed for two years from June 18, 1885; that no appointment was made at the expiration of his term of office until September 26, 1888, when re-

lator was appointed. *Held* that, under the provisions of Rev. St. Mo. 1879, § 5352, relating to the office of such inspector, and providing that when a vacancy occurs in such office by reason of death, resignation, or otherwise, the governor may appoint a successor for the remainder of the term of office, relator's term expired in two years from the date on which his predecessor's term expired.

BARCLAY, J., dissenting.

Appeal from circuit court, Jackson county; R. H. FIELD, Judge.

On the 21st day of June, 1889, an information was filed in the Jackson circuit court, by the prosecuting attorney, at the instance and on the relation of George W. Belt, which asserted the right of said Belt to the office of inspector of petroleum oils, within and for the City of Kansas, for the term of two years from the 26th day of September, 1888, by virtue of a commission of that date, issued by the governor, etc.; questioned the right of William M. Stonestreet, the present incumbent, to that office; and charged that since the 18th day of June, 1889, he had intruded himself into that office, and usurped its rights, privileges, etc., without legal warrant, etc. In the return of Stonestreet, he admitted the occupancy of the office, but claimed the office by virtue of the appointment of the governor, and a commission from him dated June 17, 1889, entitling the occupant to the office for the term of two years from and after the 18th day of June, 1889. He also alleged in his return, and proved this upon the trial, that after the Revision of 1879 went into effect the first appointment was made and commission issued on the 18th day of June, 1879, for the term of two years, commencing on said last-named day, and that the following-named persons had been successively appointed and commissioned on the days and for the terms hereinafter stated: On June 18, 1879, James A. Keel, for a term expiring June 18, 1881; on June 20, 1881, Frank K. Tutt, for a term expiring June 18, 1883; on June 12, 1883, Frank K. Tutt, for a term expiring June 18, 1885; on June 4, 1885, Joseph W. Keedy, for a term expiring June 18, 1887. It was further alleged in the return, and proved on the trial, that no appointment was made for the term commencing June 18, 1887, but that Keedy remained in office until September 26, 1888, when the then governor of the state appointed George W. Belt thereto, and undertook to issue to him a commission for two years, expiring September 26, 1890, and thereby removed Keedy from office. The return also alleged that under the law the term of office to which said Belt was appointed expired June 18, 1889, and that his commission for a period beyond that date was unauthorized. The reply of the relator put in issue the allegations of the return, and averred that under the statute the term of office of an inspector was for two years, absolutely, and until a successor of an incumbent is duly appointed and qualified, and that consequently Belt was properly appointed for two years from and after September 26, 1888.

The defendant also introduced in evidence the commission of Joseph W. Keedy, as follows: "The State of Missouri. To all who shall see these presents, greeting: Know ye, that, reposing special confidence in the integrity and abilities of Joseph W. Keedy, I, John S. Marmaduke, governor of the state of Missouri, on behalf and in the name thereof, do hereby appoint and commission him inspector of petroleum oils within and for the City of Kansas, of the state of Missouri, and do authorize him to discharge, according to law, the duties of said office, and to hold and to enjoy the same, with all the powers, privileges, and emoluments thereto appertaining, for a term of two years from and after the eighteenth day of June, eighteen hundred and eighty-five. In testimony whereof, I have hereunto set my hand, and caused to be affixed the great seal of the state of Missouri. Done at the city of Jefferson, this 12th day of June, in the year of our Lord one thousand eight hundred and eighty-five, of the independence of the United States the one hundred and ninth, and of the state of Missouri the sixty-fifth. JOHN S. MARMADUKE. By the Governor. [Seal.] MICHAEL K. McGRATH, Secretary of State." Next, the commission of William M. Stonestreet, as follows: "The State of Missouri. To all who shall see these presents, greeting: Know ye, that, reposing special trust and confidence in the integrity and abilities of William M. Stonestreet, I, David R. Francis, governor of the state of Missouri, on behalf and in the name thereof, do hereby appoint and commission him inspector of oils within and for the City of Kansas, of the state of Missouri, and do authorize him to discharge according to law the duties of said office, and to hold and enjoy the same, with all the powers, privileges, and emoluments thereto appertaining, for a term of two years from and after the eighteenth day of June, eighteen hundred and eighty-nine. In testimony whereof, I hereunto set my hand, and cause to be affixed the great seal of the state of Missouri. Done at the city of Jefferson this seventh day of June, in the year of our Lord one thousand eight hundred and eighty-nine. DAVID R. FRANCIS. By the Governor. [Seal.] A. A. LESUEUR, Secretary of State." Under objection of defendant, the state was then permitted to introduce in evidence the commission of relator: "The State of Missouri. To all who shall see these presents, greeting: Know ye, that, reposing special trust and confidence in the integrity and abilities of George W. Belt, I, Albert P. Morehouse, governor of the state of Missouri, on behalf and in the name thereof, do hereby appoint and commission him inspector of petroleum oils within and for the City of Kansas, of the state of Missouri, and do authorize him to discharge according to law the duties of said office, and to hold and enjoy the same, with all the powers, privileges, and emoluments thereto appertaining, for a term of two years. In testimony whereof, I have

hereunto set my hand and caused to be affixed the great seal of the state of Missouri. Done at the city of Jefferson this twenty-sixth day of September, in the year of our Lord one thousand eight hundred and eighty-eight. ALBERT P. MOREHOUSE. By the Governor. [Seal.] MICHAEL K. McGRATH, Secretary of State." It was also shown by the evidence adduced that each prior and present occupant of the office in question was duly qualified, and had entered upon and discharged the duties of his office in accordance with his commission. The foregoing gives the substance of the evidence and issues in this cause. The trial court found the issues for the state, and rendered judgment of ouster accordingly; to reverse which ruling, the defendant appeals to this court.

The statutory provisions directly applicable to this cause are these: "Sec. 5838. The governor shall appoint for each of the cities of St. Louis, Hannibal, St. Joseph, and Kansas City, and for such other cities and towns as shall, by the authorities thereof, petition to him therefor, an inspector of petroleum oils, kerosene, gasoline, or any product of petroleum, by whatever name known, which may be manufactured, offered for sale, or sold, for consumption for illuminating purposes, within the state. Each inspector shall be a resident of the city or town for which he is appointed, hold his office for two years from the date of his appointment, and until his successor is duly appointed and qualified, and shall, at his own expense, provide himself with the necessary instruments and apparatus for testing, gauging, and branding the oils and fluids by him inspected." Laws 1870, p. 77, § 1, amended. "Sec. 5852. Whenever any vacancy occurs under this article by death, resignation, removal from office, or otherwise, the mayor of the city where the vacancy happens shall immediately certify the same to the governor, who shall appoint and commission his successor for the remainder of the term of office, as herein provided; and in all cases where any inspector shall be charged, by indictment or information, for a violation of the duties of his office, as hereinbefore provided, the governor may suspend him from the duties of his office, and appoint another one to fill such vacancy during the time such inspector shall remain suspended." The slight changes made in the foregoing sections by the Laws of 1885 are unimportant in the present controversy.

*Kames, Holmes & Krauthoff*, for appellant. *Downing & Hardin*, for respondent.

SHERWOOD, J., (after stating the facts as above.) Two questions are thus presented by the record: *First*. Is the office of inspector of oils one which begins at a date, and ends at a date, corresponding to the date first fixed by the executive when making his first appointment to that office under the Revision of 1879; or does the term of that office, though its express limit of tenure is only two years, have no fixed period as to when that

term shall begin or end, save the pleasure of the executive? *Second*. What was the force and effect of Belt's appointment, considered with reference to Keedy's official status?

1. As to the first question: The phrase "term of office," in ordinary parlance, means the fixed period of time for which the office may be held. And we have a statutory rule for the construction of statutes requiring that in construing statutes "words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases, having a peculiar and appropriate meaning in law, shall be understood according to their technical import." Rev. St. § 3126. Going to the standards of our language, we find that a "term" means "the time for which anything lasts; any limited time; the term of life." Webster. Dict. And, turning to the authorities, they announce that "the expression 'term of office' uniformly designates a fixed and definite period of time." And. Dict. Law, 1023; *People v. Brundage*, 78 N. Y. 403, 407; *Baker v. Kirk*, 83 Ind. 517. So that, whether we take the phrase "term of office" in its ordinary or popular sense, or in its technical import, it means one and the same thing, "a fixed and definite period of time." Of course, every such period of time, in order to be "fixed and definite," must have a point of beginning and a point of termination equally fixed and definite. Now, if it can be ascertained when the "term of office" of the first appointee of the governor, under the Revision of 1879, began, it would seem not difficult to reach a correct conclusion as to when the terms of office of the successive and subsequent appointees of the executive began and ended. The statute is silent on the point as to the beginning of the first appointee's term; and the reason for this is most obvious, since, the power of appointment being lodged in the executive, it belonged to him in fact, if not in law, to determine the time of the inception of the actual official term of such appointee. The duration of that term was already fixed by law. But if the legislature, being possessed of the power, had fixed the date of the commencement of the first appointee's official term, it would not be questioned that such initial point, being once made sure and steadfast, would recur at every corresponding period of two years. This must be true; or else the premises from which this conclusion is drawn, sustained, as it is, by authority, that a "term of office" uniformly designates a fixed and definite period of time," must be false. As the legislature did not fix the date when the official term of the first appointee under the new law was to begin, this date was necessarily left to be fixed by the appointing power; but, when fixed, the determination thus reached must have been as effectual in all its incidents and consequences as if previously made by the legislature. This, also, must be true, or else it must be true that the executive was incapable of fixing such initial point, and

that, therefore, it was never fixed, which is an impossible as well as an absurd supposition. This reasoning leads to this result: That the date of the appointment first made by the governor for the office in question initiated the official term of the first appointee, and that all subsequent appointments necessarily had reference to such initial period, and, so far as lawful, conformed thereto. This conclusion is well sustained by authority. *Haight v. Love*, 39 N. J. Law, 476, is decisive of this point. And the general rule is elsewhere recognized that when no time is mentioned in the law from which the term shall commence, it must begin to run from the date of election. *State v. Constable*, 7 Ohio, 7; *Marshall v. Harwood*, 5 Md. 423; *Hughes v. Buckingham*, 5 Smedes & M. 632. These last, though election cases, furnish a strong analogous support to the view already expressed, showing, as they do, the urgent necessity felt of having some determinate period at which and from which official terms shall begin. The law favors uniformity, but uniformity cannot be obtained except by the establishment of an inflexible rule. And the course in the office of the executive, in regard to appointment of the first appointee, the language of his commission, and the language of all subsequent commissions, except that of relator, fixing the beginning of such official term at June 18th, biennially, as the period from which to reckon the duration of such term, affords a contemporaneous, as well as a continuous, exposition of the meaning of the law, and of the intention of its makers, that is not without value in the present investigation. Such contemporaneous and continuous construction, in the absence of anything of a countervailing character, should be sufficient *per se* to settle the controversy on the point in hand adversely to the relator. Under statutory provisions substantially identical with those under discussion, it has been held that the true rule was to construe the word "term" as designating consecutive periods of six years, following each other in regular order,—the one commencing where the other ends,—and treating the incumbent appointed in any such period as the incumbent in the particular term or period to which his appointment relates, his office expiring with the expiration of his term. *People v. McClave*, 99 N. Y. 83, 93, 1 N. E. Rep. 235. The statute there was like section 5838, providing that the appointee should hold for a certain number of years, and until his successor should be appointed and qualified, and also like section 5852, providing that in case of vacancy an appointment should occur for the residue of the term.

The ruling just mentioned is in entire conformity to the authorities and views heretofore cited and expressed as to the date of the commencement, and the uniform duration, of the successive terms of office of the different and successive appointees under the law now being discussed. And upon the very face of section 5838, aforesaid, there appears a legis-

lative command that the term of office of each appointee is to last two years "from the date of his appointment;" but the legislature was cognizant that appointments might fail to be made at the proper time; that deaths, resignations, failure to accept, qualify, etc., might occur; and so made provision, in section 5838, that an appointee should hold office, not only for his official term of two years, but until his successor should be duly appointed and qualified. And section 5852 exhibits the same marks of legislative solicitude that uniformity should prevail as to the duration of the official term of the inspector; for that section makes special provision, in case of vacancy, that the governor, upon being informed thereof, "shall appoint and commission his successor for the remainder of the term of office, as therein provided." What term of office? Evidently, the term of two years mentioned in section 5838, beginning at the date of the original appointee's appointment. Section 5852, which, under all known rules of construction, is to be read in connection with section 5838, forbids the idea that an appointment made to fill a vacancy under the former section extends beyond "the remainder of the term of office as herein provided." This obvious construction of the two sections is at war with the theory of the relator, that each appointment is an independent one, creating an independent term of office, with a duration of two years, and without a particle of reference to antecedent appointments, or to uniformity of official tenure. That contention cannot, therefore, prevail. Should it do so, it would in effect expunge from section 5852, as meaningless, the words in that section relating to the appointing and commissioning of a successor for the remainder of the term of office. The consideration and comparison of the two sections now before us are alone sufficient to rule this case upon the point now under discussion, without help from the authorities which the diligence of the counsel for the defendant has so carefully selected. It will therefore be ruled, in answer to the first question propounded, that, inasmuch as the term of office of the first appointee began on the 18th day of June, 1879, and continued for two years from and after that date, that the term of office of each successive appointee, whether for a whole term or for the part of an unexpired term, was regulated and controlled by the date fixed by the first appointment; and that it was beyond the power of the executive, when making subsequent appointments, to ignore or disregard the tenure of office thus first established. It was as binding upon after-coming executives as if, in terms, it had been so fixed by the legislature. And it may be said, in concluding this paragraph, that the sections of the statutes which have been discussed are by no means peculiar in providing that the coal-oil inspector shall hold his office until his successor is elected and qualified. This provision is one common both to our organic and

statutory law. Article 14, § 5, Const. Mo.; Rev. St. 1879, § 5838.

2. Now, as to the second question propounded: What was the force and effect of Belt's appointment, considered with reference to his own and Keedy's official status? The remarks heretofore made show that Keedy's term of office must have expired on June 18, 1887; but, as his successor had not been appointed, of course he held over until that occurrence took place, which was when Belt was appointed, September 26, 1888. But Belt's appointment, for reasons already given, was only effective for the residue of the term of office which had never been previously filled by appointment, and which began on the expiration of Keedy's term of office, to-wit, on the 18th day of June, 1887. This being the case, Belt's term of office was only for the remainder of a term of office which had never been filled, to-wit, the time intervening between September 26, 1888, and June 18, 1889. Keedy had no term of office, in any proper sense of that expression, after June 18, 1887. Upon and after that date he was a mere *locum tenens*, a tenant at will, who could be removed, without notice and without charges preferred, at the pleasure of the executive; and the appointment of Belt accomplished his removal. Ex parte Hennen, 13 Pet. 230, 261. The appointment of a person appointed as was Belt does not fall within the purview of section 5852. There was no vacancy here, within the meaning of that section. That section contemplates cases of vacancy where it becomes necessary to notify the governor thereof; but, certainly, no such notification can be necessary when the archives at the seat of government apprise the executive of the fact that one heretofore appointed, but whose term of office has expired, still retains official position, in order to subserve the ends contemplated both by the organic and statutory law. The rule is that, where the duration of office is fixed by law, the incumbent can only be removed in conformity to statutory regulation. Ex parte Hennen, 13 Pet. 230, 261; State v. City of St. Louis, 90 Mo. 19, 1 S. W. Rep. 757. But this rule, manifestly, has no application to a case where the term of office of the incumbent has expired, and where he is simply holding over at the pleasure of the executive. In such case the power of removal is incident to the power of appointment, without cause shown, or notice given, or hearing had. Ex parte Hennen, supra; Field v. Com., 32 Pa. St. 478; Keenan v. Perry, 24 Tex. 253, and cases cited. In such case, also, there is no restriction upon the power of the executive, such as there would be were he to attempt the removal of an incumbent, the duration of whose term of office is fixed by law, which term has not expired. In the latter case, the manner provided by law would have to be pursued before a removal could be effected. Rev. St. 1879, § 3335 et seq. But, although there was not a vacancy, in the strict sense of the expression, yet, in a limited sense, that

the same is subject to be filled at the pleasure of the executive, there is a vacancy, within the intendment of the law, so far as concerns the exercise of the appointing power; and the mere physical occupancy of the office cannot obstruct the exercise of such power. Parcel v. State, 110 Ind. 122, 11 N. E. Rep. 4; Jones v. State, 112 Ind. 193, 13 N. E. Rep. 416; State v. Harrison, 118 Ind. 434, 16 N. E. Rep. 384. The case of State v. Smith, 87 Mo. 158, has been cited as decisive of this one; but this is a mistake. The real point in judgment there is that if any officer holds over his compensation is to be regulated in conformity to his regular official term; that his compensation is not to be increased in consequence of an increase in the salary which only applies to the term of his successor; and that, so far as concerns his compensation, he is to be considered as in his regular official term. As the result of the foregoing views, the relator having shown no title to the office, and the right of the defendant thereto being satisfactorily established, we reverse the judgment. All concur, except BARCLAY, J., who dissents.

#### MARVIN et al. v. ELLIOT.

(Supreme Court of Missouri. Jan. 27, 1890.)

##### DEEDS—DESCRIPTION.

1. A deed conveying property by lot numbers is not void for uncertainty, though the recorded plat shows no division of the blocks into lots; it being shown that the proprietors had always treated the blocks as divided into lots, and that for many years the property had been assessed, conveyed, and generally known by the lot numbers.

2. The deed through which both the plaintiffs and defendant claim, describing the property, not only as the east half of the block, but also by the lot numbers, the plaintiffs are bound to take notice of its contents, and of the fact that the property was known by the lot numbers.

Appeal from circuit court, Pettis county; RICHARD FIELD, Judge.

Ejectment by Edward B. Marvin and others against Charles H. Elliot. Plaintiffs appeal from a judgment for defendant.

Chas. E. Yeator, for appellants. Sangres & Lamm, for respondent.

BLACK, J. This is an action of ejectment for a parcel of ground described by metes and bounds. It is shown to be the same land claimed by the defendant by the description of lot 10, in block 6, of Cotton Bros' addition to the city of Sedalia. The Cotton Bros. and one Strait, who were the proprietors of the addition, by a deed dated the 21st October, 1867, and recorded on the 23d of the same month, conveyed to Margaret S. Watts "the east half of block No. 6, or all of lots 7, 8, 9, 10, 11, and 12 in said block, in Cotton Brothers' addition." Mrs. Watts and her husband, by their warranty deed dated the 26th November, 1867, and recorded on the 28th of the same month, conveyed to Eliza Carrico "lots 7, 8, 9, and 10 of block 6, in the east

half of said block of Cotton Brothers' addition." The defendant acquired lot 10 by several mesne conveyances. Mrs. Carrico, the defendant, and the intermediate purchasers under this chain of title, have had possession since October, 1867. On the 8th June, 1878, Mrs. Watts and her husband made a quitclaim deed to Hartshorn, for the recited consideration of one dollar, to "the east half of block six, in Cotton Brothers' addition," and he conveyed to the plaintiffs. It will be seen the plaintiffs and defendant all claim under Mrs. Watts, the defendant, under possession, and a deed which antedates more than 10 years the quitclaim deed under which plaintiffs set up title. To defeat this elder title, the plaintiffs put in evidence the recorded plat of said addition, from which it appears the addition was laid off into blocks 270 feet square, divided by lines running north and south, thus dividing each block into two parts; but the parts are not by this plat laid off into lots. It also appears that in 1869, after the date of the deed from Mrs. Watts to Mrs. Carrico, the proprietors replatted the addition, and thereby laid off the blocks into 12 lots each; but this second plat did not cover the east half of block 6. The evidence for defendant shows, beyond all doubt, that the proprietors of the addition, before they filed the second plat, treated the block as having been divided into lots, and made many conveyances by the designation of lots and blocks; that each block was understood to contain 12 lots, those in the west half numbered from 1 to 6, and those in the east half from 7 to 12; that for many years pencil lines appeared upon the first recorded plat showing this division of the blocks into lots; that the east half of block 6 was well known as lots 7, 8, 9, 10, 11, and 12, in block 6; that the east half was assessed, and for years conveyed, by a simple reference to the lot; and that the lot in dispute was well known as lot 10, in block 6.

On this evidence the plaintiff insists that the deed from Mrs. Watts to Mrs. Carrico, conveying four of the lots by their numbers, must be read in connection with the recorded plat; and, as the plat does not show any such lots, the deed is void for uncertainty. The law is well settled that land may be conveyed by a description or appellation by which it is well known in the neighborhood, and that parol evidence will be received for the purpose of showing that it is well known by the description by which it is designated in the deed. *Cravens v. Pettit*, 16 Mo. 210; *McPike v. Allman*, 53 Mo. 551; *Tetherow v. Anderson*, 68 Mo. 96; *Charles v. Patch*, 87 Mo. 450. Such a description being good, it is a matter of no consequence whatever that the grantor is a married woman.

Now it will be seen that the proprietors of the addition conveyed the land to Mrs. Watts by a double description, namely, the east half of block 6, or lots 7, 8, 9, 10, 11, and 12, in block 6. The plaintiffs, as well as the defendant, claim through this deed, and were bound to take notice of its contents, and were

bound to know that the property was known by the number of the lots. The particular parcel in question is shown to have been well known as lot 10, in block 6, and there can be no doubt but the deed from Mrs. Watts to Mrs. Carrico conveyed the property.

Some objections are made to the deed from Mrs. Carrico to Richardson, through which defendant derives title; but if the deed from Mrs. Watts to Mrs. Carrico conveyed the property, as we hold it did, then Mrs. Watts had nothing left, and the objection is immaterial. The plaintiffs must recover on the strength of their own title, and not the weakness of defendant's title from Mrs. Carrico. This appeal is without one particle of merit, and the judgment is affirmed. All concur.

#### DOWELL v. GUTHRIE et al.

(Supreme Court of Missouri. Feb. 10, 1890.)

##### NEGLIGENCE—DISCHARGE OF FIRE-WORKS.

1. The discharge of fire-works from a veranda in front of the second story of a building in the center of a public square, from troughs so arranged that the fire-works would pass over the assembled people, who were there for the purpose of witnessing the display, is not of itself an unlawful act, in the absence of a statute or ordinance making it so.

2. One who seeks to recover for personal injuries, unintentionally inflicted by defendants while engaged in a lawful business, has the burden of proving negligence throughout the trial.

3. In an action for personal injuries caused by the alleged negligent discharge of fire-works, evidence that the fire-works were highly dangerous, that they were discharged by defendants, and that plaintiff was injured thereby, raises a presumption of negligence; and it is error to instruct that these facts alone are not sufficient to entitle plaintiff to recover.

4. Where there is evidence that a large quantity of fire-works was placed on the floor of a narrow veranda; that defendants, who had charge of the display, smoked cigars during the entire performance; that towards its close loose Roman candles were discovered on fire on the floor of the veranda, throwing out balls of fire in every direction; that these balls came in contact with the sky-rockets, one of which hit plaintiff, causing the injuries complained of,—it is error to instruct that, "unless the evidence proves to the reasonable satisfaction of the jury what caused it to be so ignited and discharged, \* \* \* plaintiff cannot recover." It is enough to show that the rocket which caused the injury was put in motion by defendants' carelessness in handling or shooting off the fireworks, without pointing out the particular negligent act that caused the conflagration.

5. To warrant the giving of an instruction in plaintiff's behalf, which selects some of the leading facts, and asks the court to declare that such facts constitute negligence, the necessary inference from all the other evidence, viewed in its most favorable light for defendants, must be that they were negligent.

6. The mere presence of plaintiff at the display as a spectator, it appearing that he had nothing whatever to do with the discharge of the fireworks, does not make him a joint wrong-doer, or render him guilty of contributory negligence.

Appeal from circuit court, Pike county; E. M. HUGHES, Judge.

H. S. Priest and Geo. Robertson, for appellant. G. B. Macfarlane, for respondents.

BLACK, J. This is a suit for damages brought by the plaintiff against the four de-



defendants, who had charge of and gave a pyrotechnic display in the city of Mexico on the night of the 11th November, 1884. The plaintiff was hit in the face by a sky-rocket, which broke his cheek-bone and destroyed one eye. There was a verdict and judgment for defendants, to reverse which the plaintiff prosecutes this appeal.

The petition states that defendants negligently selected the veranda of the court-house for the purpose of giving the display; and that they so carelessly and negligently handled and shot off the fire-works, and permitted the same to be so negligently handled and shot off, that the plaintiff was struck by a sky-rocket in the charge of and under their control. From the record it appears that various citizens of the city of Mexico concluded to celebrate the result of the presidential election of 1884. The programme adopted consisted of speaking, marching of political clubs, and a display of fire-works. The plaintiff, in company with his club, went to Mexico in the afternoon for the purpose of participating, and at night marched in the procession. He did not contribute to the purchase of the fire-works, and took no hand in the execution of that part of the programme; but he learned from a companion, while on the way, that there was to be such a display, and there is evidence from which it may be inferred that he had such knowledge before he started. The defendants constituted a committee to take charge of the fire-works, and they selected the east veranda of the court-house as the place from which to make the display. The veranda is 8 feet wide, 50 feet long, and is reached by passing through windows from the second story. The court-house is on the public square in the center of the business portion of the city. The square is surrounded by streets, and there are buildings from one or two blocks to the east, beyond which there is an open country, and it was in this direction that the rockets were directed when fired from the troughs placed on the veranda. The rockets contained from an eighth to a half pound of powder, and would shoot with great speed, almost that of a gun. It is estimated that eight or ten thousand persons were present on the occasion in question. The defendants stored the fire-works in a room on the second story of the court-house, and took them out on the veranda from time to time, as needed. They would take out at one time a bundle of large rockets, from two to four or five boxes of darts or small rockets, and a quantity of Roman candles. The candles were placed in chairs and in the windows, and the darts or small rockets were kept in the boxes, but were placed on the floor next the wall of the building. The rockets, when fired from the troughs, threw back sparks of fire on the floor, covering a circle of two, three, or four feet. One witness says: "I will not say they did not go back as far as the wall of the court-house, nor to the fire-works that were on the floor." Towards the close of the exhibition, a bunch of

candles were discovered on fire on the floor of the veranda, whirling around and throwing out balls of fire in every direction. These balls of fire came in contact with the rockets and darts, causing a conflagration, and the defendants retreated into the court-house. Several witnesses say they saw the sky-rocket which hit the plaintiff leave the veranda just as they saw the blaze begin at that place. The plaintiff was on the street, and about 200 feet from the court-house, when hit. The defendants used lighted cigars to ignite the fire-works, and nothing else. The evidence of defendants tended to show that the unexploded fire-works were placed away from the ends of the troughs. They do not know how the candles got on the floor, nor how they were ignited. Some other persons were on the veranda, against the orders of defendants, and some were there or in the windows by their consent.

1. The first question presented is whether the display of these fire-works was of itself an unlawful act. In *Conklin v. Thompson*, 29 Barb. 218, a boy on the 4th of July exploded a fire-cracker under the plaintiff's horse, while he was traveling upon the streets in a city, whereby the horse was frightened and died. The act, it is said, was wrongful, and the party committing it assumed the responsibility of all the bad consequences which ensued. In *Jenne v. Sutton*, 43 N. J. Law, 257, the plaintiff was hurt by the explosion of a bomb fired in the street of a city to signal the meeting of a political club; and it was said that the use of the street for such a purpose was illegal, and *per se* constituted a public nuisance, and that all persons concerned in doing the act, or who caused it to be done, were liable for all damages proximately resulting therefrom. Judge Cooley, in his treatise on Torts, citing these and other authorities, lays down the law in these words: "When one makes use of loaded weapons, he is responsible only as he might be for any negligent handling of dangerous machinery; that is to say, for a care proportionate to the danger of injury from it. The firing of guns for sport or exercise is not unlawful, if suitable place is chosen for the purpose; but in the streets of a city, or in any place where many persons are congregated, it might be negligence in itself." Cooley, Torts, (2d Ed.) 705. The discharge of fire-works at suitable places, when not prohibited by statute or municipal regulations, cannot be said to be unlawful; but the circumstances may be such as to make the act of discharging an explosive culpable negligence. In this case these facts are clear and undisputed: The fire-works were not displayed in the streets, but from the court-house, in the center of the public square. The defendants so arranged the troughs that the rockets would pass over the assembled people. The persons assembled, the plaintiff included, were there for the very purpose of witnessing this display. Under these circumstances it cannot be said that shooting off the fire-works

was in and of itself an unlawful or wrongful act. The case is quite unlike those which have been cited from 29 Barb. and 43 N. J. Law.

2. The plaintiff's eighth refused instruction, in substance, states that if plaintiff was struck with a sky-rocket fired off by the explosion of rockets, darts, and candles in the control of the defendants, then it devolves upon the defendants to show how such explosion occurred; that it occurred through no act of theirs; and that no precaution on their part would have prevented it; and, unless the defendants do so show, the verdict must be for the plaintiff. In support of this instruction we are cited to *Morgan v. Cox*, 22 Mo. 373, and *Conway v. Reed*, 66 Mo. 350. The first was a suit for negligent shooting of the plaintiff's slave, and the only question in the case was as to the fact of negligence. The court after disposing of the case on that ground, which affirmed the judgment, goes on to say that the facts of the case would have supported an action of trespass *vi et armis*; and that in all such cases, when the injury is proved to be inflicted by the defendant, the case is made out, and the defendant must show that the injury done was inevitable. The other case was one for an alleged unlawful and wrongful shooting of the plaintiff, and it was then said: "This action, as far as appears from the petition, is for an intentional trespass, and when the injury is proved to have been inflicted by defendant, and nothing more, the case is made out, and the defendant must prove that he was not chargeable with negligence as an exoneration." There are cases where the evidence which shows an injury inflicted by the defendant is sufficient of itself to make out a case entitling the plaintiff to go to the jury; but it cannot be said the burden of proof is on the defendant in all cases of trespass *vi et armis*, when the injury is shown to have been inflicted by the defendant. Speaking of a battery, Greenleaf says: "And here, also, the plaintiff must come prepared with evidence to show, either that the intention was unlawful, or that the defendant was in fault; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable." 2 Greenl. Ev. § 85. This statement of the law is approved in *Paxton v. Boyer*, 67 Ill. 132, and in *Brown v. Kendall*, 6 Cush. 292. The case last cited was an action of trespass for an assault and battery. The defendant, with a stick, attempted to separate two dogs that were fighting, and in raising the stick over his shoulder he accidentally hit the plaintiff in the eye, inflicting a severe injury. *SHAW, C. J.*, speaking for the court, said: "If the act of hitting the plaintiff was unintentional on the part of the defendant, and done in the doing of a lawful act, then the defendant was not liable, unless it was done in the want of exercise of due care, adapted to the exigency of the case, and therefore such want of due care became part of the plaintiff's case, and the burden of

proof was on the plaintiff to establish it." Where the injury is unintentional, and is inflicted in the doing of a lawful act, there can be no recovery, either in trespass or trespass on the case, except by showing negligence on the part of the defendant; and the burden of proof, in either form of action, in such a case, is upon the plaintiff. The question whether the injury was direct and immediate or consequential is one which affects the form of pleading, but not the burden of proof. *Morris v. Platt*, 32 Conn. 75. Under our practice act, the petition simply states the facts constituting the cause of action, but this does not, of course, alter the rules of evidence. In the present case the plaintiff's own evidence shows that the defendants were engaged in a lawful business; and it shows, beyond all question, that the injury was accidental,—that is to say, it was unintentional,—and to make the defendants liable it must appear that they failed to use due care in handling the explosives. The plaintiff's case, both on the pleadings and on his evidence, is founded on negligence, and the burden of proof is upon him, throughout the trial, to prove it.

3. In other of plaintiff's refused instructions he selects out some of the leading facts, and asks the court to declare, as a matter of law, that such facts constitute negligence. In giving such an instruction, all the other evidence must be viewed in its most favorable light for defendants; and it must appear, in spite of the other evidence thus viewed, that defendants were negligent, and the inference of negligence must be a necessary one, and there must be no room for a difference of opinion among fair-minded persons. Applying this rule, the instructions of the character before named were properly refused. Persons who take upon themselves the business of exploding fire-works must exercise great care. The care must be proportioned to the dangerous character of the explosives used, and the danger to be apprehended from the use of them. The real question in this case is whether the defendants used that care in handling and discharging the explosives that cautious and prudent persons would have used under like circumstances. While there is an abundance of evidence tending to show the want of such care, still the conclusion must be drawn from a mass of details, and the question is one for the jury to decide.

4. The first instruction given on behalf of the defendants, after reciting a number of immaterial matters, proceeds to say: "Then the mere facts that said fire-works were discharged by the defendants, and that they were of a dangerous character, and that plaintiff was injured thereby, are not sufficient to entitle plaintiff to recover; but he must go further, and show, to the reasonable satisfaction of the jury, that defendants were guilty of that want of care inconsistent with the handling of the goods they had charge of, and plaintiff's injuries resulted therefrom." *Abbott*, in his treatise on Trial Evidence, at

page 584, with the citation of a number of cases, says: "It is enough for the plaintiff to raise a fair presumption of negligence. Probability is sufficient to go to the jury. If the defendant had charge or control of the instrument of disaster, and if it was highly dangerous, or if he owed a special duty of care to one in the position of plaintiff, the disaster is evidence of negligence, sufficient to go to the jury, unless the circumstances indicate some cause consistent with due care on defendant's part." The defendants in this case had charge of instruments which were highly dangerous, and the evidence which disclosed the disaster was of itself sufficient to entitle the plaintiff to go to the jury. It may be true, in an abstract sense, that the facts stated in the instruction would not authorize a verdict for the plaintiff; but the jury must have understood the instruction to mean that the evidence which showed that the fire-works were dangerous, and were discharged by defendants, and that plaintiff was injured thereby, would not alone authorize them to draw the inference of want of due care. We are of the opinion such facts would have entitled the plaintiff to go to the jury. The instruction should be refused.

The court, at the request of the defendants, gave the following instruction: "(2) The court instructs the jury that they cannot lawfully resort to guess or conjecture in determining what caused the sky-rocket to be ignited and discharged in the direction of the plaintiff; and unless the evidence proves to the reasonable satisfaction of the jury what caused it to be so ignited and discharged, and that such cause was the result of negligence or carelessness on the part of the defendants, the plaintiff cannot recover any damages." The evidence tends to show that a large quantity of the combustible material was placed on the floor of the narrow veranda, in the windows, and in chairs; that defendants smoked cigars during the entire performance; and that loose candles were found on the floor on fire. The jury might well infer that defendants were negligent in all of those respects, and that some one of these negligent acts caused the explosion, without being able to point out which one it was. It was not necessary to a verdict for the plaintiff that the jury should settle in their minds which particular negligent act caused the conflagration. It is enough to know that the rocket which caused the injury was put in motion by reason of the carelessness of the defendants in handling or shooting off the fire-works. Under the circumstances of this case, this instruction is not a fair presentation of the law. The defendants' fourth instruction is of a like character, and should be refused. There seems to have been an effort on the part of the plaintiff to get the court to direct a verdict for him, and, on the other hand, the defendants endeavored to procure a verdict by cutting the evidence up into pieces. We do not approve of either theory. It is unnecessary to review the instructions in detail. We

have said enough to show upon what theory the case should be tried.

5. There is no evidence showing, or tending to show, that the plaintiff was a joint wrong-doer. He took no part in and had nothing to do with the display of the fire-works. The fact that he was present at the display does not show, nor does it tend to show, contributory negligence. *Fisk v. Wait*, 104 Mass. 71; *Bradley v. Andrews*, 51 Vt. 530. The judgment is reversed, and the cause remanded. All concur; BARCLAY, J., in the result.

#### CHARLES *et al.* v. MORROW.

(*Supreme Court of Missouri*. Jan. 27, 1890.)

#### LIMITATION OF ACTIONS — ACTIONS AGAINST NON-RESIDENTS.

1. Rev. St. Mo. 1879, §§ 3225, 3226, relating to limitations in cases of certain equitable titles, have no application to ordinary actions of ejectment, where the contest is between two purely legal titles.

2. In actions against unknown parties, the court acquires no jurisdiction, unless the statement in regard to their interest is verified under oath, as required by Rev. St. Mo. 1879, § 3499, relating to publication against unknown parties.

Appeal from circuit court, Newton county; M. G. MCGREGOR, Judge.

Plaintiffs brought ejectment for the W.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$ , section 4, township 26, range 33, Newton county. Answer, general denial. On trial it was agreed between the parties that both claimed title under John W. Charles, who entered and purchased the land in question from the United States. Plaintiffs' evidence in chief consisted of exemplification of the application of John W. Charles, of Adams county, Miss., to the United States land-office, for location of land-warrant on this land, dated May 28, 1857, with indorsement showing its location, and the subsequent issue of patent, June 10, 1859. Also, deposition of Emily Charles, Andrew Charles, Sarah J. Swann, showing that John W. Charles was a bachelor, residing in Natchez, Adams county, Miss., when he entered this land; that he removed to the city of New York after the war of 1861 arose, and died there, December 25, 1877, without issue, and intestate, leaving as his only heirs two brothers and a sister, Andrew Charles, Sarah J. Swann, plaintiffs herein, and George E. Charles; that George E. Charles died February 25, 1881, leaving a will which was probated in New York, and by which plaintiff Emma Charles, his widow, took his interest in his land. Also, a duly-certified copy of the will of George E. Charles, above referred to, with judgment of the surrogate court in New York, showing probate thereof March 14, 1881; said will, etc., having been recorded in Newton county, Mo., November 9, 1885. At the conclusion of plaintiffs' case as above, defendant prayed the court to declare the law as follows: "The court declares the law to be that, under the evidence introduced by plaintiffs in this case, they are not entitled to recover; that there is no evidence

before the court that the John W. Charles through whom plaintiffs claim owned the land in controversy. If the court finds from the evidence that neither John W. Charles nor plaintiffs have been in possession of the land in controversy for thirty consecutive years, and that neither John W. Charles nor plaintiffs have paid taxes on the same during all that time, and that the title to said land has passed from the government more than ten years previous to February 27, 1874, then plaintiffs cannot recover in this action." The court refused to do so. Defendant then offered in evidence a sheriff's deed, dated August 11, 1881, purporting to be by James R. McElhany, sheriff of Newton county, to John M. Sherwood, and reciting that the state *ex rel.* Hiram J. Cummins, collector of said county, obtained judgment in the circuit court of said county, May 2, 1881, against "the unknown heirs of John W. Charles, and all other persons interested," (no names being set out, or reason given why,) "for the sum of fourteen and 71-100 dollars, for certain delinquent state, county, and special taxes and interest, as hereinafter set forth, assessed and found by said court to be due and unpaid upon the following described real estate," (setting out description of the land sued for in this case, and mentioning taxes for 1872, 1873, and 1875.) "and also certain costs which have been taxed in the sum of eighteen dollars and eighty cents; which said several sums of taxes, interest, and costs were declared by said court to be a lien in favor of the state of Missouri upon the above-described tracts of real estate." This deed further recites issue of special execution upon said judgment against "the said unknown heirs of John W. Charles, and all other persons interested," (no names being given,) directing sale of said real estate to satisfy the judgment; that notice and sale were duly made and had; and that John M. Sherwood became the purchaser of the land for \$26. The plaintiffs objected to this deed because void on its face, in not purporting to be under judgment against any definite person, nor being otherwise in conformity to law; but the court overruled this objection, and admitted the deed in evidence. To which action of the court below, plaintiffs duly excepted at the time. Defendant also put in evidence a deed of quitclaim from Sherwood to Isaac Lewis, dated September 6, 1881, and offered evidence tending to prove that neither John W. Charles nor plaintiffs have ever been in actual possession of, or paid taxes upon, this land, which plaintiffs objected to as incompetent and irrelevant; but the court overruled the plaintiffs' objection, and admitted the evidence. To which action of the court, plaintiffs duly excepted at the time.

By the way of rebuttal, plaintiffs, to impeach the sheriff's deed, and the judgment therein recited, introduced "all the record and proceedings in the tax-suit," as follows: (1) The petition of the state *ex rel.* the collector, expressing the action as against "the un-

known heirs of John W. Charles, deceased, and all defendants, being signed only by relator's attorney, but otherwise framed as usual, except that at its conclusion, just before the prayer for relief, it is said, by way of description of defendants: "Plaintiff's said attorney and H. J. Cummins, said collector, further state: That they believe there are persons interested in the subject-matter of this petition, whose names they cannot insert therein, because they are not known to plaintiff and affiants. That the said unknown parties are the heirs at law of John W. Charles, deceased, and any other persons claiming by right or title in the land described in this petition, derived from said John W. Charles, and are owners of the land mentioned in this petition as tenants in common. That said heirs derived their title from said John W. Charles by descent, he having died possessed of said land; but the names, respective shares, and residences of said heirs are to plaintiff and affiants unknown. And plaintiff and affiants have no further knowledge in the matter. That said other parties, if any, are grantees of said Charles, or of said heirs." Said petition was not signed by the relator, sworn to, nor verified by him. (2) The process, namely, order of publication only, consisting of caption indicating defendants in same way as in the petition, and reading as follows: "Now, on this 4th day of November, 1880, it appearing to the satisfaction of the court, from the petition heretofore filed in the above-entitled cause, that there are persons interested in the subject-matter of this petition whose names are unknown to the plaintiff; that said unknown parties are heirs at law of John W. Charles, deceased, and any other person claiming any right or title in the land described in this petition, derived from said John W. Charles and heirs, are owners of the land described in this petition as tenants in common; that said heirs derived their title from said John W. Charles by descent, he having died possessed of said land; that the said other parties, if any, are grantees of said John W. Charles, or his said heirs,—it is therefore ordered by the court that publication be made in the Neosho Times, a newspaper published weekly in the city of Neosho, Newton county, Missouri, notifying you, the said defendants, of the commencement of this suit, the general nature," etc., concluding as usual. But the publication actually made, as shown by the printer's affidavit, with appended copy, and signed by Barton J. Morrow as clerk, was in somewhat different language, being in the nature of a notice framed by the clerk upon the basis of the court's order; but neither the relator nor his attorney designated any newspaper as most likely to give defendants notice, and the published notice omitted all that part of the order specifying the newspaper. (3) Interlocutory judgment of May 2, 1881, reciting proof of publication filed February 5, 1881, and notice by such publication, as ordered, to "the unknown

heirs of John W. Charles, and all other persons interested in the hereinafter described lands." (4) Proof of publication, being affidavit of publisher of the Neosho Times, showing only imperfect publication, as above mentioned. (5) Final judgment for \$10.21 taxes, \$4.50 interest, and \$18.80 costs, against "said defendants," (described as "the unknown heirs of John W. Charles, and all other persons interested" in the land,) to be levied of the "said real estate," and that the lien of the state be "enforced and foreclosed," etc. (6) Acknowledgment by the sheriff of execution of the sheriff's deed. (7) Special execution in usual form, following the description of defendants, as in the other proceedings. This closed the evidence in the case.

Plaintiffs then prayed the court to declare the law as follows: "Charles v. Morrow. Declaration. The court declares the law to be that, under the petition and proceedings in the tax-suit against the unknown heirs of Charles, et al., the court did not acquire any jurisdiction of the parties defendant, and the sale and deed thereunder did not convey any title; and, if it be found from the evidence that plaintiffs are the heirs and legal representatives of John W. Charles, deceased, the plaintiffs must recover in this action." But the court refused to give said declaration. To which action of the court plaintiffs duly excepted at the time. The trial court then entered judgment for defendant, against the objection of plaintiffs, who duly excepted thereunto at the time. And, on the same day of the judgment, plaintiffs filed their motion for a new trial, because the judgment was against the law and against the evidence, and because the court erred in refusing to give the declarations of law asked by plaintiffs, and because the court had no jurisdiction in the tax-suit, etc.

Geo. Hubbert, for appellants. Jos. Cravens, for appellee.

SHERWOOD, J., (*after stating the facts as above.*) 1. The declaration of law asked by the defendant at the close of plaintiffs' *prima facie* case was correctly refused by the court. The defendant had not gained a title by lapse of time, seeing that the sheriff's deed, which gave origin to the title on which his defense is bottomed, only dates from August, 1881; and sections 3225, 3226, Rev. St. 1879, have no bearing on this case whatever. Section 3225 provides for a case where the land is "in the lawful possession of another," and the claimant, *i. e.*, plaintiffs, has not been in possession of, etc., for 30 successive years, paying no taxes, etc., and the equitable title to which has emanated from the government more than 10 years, then within one year from the approval of this act, etc., which was approved February 27, 1874. Section 3226 also relates to equitable titles to lands, where the possession has been adverse for 20 years, etc. None of those sections fit this case. This is a contest between two purely legal titles. Those sections constitute a special statute of limita-

tions, as has been ruled by this court. They do not apply to ordinary actions of ejectment, nor to cases of ordinary adverse possession. Consequently, the possession of the defendant, and those under whom he claims, for less than the usual statutory period, created no bar to the action of the plaintiffs.

2. The reliance of the defendant upon the tax proceedings, which culminated in the sheriff's deed aforesaid, was no more worthy or well founded than the statute of limitations, before mentioned. The statement in regard to the interest of the unknown heirs of John W. Charles was not verified under oath, as expressly required by section 3499. This was essential to the acquisition of jurisdiction; and, lacking this essential, no jurisdiction was acquired in the tax-suit by the Newton circuit court. *State v. Staley*, 76 Mo. 160. In all cases where constructive or substituted service is had in lieu of that which is personal, there must be a strict compliance with statutory provisions and conditions. *Quigley v. Bank*, 80 Mo. 289, and cases cited; *Wade*, Notice, § 1030; *Morey v. Morey*, 11 Reporter, 199; *Settlemyer v. Sullivan*, 97 U. S. 444. There is a distinction to be taken between section 3499 and section 3494,—a distinction as to the necessity of verification by oath where unknown defendants are concerned,—which was pointed out in *Elting v. Gould*, 96 Mo. 535; 9 S. W. Rep. 922. The foregoing considerations lead to reversing the judgment, and remanding the cause; and it is so ordered. All concur.

STATE *ex rel.* THOMAS v. WILLIAMS, Recorder of Voters.

(*Supreme Court of Missouri.* Dec. 21, 1889.)

MUNICIPAL CORPORATIONS—OFFICERS—QUALIFICATION—MANDAMUS—INJUNCTION—APPEAL.

1. The charter of the city of St. Louis (article 4, § 10) provides that all elected and appointed officers must have been citizens of the city for at least two years previous to their election or appointment, and shall not, at the time of their election, be in arrears to the city for taxes, or indebted to the city in any way. The relator had received a majority of the votes cast at an election for city marshal held April 2, 1889. It appeared, however, that he had left the city in October, 1885, abandoning his family, leaving his business without making any inquiry or provision for it for nearly two years, returning to the city in September, 1887. *Held*, that this was such an abandonment of his citizenship as would disqualify him for the office of marshal.

2. Where it appears that relator had been carrying on a saloon in the city, but had not paid his saloon license, though the same had often been demanded of him, this indebtedness to the city is a disqualification for office, and relator is estopped from pleading, in order to avoid the disqualification, that no license was ever issued to him.

3. Where it further appears that at the date of the election relator was in arrears for taxes due the city, and that the books of delinquent taxes were in the collector's office for the inspection of the public; that relator had personal property subject to taxation, but on his own admission he had paid no taxes for five years prior to the election,—he cannot avoid disqualification for office on the ground that he did not know there were any taxes assessed against him.

4. A petitioner in *mandamus* must show himself the possessor of a clear and legal right to the remedy he seeks, in order to maintain his petition.

### *Mandamus.*

The relator submitted depositions under order of this court, to sustain his issues: (1) That he is and has been a citizen of the city of St. Louis for more than two years previous to his election; (2) that he was not indebted to the city at the date of his election; (3) that he was not in arrears to the city for taxes at the date of his election.

The testimony is substantially as follows:

Emil Thomas testifies that he is 49 years old. Resides at 3018 Lucas avenue, city of St. Louis, and has lived in the city since 1866, —continuously since 1881; and testified in detail to his possession of all other qualifications for marshal. That he did not have any knowledge that any taxes were assessed against him in April, 1889. The city was indebted to him at that date on his settlement with the city as marshal, somewhere about 1885. The amount was \$42.50, and has been paid to him since the election. That he first became aware that there were taxes due by him when the application for the injunction was made by Neiser, and he immediately paid the same. On cross-examination, he stated that he went to Salt Lake, Utah, in October, 1885, and remained in Utah until September, 1887. That he had a suit there about a mine, which is yet pending. Was continued from term to term, and that is what kept him there. Did not engage in business there. Was in the saloon business in summer of 1885. Did not receive any license for the saloon. Did not pay for the license. John Krauss, president of the brewing company, put up saloon for him. When the money for license was demanded of him by the collector he told the collector he (relator) would have to see John Krauss about it. Krauss had promised "to see him through" in the saloon enterprise generally. The collector allowed him to go on with the saloon, and trusted him to pay the license. The only property that he owned in St. Louis after 1885 was his household furniture. When he went to Salt Lake he intended to return in twenty days. Never changed his mind about coming back, but was detained there fifteen or sixteen months. Went there under a promise of getting some \$3,000. Failing to get it, attached the mine. Was in correspondence with his family during all the time he was there.

Frederick Gerber, chief deputy collector: All bills for unpaid taxes were yet in the hands of the comptroller in March and early part of April. Mr. Schweikhardt paid all delinquent taxes of Mr. Thomas on 3d or 4th of April last. Every tax-bill against Emil Thomas was paid. "I told the cashier to put the money in the safe, and keep it there, until the new collector came in." The money was subsequently turned over to the new collector, Mr. Ziegenhein. We could not give receipted bills at the time the money was paid, because they were not in the collector's office.

J. G. Travis stated that he was a deputy sheriff. That he went to the collector's office a day or two prior to the election, with the full intention of paying any taxes that might be due by Emil Thomas, and was told there by a deputy collector, behind the counter in the office, that there were no bills against him of any name or nature. It was Saturday or Monday preceding the 2d of April, 1889. Had been a deputy collector himself, and tried to find the books in the office which would show if there were any bills against him, but could not find them. Afterwards saw the collector, Mr. Sexton, and made the inquiry of him, and told him he would pay all bills against Mr. Thomas, and failed to get the bills. The bills had then been returned to the collector from the comptroller's office, and I offered to leave the money to pay all delinquent personal property taxes due by Thomas, if the amount could be ascertained.

James Van Schoonhoven testified that he accompanied Mr. Travis to the collector's office on the last Saturday of March, 1889, and detailed the facts of the offer of Travis to pay all taxes due by Emil Thomas, as stated by Travis.

The relator then put in evidence the receipt made an exhibit in the testimony of Frederick Gerber, certifying that all taxes assessed against Emil Thomas have been paid up to the date thereof, to-wit, April 4, 1889.

The defendant, Neiser, to sustain the issues on his part, showed, by Andy John Knapp, that he was cashier of Collector Sexton up to April 22, 1889; that persons came into the office, he thinks it was two or three days after the election, and Gerber gave him money tendered by them to put in the safe to be applied to the payment of Emil Thomas' taxes when the bills should be got back from the comptroller's office. He kept it in the safe, and turned it over to Mr. Ziegenhein, the new collector, and got his receipt for it. Thinks the amount over \$100. The delinquent tax-bills were at that time in the hands of the comptroller, and had been there since about March 2d.

Michael J. Casey was also called by the defendant. He was a sanitary officer,—a janitor at the court-house,—and was delayed one evening in cleaning out the tax collector's office by Nick Carr and some one else talking to Fred Gerber about Emil Thomas' taxes. They only wanted "to see about Thomas' taxes." Thinks it must have been about 5th April.

George Ransom Wolf, for defendant, testified that he had been a deputy collector of taxes. Two gentlemen called to see Mr. Gerber, the chief deputy, and talked with him. The subject of their talk witness did not know, and he did not know the men. They talked about seeing somebody; he does not know who. He was a deputy in the office at and before and after the election, but knew nothing about the matter.

Defendant offered in evidence some tran-

scripts of judgments in justices' courts against Emil Thomas, and one that was not against him, to-wit, the one in favor of G. H. Ashley.

Defendant called H. Clay Sexton, late collector of taxes, who testified that there were some delinquent personal property taxes against relator. Does not know for what years. After the election Travis wanted to know the amount of the taxes. Said he wanted to pay them. Thomas started a saloon, but he did not pay the license. Promised to do so, but did not. Waited on him. Another party afterwards paid the license. Think Thomas owed for about three months. Thomas told him he was a little hard up, but having known him for so many years, and thinking him a good fellow, thought he would pay it. On cross-examination stated that he thought the older bills were down in the basement, and the later ones had not been returned to him when Travis wanted to know the amounts, etc. Do not know, and would not know, in the course of business, whether any one had paid his taxes or not. Does not know when Thomas' taxes were paid. Did not receive taxes during the time the comptroller held the bills.

Peter P. Dally was deputy collector, license department. Thomas did not pay the saloon license. Thinks it was about \$188. Thinks it was at his request that Mr. Sexton allowed it to run. Thomas wanted time, and Sexton gave it to him.

Denny J. O'Callaghan, was a deputy collector in April, 1889, in the collector's office at St. Louis. Saw the tax-bills of Mr. Thomas after April 3d. There were delinquent taxes for more years than was stated in the petition of Neiser for injunction. There was a bill for the year 1888. Thinks they were all for personal property taxes. Don't know amount of any bill or aggregate amount.

John C. Hartnett had known Thomas about nineteen years. He was jailer. He was afterwards sheriff. Served one term, and was elected for a second term, but thinks the scheme and charter cut him out. Then he was afterwards city marshal for four years.

A. G. Peterson sold Thomas glasses, etc., for the saloon. Thinks it was four or five years ago. Sued for his bill, and got judgment.

William P. Macklin boarded with Mrs. Thomas in fall of 1886 for some three months. There were eight or ten boarders. Mr. Thomas was not there. Mrs. Thomas, he thinks, got money from some outside parties.

Thomas H. Burt, a saloon-keeper in "Pool Alley," has known Thomas some 23 years. Thomas left Dan Ramsey in charge of the saloon when he went to Utah. Carter afterwards got the saloon from John Krauss, and witness got it from Carter.

Henry Peterson, constable of seventh district in the city of St. Louis, went security for Thomas for liquors for the saloon. Had no interest in it. Thomas' wife took in

boarders while Thomas was gone to Utah. Thomas had an interest in a mine in Utah which he acquired from Capt. Donaldson. The widow of Donaldson offered Thomas an interest in the mine, and he went out to Utah to sell the mine. She married again about that time. He saw a letter containing some of these facts written by Thomas to his wife. On cross-examination he stated that the mine was called the "Enterprise Mine." When Thomas returned he showed me a deed to the mine by which the mine was to be sold by a certain time. The time expired, but he told me he had not given up his interest in it. He is now out at Salt Lake, and said he was going out there to look after his interest in the mine. Mr. Champion, the husband of Mrs. Champion, formerly Donaldson, had charge of some mine out west. They conceded Thomas to be the owner of one-half of the "Enterprise Mine." They organized a corporation in Utah, issued the stock, and sent the stock here to St. Louis to a bank, and Thomas undertook to sell so much of the stock as would make a working capital.

John Krauss, president of the Klausmann Brewing Company, had known Thomas about 30 years. Built and paid for the house, and started Thomas in the saloon business in 1885, in Pool alley. Had no interest in the profits of the saloon, except selling beer. He kept it open for a few months. Knew Thomas was going away, and expected to be back in a couple of weeks. The saloon was sold out by the constable, and witness bought it in and sold it again. Thomas was in debt considerably. Witness and Thomas were intimate friends, and are so still.

*Leo Rassiur and H. D. Laughlin*, for petitioner. *Jos. S. Laurie*, for respondent. *W. C. Marshall*, for Martin Neiser.

SHERWOOD, J. This is an original proceeding by *mandamus* to compel the recorder of voters to issue a certificate of election to Emil Thomas, the relator, who claims to have been elected marshal of the city of St. Louis, by reason of being qualified for that office, and by reason of having received the highest number of votes therefor at an election held on the 2d day of April, 1889. The first return of the respondent, while it "admits that said relator, at such election, received a majority of the votes cast at said election for said office," yet further states that, "whether relator possessed the qualifications for said office prescribed by the charter as alleged, respondent can only say that he knows nothing to the contrary, and did not consider that the duties of his office as recorder of voters required or authorized him to pass upon or determine the eligibility of candidates." It was further alleged in the return that at the close of the election respondent cast up the votes cast, ascertained that relator received the highest number of votes, etc., and was about to give him a certificate of election, when he was restrained from so doing by an injunction issued out of the circuit court on



the 6th day of April, 1889, directed against him and relator, and based upon the petition of Martin Neiser, the present incumbent, which alleged that the relator did not possess the qualifications for said office required by the charter; that, upon demurrers filed questioning the jurisdiction of the circuit court to entertain in the petition, the injunction was dissolved, the petition dismissed, and on the same day, April 9, 1889, Neiser was granted an appeal to this court, giving *supersedeas* bond, etc. Upon this return being made, Martin Neiser filed a motion asking to be made a party, alleging that he himself had been elected marshal at the election aforesaid, and that, if granted time so to do, he could establish the fact of his election and relator's ineligibility; and, further, Neiser suggested, in effect, that the return of respondent was evasive or collusive, and did not put the relator upon the proof of his averment that he possessed the necessary qualifications. This motion, being passed upon, resulted in an order being made, by a majority of this court, granting the motion of Martin Neiser "to be made party defendant, and for leave to be heard in the cause, \* \* \* unless the respondent, within five days from this date, make that portion of his return touching the qualifications of relator, for the office in question, definite, positive, direct, and certain." Thereupon the relator filed an amended return in substance like the first, with the exception that it distinctly puts in issue the qualifications of relator for the office of marshal, by setting forth qualifications required by the city charter, and giving in detail reasons why relator did not possess such qualifications. Neiser also filed an answer on the same day, June 24, 1889, as party defendant, claiming that he was elected to the position of marshal in 1885, for four years, and that under the city charter he was entitled to hold his office until his successor was elected and qualified; and further alleged that relator did not possess the qualifications of the office required by the city charter, giving details similar to those given in the return of the respondent. In this amended return and this answer, on the day of their filing, replications in denial of their chief averments were filed. On the 28th of June, 1889, an order was entered by this court authorizing the taking of depositions in support of the issues joined, and granting leave to Neiser to appear and cross-examine relator's witnesses, as well as to produce and examine witnesses on behalf of respondent. In response to this order depositions have been taken by relator and by Neiser, and are now before us.

This is the shape this cause is now in, and we shall proceed to discuss it in the shape we find it; and, inasmuch as the amended return of respondent controverts the qualifications of the relator, it becomes unnecessary to comment on the propriety of making Neiser a party to this proceeding. It is not impertinent, however, to state that in the case of

In re Strong, 20 Pick 484, relied on by relator, where Strong applied for a *mandamus* to compel the issuance to him of a certificate of election, notice was ordered to be served on the incumbent, whose rights, Chief Justice SHAW suggested, might be affected in case the writ went, and notice was given accordingly. If the original return of respondent had put in issue the qualifications of relator for the office of marshal, by direct denial, or by "something equally as good," *i. e.*, that which would be the legal equivalent of such denial, (High, Extr. Rem. § 460,) this, and nothing short of this, would suffice, (State v. Williams, 96 Mo. 13, 8 S. W. Rep. 771.)

As the return admitted that relator had received a majority of the votes cast, and as the residue of that return was a virtual admission of the qualifications of relator for the office, there was nothing left remaining for the relator to do but to move for a peremptory writ on the pleadings. This course we could not allow to be pursued, especially in view of the suggestions made under oath by Neiser, the incumbent, that relator was ineligible to the office in question. Had we done so, it would have been to permit an abuse of the process of this court. These considerations induced a majority of this court to make the order it did in relation to the return of the respondent.

Having thus shown how this case stands, and the issues raised by the pleadings, to-wit, the petition, which is treated as the alternative writ, and the return of respondent, and the reply to same, we shall address ourselves to the questions presented by the testimony as applied to the issues made on the pleadings. As the reporter will accompany this opinion by a statement of the substance of the testimony adduced, it is deemed unnecessary to do but little more than to give an outline, or brief statement, of the salient facts in evidence; our conclusions of fact thereon, with brief reasons therefor; and then, upon this fact basis, present our reasons for the conclusions which we think the law draws from those premises of fact.

Section 10, art. 4, of the charter of the city of St. Louis provides that "all elected and appointed officers shall possess the following qualifications: They shall have been citizens of the United States and of the city of St. Louis for at least two years previous to their election or appointment, and shall be able to read and write the English language. They shall not, at the time of their election, be in arrear to the city for taxes, or indebted to the city in any way," etc.

With these charter provisions before us, our conclusions from the testimony are these:

1. That the relator was not on the 2d day of April, 1889, the day on which the election occurred, eligible to the office of marshal, not having been a citizen of St. Louis for at least two years previous to such election. His hurried departure from St. Louis to Salt Lake in October, 1885, overwhelmed with debt, to be gone, as he says, but 20 days; his

practical abandonment of his family to care for themselves, and to beg assistance from others; his entire abandonment of his saloon business, without making any provisions for its continuance, or even so much as making inquiry about it, or asking or receiving any report from his supposed bar-keeper, Ramsey, as to what had become of that business; his ability to return to St. Louis at any time, as he says; his prolonged and seemingly aimless absence for 23 months, ending in September, 1887, having no business there, except an attachment suit still pending against "Enterprise Mine," "for money owed to him years and years ago,"—all stamp relator's story as one scarcely consistent with continuous citizenship in the city of St. Louis; and this effect is by no means lessened when, in connection with his own statements as a witness, we place those he made to another witness, his intimate friend Peterson, to the effect that while he was marshal he loaned Capt. Donaldson some money which went into the purchase of Enterprise mine, and, relator having no papers to show for his interest, Capt. Donaldson said he should not be forgotten, and that after Capt. Donaldson's death his widow, Mrs. Donaldson, wrote to him, requesting him to go out with her to Salt Lake, and that he should have an interest in the mine; that, moved by this request, he went out there with Mrs. Donaldson, and straightway brought an attachment suit against the property of a dead man, and the very same property he went out for the express purpose of obtaining the promised interest in.

2. That relator was ineligible to the office of marshal on the 2d day of April, 1889, by reason of the fact that he was indebted to the city of St. Louis for a saloon license to the extent of \$138.50. This saloon he opened, as he admits, and started the business; but he denies ever having made application for a license. Still he admits that, when called upon by the collector for the amount of his license, just before his sudden departure for Salt Lake, he referred him to his friend Krauss for the money; not that Krauss had agreed to pay it for him, but because he thought he would do so as an old friend. The testimony of Sexton, the collector, a disinterested witness, is, however, to the effect that Thomas started the saloon; didn't pay the license; kept promising to pay it; that he saw Thomas about it; that he thought Thomas was a good fellow, a little hard up, so he waited on him awhile, but Thomas "skipped out," and never did pay it. Daily, a former deputy collector, also testified that he saw Thomas about paying for the saloon license, perhaps half a dozen times while he was running the saloon; that Thomas came to the office and begged for time in which to pay; but up to the time of Daily's leaving the collector's office, in April, 1889, the license had not been paid. It is now gravely urged by relator's counsel that, relator never having received a saloon license from the city, he does

not owe the city for it, and we are referred to the provisions of the revised ordinance of the city, (chapter 37, art. 2, §§ 1-7.) Looking at these sections, we find various provisions as to the amounts to be paid for differently graded licenses, and section 3 requires applications for licenses to be made in writing to the collector. As to this point, there is no force or merit in it, for the reason that, Thomas having enjoyed the benefits of a saloon license on the promise to pay for it, it does not lie in his mouth, and he is estopped, to say that, after having all the privileges conferred by a saloon license, he did not get the mere paper, which was but the evidence of previously granted authority. If after conducting a saloon, and after making repeated promises to pay for the license, he had been sued by the city for the amount due for that license, it is clear he could not interpose such a defense to the action of the city, and for the same reason such an objection must be equally unavailing here.

3. That relator was ineligible to the office of marshal on the 2d day of April, 1889, in consequence of his being in arrears to the city for taxes. He admits, himself, that the last time he had paid any taxes was five years ago,—“somewhere around that neighborhood;” that the taxes—that is, personal taxes—for 1885, 1886, 1887, and 1888 were due and unpaid on the 2d day of April, 1889; and that he was unaware that taxes for those years had been assessed against him, until the injunction suit of Neiser was brought, when such taxes were at once paid. The injunction in behalf of Neiser was not issued till the 4th of April, 1889; and the testimony of Sexton, the collector, does but confirm these admissions of relator. He distinctly states that at the time of the election the taxes of relator were not paid; that Travis did not, prior to the election, call to see about relator's taxes; that after the election, in April, Gerber, his deputy, called him into the real-estate department to see somebody about Thomas' taxes. Going in there, he saw “Travis, Filley's brother-in-law,” who wanted to see the bills for Thomas' taxes; that, being shown the bills, Travis put down the amount, but didn't pay anything at the time; and that Travis did not, prior to the election, come to his office, and offer to pay the back taxes of Thomas. Sexton also testifies that there was always kept in the office of the collector a book of delinquent personal taxes, showing the amounts and years; that said book was in the office at the time, and was never allowed to go out of it. This statement of Sexton is supported by that of Knapp, the cashier, in the collector's office, as to such a book being kept in the office, and that it was there in March and April, 1889, and was not turned over to the comptroller when tax-bills were given out to that official for collection. This testimony as to the delinquent tax-book always being in the office is uncontradicted. This uncontradicted testimony about this book goes very far towards showing that the

excuse of the tax-bills being out in the comptroller's hands, and therefore relator's taxes could not be paid, is a very lame one; and Travis, though a former deputy collector himself, and for this reason presumably well acquainted with persons in the city, does not pretend to give the name of the deputy collector to whom he says he offered to pay Thomas' tax-bills; says he does not know the name of the deputy to whom he made the offer. He says that this unknown deputy told him there were no bills against Thomas; that he himself tried to find the delinquent tax-books, but could not; took Berger, deputy collector and entry clerk, to assist in looking for the books, "but did not tell Berger what he was looking for." He says, further, that, a day or two after the election, he saw Sexton, the collector, and the latter said the Thomas' bill amounted to something like a thousand dollars. But Schoonhoven, who attempts to support Travis, does so by testifying that the last Saturday or Monday in March, 1889, at Travis' request, he went with him to the collector's office; that "Travis told him he wanted him to go and pay attention to what was said," and they called on one of the clerks for Thomas' bills,—all he owed for taxes; that, while the clerk was looking, Sexton came forward, and, when Travis repeated to him what he had said to the clerk, Sexton said that the bills were more than Travis could pay,—a couple of thousand dollars; that Sexton thereupon went back among the books, and came back, and said that the books had gone to the comptroller's office; had not been returned; and that Travis asked one of the clerks to look over the books, and give him a memorandum of the taxes, and he saw the clerk looking among the books, but did not see Travis looking for any book. It will be readily seen from what has been said that Travis is unsupported by Schoonhoven in material parts of his testimony, and contradicted in others. These are the only witnesses who testify that any offer to pay Thomas' taxes was made prior to the election, though, if this were true, it would seem easy to have shown the deputy to whom Travis made the offer he says he did. Gerber, deputy collector, testifies that Schweikhardt paid relator's taxes between 4th and 6th of April, 1889, between 12 and 2 o'clock, the amount being over \$100; that the delinquent tax-bills were not in his hands, and so he simply gave a certificate at the time by recording them, showing all taxes had been paid; and afterwards Schweikhardt paid a bill which had not been paid at the time the others had been; and that it was not until after April 22, 1889, the date Ziegenhein qualified, that Thomas' taxes were entered "paid" on the cash-book. The receipt of Gerber, as deputy collector, is dated April 4, 1889, and states: "This is to certify that all taxes, for state, school, and city, assessed against Emil Thomas, have been paid to date." It is unnecessary to say that this so-called "tax-receipt" is not in usual form,

does not pretend to acknowledge the payment of any particular sum of money, and seems to have been gotten up for the occasion. But, in any event, it is valueless as evidence.

The remarks already made as to the presence of the delinquent tax-books in the collector's office show there was no necessity for the presence of the bills in order to know the amount of relator's taxes; and it is worthy of note that the sum thus paid in bulk was never entered, even on the cash-book, until after Ziegenhein qualified, but how long after is not stated. The testimony of Casey, the janitor in the tax department and collector's office, and Wolf, deputy collector, show that, shortly after the election was over, great interest became suddenly manifest in the fact whether Emil Thomas' back taxes were paid; that two unknown gentlemen called on Gerber on the 4th or 5th of April, after office hours, who seemed anxious to see him; that they talked with Gerber about Thomas' taxes, but paid him no money; and on the 5th or 6th of April, also after office hours, one Carr, a saloon-keeper, came to see Gerber, also about Thomas' taxes, and, in response to what Carr said, Gerber replied, as they both left the office: "If Mr. Schweikhardt is so much interested in this case, why didn't he come over and see about it himself?" Taking all these circumstances into consideration, and others of similar drift and nature, we can but conclude that there was no genuine and honest effort ever made to pay relator's taxes prior to the day of election; and perhaps we would not be going too far to say that no honest or genuine endeavor has been made to pay them since the election, there not being a particle of testimony that any book save the cash-book shows that any payment of relator's taxes has been made. But it is urged that it nowhere appears from the testimony what taxes were arrears; that it is not shown that there was any arrears of taxes due the city. This is true, but the blank certificate given by Deputy Gerber, introduced in evidence by relator, is, to say the least of it, a tacit admission that taxes were due the city, else why recite they were paid? and, besides, the tax assessor is presumed to do his duty, and, as it was shown that Thomas had personal property, and that there were taxes due on it, it will be presumed that city taxes were also included in the list. To presume otherwise would be to presume contrary to the faithful discharge of official duty,—a presumption never indulged. *Long v. Smelting Co.*, 68 Mo. 422; *Henry v. Dulle*, 74 Mo. 443; *Bush v. White*, 85 Mo. 389; *Breckinridge v. Insurance Co.*, 87 Mo. 62; *Addis v. Graham*, 88 Mo. 197; *Lenox v. Harrison*, Id. 491; *Hammond v. Gordon*, 98 Mo. 223, 6 S. W. Rep. 93. But we are not to be understood as saying that anything short of a payment, prior to the day of election, would satisfy the demands of the charter. If the legislative function may be exercised at all as to the eligibility of candidates; if it may prescribe conditions reasonable of

course, and capable of being performed,—it is difficult to see why it may not prescribe that such conditions shall be performed or exist by a time certain, and, without this, that the candidate shall not possess the attributes of eligibility on the day of election. In a number of instances it has been ruled that such an exercise of legislative power is valid as to voters, and that, unless qualified at such a time by reason of residence, registration, or the payment of a tax, they shall not be deemed qualified at all, (*McCrary, Elect.*, 3d Ed., §§ 52, 78; *Myers v. Moffatt*, 2 Bart. El. Cas. 564;) and, in quite a recent case in Illinois, it has been held that an act was valid which denied the right to vote to all persons not registered on or before a fixed day prior to the election, (*People v. Hoffman*, 116 Ill. 587, 5 N. E. Rep. 596, and 8 N. E. Rep. 788.) To the same effect are *Capen v. Foster*, 12 Pick. 485; *In re Polling Lists*, 13 R. I. 729; *State v. Butts*, 81 Kan. 587, 2 Pac. Rep. 618; *Patterson v. Barlow*, 60 Pa. St. 54; *McCrary, Elect.* §§ 95, 96. And, certainly, no just distinction can be taken between the power of a legislative body, when exercised in regard to the qualifications of a voter and the performance of conditions precedent to the enjoyment of the elective franchise, and the performance of similar conditions on the part of those who offer themselves as candidates at the polls. We have been cited to the case of *State v. Murray*, 28 Wis. 96, as showing that such conditions precedent are of no avail, provided they be complied with anterior to taking office. But that case did not present any such feature. There were no restrictions or conditions, either constitutional or statutory, in that case; and the supreme court there very properly held that an alien might be elected to an office to commence in the future, and he become eligible thereafter, by naturalization. *McCrary, Elect.* § 311.

In the remarks heretofore made touching the qualifications of the relator, it is to be borne in mind, not only that he is the party holding the affirmative, and therefore having the burden of proof, but that, in calling upon this court to issue its writ of *mandamus*, he must show himself the possessor of a clear legal right to the remedy he seeks; and that consequently, if his evidence or his pleadings leave any essential point in doubt, such doubt will be resolved against him, and such remedy denied him. Where the right is doubtful, the mandatory authority of this court cannot be successfully invoked. *State v. Albin*, 44 Mo. 846. An attempt has been made to distinguish the case at bar from that of *State v. Newman*, 91 Mo. 445, 8 S. W. Rep. 849. It may be distinguished in fact, but certainly not in principle. There, the return showed that relator did not possess the requisite qualifications, but the writ was so evasive in its character as to be regarded by us as tantamount to an admission that the requisite qualifications were not possessed. Here, the return denies that relator possesses

the necessary qualifications in several particulars, and upon the issues thus joined the evidence adduced supports that return; but if that evidence fell short of this, if it rendered it even doubtful whether the relator was entitled to the remedy he seeks, the result must be the same; and for reasons already given, and rulings made in another case, (*Neiser v. Thomas*, 12 S. W. Rep. 725,) the injunction proceeding of *Neiser* forms no obstacle to our action in this one. Controlled by these reasons, we shall deny the peremptory writ. All concur; RAY, C. J., and BLACK, J., in the result.

BARCLAY, J. In his return to the alternative writ the respondent asserted, and all parties admit, that the circuit court, by a restraining order in the case of *Neiser v. Thomas* and *Williams*, enjoined the respondent, *Williams*, from issuing the certificate which this court is asked to compel him, by this proceeding, to issue. It is admitted that, after making the restraining order, the circuit court, upon issue joined, entered a decree vacating it and dismissing the petition in that cause. But an appeal was at once taken by *Neiser*, the plaintiff, the effect of which was to continue the original injunction in force during the appeal. The circuit court had undoubted jurisdiction to enter and enforce the restraining order as part of its general equity powers. Whether the case made by the petition was sufficient to obtain the remedy asked was a question of law, the decision of which would not affect the validity of the preliminary injunction until the decree became final. It is far from accurate to say that, because the facts stated by plaintiff did not warrant the equitable relief prayed, the court had no jurisdiction to make the original restraining order in the cause. It had such power. It exercised it. The injunction was in force pending the review of the cause upon plaintiff's appeal. During its pendency *Williams*, one of the parties enjoined, could not properly be compelled by *mandamus* to do the act forbidden by the restraining order. For this reason the peremptory writ of *mandamus* should be denied. My concurrence is not given to any ruling in this case which may imply that it is within the power of the recorder of voters of St. Louis to pass upon the qualifications of a person to hold a public office who has received the highest number of votes cast therefor at a regular election; nor does it seem to me that any issue concerning such qualifications has a proper place in the present proceeding.

BRADLEY et al. v. WELCH et al.

(Supreme Court of Missouri. Feb. 10, 1890.)

APPEARANCE—AUTHORITY OF ATTORNEY—JUDGMENT.

1. Plaintiffs, claiming to be the owners of 80 acres of land, filed 10 suits in ejectment against persons in possession of different lots; and writs of summons were duly issued in these cases. The

attorneys employed to defend them entered into a stipulation with plaintiffs which provided that in two cases to be tried as test cases, and in "suits now brought and about to be brought," defendants who have not been served with summons "enter their appearance, and waive service of summons." *Held*, that another case against defendants, in which the petition was simply lodged with the clerk of the court, with directions not to issue a writ of summons on it, and which had never been docketed as a pending cause, was not a "suit brought," within the meaning of the stipulation.

2. After the service of summons in the 10 cases, a public meeting was held, and a committee appointed to employ attorneys to defend the cases. The members of the committee did not know that any other petition had been left with the clerk; nor, in employing the attorneys, did they profess to make a contract for any person that might thereafter be sued. *Held*, that the fact that defendants attended the meeting at which the committee was appointed, and contributed to the fund to defend the suits, and that there was a general understanding that the attorneys would, for a reasonable fee, defend any other suits that might be brought, was not sufficient to constitute them defendants' attorneys.

3. Where there has been no ratification of the unauthorized act of an attorney in entering appearance for defendants, a domestic judgment entered thereon, without the service of summons on defendants, will be set aside on direct proceedings timely instituted, without regard to the question whether or not the attorney is responsible.

Appeal from circuit court, Pettis county;  
JOHN MONTGOMERY, Jr., Special Judge.

*W. S. Shirk*, for appellants. *Geo. P. B. Jackson*, for respondents.

**BLACK, J.** The plaintiffs obtained a judgment against the three defendants for the possession of five lots, and for damages and costs, at the September term, 1886, of the Pettis circuit court. The defendants Welch and Ferguson were the tenants of the defendant Julius Blondon. At the same term the defendants filed their motion to set aside and vacate the judgment; and, as grounds therefor, they state that they had no notice or knowledge of the suit, and had never been served with summons, and did not enter, or authorize any one to enter, their appearance. From an order overruling the motion they sued out this appeal.

The record discloses the following facts: The plaintiffs resided in the state of California, and are called in the record the "Price Heirs." Through their attorney, they made claim to 80 acres of land in and adjacent to the town of Smithton. In December, 1881, they filed 10 suits in ejectment against persons in possession of different lots. Writs of summons were duly issued in these cases; and they were placed upon the court docket, in the usual course of business of the court. At the same time the attorney for the plaintiffs gave the clerk six or eight petitions against other persons,—one of them being a petition against these defendants,—and directed the clerk not to issue upon them at that time. The clerk or his deputy placed them in one envelope, and made the following indorsement thereon: "Sarah E. Bradley et al. v. Sundry Parties. Filed Dec. 14, 1881. Not to be issued on until further instructions from plaintiffs' attorneys." No writs were

ever issued on any of these petitions, nor were they ever docketed as cases pending in the court. They remained in this envelope until 1884, when Mr. Jackson, the plaintiffs' attorney, got them from the clerk, for the purpose of having judgments entered thereon. When the writs in the 10 suits were served, many of the citizens of Smithton held a meeting, and a committee was appointed to employ attorneys to defend the cases. The committee employed attorneys, who executed the following receipt: "Price Heirs v. W. C. Overstreet. Same v. Nine Other Suits. Sedalia, Mo., Dec. 24, 1881. Received of W. C. Overstreet, H. Deaman, James Cook, Joe Warren, committee for the Smithton people, per hands of Jesse Fowler, one hundred dollars, being fifty dollars retainer fee for W. W. S. Snoddy and fifty dollars retainer fee for H. C. Sinnett, in said suits, pending in the circuit court of Pettis county, Missouri. Said one hundred dollars being one-half of the fee for said suits, and the balance to be paid at the termination of said suits. Said total fees to be for services in the said circuit court and supreme court, if carried there. For any future suits brought by the Price heirs, a reasonable fee for services in doing work, in drawing answers therein, shall be paid to said Snoddy and Sinnett. H. C. SINNETT. W. W. S. SNODDY." The defendant Blondon attended the meeting at which the committee was appointed to engage lawyers, and took part in it. He, as well as many others, who were not sued, and others who were not in the disputed district, contributed to the fund raised to pay the attorneys in the 10 suits. The proof is clear that he did not, until the present judgment was entered, in 1886, know that any petition had been filed against him or his tenants; and the persons composing the committee had no knowledge that any suits had been brought except the 10 in which writs had been issued. Sinnett and Snoddy appeared for the defendants in these 10 suits, and stipulated with the attorney for the plaintiffs to try the case against H. L. Cook, and let the other cases abide the result. In this stipulation they profess to act for H. L. Cook and "the defendants in all of the other cases brought by said plaintiffs." A change of venue was awarded the plaintiffs, in the case against H. L. Cook, to Lafayette county; but, a jury being waived in that court, the cause was sent back to the Pettis circuit court for trial with the other cases. In the mean time, Sinnett and Snoddy became anxious to take the case against James Cook—it being one of the ten duly docketed—for a test trial, and desired a continuance. The substitution was made, and a continuance agreed to, by a stipulation made and filed in the two Cook Cases, dated December 1, 1883. Among other things, this stipulation provides that the attorney for the plaintiffs, and the attorneys for defendants in the two Cook Cases, and "in suits now brought, and about to be brought," for the recovery of the 80 acres, agree as follows:

"That all who are now defendants, or who shall be made defendants, and who have not already been served with summons, enter their appearance, and waive service of summons; and the signing hereof shall be the evidence thereof, without more. And it is further stipulated and agreed that each of said persons claiming the several parts of said land, whether already sued or not, admit the possession of the part for which they have been, or are to be, sued," etc. The Missouri Pacific Railway Company is excepted. A trial of the James Cook Case, in 1884, resulted in a judgment for plaintiffs; and thereupon the attorney for the plaintiffs presented to the court the stipulation before set forth, and the court ordered the clerk to enter a judgment against the defendants in this case. These judgments were set aside, and a new trial awarded in the Cook Case. The second trial of that case occurred in September, 1886, and the plaintiffs again recovered; and thereupon the court, on motion of plaintiffs' attorney, ordered the judgment to be entered in this case, which the defendants seek to set aside. Mr. Sinnett testified, in substance, that he had nothing to do with the Smithton suits, except those which appeared upon the court docket; that he had no knowledge of the other alleged suits until September, 1886; and that he did not know that a judgment had been entered in this case in 1884, at the time of the first trial of the Cook Case. Says he told Mr. Jackson, when he signed the stipulation of December 1, 1883, that he did not have the authority; that he and Snoddy only represented the cases then on the court docket. On the other hand, Mr. Jackson testified that he called Mr. Sinnett's attention to these cases in which the parties had not been served about the time a change of venue was awarded in the Cook Case; that it was always understood Sinnett and Snoddy would enter the appearance of the defendants in the cases not appearing upon the court docket, but the matter was neglected until they signed the stipulation.

1. There is but one thing upon which plaintiffs can rely to give the court jurisdiction of these defendants, and that is the stipulation of the attorneys, Sinnett and Snoddy, of December 1, 1883, and filed in the two Cook Cases. That stipulation, in so far as it relates to "suits brought," can have no application to this case. This suit was not brought when the stipulation was signed. The petition, with a number of others, was simply lodged with the clerk, with directions not to issue upon it, and for a period of two years had not been docketed as a cause pending in the court. In fact, it never was docketed as a pending cause. In no fair sense of the expression can it be said the suit was one then brought. The circumstances tend strongly to show that these petitions were unknown to Sinnett and Snoddy when they signed the agreement. But the stipulation is far-reaching; for it professes to waive service and enter the appearance of all defendants

not then served "in suits now brought, and about to be brought," for the recovery of parts of the 80 acres. It is certainly a most remarkable agreement, either to be made or accepted by attorneys. The usual practice is, when attorneys attempt to enter the appearance of a defendant, to have the cause docketed, and to make a formal order upon the record in the particular case. If plaintiffs will rely upon such a wholesale waiver of service upon unnamed defendants, they must see to it that the attorneys making the stipulation have the authority. In accepting such a waiver, they do so at their peril, where the proceeding to vacate the judgment is a direct one, as it is here.

2. The evidence shows, beyond question, that when the persons constituting the committee employed Sinnett and Snoddy to defend the 10 cases they did not know that any other suits had been filed. They did not profess to have authority to make a contract for any person that might be thereafter sued. One of them says, in positive terms, that they had no such authority. The fact that the defendant Blondon attended the meeting at which the committee was appointed, and contributed to the fund raised to defend these 10 suits,—and that is all he did do,—would not make the attorneys engaged in those suits his attorneys for any suit that might thereafter be brought against him. The members of this committee had reason to believe that suits against other persons would be instituted; and hence there seems to have been a general understanding between them and the attorneys that the latter would defend any other suits that might be brought for a reasonable fee. This much is indicated in their receipt. But no persons were named or designated; and the arrangement was necessarily a general and indefinite one, subject to the acceptance of those who might thereafter avail themselves of it. It has been held that an attorney at law has no authority, by virtue of his general retainer, to waive service for his client of original process by which the court acquires jurisdiction for the first time of the person of the client. 1 Wait, Act. & Def. 489; Masterson v. Le Claire, 4 Minn. 163, (Gil. 108;) Starr v. Hall, 87 N. C. 383. The principle upon which the rule is founded is that it is not within the scope of the duty of an attorney to admit service of original process; that the exercise of such a power is rather the act of an agent or attorney in fact than that of an attorney of the court, and he should have special authority for it. Weeks, after speaking of the former method of appointing attorneys, says: "And now, although an attorney cannot, without special authority, admit service of jurisdictional process upon his client, yet it has been presumed in collateral proceedings, and on appeal or in error, that a regular attorney at law, who appeared for a defendant, though not served, had authority to do so." Weeks, Attys. 338. But, from the evidence in this case, we must say that Sinnett and Snoddy

were not the attorneys of these defendants, for the defendants never availed themselves of the general and indefinite arrangement made by the committee. It required some further act on their part to bring about the relation of attorney and client.

3. It is now the settled law of this state that in a suit upon a foreign judgment the defendant may plead and show as a defense that in the original suit no service was had upon him, and that his appearance, entered by an attorney, was unauthorized. He will not be required to go to the state where the judgment was rendered, and by some proceeding have it set aside. *Marx v. Fore*, 51 Mo. 69; *Eager v. Stover*, 59 Mo. 87; *Barlow v. Steel*, 65 Mo. 619; *Napton v. Leaton*, 71 Mo. 367. This is a direct proceeding to set aside the judgment entered upon the unauthorized appearance by an attorney; and, whatever may have been the state of the law at one time, it is now generally held that a domestic judgment, entered without the service of summons on the defendant and on the unauthorized appearance of an attorney, may be set aside on motion timely made in the court which rendered the judgment. The relief will be granted without regard to the question whether the attorney is responsible or not. *Freem. Judgm.* § 499; *Harshey v. Blackmarr*, 20 Iowa, 161; *Critchfield v. Porter*, 3 Ohio, 519; notes to *Bunton v. Lyford*, 75 Amer. Dec. 144; *Bayley v. Buckland*, 1 Exch. 1. In thus stating what we believe to be the correct rule, we do not include those cases where the judgment defendant has in some way ratified the unauthorized act of the attorney. No ratification appears in this case. On the contrary, it appears the defendants knew nothing about this suit until *Blondon* saw a notice of the judgment in the newspapers. It results from what has been said that the motion should have been sustained; and the judgment is reversed, and the cause remanded, with directions to the trial court to sustain the motion. All concur.

#### HEIDELBURG v. ST. FRANCOIS COUNTY.

(Supreme Court of Missouri. Feb. 10, 1890.)

##### COUNTIES—CONTRACTS—BRIDGES—ESTOPPEL.

1. Where a road commissioner contracts orally with plaintiff to do certain work on a bridge, without advertising the time and place of letting the contract, or in other respects complying with the provisions of Laws Mo. 1883, §§ 4314-4320, relating to the building of bridges, the contract is void.

2. Rev. St. Mo. 1879, § 1218, which provides that if a claim against a county be for work done or materials furnished in good faith by the claimant, under contract with the county authorities, the claimant shall be entitled to recover, though the authorities, in making the contract, may not have pursued the form prescribed by law, has no connection with the special statute in relation to bridges, which confers special powers, and prescribes a special method for their exercise and execution.

3. The acceptance by the commissioner of a bridge built under a contract which is void because the law has not been complied with, and the acceptance by the county of the commissioner's report, and payment of a claim for work done on the

bridge, will not preclude the county from denying the validity of the contract, as the doctrine of estoppel does not apply to counties.

BARCLAY, J., dissenting.

Appeal from circuit court, St. Francois county; JAMES D. FOX, Judge.

The facts developed in this cause were that the county court wanted to build a bridge over Big river, and the court and commissioner agreed upon certain plans and specifications for the building of the bridge, advertised the letting as provided for by law, and the J. A. Bullen Bridge Company was the lowest bidder for the building of the same, and the contract was made by the commissioner in accordance with the plans and specifications. The commissioner made report of the cost of the bridge before advertising and letting to the lowest bidder, and the county court made an appropriation for the payment for the building, under plans agreed on with the Bullen Bridge Company. Before the Bullen Bridge Company commenced work under their contract, the commissioner contracted with plaintiff to build the abutments and pier wider and longer; and it was under this parol contract for extra work that plaintiff sought to recover. On the conclusion of the testimony, the trial court gave a declaration of law, to the effect that on the pleading and evidence the plaintiff was not entitled to recover, and judgment for the defendant. Hence this appeal.

*W. M. Carter and Smith, Silver & Brown*, for appellant. *Merrill Pipkin*, for respondent.

SHERWOOD, J., (after stating the facts as above.) At the time when these matters mentioned in the petition occurred, the law relating to bridges had been changed by the act approved March 14, 1883, and that act was in force. Laws 1883, p. 31. Sections 4314, 4316, 4317, 4319, 4320 of the amendatory act are as follows: "Sec. 4314. If the county court be of opinion that a bridge is necessary, and that it shall be built at the expense of the county, they shall determine in what manner, and of what materials, the same shall be built, and the probable cost thereof, and shall order the road commissioner to let the contract for building such bridge, and for keeping the same in repair not less than two nor more than four years, to be determined by the county court." "Sec. 4316. The commissioner shall do nothing towards building the bridge, after the letting thereof, until an appropriation for the same shall first be made by the county court." "Sec. 4317. Unless the court, from its own information, shall be satisfied as to the expense of building the bridge, it shall be the duty of said court to require the commissioner to proceed to the spot where the bridge is to be built, and make an accurate estimate of the cost of building the same, according to any plan or plans ordered by the court, or such as in his opinion may be best, and without delay make report thereof." "Sec. 4319.



The commissioner shall advertise the time and place of letting the bridge at three public places in the township where such bridge is to be built, or by publication in some newspaper published in the county, or both, as the court may direct, for not less than twenty days prior to letting the same." "Sec. 4320. He shall let the same, subject to approval or rejection by the court, by public outcry, to the person making the lowest bid. If such letting be approved by the court, it shall make an appropriation for building such bridge, and order the commissioner to contract therefor at the price let, who, in contracting, shall take bond, payable to the county, with two good and sufficient householders as securities, in such penalty as he shall deem sufficient to cover all damages which may accrue from the breach of such contract."

Section 1218, Rev. St. 1879, on which plaintiff relies, is the following: "If a claim against a county be for work and labor done, or material furnished, in good faith, by the claimant, under contract with the county authorities, or with any agent of the county lawfully authorized, the claimant, if he shall have fulfilled his contract, shall be entitled to recover the just value of such work, labor, and material, though such authorities or agents may not, in making such contract, have pursued the form and proceeding prescribed by law." I have traced that section to its origin, and find it was enacted in 1863, (Laws Id., p. 110, § 3,) under the caption of "Treasuries; County." It would seem, from this brief history of the section, that there is no necessary connection between it and the special statute in relation to bridges. When special powers are conferred, or where a special method is prescribed for the exercise and execution of a power, this brings the exercise of such power within the purview of the maxim, *expressio unius*, etc., and, by necessary implication, forbids and renders nugatory the doing of the thing specified except in the particular way pointed out; and this rule obtains as well in regard to the organic law as to the statutory law. The familiar principle here announced is tersely uttered by the English court of exchequer in a comparatively recent case, where it is thus expressed: "If authority is given expressly, though by affirmative words, upon a defined condition, the expression of that condition excludes the doing of the act authorized under other circumstances than those so defined. *Expressio unius est exclusio alterius*." *Coal Co. v. Ward*, L. R. 8 Exch. 172; *Smith v. Stevens*, 10 Wall. 321; 1 Kent, Comm. 467, note d; 1 Sugd. Powers, 258 et seq.; *City of New Haven v. Whitney*, 36 Conn. 373; *District Tp. v. City of Dubuque*, 7 Iowa, 262; *Railroad Co. v. City of Savannah*, 30 Fed. Rep. 649; *Mayor v. Ray*, 19 Wall. 475; *Thomas v. Railroad Co.*, 101 U. S. 82; *Broom, Leg. Max.* 651, 664; *And. Dict. Law*, 436 et seq. "Affirmative specification excludes implication." *Maguire v. Association*, 62 Mo. 344; *State v. Laughlin*, 73 Mo. 449; *Rannells*

*v. Gerner*, 80 Mo. 480; *Dwar. St.* 655, and cases cited; *Ex parte Snyder*, 64 Mo. 61.

If these authorities are to be our guide, I see no refuge from the conclusion that the provisions of the statute in relation to bridges must dominate this case. But grant that section 1218 is to be considered in connection with the other sections already set forth, I do not see how this concession will better the position of the plaintiff; for certainly, under the statutory provisions already quoted in relation to bridges, the road commissioner could not be regarded as the "agent of the county, lawfully authorized," when he was proceeding in entire disregard of the plainest statutory provisions. Murphy, the road commissioner, was only "lawfully authorized" when he took the steps pointed out in the bridge law.

But the concession may be made that Murphy was "lawfully authorized," and still this broad concession will avail the plaintiff nothing, because, according to his own admission as a witness, he had not complied with the liberal provisions of section 1218. He had not built the abutments up to the specified height, even under his parol contract with Murphy.

Again, inasmuch as the law in relation to bridges has been materially modified by the act of 1888, it may well be held that, being a subsequent and inconsistent law, it repeals any inconsistent provision which section 1218 contains, in consequence of such repugnancy.

But it is said, in substance, in one of plaintiff's declarations of law, that, inasmuch as the bridge commissioner received and accepted the abutments and pier built by plaintiff, and the county court accepted said report, and paid the Bullen Bridge Company for its work, that thereby the county is estopped from resisting a recovery by plaintiff. The doctrine of estoppel does not apply to counties. Nor could the county, even by an order entered of record, ratify the void act of the bridge commissioner, (*Wolcott v. Lawrence Co.*, 26 Mo. 272,) for the reasons that, his acts being void, they were incapable of ratification, (26 Mo., *supra*; *Johnston v. Wilson*, 2 N. H. 202, and cases cited; *Johnson v. School-District*, 67 Mo. 319; *Maupin v. Franklin County*, Id. 327, and cases cited.) These views result in affirming the judgment.

RAY, C. J., and BLACK and BRACE, JJ., concur. BARCLAY, J., dissents.

#### HOME INS. CO. v. STONE RIVER NAT. BANK.

(Supreme Court of Tennessee. Jan. 14, 1890.)

INSURANCE—WAIVER OF CONDITION—ACTION ON POLICY—EVIDENCE.

1. The delivery by an agent, who has been informed by the assured that the building is on leased land, of a policy in which that fact is not noted in writing, amounts, in the absence of collusion, to a waiver of the condition requiring it, though the policy provides that "the use of general terms, or anything less than a distinct agree-

ment indorsed on the policy, shall not be construed as a waiver of any restriction therein."

2. Parol evidence in such case that the agent was so informed, does not alter or vary the terms of a written contract.

8. Where the assured testifies that he told the agent that the building was on leased land, and the agent says that if such information was given he did not hear it, but afterwards states that he had an impression that it was on leased land, a finding that he was so informed will not be disturbed.

4. Where the company is to pay the cash value of the property at the time of loss, not exceeding the sum named, recovery cannot be had without proof of the value of the property destroyed; and this is not waived by an agreement that preliminary proof of loss had been duly made.

5. That the assured applied for \$3,000 insurance, and was allowed \$2,000, and the loss was total, is not sufficient to show cash value at the time of loss, several months later.

6. On reversal of judgment for assured, the case will be remanded, but at his cost, where it seems he is entitled to recover, but the amount is not shown, owing either to misunderstanding, or a waiver of evidence of preliminary proof of loss, or to error of the judge in ruling as upon a valued policy.

Error to circuit court, Rutherford county; CANTRELL, Judge.

J. C. Bradford, for plaintiff in error.  
Palmer & Palmer, for defendant in error.

FOLKES, J. This was an action at law to recover the amount of a policy of insurance for the sum of \$2,000, issued by the plaintiff in error upon a "one-story brick, metal-roof building, situated in the town of Murfreesborough, Tennessee," the property of defendant in error. To the declaration the defendant pleaded *nil debet* and *non assumpsit*. The case was tried by the circuit judge without the intervention of a jury, resulting in a judgment for the full amount of the policy, with interest. Motion for a new trial having been overruled, the defendant has appealed in error.

The policy contained among its printed provisions the stipulation that "if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured, or if the building insured stands upon leased grounds, it must be so represented to the company, and so expressed in the written part of the policy; otherwise, the policy shall be void." It was agreed at the trial below that the house insured stood on leased ground; that the building belonged to the bank, and the ground to the Nashville, Chattanooga & St. Louis Railway Company; that the lease was made in March, 1868, to run for 20 years; that the bank had made out and furnished to the insurance company the preliminary proofs of loss as required by the policy, and proof of the fact that such preliminary proofs of loss had been so furnished was waived. It was not stated in the written portion of the policy that the house insured stood upon leased ground. Proof was admitted, over the objection of counsel for the company, that the cashier of the bank, at the time the insurance was applied for, informed the local agent of the company, who countersigned and issued the policy, that the

house sought to be insured stood upon leased ground. The agent, in his testimony, says if such information was given he did not hear it; but further on in his proof the agent says that he "had an idea that the house stood upon leased ground." Both the agent and the cashier were residents of the town of Murfreesborough, and the locality of the building, near the depot, was well known. Without imputing the slightest dishonesty to the agent, the circuit judge has found as a fact, from the proof, that such information was given at the time of the application, and that the agent, in a few days thereafter,—perhaps the next day,—delivered the policy, folded, to the cashier of the bank, who paid the premium to the agent, and, without reading it, put the policy among the valuable papers of the bank, and did not know, until after the fire, its contents. There was no written application. The trial court held that the issuing and delivery of the policy, with the knowledge of the agent concerning the fact that the house stood on leased ground, without calling the attention of the assured to the clause in question, amounted to a waiver of the condition, leaving the company liable as though no such condition had been contained in the policy. This is assigned as error. For the plaintiff in error, it is insisted that parol evidence of a notice to the agent is inadmissible as tending to vary the terms of the written contract; that mere knowledge on the part of the agent is of no avail to the assured, if not indorsed or written in the policy, where the instrument itself requires such writing; and that such is certainly the rule at law, whatever may be the relief obtainable in equity.

It is not to be denied that each of the above contentions is sustained by the authority of adjudged cases. But it is equally true that the converse of each proposition is amply fortified by numerous adjudications of the highest authority. The question has been so much discussed, and the grounds upon which the antagonistic conclusions rest are so familiar, that it would be unprofitable, at this late day, and certainly unprofitable, to attempt a review of cases, or a criticism thereof. We content ourselves, therefore, with a statement of our holding. The knowledge of the agent that the building sought to be insured stood upon leased ground, obtained by the direct information furnished by the assured, amounts to a waiver of the printed condition requiring the fact to be written in or upon the policy, and, in the absence of collusion between the assured and the agent to mislead the company, is binding upon the latter. To so hold is not to innovate upon the general rule concerning the inadmissibility of parol proof to alter or vary the terms of a written contract. The ground of the company's liability in such cases is that the knowledge of the agent is in law the knowledge of the principal; and to permit the insurance company, possessed of such knowledge, and itself required to do

the writing upon the policy, to accept the premium, and deliver the policy containing such condition, without writing the fact thereon, would be to allow the company to perpetrate a fraud upon the assured. It would virtually be allowing the company to accept the money of the assured in payment for a policy known to the company to be void and inoperative at the moment of its issuance, and, with this knowledge, permit it to retain the money, leaving the assured under the false impression that he has a valid insurance upon, and protection to, his property, and to remain under such impression until his property is destroyed. He is then to be told by the company that "You have no insurance, and you have never had any, under the policy, as was known to us at the time of its delivery, and has been known to us ever since." When the insurer undertakes the preparation of the contract, he will be estopped to take advantage of the failure of the instrument, signed alone, as it is, by himself, to express any fact that has been duly communicated by the assured, and omitted by the negligence, mistake, or design of the insurer, its officers or agents.

The result is not changed nor affected by the other clause, which reads that "the use of general terms, or anything less than a distinct, specific, agreement, clearly expressed and indorsed on the policy, shall not be construed as a waiver of any printed or written restriction therein." This clause may be operative to restrict or confine the meaning of a written waiver; but, so far as it is relied on to defeat the waiver which the law raises and makes, under the facts of this case, it is true, and answered by the principle which disposes of the clause as to leased grounds. In other words, it can add nothing to the support of the position contended for by counsel of the insurance company. If he cannot stand on the clause first quoted, he can find no refuge in the one last mentioned. See *May, Ins.* §§ 131, 132, and cases cited in notes; *1 Wood, Ins.* pp. 195-207, §§ 88-90, and cases cited in notes; *Insurance Co. v. Well*, 28 *Grat.* 389; *Insurance Co. v. Myers*, 55 *Miss.* 479. But, without multiplying citations from other states, we have only to turn to our own Reports to see the tendency and scope of the decisions in this state, leading inexorably to the conclusion we have announced. *Delahay v. Insurance Co.*, 8 *Humph.* 684; *Insurance Co. v. Barker*, 7 *Heisk.* 504; *Insurance Co. v. Sorrels*, 1 *Baxt.* 352; *Insurance Co. v. Crockett*, 7 *Lea*, 726. It was held in *Insurance Co. v. McCrea*, 8 *Lea*, 541, that delivery of a policy without demanding payment is a waiver of the clause that the policy shall not be considered as binding until the actual payment of premium. And in *Insurance Co. v. McCrea*, *Id.* 513, it was held that a condition against running at night is waived by a delivery of the policy with a full knowledge on the part of the agent, who had countersigned and delivered the policy, that the manufactory was then,

and had constantly been, operated at night; and that a general provision of a policy allowing additional insurance, to a specified amount, waives, to that extent, a condition requiring notice and indorsement of existing or subsequent insurance; and this, too, in a policy containing the clause limiting the use of general terms, similar to the one in the case at bar.

It is, however, urged by counsel that, if we should hold that knowledge of the agent can operate as a waiver of such a stipulation as we have here, the rule ought not to be applied to this case, because the proof fails to show the agent heard and understood the statement of the cashier of the bank that the property stood on leased ground, and that the waiver must be made intentionally, and with full knowledge. It is sufficient to say that we have the positive testimony of the assured, against the negative evidence of the agent, and that the finding of the circuit court, upon such a state of the record, is, under the rule in this court, conclusive of the fact of full knowledge. With the knowledge conclusively established, and the conduct of the agent shown, in writing and delivering the policy, receiving premium therefor, the law presumes the intentional waiver, upon the principles already stated.

It is next assigned as error that the plaintiff below "failed to introduce at the trial any proof of the value of the property destroyed, or of the amount or extent of the loss." The undertaking of the company, as expressed in the policy, was "to make good \* \* \* all such immediate loss or damage, not exceeding in amount the sum specified, (\$2,000,) as shall happen by fire to the property specified; \* \* \* the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid 60 days after due notice, and proofs of the same, shall have been made by the assured, and received at the office of the company in New York," etc. This assignment must be sustained. The record does fail to show any effort to prove the actual cash value of the property at the time of the loss. It is proven that the property was totally destroyed, and that preliminary proofs of loss had been made and forwarded as required by the terms of the policy. Now, however sufficient this proof might be in a suit on what is known as a "valued policy," it is manifest that such proof will not authorize a judgment against the company for the full amount of the policy where, by the terms of the contract, the company is to pay only the cash value of the property at the time of the loss, not exceeding the amount named in the policy. The fact that it was agreed that the preliminary proofs of loss had been duly furnished, and the waiver of proof of such fact, does not relieve the assured of the burden of proving at the trial the extent of his loss, and the cash value thereof at the time of the loss. The agreement was effectual only to show that the condition precedent to the ma-

turity of the policy and right to sue had been performed by the furnishing of such "preliminary proofs of loss." The preliminary proofs of loss are never admissible at the trial as evidence of the fact of loss, or the amount thereof. If authorities be desired for so plain a proposition, they may be found in *Insurance Co. v. Stibbe*, 46 Md. 302; *Breckinridge v. Insurance Co.*, 87 Mo. 62; *Hiles v. Insurance Co.*, 65 Wis. 585, 27 N. W. Rep. 348.

It is said by counsel for the insured that the proof that the bank sought \$3,000 of insurance, and that the agent fixed it at \$2,000, coupled with the fact that the loss was shown to be a total one, furnishes evidence of value of property destroyed sufficient to sustain the judgment. We do not think so. It may show the estimate placed by the assured and the insurer upon the property at the time of the insurance, but does not show the actual cash value at the time of the loss, some months thereafter.

Inasmuch as it is manifest from the record that either the trial judge was mistaken in applying the law concerning valued policies in this case, or the assured was unintentionally misled by the agreement dispensing with evidence of preliminary proof of loss,—one or both,—we will reverse the judgment, and remand the cause for a new trial. It is true that we might be authorized to render judgment here for the plaintiff in error because of the failure of the plaintiff below to make out his case. But where we see, as we do here, that the plaintiff below is entitled to some recovery, the amount of which is not shown, owing either to the error of the trial judge upon the law of the case, or to a misunderstanding of an agreement of counsel, without culpable negligence, we undoubtedly have the power to remand for further proof, which the record shows is attainable. The judgment is therefore reversed, at cost of defendant in error, and cause remanded.

#### FRIZZELL v. RUNDLE *et al.*

(*Supreme Court of Tennessee. Jan. 21, 1890.*)

##### CHATTEL MORTGAGES—RECORD—AUCTIONEERS.

The registration of a chattel mortgage is not notice thereof to an auctioneer who, in the regular course of business, sells the property, and pays over the proceeds to the mortgagor, and, in the absence of actual notice, he is not liable to the mortgagee.

Appeal from circuit court, Davidson county; Wm. K. McALISTER, Judge.

Action by John R. Frizzell against I. T. Rundle & Co., to recover the value of chattels mortgaged to plaintiff by one Anglin, and sold for Anglin by defendants, as auctioneers. Plaintiff appeals from a judgment for the defendants.

*Frizzell & Zarecor*, for appellant. *Bryan & Cartwright*, for appellees.

LURTON, J. One Anglin executed to Frizzell, the plaintiff, a mortgage upon his household furniture, to secure the latter as the

surety of the mortgagor upon certain rent notes. The property mortgaged was in the residence of the mortgagor, and was to remain in his custody and possession until the maturity of the notes. It was stipulated that, should the mortgagor remove, or attempt to remove, the property, or attempt to sell same, then the mortgagee should have the right to take possession; and that in such event, or in case default was made in payment of the secured debt, Frizzell should sell said property, publicly or privately, and apply it to payment of debt. The mortgagor obtained consent of the mortgagee to a removal of the property from the residence in which it was to another part of the city, and to another house, upon the statement that he had rented another residence. In place of such a removal, he fraudulently took the mortgaged articles to the auction house of defendants, and caused them to be then sold at public sale. Rundle & Co. are regular auctioneers, and had no actual notice of the mortgage upon the property; and they paid over the proceeds of sale to Anglin before notice of Frizzell's right. Having sold the property for cash, and at a sale with many other articles of the same sort, and keeping no memorandum of the buyers, they are unable to state who became purchasers of the mortgaged property. Frizzell has sued them, upon these facts, in trover, or for a conversion. The mortgage made by Anglin was duly registered. This property was sold by defendants in the usual course of their business as auction commission merchants.

Unless the registration of the mortgage operates as constructive notice, they must be regarded as innocent agents or factors, who have secured the property in the regular course of their business, and sold it as agents for the one who had delivered it to them, and paid over the proceeds to their principal, without knowledge of any incumbrance on his title. The case is controlled in this aspect by that of *Roach v. Turk*, 9 Heisk. 708. Having asserted no lien, claim, or title for themselves, as against the mortgagee, they cannot be held guilty of conversion. A different result would, perhaps, follow if they had been shown to have had knowledge of the true state of Anglin's title. Will the registration of this mortgage operate as constructive notice to defendants? If they assert any title or lien or interest in the mortgaged property, then, beyond doubt, they would be affected by the registration. But they do not, and have not, asserted any claim to the mortgaged property whatever. The constructive notice consequent upon registration attaches only to persons who subsequently assert any title, charge, or lien, or interest in the property described in the registered instrument, and only in favor of the grantees in such instrument. It is, for instance, well settled that a subsequent purchaser from the grantor will not, as between himself and such grantor, be charged with notice of the state of his vendor's title as shown by the regis-

tered title. He may, as between himself and his grantor, rely upon the representations of the latter as to his title, and will not be bound by the registered title, of which he has not actual notice. *Napier v. Elam*, 6 Yerg. 108; *Ingram v. Morgan*, 4 Humph. 66; *Topp v. White*, 12 Heisk. 165. Defendants, having neither actual nor constructive notice of the mortgage, and having in the whole matter acted only as the innocent agent or factor of the mortgagor, with whom the possession had been left, are not guilty of conversion; and the judgment is affirmed.

**PICKLE v. PEOPLE'S NAT. BANK *et al.***

(*Supreme Court of Tennessee. Jan. 16, 1890.*)

**BANK-CHECKS—PAYMENT—ACCEPTANCE.**

1. Possession by a bank of an undorsed check drawn on it in favor of complainant or his order, coupled with evidence that it was not its custom to require a payee to indorse the check when paid to him in person, is not sufficient to show payment to him, when denied by him.

2. The holder of a check cannot sue the bank on which it is drawn, unless it has been accepted by the bank.

3. Where a bank has paid a check drawn on it to one not the payee or his indorsee, and charged and deducted the amount on settlement with the drawer, its conduct amounts to such acceptance as will enable the payee to sue upon it. *SNODGRASS and CALDWELL, JJ.*, dissenting.

4. Whether the check has been accepted in such case is rather a question of weight of evidence than of commercial law, so that a state court need not follow a decision of the United States court for the sake of uniformity in commercial law. *SNODGRASS and CALDWELL, JJ.*, dissenting.

5. It is immaterial, in such case, that it does not appear that the check was delivered to complainant, or how it came into possession of the bank, as by suing upon it the payee ratifies the receipt of the check on his account, though not its subsequent collection.

Appeal from chancery court, Bedford county; **WALTER S. BEARDEN**, Chancellor.

*Cooper & Frierson*, for complainant. *Ivie & Ivie* and *Myers & Dayton*, for defendants.

**LURTON, J.** This is a bill in equity to recover the sum of \$600, which complainant charges is due to him from either the People's National Bank or John T. Meese, both of whom are made defendants. The bill, in substance, alleges that Meese, being indebted to complainant in the sum of \$600, claims on the 26th of March, 1887, to have paid the debt in a check drawn by himself, against his account with the defendant bank, payable to complainant or his order, and that the check had been paid by the bank, and charged up against his account. The defendant bank claims that the check was presented to it for payment by complainant in person, and that it was paid to him. Complainant charges that the check has never been paid to him, or to his order, or to any one authorized by him. Upon these facts he prays for a decree against the defendants or either of them, as the law and facts may justify. The defendant Meese, in his answer, admits the indebtedness as charged, but insists that

he has fully paid same by drawing and delivering his check for the sum of \$600 to complainant, and that the check has been paid by the drawee to Thomas Pickle, and charged up to the account of the drawer. The answer of the bank admits the drawing of the check by Meese, payable to Thomas Pickle or order, and claims that it was presented by the payee, and paid to him in person. It admits that the check has never been indorsed by complainant, but insists that it never required the indorsement of such a check when presented for payment by the payee in person. The officers of the defendant bank do not in their depositions pretend to any memory as to the payment of this check. They prove that it was the rule and custom of the bank to require the indorsement of all checks drawn against it where the check is payable to the payee or order, when presented for payment by one other than the payee, but that, when presented by the payee in person, they do not require his indorsement; that the check in question bears the bank stamp of payment as of March 28, 1887, and has no indorsement; and that, in view of their custom or rule, they would not have paid such a check to any one but complainant, unless indorsed by him. They further insist that the possession of such a check raises a presumption that it was paid to the payee named in the check.

The possession of an order by the person upon whom it is drawn is *prima facie* evidence that the articles or money specified therein were delivered or paid according to the order. *Kincaid v. Kincaid*, 8 Humph. 17; 2 Daniel, Neg. Inst. § 1647. This presumption is, however, rebutted by the positive and uncontradicted testimony of complainant that he in fact never did collect the check, or authorize any one to collect it for him. We have considered all the circumstances relied on by the defendant as tending to support the presumption of payment to complainant in person, and are of opinion that the weight of proof is that the check has never been paid to complainant. The custom of the defendant bank to pay such checks as the one now under consideration, to the payee, without his indorsement, is the occasion of this litigation. The contrary is the usage of commerce. Such a check, returned to the drawer when paid, and credited to his account, with the indorsement of the payee, would be a voucher for such payment in favor of the drawer against the payee. But, without such indorsement, it would not be evidence, as between drawer and payee, of such payment. 2 Daniel, Neg. Inst. § 1648. The almost universal custom of business is to make checks payable to the payee or order, for the purpose of making the check a voucher for the payment; so the indorsement by the payee would furnish the banker very high evidence of payment in accordance with the direction of the drawer. A check drawn in favor of a particular payee or order is payable only to the actual payee,

or upon his genuine indorsement; and, if the bank mistake the identity of the payee, or pay upon a forged indorsement, it is not a payment in pursuance of its authority, and it will be responsible. *Morgan v. Bank*, 11 N. Y. 404; 2 *Daniel*, Neg. Inst. §§ 1618, 1663; *Bank v. Whitman*, 94 U. S. 343.

This brings us to the question as to whether complainant can recover upon this check as against the bank. While the authorities are not agreed, yet the decided weight of opinion is that the holder of a bank-check cannot sue the bank for refusing payment, in the absence of proof that it was accepted by the bank, or that it has done some other act equivalent to and implying acceptance. This has been the uniform view of this court. *Bank v. Merritt*, 7 Heisk. 177; *Bank v. Kee-see*, Id. 200; *Imboden v. Perrie*, 13 Lea, 504. In the latter case the reasons for this doctrine are forcibly stated and the authorities collated by Judge TURNER. We are unable to see any reason for disturbing the rule as heretofore declared by this court, especially as the decided weight of authority is in accord with our decision. *Bank v. Millard*, 10 Wall. 152; *Bank v. Whitman*, 94 U. S. 343; *Carr v. Bank*, 107 Mass. 45; *Bank v. Bank*, 46 N. Y. 82; *Bank v. Cook*, 73 Pa. St. 485; *Saylor v. Bushong*, 100 Pa. St. 23; *Purcell v. Allemong*, 22 Grat. 742; *Bellamy v. Majoribanks*, 8 Eng. Law & Eq. 523.

Has there been any acceptance by the defendant bank of the check in question? It is argued that the check, having been charged up to the account of the drawer, and returned to him, is tantamount to an acceptance. The authorities are not agreed as to the effect of such an act. The case of *Bank v. Millard* was the case of a payment made of a check upon a forged indorsement. It did not appear that the check had been charged to the drawer, and there was a judgment in favor of the bank. Mr. Justice DAVIS, in delivering the opinion of the court, in speaking of the effect of such a charge, said: "It may be, if it could be shown that the bank had charged the check on its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule *ex æquo et bono* would be applicable; as the bank, having assented to the order, and communicated its assent to the paymaster, would be considered as holding the money \* \* \* for the plaintiff's use, and therefore under an implied promise to him to pay it on demand." 10 Wall. 157. In the subsequent case of *Bank v. Whitman* the very question arose, when the court, through Mr. Justice HUNT, held that such a charge, having been made through mistake, and upon the assumption that it had in fact paid the check to one authorized to collect it, would not authorize the presumption of an acceptance and promise to pay it again. 94 U. S. 347.

Upon the question of commercial law, we should be generally inclined to follow any

well-settled line of decisions by the supreme court of the United States when the question was in this state *res integra*. This question can hardly be regarded as one of "commercial law," in the ordinary sense of the phrase. It is rather a question as to weight and sufficiency of evidence tending to prove an acceptance. We agree that the holder of a check, for want of privity, cannot recover upon the check against the bank, unless he can show an acceptance. The question presented is as to the weight to be attached to certain acts done by the bank, and the inference fairly to be drawn from these acts. Where a bank has negligently paid a check to an improper person, it would seem that, in good conscience, the true owner and payee ought not to be remitted to his action against a palpably insolvent drawer, for thereby he may lose his debt altogether. A legal principle, however, stands in the way, in that there is no privity between himself and the bank until the bank has assented to the order of the drawee requiring it to pay the holder of the check the sum of money named. The assent which is necessary before there is any contract relation between the holder of the check and the bank is what is meant by acceptance. This assent need not be by indorsement of "Good" across the check, or by any other particular words, either in writing or oral. The question of assent or acceptance is one of fact, and may be made out by any of the methods by which a fact is proven. Did the defendant bank assent to the directions of its customer to pay out of his funds on deposit the sum named in the check? If so, to whom did it assent to pay this sum? The answer is found by inspection of the check. If it assented to pay the check, it undertook and assumed to pay it to Thomas Pickle, or upon his order. Now, the facts which are relied upon as making out such an assent to the direction of the drawee of this check as to bring complainant into privity with the bank are that it received and retained the check, and that it has charged the check to the account of the drawer, and settled with him, deducting the amount of the check. Now, when a bank certifies a check as "good," it is not only authorized but good banking would require that such check should be then charged to the account of the drawer, as so much of his funds which they have obligated themselves to pay upon that check. Of course, if the check is never paid, or is returned, the drawer would be credited. The debiting of this check to the account of the drawer would then mean only one of two things,—that the check has been paid as ordered, or that the fund is held subject to the demand of the payee. The bank must be taken to have assented to pay it as directed; that is, to the payee or his order. That it has assented to the payment of this check is, we think, to be inferred from the retention of the check when presented at its counter, and the subsequent charge of the check to the drawer. Upon this charge to the drawer

we predicate its assent or acceptance." It had no right to charge it to the drawer, and to settle his account, unless it had either paid the check to the payee named in the check, or his order, or, having accepted the check, held the fund of the drawee subject to the demand of the payee. It has not paid the check. It must therefore be held to hold the amount of the check for the payee. It cannot escape this consequence by saying that what we have done in receiving the check, and in paying it, and in debiting to the account of the drawer, is all through mistake. That would be to suffer it to escape the consequences of its own mistake, by pleading its own negligence in answer to the natural inference from its reception and retention of this check, and its subsequent charge to the drawer might enable it to shelter itself behind the technical defense of want of privity; but, on the other hand, it may result in the loss to complainant of his debt by remitting him to his action against his original debtor, whom he may be unable to coerce into payment. We think there is no inequity in holding the bank to the inference that it has accepted this check, springing out of the fact that it has charged it up to the account of the drawer. This was clearly the view of Mr. Justice DAVIS, a great master in the law, as appears from his opinion in the Millard case, *supra*. It has the support of the only other courts which have been called upon to pass upon this question,—the supreme courts of Pennsylvania and Ohio. *Bank v. Cook*, 73 Pa. St. 483; *Saylor v. Bushong*, 100 Pa. St. 23; *Dodge v. Bank*, 20 Ohio St. 234. So Mr. Daniel, in his very learned work upon *Negotiable Instruments*, lends the support of his name to the view we have taken, saying: "There is no doubt that, if the bank pays a check upon the forged indorsement of the payee's or special indorser's name, the payee or such indorser may recover back the amount, if the check had been delivered to him, and the drawer may recover it back if he had not issued it." 2 Daniel, *Neg. Inst.* § 1663.

This brings us to the question as to whether the check was ever delivered to the complainant; for it is asserted that if there has been no delivery to him he has no such title to the instrument as will enable him to maintain a suit against the bank. Whether this check was sent to complainant, and miscarried, and fell into the hands of a stranger, or whether it was left with the bank to be credited to the complainant, who kept his account there, and by oversight this credit was not given, is all matter of conjecture. How this check ever reached the bank we are unable, from the proof, to determine. All we can say is that we are satisfied that it never came into the hands of complainant. Some one undoubtedly received it from Meese. By suing the bank upon this check, complainant may and does ratify the receipt of the check from Meese. It is as if it had been received by an agent for the use and benefit of the

complainant. *Omnis ratihabito retro trahitur et mandato priori equiparatur*,—a subsequent ratification has a retrospective effect, and is equivalent to a prior command. *Broom, Leg. Max.* 867. "This is a rule," says Mr. Broom, "of very wide application. \* \* \* 'No maxim,' remarks Mr. Justice STORY, 'is better settled in reason and law than this maxim; \* \* \* at all events, where it does not prejudice the rights of strangers.'" *Fleckner v. U. S.*, 8 Wheat. 863." As illustrative of the application of the rule, the author cites the case where the goods of A. are wrongfully taken and sold. The owner may either bring trover against the wrong-doer or may elect to consider him as his agent, and adopt the sale, and bring an action for the price. *Smith v. Hodson*, 4 Term B. 211. So, in another case it was said: "That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well established rule of law. In that case the principal is barred by the act, whether it be for his detriment or advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority." *Wilson v. Tumman*, 6 Man. & G. 242." *Broom, Leg. Max.* 871. The bank is not prejudiced by this subsequent ratification, for it dealt with the check as the property of the complainant, and undertook to pay to him or his order. The effect of this ratification is simply to make the check the property of the complainant. It does not ratify the collection of the check by one whose act in receiving it is subsequently ratified, and agency to receive a check payable to order implies no authority to indorse it in the name of the payee, or to collect it without such indorsement. In the case of *Dodge v. Bank*, a certificate of indebtedness by the government to Dodge was remitted by mail to the pay-master for a check. The mail was robbed, and the certificate presented by the thief to the pay-master, and a check demanded. The latter, without requiring proof of the identity of the holder of the certificate, paid a check payable to Dodge or order, and took up the certificate. The indorsement of Dodge was forged, and the check paid. Subsequently Dodge sued the bank, and recovered, the court holding that he might ratify the taking of the check for the certificate, and sue upon it as an accepted check. 20 Ohio St. 234. See, to same effect, *Graves v. Bank*, 17 N. Y. 207.

The decree of the chancellor is reversed, and judgment for complainant against the bank for the amount of the check, and interest from date of filing of bill, and all the cost of the cause.

SNODGRASS, J., (*dissenting*.) Disagreeing with the majority upon the merits of the



question decided, and strongly opposed to the policy of refusing to follow the supreme court of the United States on this important banking and commercial question, I am constrained to express briefly my dissent. The exact question before us, as shown in the majority opinion, was decided adversely to it in *Bank v. Whitman*, in 1877, by the supreme court of the United States, without dissent by any member of the court. In that court, in the *Millard Case*, Judge DAVIS had doubtfully intimated that the bank might be liable to the payee of a check which it had improperly paid off to an unauthorized holder and charged to account of drawer, not, as the majority holds here, because such payment to an unauthorized holder is an acceptance and implied promise to pay the real owner or payee,—for this doctrine he repudiated,—but because of the charge to the drawer the bank might be liable to the payee for money had and received to his use. But this whole matter was the doubtfully expressed inference of argument, and was not even an affirmative *dictum*, which, least of all things, is entitled to serious consideration. Afterwards, when the exact question arose with the *Millard Case* before it, cited in argument and referred to in the opinion, the court, on full consideration, unanimously held the bank not liable to suit on any ground. Judge DAVIS, who had made the *dictum* in the former case, it is true was not present, having just before resigned, but the other judges who made the decision were present, and all concurred in it. The decision commands my most earnest approval; but there are additional reasons why I think it should be followed: *First*. It is the judgment of the highest court in the country, on a general banking and commercial question, where the decisions should be treated as conclusive, as on such questions the supreme court of the United States follows no state construction. It is not “rather a question of the weight of evidence,” as put by the majority, because we all agree that the check in the case before us was not paid to the payee, and, having determined that, we come to settle the question whether, upon this conceded condition of affairs, the payee can maintain suit against the bank. *Second*. The decision should be followed because it is an original question in this state, so far as our cases go, and we should in such case, on such question, make our decisions conform to that of the United States, and thereby have but one rule applicable to our citizens. As it is, when our decisions conflict, ours, of course, can only be good as to a part of the litigation which may arise in the state, for, as to any litigants who may be carried into the federal courts by non-residence and otherwise, the federal rule will be applied. So it will be in all cases where the national banks go into the hands of receivers, and have their affairs wound up in the federal courts, and in every case in which, by virtue of the situation of parties, or manner in which the ques-

tion is involved, the federal courts have jurisdiction. Many reasons could be added, but they will suggest themselves. These are sufficient to indicate them, and outline the ground of dissent.

CALDWELL, J., joins in this dissent.

#### HAND v. CALE et al.

(Supreme Court of Tennessee. January 21, 1890.)

CORPORATIONS—STOCKHOLDERS—LIABILITY—CLERKS.

A traveling salesman, who spends about half of his time on the road, selling goods and collecting, and the rest in shipping and receiving goods, and making sales and collections in the city, is a clerk, within the meaning of Act Tenn. 1875, § 11, making stockholders liable for money due “laborers, servants, clerks, and operatives.”

Appeal from circuit court, Davidson county; W. K. MCALISTER, JR., Judge.

P. D. Maddin, for plaintiff. Gaines & Slemmons, for defendants.

FOLKES, J. This is an action at law to recover of the defendants individually the wages claimed to be due plaintiff by the Nashville Plow Company, an insolvent manufacturing corporation chartered under section 11 of the general incorporation act of 1875. Under the case as made in the record, the only question presented is whether the plaintiff, who was a traveling salesman or drummer in the employ of the company, can claim the benefit of said act, as being one of the persons in favor of whom the legislature has given an individual right of recourse over upon the stockholders. Section 11 of said act provides for the creation of mining, quarrying, and manufacturing companies, and contains this clause: “The stockholders are jointly and severally liable, individually, at all times, for all moneys due and owing to the laborers, servants, clerks, and operatives of the company, in case the corporation becomes insolvent.”

The proof shows that for a salary of \$100 per month, payable as wanted, the plaintiff had been on the road for about 23 weeks, and at the factory 14 or 15 weeks, during the time of his employment, being out and in alternately, and for varying periods, as directed and required by the company: that while on the road he sold goods by sample or photograph, made collections, settled claims, and generally did any and every thing which is understood to be within the duties of a drummer working on a salary, subject to the direction and control of the general manager of the company. When not on the road, he worked in the store, shipping and receiving goods, moving and handling stock, etc. He also made sales in the city, and collected bills, when so instructed. There is due him salary for five and four-fifths months, during which time he was on the road and at the factory, about half each. Does this character of employment and service bring him within the benefit of the clause of the act

above quoted? While there is no doubt of the power of the legislature to impose this increased liability upon the stockholder, when it is done in the act creating the corporation, yet, being in derogation of the common law, such statutes, so far as concerns such liability, are to be strictly construed. They are a wide departure from established rules, and, though founded upon considerations of public policy and general convenience, are not to be extended beyond the plain intent of the words of the statute, as said by Mr. Cook in his work on Stocks and Stockholders, (section 214.) Again, this author says, in speaking of the statutory liability of stockholders for debts of the corporation due its servants or laborers: "There has been difficulty in determining what persons are to be classed as 'servants;' but the courts are not inclined to give a broad application to the word." Section 215. It must also be borne in mind that while the legislature has in such acts manifested a purpose to guard and protect the wages of a certain class, it does not follow that the class should be extended, by any liberality of construction, as so to include persons not named. The court should be slow to enlarge the class by any latitudinous construction, not only upon the consideration above stated, but for the further reason that the legislature is not to be presumed to place unnecessary burdens upon the corporations of its creation. They serve a most valuable purpose in developing and building up the resources of the state. By means of the aggregation of capital, they are able to accomplish great and much to be desired benefits to the public, which individual means and effort would be unable to achieve. With these general principles to direct us, we are to ascertain, as each case arises, what employe is or is not within the language of the act. In arriving at a satisfactory conclusion, we find but little aid and comfort from the adjudged cases from the courts of other states; the same language receiving very different construction at the hands of different courts, of equally high authority, as a citation of some of them will show. The following persons have been held not to fall within the terms "servant" or "laborer:" The secretary of a manufacturing company, (*Coffin v. Reynolds*, 37 N. Y. 640;) a civil engineer, (*Railroad Co. v. Leuffer*, 84 Pa. St. 168;) a consulting engineer, (*Ericsson v. Brown*, 38 Barb. 390;) an assistant engineer, (*Brockway v. Innes*, 89 Mich. 47;) an overseer on a plantation, (*Whitaker v. Smith*, 81 N. C. 340;) a book-keeper and journal manager, (*Wakefield v. Fargo*, 90 N. Y. 213.) These cases seem to rest upon the idea that the terms named have reference only to persons who perform menial or manual labor, or, rather, to persons whose chief employment is to perform such labor, and not to embrace the higher class named in the authorities just cited, although each of the persons named did perform more or less of manual labor, as incident to their employments. On the other hand, a master me-

chanic or machinist employed by the year was held to be embraced under a statute protecting clerks or laborers. *Sleeper v. Goodwin*, 67 Wis. 590, 31 N. W. Rep. 355. But, without further naming the cases, we refer the curious to note 1 to section 215, Cook, Stocks, where a number of cases are to be found.

The statute under consideration, as we have seen, uses the words, "laborers, servants, clerks, operators." We do not deem it necessary to define the terms "laborer" or "operator," as it may be said to be clear, under the principles of construction that are to govern us, that they do not include the traveling salesman on a salary of \$100 per month. Whether he would be embraced under the term "servants," it would be difficult to say. He would be, if we were at liberty to accept the term in its broadest sense, as defined by Mr. Wood in his work on Master and Servant, viz.: "The word 'servant,' in our legal nomenclature, has a broad significance, and embraces all persons, of whatever rank or position, who are in the employ, and subject to the direction or control, of another, in any department of labor or business. Indeed, it may, in most cases, be said to be synonymous with 'employee.'" Section 1. That it is, however, not used in that sense in the statute, is shown by the fact that other terms are used, which would be altogether unnecessary and idle, if it were meant to be synonymous with "employee." We would have no room for the words "laborer," "clerk," or "operator." Webster defines "clerk" as "an assistant in a shop or store, who sells goods, keeps accounts," etc. Bouvier says he is a person in the employ of a merchant, who attends to only part of his business, while the merchant himself superintends the whole, or a person employed in an office to keep accounts or records. *Rapalje* says: "In business law, an assistant employed to aid in any business, mercantile or otherwise, subject to the advice and direction of his employer." *Rap. & L. Law Dict.* 219. That "clerk" embraces and includes "salesman," seems beyond all doubt. If the term includes the salesman who remains in the shop or store, we can see no reason why it does not include the salesman on the road, under like terms of employment. Each makes sales, collects accounts, handles goods, and acts under the instruction of the employer.

It is worthy of note that the act of 1875, c. 142, "to provide for the organization of corporations," creates an individual liability upon the stockholders to employes in different companies in different language, and some of the corporations created are left without any provision at all on the subject. Thus section 12 ("cotton compress and warehouse" companies) has the same provision that we have been considering for mining and manufacturing, viz.: "Laborers, servants, clerks, and operatives." Section 18, (hotel companies:) The terms are "laborers, servants, and clerks." Section 21, (as to printing and publishing companies:) The

language is: "Journeyman, for wages due, and all other servants and employees." Section 22, (as to transfer and omnibus companies:) "To servants and agents." Section 24, (steamboat and packet companies:) "To hands, and other employees,"—while there is no provision at all on the subject as to railway, turnpike, telegraph, insurance, or street railway companies, building associations, pawnbrokers, levees, banks, or immigration and real-estate companies. Whatever may have been the purpose of the legislature in making these distinctions, they do not materially help us to a decision of the case in hand; and we have referred to it merely as a matter of interest in connection with the subject of statutory liability of stockholders, so far as concerns employees.

There was no error in the action of the circuit judge; and his judgment in favor of the plaintiff for the full amount of the wages or salary shown to be due by the corporation will be affirmed against the stockholders sued herein, with interest and costs.

**SMITH, County Clerk, v. MAYOR, ETC., OF NASHVILLE.**

(Supreme Court of Tennessee. Feb. 1, 1890.)

**TAXATION—MUNICIPAL CORPORATIONS—WATER-WORKS.**

1. As the charter of the city of Nashville (Acts Tenn. 1833, c. 114, § 17, subd. 8) authorizes the mayor and council "to provide the city with water by water-works, \* \* \* and to provide for the prevention and extinguishment of fires," it cannot be held that the city, in operating water-works used to supply its citizens with water, and to extinguish fires and sprinkle streets, is engaged in a private enterprise, or performing a municipal function for a private end, though it imposes water-rates which are used to defray the expense of operating the water-works, and to keep down the interest on the indebtedness incurred in their construction.

2. In a litigation as to the validity of a tax imposed on a city for "exercising the privilege of running a water company" within its limits, under a statute (Acts Tenn. 1887, c. 1, § 4, pp. 20, 21) providing for the assessment of taxes against water companies doing business "in cities, taxing districts, or towns," the question whether the city can be taxed for furnishing water to individuals and factories beyond its corporate limits cannot be adjudged, because not put in issue; there being also nothing to show whether such individuals and factories were within any "city, taxing district, or town."

Appeal in error from circuit court, Davidson county; W. K. McALISTER, JR., Judge. *Ed. M. Woodall*, for appellant. *Lyttion Taylor*, for appellee.

CALDWELL, J. This record raises the question of the liability of the city of Nashville for a privilege tax on the water-works, under the revenue act of 1887. The case was before the court on petition for *certiorari* and *supersedeas* at the December term, 1887, and the opinion there delivered is reported in 2 Pickle, beginning at page 214, 6 S. W. Rep. 273. The petition alleged the construction and maintenance of the water-works by the city in its corporate capacity, for the public

good, and not as a private enterprise for pecuniary gain or profit, and this court held that, in the absence of express statutory provision on the subject, the exemption from taxation arose by implication of law from the public ownership, nature, and use of the property, as revealed by the allegations of the petition. It was further decided, however, that the city could not in that mode question its liability for that part of the tax assessed in favor of the state; but that its remedy was to pay the same under protest, and sue to recover the amount in 30 days, as provided by the act of 1873. Hence, so far as the state was concerned, the petition was dismissed. As to the county it was retained, and remanded for further proceedings. Subsequently, the amount claimed for the state was paid under protest, and suit to recover the same was brought in due time. This new suit and what remained of the former one were then consolidated by mutual agreement, and heard together before the Honorable W. K. McALISTER, circuit judge, without the intervention of a jury. Judgment was for the city, and there is an appeal in error on behalf of the state and county.

The correctness of the decision heretofore made by this court on the allegations of the petition is conceded, but counsel for the state and county say that the proof on the trial refutes those allegations, and shows that the water-works were used for pecuniary gain and profit, and not exclusively for the public good. P. J. Flanagan, comptroller of the city, was the only witness introduced. We give the material part of his evidence in his own words, as found in the bill of exceptions. He said: "That said city always owned and operated the water-works, \* \* \* and it was maintained by levying a tax upon persons in said city who used the water supplied. That the water was used for extinguishing fire, sprinkling streets, and the use and benefit of citizens in said city. That there were several factories adjacent to said city, but beyond its corporate limits, and several thickly-settled places in close proximity to said city, which from time to time were annexed to said city. That the factories laid their own pipe, connecting with the city's water-mains, and, in case of emergencies, when their private water supplies were exhausted, they used water furnished by the city; but this was only occasionally. The main reasons why connections were made was to provide for an abundant supply of water in case of fire. That in all there were about \$6,000.00 paid by factories and persons living adjacent to the corporate limits. That this \* \* \* was not the real source from which the revenue was derived. That about \$85,000.00 annually were derived, [from all sales of water,] \$50,000.00 of which went to pay the operating expenses, and the remainder to pay the interest on about \$1,000,000.00 invested by said city in the water-works improvement, and that the remainder was not sufficient, and that there was a deficit annually which

was made up from other sources. \* \* \* That the fire companies responded to alarms when given, if adjacent to the city, and used water furnished by the city in extinguishing them, and had frequently responded to alarms sent in from factories beyond the corporate limits."

It is seen at once that the water-works are corporate property. That is not denied. The debate is with respect to the nature of the use. As to that, for the sake of convenience, we divide all the purposes for which the city furnishes water into three classes: (1) To extinguishing fires and sprinkling the streets; (2) to supply citizens of the city; (3) to supplying persons and factories adjacent to but beyond the corporate limits. If the business were confined to the first class, there would be no ground to base a decision on, so clearly would the use be exclusively for public advantage. We think there can be but little more doubt about the second class, especially in view of certain words in the city charter, to which we will advert presently. Nothing should be of greater concern to a municipal corporation than the preservation of the good health of the inhabitants. Nothing can be more conducive to that end than a regular and sufficient supply of wholesome water, which common observation teaches all can be furnished in populous cities only through the instrumentalities of well-equipped water-works. Hence, for a city to meet such a demand is to perform a public act, and confer a public blessing. It is not strictly a governmental or municipal function, which every municipality is under legal obligations to assume and perform, but it is very closely akin to it, and should always be recognized as within the scope of its authority, unless excluded by some positive law. If the responsibility be voluntarily assumed or fixed by law, whether the one or the other, the performance of it is the doing of an act for the public weal,—a lending of corporate property to a public use. The eighth subsection of section 17 of the charter of the city of Nashville (Acts 1838, c. 114) enumerates some of the powers conferred upon the mayor and city council in these words: "To provide the city with water by water-works, within or beyond the boundaries of the city, and to provide for the prevention and extinguishment of fires, and organize and establish fire companies." Here the first clause, "to provide the city with water by water-works," is very broad and comprehensive, and was obviously intended to authorize the corporation to furnish the inhabitants of the city with water. Having accepted the charter, and undertaken to exercise this authority in the manner detailed by the witness, it cannot be held that the city in doing so is engaging in a private enterprise, or performing a municipal function for a private end. It is the use of corporate property for corporate purposes, in the sense of the revenue law of 1877. It can make no difference whether the water be

furnished the inhabitants as a gratuity or for a recompense; the sum raised in the latter case being reasonable, and applied for legitimate purposes. So raising a fund to help defray the expense of operating the water-works, and to keep down the interest on the city's indebtedness, incurred in the construction thereof, is no more engaging in business for gain and profit than would be the assessment and collection of taxes for that or any other legitimate object. To the extent that money is realized by sale of water, if it be so termed, the necessity of laying taxes in the usual way is diminished. If the water were furnished free of charge, then the expenses of operating the works and meeting the interest on the debt would have to be met by an increased tax assessment.

We believe the views here expressed are sustained not only by sound reason and policy, but also by the weight of adjudged cases. In a Connecticut case it was decided that land owned by the city of Hartford, and used for reservoirs for collecting and storing water for the benefit of its inhabitants, was not subject to taxation by the town of West Hartford, in which the land was situated; and, further, that the question of exemption was not affected by the fact that the water was sold to consumers, and the water-rents applied in payment of interest on the investment, and incidental expenses. In the same case it was further held that another portion of the same tract, bought by the water commissioners at the same time, was not exempt, because not used for reservoirs or other public purposes. *Town of West Hartford v. Board*, 44 Conn. 367. By act of the legislature of New York a certain board of commissioners of Rochester was authorized to determine and execute the best and most expedient plan of supplying that city "with a sufficient quantity of pure and wholesome water for the use of its inhabitants and the extinguishment of fires." Laws 1872, c. 387. As a part of this plan lands were purchased in the town of Rush, and a reservoir was erected thereon. Water was supplied therefrom for the city's own use, and for the consumption of the inhabitants; the latter paying prescribed water-rates. The amount of rents received from consumers of the water was less than the interest on the bonds issued for the construction of the works. One question submitted to the court on those facts was: "Can the town of Rush legally impose a tax upon the said property of the city of Rochester?" The court of appeals, speaking through DANFORTH, J., said that it could not, because the water-works, being "for the public good," were in legal contemplation "held for public purposes." *City of Rochester v. Town of Rush*, 80 N. Y. 302. Other cases in harmony with these two might be cited, but that is not deemed necessary.

The cases relied on as in direct conflict we do not find to be so. The strongest adverse case is that of *City of Louisville v. Com.*, 1 Duv. 295. There the court, in discussing the

implied exemption of municipal property from taxation, used this language: "The more precise and distinctive test for classification is this: Whatever property, such as court-house, prison, and the like, which became necessary or useful to the administration of the municipal government, and is devoted to that use, is exempt from state taxation; but whatever is not so used, but is owned and used by Louisville in its social or commercial capacity, as a private corporation, and for its own profit, such as vacant lots, market-houses, fire-engines, and the like, is subject to taxation." 1 Duv. 298. It will be observed that reservoirs or water-works are not enumerated here; and we are not informed, and cannot with certainty determine from the language used, on which side of the line the learned judge would have placed such property if he had mentioned it in the classification of exempt and non-exempt property. So it is not necessarily an authority in point.

The Iowa case does not touch the question at all. Here the water-works were owned and operated by a private company, and not by the city. The company bound itself to furnish the city of Des Moines and its inhabitants with pure and wholesome filtered water at certain rates, and, after a limited period of time, to sell all of its property used in its business to the city, at its election. Because of this arrangement and contract with the city, the company denied its liability for taxes. Chief Justice BROTHEROCK, in delivering the opinion of the court, said: "The fact that the city is furnished water for which it pays what is presumed to be a fair consideration does not change the property from a private to a public use. The reservation of the city of the right to purchase the works does not invest it with any title or right to the property, or in any sense make it public property, until it shall elect to purchase." *In re Water Co.*, 48 Iowa, 824.

If possible, the decision in the case of *Bailey v. Mayor, etc.*, 3 Hill, 531, is still further from the question before us. That was an action against the city for damages for injuries resulting from the negligent and unskillful construction of a dam by the city water commissioners. The commissioners were held to be the agents of the city in such a sense that it was liable for the injuries complained of. No question of taxation was raised in the case. Mr. Cooley and Mr. Desty both lay down the rule that municipal property is by implication exempt from taxation when put to a public use, and that it is not exempt when not so used. They give instances of both classes and cite the cases. Each author gives some prominence to the Kentucky case reported in 1 Duvall, but Mr. Cooley, in his concluding sentence, says that the doctrine of that case would seem to limit implied exemptions unreasonably, unless restricted to the case of special assessments. *Cooley, Tax'n*, 172-174; 1 *Desty, Tax'n*, 48, 49.

With respect to the third class, there is an

equally obvious though altogether different solution of the question. It is this: The tax in litigation was assessed against the city of Nashville for "exercising the privilege of running a water company" within her own limits, in a city "of 40,000 inhabitants, or over;" the amount of the tax, as to the state's part, being determined by the statute according to proportion. There is no assessment for the privilege of doing the business of a water company elsewhere than in the city; hence, if there be liability to the tax for furnishing water to any other person than her own citizens, to individuals and factories adjacent to and beyond her corporate limits, that liability cannot be adjudged in this case because not put in issue. Moreover, in addition to the lack of such issue, it does not appear in this record that the persons and factories receiving the water outside of the limits of Nashville were in any city, town, or taxing district, nor, if in any of these, the number of inhabitants therein. Yet such facts are indispensable to a correct determination of liability or non-liability for the tax, and for an ascertainment of the amount of tax, if liability exists. The tax is to be assessed against water companies doing business "in cities, taxing districts, or towns," and the amount of the state's part of the tax varies from \$50 to \$600, according to population ranging from 500 to 40,000, or over. Acts 1887, c. 1, § 4, pp. 20, 21. Let the judgment be affirmed.

#### CREUTZ v. HEIL et al.

(Court of Appeals of Kentucky. Jan. 14, 1890.)

##### LIFE-TENANTS—COMPROMISE—CONSIDERATION.

1. A life-tenant is entitled to no compensation for taxes or improvements against the remaindermen, and where a married woman is the life-tenant the same rule applies to her husband.
2. The widow of a testator was empowered by his will to invest the proceeds of certain of his personal property in a house and lot, the title to be vested in her during her widowhood, and in the event of her marriage to be divided in the proportion of one-third to her for life and remainder to plaintiffs. The widow had the absolute title to the house and lot conveyed to herself, and soon after married defendant, and lived with him on the property. During this time the taxes on the property were paid, and it was improved. At her death plaintiffs claimed the property, and, on defendant's refusal to surrender possession, the parties compromised by plaintiffs executing a mortgage in favor of defendant for \$800, payable when they should sell the property; defendant to remain in possession, rent free, until such sum should be paid. Defendant was fully aware that he had no estate in the property. *Held*, that there was no consideration whatever for the compromise, and that the fact that defendant threatened, and plaintiff dreaded, a lawsuit, was not alone sufficient to uphold the agreement.

Appeal from chancery court, Campbell county.

"To be officially reported."

Action by William A. Heil and others against H. Z. Creutz, to set aside a compromise agreement. Judgment for plaintiffs. Defendant appeals.

*G. H. Ahlerting and Geo. Washington, for appellant. Crawford & Irwin, for appellees.*

BENNETT, J. Mrs. Creutz, wife of the appellant, was the widow of Valentine Heil, deceased, who died in 1866, leaving the widow aforesaid, and the appellees, as children by himself and said widow. Said Heil left a will, by which his widow was empowered to dispose of certain personal property, and invest so much of the proceeds as she might deem necessary in a house and lot, the title to be vested in her for and during her widowhood, remainder in fee to the appellees in equal portions; and, in the event of her marriage, to be divided in the proportion of one-third to her for life, and remainder to the appellees in equal proportions. The widow did not follow the directions of the will in making said investment; but on the 20th day of June, 1867, she bought the house and lot in controversy with said proceeds, and had the absolute title conveyed to herself. Not long thereafter the appellant married said widow. They lived together, as husband and wife, until her death, which occurred in 1883. All of this time the title to said house and lot was in Mrs. Heil, and she and the appellant, together with the children, lived in it. During said time the taxes on said property were paid, and it was improved. Within a year and a half after the appellees, the children by the first husband, came of age, they set up a formal claim to this property. The appellant, being in possession of it, refused to surrender the possession. The appellees thereupon consulted a lawyer, who advised them that the appellant had no interest in said property, nor any right to compensation for any taxes that he might have paid on the property, nor compensation for any improvements that he might have put thereon. Notwithstanding this advice, the appellant and appellees, as is alleged, compromised their differences relative to said property rights, by the appellees executing to the appellant a mortgage on said house and lot for the sum of \$800, payable, without interest, when the appellees should sell said property, and the appellant to remain in the possession of the property, rent free, until said sum should be paid. About three years after said compromise the appellees sought, by this suit, to set it aside. We think that it clearly appears from the evidence that the widow of Valentine Heil purchased said property with the proceeds of the personal property with which he authorized her to buy a house and lot; indeed, there is no dispute as to this fact. We also think that it clearly appears that the appellant knew, in the life-time of his wife, that she only claimed a life-estate in said property; for she told him that, at her death, the children would turn him out, and he could not hold the property as a home. Hence he had her to make a will giving him a life-estate in the property. But after her death he abandoned the idea of trying to hold under the

will, because his wife had no estate to will. It is clear that at the time of the compromise he was fully aware of the fact that he had no estate in said property. The appellant, during the life of his wife, lived on said property, and enjoyed the use of it as a home, rent free, in right of his wife's life-estate. It is settled by this court (see *Johnson v. Stewart*, 8 Ky. Law Rep. 857) that a life-tenant is entitled to no compensation for taxes or improvements, against the remaindermen, because he enjoys the use of the property, its yield, etc., free of rent; therefore he should pay the taxes and keep the property improved. And, as the husband is entitled to the use and profits of the wife's life-estate, the same rule as to rents and improvements should apply to him. Besides, the weight of evidence is that the taxes were paid, and improvements paid for, or, at least, the principal part of them, with the earnings of the appellees. From the record before us we regard it as certain that the appellant had not as much as a shadow of legal or equitable title to a life-estate in said property, and his right to compensation for taxes and improvements were equally groundless. So the question arises, was there any consideration for the promise to pay said \$800? According to the authorities, this question must be answered in the negative. This court, in the case of *Mitchell's Heirs v. Long*, 5 Litt. Sel. Cas. 72, said: "To sanction the compromise, it is sufficient that there was an honest claim on his part, asserted without fraud, and that there was a real ground of dispute." In *Pitkin v. Noyes*, 48 N. H. 294, it is said: "The surrender or discharge of a claim which is utterly without foundation, and known to be so, is not a good consideration for a promise; but it is otherwise if the claims are doubtful, and so understood by the parties, and in such a case the consideration will not be defeated by showing that in fact no valid claim really existed." It seems that the inquiry is whether the party relying on the agreement had reasonable and probable cause for believing that the question was doubtful, and that the right might ultimately prove to be with him. It other words: "It is sufficient that there was an honest claim on his part, asserted without fraud, and that there was a real ground of dispute." If the point is so clear that it can only be answered in one way, the compromise will be invalid as wanting a consideration to uphold it. The adequacy of the consideration cannot be inquired into, but the want of any consideration whatever may be inquired into. The verdict of a jury or the decision of a court depends in a greater or less degree upon the human will as to what is right and equitable in a given state of case; but when the given state of case has received such judicial interpretation as to admit of no question, supposing that the judicial mind will continue to run in the same channel, (and such supposition should always be indulged in,) then there can arise, in a legal or equitable sense, no consideration for

a compromise of such matter. It is only in reference to such matters as counsel, learned in the law, or courts, might differ, although the right ultimately turns out to be wholly on one side, that constitutes a valid consideration for compromising such matters. The quantity of such consideration cannot be measured, hence its adequacy will not be inquired into. There was no consideration whatever for this compromise. The fact that the appellant threatened a lawsuit, and the appellees dreaded a lawsuit, was not alone sufficient to uphold the agreement. It is not the mere threat or fear of a lawsuit, on a groundless pretense, that will constitute a consideration sufficient to uphold an agreement. If it were so, a threat to go to law about the plainest matter and the most undisputed right would be sufficient; but the threat, to be sufficient, must be founded upon some claim, as above indicated. The judgment is affirmed.

#### ROSENFELD v. GOLDSMITH.

(Court of Appeals of Kentucky. Jan. 16, 1890.)

##### COMPOSITION WITH CREDITORS—FRAUD.

1. Plaintiff loaned defendant, his step-son, money to become a member of a firm, and, by reason of his son being such partner, also made a loan to the firm. Just before the institution of bankruptcy proceedings against the firm, defendant executed to plaintiff two notes, one for his individual debt, and the other for the firm debt, secured by a mortgage on his wife's real estate. Plaintiff proved the firm note in the bankruptcy proceedings, and accepted a composition. Subsequently the note for defendant's individual debt was renewed by notes maturing after the period fixed for the maturity of the composition notes. In an action on these renewal notes it was claimed that the original note was executed to plaintiff in advance of the composition, and in consideration of his promise to assent to and assist it, and that this was a fraud which vitiated the note, and all renewals thereof. Defendant failed to testify to any promise of plaintiff, or that a word was ever said between them about the composition. Plaintiff testified that he never paid any attention to the bankruptcy proceedings, and only accepted the composition at defendant's instance. *Held*, that a judgment in favor of defendant would be set aside.

2. The mere fact of taking a note for the debt, secured by a mortgage upon the wife's property, when the firm was insolvent, and contemplating a composition, does not evidence a corrupt agreement.

Appeal from Louisville law and equity court.

"Not to be officially reported."

An action on promissory notes brought by Albert Rosenfeld against Charles Goldsmith. Judgment for defendant. Plaintiff appeals.

*Willson & Thum and G. H. Wald*, for appellant. *Brown, Humphrey & Davis*, for appellee.

**HOLT, J.** The appellee is the step-son of the appellant. When the parents intermarried the appellee was but 11 years old, and the relations between the parties appear to have been altogether kindly until the bringing of this action, in 1887. Not long after the appellee became of age, and in 1869, the appellant loaned him money to become a mem-

ber of the firm of Fechheimer, Karpeles & Co.; and thereafter, by reason of the step-son being such partner, also made a loan to the firm; so that in December, 1876, the appellee owed him \$6,000 individually, and the firm a like sum,—the latter debt being evidenced by notes secured by indorsement. About January 1, 1877, the firm suspended payment. The appellant had great confidence in his step-son, and appears to have always relied upon him to see to the payment of both debts. On January 6, 1877, the appellee executed to him two notes, for \$6,000 each,—one being for the individual and the other for the firm debt,—and to secure their payment the appellee's wife executed a mortgage upon her real estate. At the appellee's instance, however, it was never recorded, and the wife subsequently sold it, and nothing was realized from it upon these notes. In February, 1877, the firm became involuntary bankrupts, and petitioned for a composition. The appellant proved the notes he held upon the firm, and an attorney, under a power of attorney from him, consented to the composition of 80 cents to the dollar, and it was approved by the court on April 9, 1877. The appellant appears to have paid but little attention to the bankruptcy proceeding, and there are circumstances tending to show that the appellee was looking to it upon the part of the appellant. In August, 1878, the parties to this suit had a settlement, resulting in the execution by the appellee to the appellant of new notes,—one of \$6,000, payable January 1, 1886, and six of \$1,000 each, payable at intervals of a year, and some others as interest notes. All of these notes were subsequently paid, save the \$6,000 one, and two interest notes of \$120 each. February 12, 1886, the appellant, in pursuance of a written agreement between them, surrendered to the appellee these three notes, the two smaller ones being paid, and received, in lieu of the larger one, six notes, for \$1,000 each, payable at yearly intervals, together with new interest notes covering the extension. The contract provided that, in case of default of payment of any one of the notes for a certain time after maturity, all should become due, save that any interest notes not then due should be surrendered to the appellee. The \$1,000 note first maturing and an interest note were not paid. The appellant surrendered them to the appellee, he executing in lieu three notes, of \$363 each. This action is upon the last-named three notes, the five principal notes of \$1,000 each, and two interest notes of \$75 each, there having been a default of payment of a second note. The only defense is that they are tainted with an illegal agreement, made between the appellant and the appellee, in fraud of the creditors of the latter. It is not pretended but what the money was originally loaned by the appellant as above stated, and while equity abhors fraud, and will not, as a general rule, aid a party to it as to any one, yet it is suggestive that here no creditor is complaining.



and for 10 years after the time when the appellee claims that he and the appellant committed the fraud nothing of the kind was ever suggested. It is claimed that the note for \$6,000, executed January 6, 1877, was given in consideration of the appellant's consenting to the composition agreement; and that this was a fraud upon the other creditors of the appellee, which vitiated the note and all renewals of it. The appellee's pleadings are somewhat contradictory. The original answer avers, in substance, that it was agreed between the appellant and the appellee, before the institution of the bankruptcy proceedings, that if the appellant would consent to the composition, his debt of \$6,000 should not be thereby discharged, but when the settlement should be confirmed so as to bind the other creditors the appellee would execute to him his notes for the entire debt; and, in consideration of this agreement, the appellant signed the composition article, and agreed not to resist the composition proceedings, and the notes were executed after they became final. At the close of the testimony the appellee shifted his ground somewhat, and by an amended answer set up that the notes were executed after the composition proceedings, because the appellant refused to receive the composition per cent. in full of his debt, and demanded the notes; and that they were without consideration. The law and facts were by consent submitted to the court. The judgment finds a state of case not presented by either of the appellee's pleadings, when separately considered, to-wit, that the appellant knew prior to January 6, 1877, that the firm intended to seek a compromise with its creditors; and in consideration that he would assent to and assist it by means of his debt, instead of obstructing it, the \$6,000 note was executed to him in advance, with the promise that if the composition was perfected it should be paid in full. The amended answer is not of such a character as to entirely supersede the original one. It amended it to a certain extent, and thus far, but no further, was a substitute for it. To the extent of the amendment only, the original answer must be regarded as having been abandoned.

Viewing the appellee's pleadings thus, they are to be regarded as having presented the state of case found by the court, and the question remains, is the finding supported by the testimony? This is not a case where a bankrupt, without the knowledge of his other creditors, gives to one creditor, after the making of a composition agreement, notes for the balance of his debt, which will mature before the notes given in composition. There is perhaps some question whether the notes in suit are renewals of the firm or the individual debt of the appellee; but, conceding that they were given for the firm debt, yet the note of January 6, 1877, was given before the institution of any proceedings in bankruptcy;

and we therefore again recur to the question, was it executed in consideration of the appellant's consenting to the composition agreement? A promise by a debtor, after his discharge in bankruptcy, to pay a creditor whatever may be yet owing to him, is not, of course, unlawful. So a promise by a partner, after the discharge of a partnership debt by composition in bankruptcy, to pay it in full, is lawful, and enforceable without any new consideration. In *re Merriman's Estate*, 44 Conn. 587; *Higgins v. Dale*, 28 Minn. 126, 9 N. W. Rep. 583. In this instance a note was given on January 6, 1877, and just before the institution of the proceedings in bankruptcy, for the debt. Not until August, 1878, was it renewed, and then none of the notes given in renewal were to mature within the period fixed for the maturity of the composition notes given to the other creditors; so that unless the note given prior to the bankruptcy was executed in consideration that the appellant would consent to the composition agreement, thus working a fraud upon the other creditors, it was not invalid, nor are the notes given in renewal of it. The mere fact of taking a note for the debt secured by mortgage upon the wife's property when the firm was insolvent, and contemplating a composition with its creditors, does not evidence a corrupt agreement. This was no preference, within the prohibition of the bankrupt law. *Dalrymple v. Hillenbrand*, 62 N. Y. 5. When the appellant offered the notes in evidence he had a *prima facie* case. Only the parties to the suit testify to what occurred between them. The appellee fails to bear witness to the statements in his pleadings. He utterly fails to testify to any promise of the appellant of any character whatever. He does not prove that the appellant ever said a word about the composition, or intimated a threat of resistance to it, or an unwillingness to agree to it. The *onus* was upon the appellee to show the unlawful agreement or arrangement. It was not necessary, of course, to show it by proving an express contract as to it; but the most that the appellee himself testifies to, when his entire evidence is considered, is that the appellant looked to him for his debt, and this was not only undoubtedly true, but quite natural. An unlawful agreement should not be presumed from what is proven in this case. It should result from something more than mere suspicion, but ground for it, even, is not shown. The appellant testifies that not a word was ever said between him and the appellee as to any composition with the creditors; that he never paid any attention to it, or the bankruptcy proceedings, and signed the power of attorney relating to them and the debt at the instance of the appellee. A careful examination of the testimony is convincing that the judgment is entirely unsustained by it, and the judgment is reversed, with directions to render a judgment for the appellant.

**DEPOSIT BANK OF OWENSBORO v. DAVIESS  
COUNTY COURT.**

**DAVIESS COUNTY COURT v. WORTHINGTON'S  
ADM'R et al.**

(Court of Appeals of Kentucky. Jan. 16, 1890.)

**DEPOSITARIES.**

1. A bank duly selected as the depository of money collected by way of taxes to satisfy county bonds issued in aid of a railroad company, cannot be held responsible for money which it pays out by order of the committee having charge of the fund, on the ground that an excess of bonds had been issued, in the absence of fraud or collusion between it and the committee in an appropriation of the fund to a purpose known to be unauthorized.

2. The facts that the president of the bank was the president of the railroad company, and that one of the committee was cashier of the bank and secretary of the railroad company, did not impose upon them the duty of knowing which of the bonds were valid and which invalid.

Appeals from circuit court, Daviess county.  
"Not to be officially reported."

*W. N. & J. J. Sweeney and Weir, Weir & Walker*, for the bank. *Stuart & Atchison*, for the county court. *G. W. Williams, L. P. Little*, and *Geo. W. Jolly*, for appellees.

PRYOR, J. There are two appeals on this record,—the one, of the Deposit Bank of Owensboro against the Daviess county court; and the other, of the Daviess county court against E. S. Worthington and others. The principal action originated from the decision of this court in the case of *County Court v. Howard*, reported in 13 Bush, 101, where it was adjudged that an excess of county bonds had been issued on the payment of a subscription of stock made by the county of Daviess to the Owensboro & Nashville Railroad Company. Under the provisions of the legislative enactment, or the proceedings under it for the purpose of issuing the bonds and receiving the taxes collected in discharge of the bonds and the interest coupons, Triplett, Berry, and Tyler were appointed a committee, and, in the discharge of their duties, failed, as is alleged in the petition, to make a proper appropriation of the moneys, but had paid knowingly, willfully, and unlawfully the principal and interest of the unlawful issue, amounting to near \$70,000. Amended petitions were filed, several in number, charging fraud and collusion between the committee and the bank, by which the bank, now appellant, appropriated the money collected by way of taxes, by the concurrence of the committee, to the payment of these void bonds with notice that they were illegal. The action was dismissed as to Tyler, Berry, and Triplett; the appellees, on motion, being compelled to elect whether they would proceed against the commissioners or against the bank. On the hearing of the case below, a demurrer was then sustained to the pleadings seeking to make the bank responsible, and the action dismissed. The case was brought to this court, and the judgment below reversed, for the reason that the bank, being the depository of the money to be paid

out on the order of the committee, had no right, if possessed of the knowledge of the illegal and void character of the bonds, to apply the money to their payment; it being also alleged that the bank had actually purchased some of the void bonds, with notice of their illegality, when it applied the money to their payment. The case is reported in 80 Ky. 498. It was also held that the tax-payer could maintain the action, as the county court or the county judge had declined to do so, and was in fact before the court, as a defendant with the bank, until dismissed on the motion to elect. The right of the tax-payer to maintain the action is not now involved, as the county of Daviess or the county court is now represented as an appellee in this court by its present county judge, (Atchison,) and was made a plaintiff before the final judgment in the case was rendered. The bonds issued, and the coupons, were made payable at the Deposit Bank; and this bank was made by an order of the court, and selected by the committee, as the depository of the money collected by way of taxes to satisfy the bonds. The money was paid out by order of this committee; and in fact one of the committee, Tyler, was cashier of the bank. His acts of payment were all approved by the committee; and in fact it is not insisted that the moneys placed to the credit of the committee in the bank were applied in any other way than in paying off these bonds. The county judge (Triplett) would draw his check upon the fund on deposit, and in this manner the money was paid out. This was done by an arrangement between the three,—Triplett, Tyler, and Berry; and no bad faith is shown on the part of the bank, or any member of the committee. The overissue of bonds originated from a misconception of the provisions of the act authorizing the subscription; the committee and the county, represented by the county judge, construing the act as meaning that bonds should be issued for a sufficient sum to make the subscription of \$250,000 equal to a cash payment. The appellant was the agent of the county, and held the fund as a depository, to be used, at the instance of the committee, in payment of the bonds and coupons when presented; and, when the county court was enjoined from levying a greater sum by taxation than the amount of the subscription, the defense by the county was that the tax was only levied to meet the bonds authorized to be issued by the act under which the subscription was made; "that the county court was invested with the power to execute, and sell at a discount, as many bonds as were necessary to raise the money." The county of Daviess had made itself a stockholder in the road; and if its agents, the committee, in excess of the authority given them, paid or collected more money than was necessary to pay the actual subscription, the fact was that the bank paid the money out as directed by the agents of the county. It being a mere depository of the fund, we cannot well see how,

in the absence of fraud or collusion, it can be made responsible for doing that which the owner of the fund authorized it to do.

The fact that Weir, the president of the bank, was the president of the railroad company, and Tyler, its secretary, did not impose upon them the duty of knowing or of ascertaining which of the bonds were valid and which invalid, for the reason, if no other, that the depositor and the owner of the fund was during the whole controversy insisting that the payments were rightfully made. Not one dollar was paid except such as was ordered or approved by the committee; and to hold that the bank would be liable for paying out money on the order of those entitled to it, when approved by those who had the authority to direct its payment, cannot well be sustained upon any principle of law or equity. It would be making the agent liable to the principal for doing an act that the principal had expressly authorized. There had been no judicial utterance determining that the bonds, or any of them, were void, and even now it is an open question as to which of these bonds are valid and which void; and to determine that the bank should have made the inquiry, and determine which of the bonds were valid, would be imposing a duty on the bank that the chancellor will find difficult to determine when the question is presented. The bank made no purchase of the bonds, and was never enjoined from paying out the money, nor did the fact of its paying \$3,000 on what is termed "void coupons" after January, 1876, when the relief of the tax-payer was granted by the lower court, make it responsible; for it was required to pay as directed, and no notice, actual or constructive, had been given as to the bonds upon which payment should be withheld. The bank was not a trustee, but a mere naked depository, with the agents of the county to supervise its action. The fund was a trust fund, to be applied in a particular way, not by the bank, but by the agents of the county. The bank was required to know that the bond or coupon issued had been signed and delivered,—in other words, that it was a genuine bond, nothing more; and the mere fact that it might have been an overissue created no liability, unless there was fraud and collusion between the bank and the committee in an appropriation of the fund to a purpose they knew was unauthorized. It is stated in the opinion below that the managers of this fund were men of the highest order of integrity; and this entire trouble has originated from a mistaken judgment in the construction of the law under which they acted, and, if the county, in its desire to aid in the construction of this railroad, has selected them to manage its finances with a view of meeting its obligations for that purpose, it will not be allowed to say that the bank in which its money has been deposited is responsible for the acts of its authorized agents in making these payments, when not a semblance of bad faith is shown on the part of the bank or its officials.

During the progress of the case below, it was insisted that various sums of money paid into the Deposit Bank by the tax collector, Worthington, amounting in the aggregate to \$10,725, as the tax money, had not been credited to the committee when it should have been done, as evidenced by the pass-book of Worthington, with a memorandum or heading upon it showing that it was the account of Triplett, Berry, and Tyler with the bank, of moneys deposited by E. S. Worthington. The entries in the pass-book to the amount mentioned are in the handwriting of Tyler, the cashier. Neither the book itself nor a copy was before the commissioner; but the testimony of the circuit clerk shows that it was on file in a suit by the county against Worthington on his bond, he being the collector of these taxes, and the county claiming that he was in default. The testimony for the appellee shows that this book was not complete, and contains other items than those mentioned; and, if competent to prove its contents in the mode adopted, it appears that the books of the bank show the entry of each item found in this pass-book of the same amount and date, and placed to the individual credit of Worthington, and the money checked out by him. That he in fact checked out this entire sum is not denied, and that his individual account amounted to a sum exceeding \$100,000. When Worthington was sued on his bond, he made no such defense as the payment of this money into the bank to the credit of the committee; nor does it appear that any such entry was ever made on the books of the bank. There is no charge that the bank had any notice of Worthington's misappropriation of the money, or any pleading filed raising that question; but, assuming that the general charge of a wrongful misappropriation of the funds of the county by the bank would authorize this inquiry, then it seems to us to be plain that Worthington could not maintain an action for this money, because he had withdrawn it, and equally plain that it was placed to his individual credit by the bank, under his direction, else he would not have checked it out. There was no reason why the bank should have suspected Worthington of acting improperly in the use of the money; nor should the books of the bank have been rejected, showing the entries to the individual credit of Worthington, corresponding in amount and date as to each item found on the pass-book, which the testimony, when properly considered, shows to have been more of a memorandum book than a pass-book, evidencing the deposits made to the credit of the committee. If Worthington withdrew the money, then why make the bank responsible? If placed to the credit of the committee, the county could have made the bank liable, because it had no right to pay the money of the county on the check of Worthington. The action of the county against the latter on his bond as collector seeks to recover the \$10,000; and there is no reason why he should

not be compelled to pay it. He has not accounted for it, but, on the contrary, has used it for his own purposes. The bank had no right to apply the money of the county to pay the private debt of Worthington; but the question is, has this been done? The testimony shows otherwise, and that the bank has applied the money paid to the credit of the county as required by the agents of the county. There was no misappropriation of the funds by Triplett, who seems to have checked on the fund; and, while the other members of the committee should have signed the checks to protect the bank against any misappropriation, when there has been none, and as Triplett, as the proof shows, was authorized to draw these checks, because it was inconvenient for the others to be always present, we perceive no reason for making the bank liable upon the ground that the signatures of all were indispensable to the validity of the check. Under the circumstances, the bank should not be held responsible for this loss.

The questions involved here are more questions of fact than law; and, as there is a case pending below for the purpose of determining the equities of the bondholders in the distribution of the fund, or in sustaining the loss by reason of the overissue, we will express no opinion on the question. The judgment as to Worthington is reversed, and remanded for proceedings consistent with this opinion.

As to the bank, this court has made no calculation as to the amount of funds on deposit and unpaid. It is evident that the payment on what is termed the "overissue" creates no liability on the bank, nor is the bank liable for the \$10,000, or the amount said in the opinion below to have been placed to the credit of the committee. With this as a guide, it is easy to determine how much the bank received to the credit of the committee, and how much it paid out; and the case should go to the commissioner for that purpose. The judgment against the bank is reversed, also, for proceedings consistent with this opinion.

#### CITY OF HENDERSON v. McCULLAGH.

(Court of Appeals of Kentucky. Jan. 12, 1890.)

#### TAXATION—EXEMPTION—PRIVATE SCHOOL PROPERTY.

Gen. St. Ky. (Ed. 1888) c. 92, art. 1, § 8, exempting from taxation "the real estate and investments devoted to public schools, seminaries, universities, colleges," etc., was not intended to embrace school property in use for private gain merely, and entirely devoid of a public or charitable character.

Appeal from circuit court, Henderson county.

"To be officially reported."

John L. Dorsey, for appellant. A. T. Dudley, for appellee.

HOLT, J. The appellee, Mary L. McCullagh, resists the collection of city taxes by

the appellant, the city of Henderson, assessed for the years 1884-85 upon certain real estate and personal property, which was used during those years by her for school purposes. Such use began in 1878, and was continued until 1886. In 1880 the institution was incorporated as the "Henderson Female Seminary" by an act of the legislature. The appellee was, however, named therein as the owner of the property, and given the absolute control of the school. The charter shows that it was a private educational institution. The appellee was the sole owner, and in control of it. She could select her patrons, and she alone received the benefits. The taxpayers had no voice in the control of the school. All or any of them could be excluded from its benefits, at her option. All this is clearly shown by her own testimony. It remained, therefore, after the incorporation, as it was before, essentially a select or private school. By the charter of the city of Henderson, passed in 1867, it was authorized to "levy a tax of not exceeding one dollar on each one hundred dollars worth of property, upon all property within the city made taxable by law for state purposes." So much of the taxes enjoined as were for city purposes generally were levied under this provision of its charter. So much as were for the purpose of paying the interest on its indebtedness were assessed under an act of the legislature of 1878 directing the annual levy of a tax "upon all the real estate and personal property in said city subject to taxation under the revenue laws of this state." The school-tax portion, and which makes up the balance of the tax enjoined, was levied under the law providing for a system of public schools in the city of Henderson, enacted in 1869, and which authorizes an annual levy "of not exceeding 30 cents on each one hundred dollars worth of the same property that is now taxed by the state for common-school purposes, situated in said city." The appellee contends that her property was exempted from state taxation under the law in force in 1884-85, and that it was therefore, by reason of the several statutory provisions above cited, exempt from the tax now in question. This is denied by the appellant, who also insists that even if the appellee be correct in this contention, yet her property is certainly liable for the general city and school tax, because they were levied by virtue of laws enacted prior to the adoption of the General Statutes in 1873, and when the act of May 27, 1865, was in force, which forbade the exemption from taxation of "any lot or parcel of ground in any city or town, other than church property, on which any private school is taught;" and the city school-tax law says that the levy is to be upon the property "now taxed by the state for common-school purposes, situated in said city." It is unnecessary to determine, however, whether the appellant is right in the last position. We will accept the view most favorable to the appellee, to-wit, that the entire tax in

question is to be tested by the law in force in 1884-85, relating to exemption from state taxation. It provides: "The property mentioned in this section shall be exempt from all taxation, viz.: \* \* \* The real estate and investments devoted to public schools, seminaries, universities, colleges, court-houses, clerk's offices, jails, public graveyards, lunatic, orphan, and deaf and dumb asylums, hospitals, infirmaries, widows' and orphans' asylums," etc. Gen. St. (Ed. 1883,) c. 92, art. 1, § 3.

Let us see if we can arrive at the legislative meaning of this provision. Its extent and scope, is the question. It may now be regarded as an accepted rule that there can be no lawful tax unless it be laid for a public purpose; that it can only be used in aid of an object within the governmental purpose, and not to promote enterprises strictly private, and conducing essentially to private gain, even though they may collaterally benefit the public. A mere private purpose cannot be thus aided. It may be difficult, and often is, to determine what falls within the one class or the other. Courts differ in this respect, but not as to the governing rule. It is also generally conceded that the taxing power should be held to be broad enough to provide liberally for all governmental purposes, such as providing roads, that the public may travel; public schools, that the people may become informed as to their governmental duties; for the police of the state and its courts, that crime may be punished and individual right protected; and for all other purposes which are fairly governmental, but no further. Let us also keep in mind that the exemption of property from taxation is but the imposition of increased taxation upon non-exempt property, and that taxing is the rule, and exemption the exception. The state must live. To do so, it must have its taxes. The legislature cannot exempt property from taxation, save in consideration of public service, unless it be of a benevolent or charitable character. If the object directly promotes individual interest, and be essentially a private enterprise, then the exemption of its property from taxation by the legislature would be a constitutional violation, and, as such, it would be the duty of the courts to declare it invalid. *Lancaster v. Clayton*, 86 Ky. 373, 5 S. W. Rep. 864. Unquestionably the tax-payers of the city of Henderson could not have been taxed for the support of the appellee's school. It constituted no part of our system of common education. It was not open and free to the youth of the city of Henderson who were of proper age and qualification to attend it. It should not be presumed that the legislature, in enacting the provision above cited from the General Statutes, have violated the fundamental law. Such a construction should not be given to it, if it be susceptible of any other. It can hardly be supposed that it intended to in effect take the property of one individual and give it to another by exempt-

ing the property of one and adding an increased burden to that of the other, nor is this the necessary or reasonable construction to be given to the statute.

It is urged that, in using the term "seminaries," it must be held to mean those which are private as well as public; because the word "public" is used in connection with the word "schools," and subsequently with the word "grave-yards," showing that where a public institution was intended it was expressly so denominated. A "seminary" is, however, defined by standard lexicographers to be an "institution of education; a school, academy, college, or university, in which young persons are instructed in the several branches of learning which may qualify them for their future employments;" and it can hardly be supposed that the legislature, after limiting the exemption of school property to "public schools," intended, by the very next word, to extend it to schools both public and private. Such a construction would be absurd, and the spirit of the statute must govern, even conceding that the letter of it is otherwise. Not only so, but if such construction were adopted it would be saying that the legislature, instead of looking, as was undoubtedly the case, to the education of all our children, and to a system of common education, were favoring the private enterprises of the few at the expense of the many. We are unwilling to adopt such a view of the statute, and, to our minds, it is not only not required, but is not the fair and reasonable one. The case of *Institution v. Com.*, 14 B. Mon. 214, arose under a different statute. Moreover, it related to an institution of a benevolent or charitable character, and the property belonged to the corporation. In our opinion, the statute upon which the appellee relies for the exemption of her property from taxation was not intended to embrace school property in use for private gain merely, and entirely devoid of a public or charitable character. The judgment is reversed, with directions to sustain the demurrer to the petition and dismiss the action.

#### MYERS' GUARDIAN v. MYERS' ADM'R.

(*Court of Appeals of Kentucky*. Jan. 16, 1890.)

#### HOMESTEAD — RIGHTS OF INFANT CHILDREN — WILLS.

1. Gen. St. Ky. c. 33, art. 13, § 13, providing that the homestead "exemption in favor of an execution debtor, or one against whom judgment has been rendered, shall continue after his death for the benefit of his widow and children," extends to claims of creditors proved in an action for the settlement of estates of deceased persons under provisions of the Civil Code.

2. Under section 14, providing that "the homestead shall be for the use of the widow so long as she occupies the same, and the unmarried infant children of the husband shall be entitled to a joint occupancy with her until the youngest unmarried child arrives at full age, but the termination of the widow's occupancy shall not affect the rights of the children," the failure of the widow of the owner of a homestead to take under his will devising her his real estate cannot prejudice his infant children.

3. The owner of a homestead not exceeding \$1,000 in value has power under the statute to pass title to the property to his widow and children by will.

Appeal from circuit court, Fleming county.  
"To be officially reported."

G. A. Cassidy and L. J. Moore, for appellant.  
J. H. Power, for appellee.

LEWIS, C. J. By his will dated February 12, 1885, and proved and admitted to record February 23, 1885, Michael A. Myers devised to his wife, Ann J. Myers, for life, remainder to his daughter Hattie E. Myers, all his estate, consisting of a small amount of personalty, since consumed, and a house and lot, the subject of controversy. June 8, 1888, J. H. Power was appointed administrator of the estate of the testator, the widow having died in May, 1888, and June 11, 1888, instituted this action for a sale of the house and lot, and application of the proceeds to payment of creditors, whose debts, as alleged in the petition, amount to about \$450, and the cost of administration, and of the action. Hattie E. Myers, who is an infant, by her guardian *ad litem* filed an answer alleging that her father, at the time of his death, was a *bona fide* housekeeper, with a family, and as such occupied the house and lot, which is of less value than \$1,000; and that in virtue of his will, her mother being dead, she is the absolute owner thereof; and asked judgment to that effect. But in a second paragraph she asked that, in case the court adjudged the property subject to payment of debts against the testator, her homestead right to the proceeds be saved and set apart to her. The court, however, sustained a general demurrer filed by the administrator to the answer, which had been made a counter-claim, and, in pursuance of the judgment rendered, the house and lot were sold by a commissioner, bringing at the sale \$505, which will, unless this court intervenes, be paid out according to the prayer of the administrator, excluding the infant as well from what is claimed for her in virtue of the statute as under the will of her father. Section 13, art. 13, c. 38, in express terms provides that the homestead exemption in favor of an execution debtor, or one against whom judgment has been rendered, shall continue after his death for the benefit of his widow and children, subject, however, to be estimated in allotting dower; and, of course, the reason of the law requires, and consequently we must presume the legislature intended, such exemption should exist and be continued, as to claims of creditors proved in an action for the settlement of estates of deceased persons under provisions of the Civil Code. Section 14 provides: "The homestead shall be for the use of the widow so long as she occupies the same, and the unmarried infant children of the husband shall be entitled to a joint occupancy with her until the youngest unmarried child arrives at full age; but the termination of the widow's occupancy shall not affect the right of the children, but said land may be sold, subject

to the right of said widow and children, if a sale is necessary to pay the debts of the husband." By a fair construction of that section, the widow and children cannot be disturbed in possession of the homestead while the widow lives, nor, in case of her death or abandonment, can the children be deprived of the possession and enjoyment of it before they arrive at full age; and, in case of a sale of the homestead, the widow, and, in case of her death or abandonment, the infant children, are entitled to the use of the proceeds. For not only is it in terms provided that the termination of the widow's occupancy shall not affect the right of the children, but this court, in the cases of *Eustache v. Rodaquest*, 11 Bush, 46, and *Little's Guardian v. Woodward*, 14 Bush, 585, has decided that the children, where there is no widow, would be entitled to the exemption. Such being the condition and relative rights of the widow and children where the owner of a homestead dies intestate, we are at a loss to see how the failure of the widow to exercise an election not to take under a will of such owner could prejudice his infant children; and consequently it seems to us the case of *Watson v. Christian*, 12 Bush, 524, has no application, for there it was simply decided the widow who had not elected to renounce the will of her husband, by which it was provided his debts should be first paid out of the homestead before she was entitled to any part of the estate devised, could not claim as widow, under the statute,—the rights of the infant children, if there were any, not being involved at all.

But the further, and hitherto undecided, question is presented, whether the owner of a homestead, not exceeding \$1,000 in value, can pass title to the property to his widow and children by will. It has been decided by this court more than once that the owner of a homestead has power, under the statute, to convey by deed and pass a good title to the property, not exceeding \$1,000 in value; the reason being that such conveyance does not affect rights of creditors. *Brooks v. Collins*, 11 Bush, 622; *Richart v. Utterback*, 9 S. W. Rep. 422, 825. In the last-named case the debtor conveyed the homestead to his children, in consideration of love and affection, and a continuance by them of kindly service and attention during the remainder of his life, but the use and occupation thereof was by the terms of the deed reserved by the grantor during his life. Although the effect of that conveyance was to postpone the use and enjoyment of the property by the grantees until after death of the grantor, and to pass to them only an interest in remainder, nevertheless it was held that, as the owner of the homestead had the right to convey the whole estate, there was no reason for denying him the right to convey less than the whole, for in neither case were creditors thereby prejudiced. The reason of the homestead statute, and manifest policy of the legislature, is to secure to each housekeeper with a family a

homestead, of the value of not more than \$1,000, that shall not only be exempt from coercive sale, but may be sold and conveyed by the debtor. As, therefore, credit is not, nor need be, given to the owner of such homestead, upon the faith it can and will be made liable for any debts contracted by him, no one is or can be prejudiced or injured, in fact or in law, by the transfer or conveyance of it by him, whether to his wife and children for a good, or to strangers for a valuable, consideration; and it would therefore seem no more injury to creditors, nor in contravention of the purpose and reason of the homestead law, for the debtor to pass the title by will than by deed. For if, as has been held, he can by deed, and for merely love and affection, convey the remainder interest to his children, reserving a life-estate to himself, we see no reason why he may not do practically the same thing by will, because his creditors are prejudiced in one state of case no more than the other. In fact, they are not wronged in either, but in both the object of the law, which is to secure to every housekeeper with a family the certain and uninterrupted enjoyment of a homestead, is accomplished. In our opinion, Hattie E. Myers was, under the will of her father, entitled to the interest in remainder of the house and lot; and it having been sold, and her mother being dead, she is now entitled to the whole amount for which it was sold. Wherefore the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

**LOUISVILLE & N. R. CO. v. MERRIWETHER'S ADM'R.**

(*Court of Appeals of Kentucky.* Jan. 25, 1890.)

**DEATH BY WRONGFUL ACT—PUNITIVE DAMAGES.**

Under Gen. St. Ky. c. 57, § 8, giving an action to recover punitive damages to the widow, heir, or personal representative of a person whose death is caused by willful neglect, no recovery can be had if the deceased left neither widow nor child. *Jordan's Adm'r v. Railway Co.*, 11 S. W. Rep. 1013, followed.

Appeal from circuit court, Warren county.  
"Not to be officially reported."

Action by the administrator of W. A. Merriwether against the Louisville & Nashville Railroad Company to recover damages for the killing of his intestate. The company appeals from a judgment in favor of the administrator. Gen. St. Ky. c. 57, § 8, provides: "If the life of any person or persons is lost or destroyed by the willful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the widow, heir, or personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of the life aforesaid."

*Delaney & Mitchell*, for appellant. *Rodes, Settle & Rodes, J. M. Simmons*, and *E. W. Hines*, for appellee.

PRYOR, J. We perceive no reason for distinguishing this case from that of *Jordan's Adm'r v. Railway Co.*, 11 S. W. Rep. 1013. The action is for the death of one caused by the willful neglect of the employees of the railroad company. The deceased left neither widow nor child, and it must therefore follow that no recovery can be had. Judgment reversed and remanded for proceedings consistent with this opinion.

**McCROCKLIN v. LLOYD.**

(*Court of Appeals of Kentucky.* Jan. 25, 1890.)

**VENDOR AND VENDEE.**

A mistake as to the quantity of land having been made, and the price in the deed fixed accordingly, the fact that within six months after taking the deed, and repeatedly thereafter, the vendee promised to pay a specific sum for the excess, will sustain a finding that the excess had not been adjusted and paid for at a less price.

Appeal from circuit court, Nelson county.  
"Not to be officially reported."

Action by S. T. Lloyd against W. T. McCrocklin for price of land and interest. McCrocklin appeals from judgment of chancellor in favor of Lloyd.

*John D. Wickliffe* and *C. T. Atkinson*, for appellant. *John S. Kelley*, for appellee.

BENNETT, J. The appellee sued the appellant for \$175, price of land, and \$173 and \$92, balance of interest. Said respective sums occurred in this wise: The appellee sold to the appellant 56½ acres of land off of the appellee's farm. The sale was in two parcels,—one 40 acres of hill land, including a good dwelling-house, doctor's office, and blacksmith's shop, which was the main inducement for the sale at \$110 per acre; and 16½ acres of bottom land, valuable for agricultural purposes, for \$100. Said parcels of land, adjoining, were surveyed in one body, and the hill land measured 41½ acres, and the bottom land measured a fraction over 16½ acres; and the deed was drawn, signed, and delivered as containing this aggregate number of acres; but the price, by mistake, was fixed in the deed so as to correspond to the 40 and 16½ acres. It is agreed that the mistake, as above indicated, did occur, but the appellant contends that the surplus was adjudged at the rate of \$50 per acre, and paid for at that price; but the weight of the evidence, as construed by the chancellor, shows that the appellant agreed to pay for the surplus \$175; that he made this agreement within six months after the making of the deed, and repeatedly promised, the last of which promises was written three years next before bringing this action, to pay said sum. We are not prepared to say that the chancellor decided against the weight of the evidence; unless we can say that we are clearly of the opinion that he did so decide, his judgment must stand. The appellant also admits that, in calculating interest, there was a mistake of \$173 and \$88 committed against the appellee; but he contends that the ap-



pellee, in 1882, collected of him \$243 usury, which sum he says should be treated as a payment of said two sums, etc. It may be conceded that the debt on which said usury is said to have been collected was a part of the debt sued on, though due as a different installment, and the payment of usury thereon should be applied, in way of payment, to the extinguishment of any part of the whole debt, yet it was a question of fact as to whether or not said usury was paid by the appellant. The court, in that regard, heard the facts *pro* and *con*, and decided that there was no usury paid. There was positive evidence for and against the proposition, and the chancellor decided on behalf of the appellee, and we, for the reason above indicated, cannot disturb his judgment. The judgment is affirmed.

**WHITE v. CINCINNATI, N. O. & T. P. Ry. Co.**

(Court of Appeals of Kentucky. Jan. 25, 1890.)

**CARRIERS—DEFECTIVE PLATFORMS.**

A shipper of stock is not guilty of contributory negligence who uses the only platform provided by the railroad company for that purpose, and is injured in so doing, though he knows it to be unsafe, if he exercises reasonable care in its use.

Appeal from circuit court, Grant county.  
"To be officially reported."

Action by J. M. White against the Cincinnati, New Orleans & Texas Pacific Railway Company, for personal injuries. White appeals from a judgment on a verdict directed for the company.

J. J. Landram, for appellant. C. B. Simrall, for appellee.

**HOLT, J.** The appellant sues for damages for injuries sustained by him while assisting his employer, a shipper over the appellee's road, in loading stock at night upon its cars. The apron or platform connecting the stock-chute with the car into which the cattle were being driven gave way, precipitating the appellant against the side of the car. The evidence tends to show that the apron was too short,—not long enough to lap sufficiently far over on either the chute or the car to insure safety to one upon it; that it was not fastened to the chute by hinges or otherwise, as is usual, and had been out of repair for a considerable time; that all this was known to the company, through its agent, previous to the time of the injury, but was likewise known to the appellant. It further appears that the station where the accident occurred was the nearest and most convenient point for shipping the stock, and that but the one chute and apron were provided by the company. The lower court, at the close of the appellant's testimony, peremptorily instructed the jury to find for the company upon the ground, as is admitted in argument, that the appellant was aware of the defective condition of the platform, and could not, therefore, recover.

Such an instruction should not be given, unless, conceding the truth of the evidence offered, and of every fact which it conduces to prove, the party has no case. It is contended that the knowledge of the appellant prior to the time of the injury of the unsafe condition of the platform forbids a recovery. If so, the action of the trial court was correct. Let us see. It is not properly a question of contributory negligence. It is not claimed, and there is no testimony tending to show, that the appellant was negligent in the manner of using the platform. So far as appears, it was the usual and careful use of it; but the trouble consisted in the fact that it was defective. The rule is well settled by a uniform current of decisions, so numerous that citation is unnecessary, that a railroad must keep its platforms and approaches to which the public do, or will naturally, resort in doing business with it, in a safe condition for such use. This is one of the duties it owes to the public. It goes hand in hand with its franchises and extraordinary privileges. The appellant had a right to be where he was, and engaged as he was, when he was injured. The company had invited his presence by holding itself out as a carrier of stock. It had impliedly said to the public: "The platform is safe for the purposes intended, if reasonable care be exercised in its use." It is said, however, that the appellant knew this was not true, and that he therefore used it at his peril. This is, however, unlike the case of a servant against the master for an injury caused by a defective state of the machinery or premises, or materials provided by the latter for the work of the former. The master is not bound to employ the servant. The latter cannot dictate to him in this respect. Not only the duty rested upon the company, however, so long as it held itself out to the public as a carrier, of providing safe appliances for such purpose, but the public had a right to demand it, and to use the road for travel and shipping purposes. It was bound to keep its platforms and approaches essential to travel or shipment in a safe condition; and public policy forbids that it should be allowed to protect itself from liability for injurious consequences resulting to persons from its failure to perform this important duty upon the ground that they knew the platform or approach was defective. Suppose a passenger platform at a depot is defective. A person desiring to take passage knows it. Is he, therefore, to forego going, or else take the risk of injury without remedy, notwithstanding the exercise of reasonable care upon his part in attempting to board the train? Surely not. In this case the company had provided but the one chute and the one apron for the shipment of stock at the station. It was inviting patronage in this way by the public, although it knew the means provided for the purpose were unsafe. Under such circumstances, was the owner of the stock to be

compelled to take them elsewhere for shipment, or the appellant to refuse employment, because of knowledge of the defective condition of the platform? A very different case would be presented where one contributed to his own injury by carelessness upon his part in the use of the defective platform. He cannot complain where, but for his own neglect in the manner of using it, the injury would not have occurred. In such a case, there is a co-operating cause of injury upon his part. Here there is none, but the railroad company invite the shipper to ship his stock. It holds itself out as furnishing safe means for the purpose; and, although he makes a prudent and usual use of them, yet after he has been injured it says to him: "There is no liability upon our part, because you knew we were not doing what we professed to the public?" It cannot be heard to rely upon the failure of a duty so important to the public. It is the duty, for instance, of a railroad company to keep its depot lighted at night, that entrance and exit may be safe. Suppose a person desires to take passage at a certain place, and upon reaching the depot he finds that this has not been done. The situation is such that he must enter the depot to take passage, or decline to go, however important his business. He accordingly enters; and, while prudently, and as best he can, making his way in the darkness, falls, and is injured by something carelessly placed in the way by the company. Will it be contended that the company could shield itself by saying: "You knew there was no light in the depot, and if you had kept out of there no injury would have resulted?" If one have notice of a defect in a highway making it dangerous for travel, this does not *per se* make a careful and usual use of it by him negligence. We do not, of course, mean to hold that one may, by recklessly rushing into danger, or by his own culpable negligence in use of the appliances provided by the railroad company, directly produce the injury, and then hold the company liable; but as he must of necessity use them, or forego travel, or the transportation of his property, he should not be remediless, although he may know of their defective condition, if he is injured when using them for these purposes in a prudent and the usual manner. Any other rule would leave the public at the mercy of the railroad companies. They, knowing the traveler or shipper, in this day of wonderful advance and improvement, is compelled to use their roads, or forego travel or the shipment of his property, could by their agents inform him of the defective condition of their appliances for travel, and then be exempt from liability for his injury by reason thereof, although still inviting him to use them, and although he has been injured when doing so in a prudent and the usual manner. Public safety, and the proper management of this now almost universal mode of travel and shipment, forbid the adoption of a different rule from the

one we have indicated. Judgment reversed, and cause remanded for a new trial consistent with this opinion.

#### KINNAIRD v. STANDARD OIL CO.

(Court of Appeals of Kentucky. Jan. 25, 1890.)

##### POLLUTION OF UNDER-GROUND CURRENTS.

The owner of a spring of water is entitled to recover damages for its pollution by oil stored in large quantities on the land of his neighbor, which, leaking from the casks containing it, saturates the ground, and penetrates to the hidden or unknown veins of water feeding the spring.

Appeal from circuit court, Garrard county.  
"To be officially reported."

Action by Robert Kinnaird against the Standard Oil Company for polluting his spring. Kinnaird appeals from a judgment on a peremptory instruction to the jury to find for the company.

W. J. Landram and M. H. Owsley, for appellant. Brown, Humphrey & Davis, for appellee.

PRYOR, J. The appellant, Kinnaird, is the owner of a small tract of land containing about four acres, lying adjacent to or within the boundary of the town of Lancaster, in the county of Garrard. On this land is a valuable and never-failing spring, that appears upon the surface of the ground at the foot of a hill, and had been used as such for a long period of time. In November of the year 1886 the appellee, the Standard Oil Company, leased from the Kentucky Central Railroad Company a site upon which to build a warehouse for the storage of its coal oil. They erected the warehouse, and placed in it their coal oil, that leaked from the casks, and saturated the ground, both on the inside and outside of the building. The floor of the house consisted of a bed of cinders about 12 inches in depth, that supplied the place of plank, that, as the proof shows, would become very inflammable when saturated with the oil. The bed of cinders, therefore, rendered the property much more secure than if a floor had been laid in the building. The spring of the appellant is located about 200 yards from the oil-house of the appellee, with a hill or rise in the ground between the two, and the proof conduces to show that water on the surface of the ground at the oil-house would naturally flow in an opposite direction from the spring, because it is lower than the ground where the spring emerges from the hill. After the oil had been deposited in the building erected for that purpose, it is manifest that it leaked from the casks, and, being of such a penetrating character, it passed into the ground, and polluted the water or stream from which the spring of appellant was supplied. While it is argued that the proof on this subject is by no means satisfactory, we think it apparent from the testimony that the oil mingled with under-ground currents of water that fed the spring of the appellant, and caused the injury. The court below, on

hearing the testimony, gave a peremptory instruction to the jury, on the ground that no action could be maintained for contaminating the subterranean water that flowed into the spring of the appellant, as the appellee had the right, in the exercise of its legitimate business, to build the house, and store the oil within it, on its own land, although the property of its neighbor was injured by it. If this had been surface water, or a vein of water under-ground, with a well-defined and known channel, the right to maintain the action cannot be doubted; but, as to hidden or unknown veins of water, it is said they belong to the soil, constitute a part of it, and may be used, controlled, or removed by the owner in the same manner that he could the soil through which the water percolates or runs.

The theory of the defense is that, this water being the property of the owner of the land, its use, if not forbidden by law, cannot work an injury to his neighbor, in the absence of a design to do so, however great the damage sustained. This view of the legal rights of these parties seems to be sustained by numerous reported cases, involving questions analogous in almost every particular, and, if followed by this court, it must be held that the peremptory instruction was proper. The case of *Brown v. Illius*, reported in 27 Conn. 84, was an action on the case for a nuisance, and in the declaration it was alleged that offensive matter in the manufacture of gas, deposited on the surface of the ground, had permeated into the soil around and adjoining the well, and into the well itself, corrupting the water and rendering it unfit for use. The court, in applying the rule in regard to subterranean currents, and in discussing the instruction given by the lower court, held that the ownership of the land sanctioned and justified the use made of it by the defendant, and, although the latter was injured, if the damage resulted from the mingling of the noxious matter with the under-ground vein of water, it was an injury without any violation of the plaintiff's legal rights by the defendant, and the latter "was under no legal obligation to prevent it in the first instance, or a continuance of it afterwards." The rule that gives to the owner of the soil all that lies beneath its surface, whether oil or water, was made to apply in the case cited, with the right of the owner to use it at his pleasure, and in any legitimate mode, and the plaintiff denied the right of recovery upon that ground. The case of *Dillon v. Oil Co.*, 49 Hun, 565,<sup>1</sup> was where the plaintiff owned two lots, upon which he had erected dwellings, and had dug a well on each lot, that he used for household purposes. The defendant erected an oil refinery about 300 feet distant from the lots of the plaintiff, and the oil, leaking on the surface, had permeated the ground until it reached some under-ground stream that carried it to the wells of the plaintiff. An injunction was sought, and the relief denied, for the reason that the defendant

had the right to use that which he owned for legitimate purposes, provided, in doing so, he exercised proper care and skill to prevent injury to others; and, as an illustration of the rule, it was there said that he might dig a well or ditch, and cut off a hidden stream of water that supplied his neighbor's well, and thereby render it useless. In *Bloodgood v. Ayers*, 108 N. Y. 400, 15 N. E. Rep. 433, it was also held that no person is liable for interrupting a stream supplying a well or spring, unless he knew beforehand where the stream was,—a doctrine, we think, well settled by an unbroken line of authority. That one may divert or consume all the water from under-ground currents, that have no fixed known channels, and appropriate all the water to his own use, and that he is the absolute owner of this water while it remains under his soil, with the right to appropriate it as he pleases for legitimate use, will not be denied. This use or right of property is, however, only temporary, and remains only so long as the water stands on or under his land. He cannot follow it when it leaves his premises, and passes to the land of his neighbor; and it may therefore be said that he has not the absolute title, as each owner of the land is vested with the right to use the water, and appropriate the whole of it when it reaches him. In the case of *Upjohn v. Board*, reported in 46 Mich. 542, 9 N. W. Rep. 845, the opinion delivered by Mr. Justice COOLY, it was held to be an established rule that owners of the soil have no rights in subsurface waters not running in well-defined channels, as against their neighbors who may withdraw them by excavations; and therefore, if no right of action exists for ruining the plaintiff's well by withdrawing the water, it is difficult to understand how corrupting its waters by a proper use of the adjoining premises can be actionable, when there is no intent to injure, and no negligence, as each act would destroy the well of the plaintiff. It seems to us, after a careful review of the authorities referred to by counsel for the corporation, all of which are entitled to great weight, that there is a manifest distinction between the right of the owner of land to use the under-ground water upon it, that originates from percolation or is found in hidden veins, and the right to contaminate it so as to injure or destroy the water when passing to the adjoining land of his neighbor.

It is a familiar doctrine that one must so use his property as not to injure his neighbor, and because the owner has the right to make an appropriation of all the under-ground water, and thus prevent its use by another, he has no right to poison it, however innocently, or to contaminate it, so that when it reaches his neighbor's land it is in such condition as to be unfit for use either by man or beast. One may be entitled by contract with his neighbor to all the water that flows in a stream on the surface that passes through the land of both, and, while he can thus appropriate it, he has no right to pollute the

<sup>1</sup>2 N. Y. Supp. 289.

water in such a manner as, when it passes to his neighbor, its use becomes dangerous or unhealthy to his family, or to the beast on his farm. As soon as the water leaves the land of the one who claims the right to use it, and runs on the land of another, the latter has the same right to appropriate it, and, if property, it then becomes as much the property of the last as the first proprietor. The owner of land has the same right to the use and enjoyment of the air that is around and over his premises as he has to use and enjoy the water under his ground. He is entitled to the use of what is above the ground as well as that below it, and still it will scarcely be insisted that he can poison the atmosphere with noxious odors that reach the dwelling of his neighbor, to the injury of the health of himself or family. If not, we see no reason why he should be permitted to so contaminate the water that flows from his land to his neighbor's, producing the same results, and still escape liability for the damages sustained, and whether the water escapes the one way or the other is immaterial. The simple question is, can the owner, with a knowledge of the penetrating character of its oil, and the effects following its leakage, store large quantities of it near the spring of the plaintiff, when the oil is seen in puddles outside of the building, the result of leakage of the casks on the inside, and resist the claim of the plaintiff on the ground that it did not know the water was affected by it? The injury has been done, and can it be said that it presents a case of *damnum absque injuria*? We think not. The case of *Ballard v. Tomlinson*, an English case, reported in 24 Amer. Law Reg. 634, contains the correct rule on the subject. In that case the water in the plaintiff's well was injured by sewerage from the defendant's well, and it was held that an injunction to restrain the defendant from so using his well was proper, and the plaintiff entitled also to damages for what he had suffered by reason of the pollution. While the unlimited right to use the percolating water was conceded to the plaintiff, the right to contaminate the water so as to render it unhealthy or unfit for use, when it came to his neighbor's land, was held to be a violation of the plaintiff's rights, for which an action could be maintained. If one has that on his own premises that is dangerous, or a substance that he is constantly using which is liable to escape and injure others, whether above or under the ground, and injure the property of his neighbor, or that which his neighbor has the right to use, he must answer for the consequences. A recovery was had against gas companies in the case of *Gas-Light Co. v. Graham*, 28 Ill. 74; *Gas Co. v. Murphy*, 39 Pa. St. 257; *Gas-Light Co. v. Freeland*, 12 Ohio St. 392. In the case in 28 Ill. 74, the gas company erected works near the dwelling of Graham, and injured the water in his well by permitting the substances used in its manufacture to permeate the soil, and find their way to plaintiff's well. The court told the jury that if such substances did soak

into the ground, and permeate and pass along and through the earth, mingling with the water of the well, and did thereby render it nauseous to the taste, or unfit for use, the jury should render a verdict for the plaintiff. This branch of the instructions was held to be proper, and no question raised as to the right of recovery, if the jury believed the facts existed as alleged and proven. In *Gas Co. v. Murphy*, the court held the company answerable for the corruption of the plaintiff's well by reason of fluids percolating from the works. The entire dominion of the defendant over its property in the present case is undenied, but it had no right, while enjoying its use, although in a legitimate way, to violate, by the manner of its use, the rights of others. It seems to us unreasonable to adjudicate that the erection and operation of gas-works, or buildings for the storage of oil, with the noxious and injurious substances, by reason of the deposit on the surface permeating the ground, and injuring or destroying the taste or use of water belonging to and on the property of others, is such a legitimate use of one's property, and his dominion over it, as to preclude any recovery for an injury to the property of his neighbor, however great, and to require a notice that the injury has been inflicted before the action can be maintained would be to destroy the theory or the principle upon which a recovery in the case is permitted. It is argued that the appellee was ignorant of the existence of the nuisance or injury to appellant's spring, and had no right to suppose that its oil was affecting the water in the spring of the plaintiff. This may be so, and still the defendant is responsible for the injury, although it was not aware that its neglect in permitting the oil to leak from the casks, and stand in pools outside the building, had or would work an injury to the plaintiff. If a nuisance, whether neglect or not, the appellee is liable.

We have assumed, in the consideration of the questions presented, that the injury complained of resulted from the manner in which the oil was kept in the store-house of the defendant, but we are not to be understood as taking that question from the jury on the return of the case. Some question was made in the court below, as to the right of the plaintiff in estimating the value of his spring, or the damages occasioned by the act of the defendant, to show that years before he had sold water from it; this testimony was properly excluded. We do not understand that the injury has resulted in the entire destruction of the spring or the water for use, and for that reason the actual damage sustained is the criterion of recovery,—the deprivation of the use of the water for domestic or farm purposes up to the time of the trial. The continuance of the use of the building for the purposes of storing the oil, without any additional protection to the flow of the oil to the spring of the plaintiff, would subject the appellee to another action. We cannot well see how the plaintiff can be fully compensated in

any other mode, and to make the injury permanent, when it is certainly in the power of the defendant to prevent it, would be subjecting it to the payment of damages, although the beneficial use of the spring had been again restored. Judgment reversed and remanded, with directions to award a new trial, and for proceedings consistent with this opinion.

**MORRIS' ADM'X v. LOUISVILLE & N. R. Co.**  
(*Court of Appeals of Kentucky. Jan. 28, 1890.*)  
**DEATH BY WRONGFUL ACT—COMPENSATORY DAMAGES.**

Though, under Gen. St. Ky., c. 57, § 3, an action cannot be maintained for punitive damages for the killing of a person by the willful neglect of any one, unless the person so killed leaves a widow or minor child, a recovery may be had under section 1, giving compensatory damages to the personal representatives for death caused by negligence, and an allegation in the petition of "willful" negligence may be disregarded as surplusage.

Appeal from circuit court, Campbell county.

"Not to be officially reported."

Action by administratrix of Eleanor Morris against the Louisville & Nashville Railroad Company to recover damages for the killing of her intestate. The administratrix appeals from a judgment sustaining a demurrer to her petition. Gen. St. Ky. c. 57, provides: "Section 1. If the life of any person, not in the employment of a railroad company, shall be lost, in this commonwealth, by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, or by the unfitness, or negligence, or carelessness of their servants or agents, the personal representative of the person whose life is so lost may institute suit and recover damages in the same manner that the person himself might have done for any injury, where death did not ensue." "Sec. 3. If the life of any person or persons is lost or destroyed by the willful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the widow, heir, or personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of the life aforesaid."

A. T. Root, for appellant. Wm. Lindsay, Geo. Washington and James C. Wright, for appellee.

**BENNETT, J.** A demurrer was sustained to the appellant's petition; and she, declining to amend, has appealed to this court. The appellant, as administratrix of Eleanor Morris, seeks to recover damages for the killing of said intestate by appellee. It is alleged that the intestate died unmarried and childless. It is also alleged that the killing was by "the gross and willful negligence" of the appellee. We have heretofore decided, which decision is adhered to, that no action can be maintained under chapter 57,

§ 3, Gen. St., to recover damages for the death of any person, unless the killing was caused by the willful negligence of the persons or corporations in said section named; and no recovery could be had for such killing unless such person left a widow or minor child or children, for whose benefit alone the recovery could be had. But under the first section of said chapter the administrator of a person killed, whether or not he has a widow or child, or heir in any degree whatever, can recover damages for the negligent killing of such person by the person or corporations therein named. Such negligent killing includes ordinary or gross negligence. In the petition, both "gross and willful" negligence are set up; and, as the petition not only fails to show, but negatives, the right to recover under the third section of said statute, nevertheless a full and complete cause of action is set up under the first section. All that is said in reference to willful negligence may be stricken out, yet a sufficient cause of action is set up under the first section for negligence, either ordinary or gross. The allegations in reference to willful negligence, by reason of their insufficiency, are immaterial, and amount to nothing. The petition stands as though such allegations had not been made, and as though the action had been brought to recover damages for negligence only. So the only question is, do the allegations set up a cause of action for negligence? As before stated, we think they do. The judgment is reversed, with directions to overrule the demurrer, and for further proceedings consistent with this opinion.

**ADAMS v. THOMAS et al.**

(*Court of Appeals of Kentucky. Jan. 30, 1890.*)

**SCHOOL BOARD—LIABILITIES.**

The duties and powers of the board of education of the Paris City school being prescribed, not by the general law relating to common schools, but by special statute, applicable to that city, under which the board has the power to remove a superintendent without the approval of the county superintendent, and the contract between the board and the superintendent reserving the right to each to terminate the relation of employer and employe at any time, the members of the board are not liable for discharging a superintendent, unless they act maliciously.

Appeal from circuit court, Bourbon county.

"Not to be officially reported."

Action by R. H. Adams against James M. Thomas and others to recover damages from the individual members of the school board for his removal. From a judgment in favor of defendants, plaintiff appeals.

L. H. James and S. Hodge, for appellant. J. W. Lucas, for appellees.

**LEWIS, C. J.** The board of education of the Paris City school has, as admitted in the petition of appellant, the power to select a superintendent, and fix his salary; and we think the power also exists to remove him at pleasure, without the revision or approval of

the county superintendent, for the board of education exists, and its duties and powers are prescribed, not by the general law relating to common schools, but by special statute, applicable to the city of Paris, which is, for the purposes of such statute, made one district. Moreover, it appears from the evidence that, at the time appellant was appointed superintendent, he was informed by the members of the board of education that the power existed, and was reserved by the board, to remove him at any time; and the right was claimed by and conceded to him at any time to resign the position.

His appointment being, then, made under a contract, with the right agreed to exist, and reserved to each party, to terminate the relation of employer and employe, at any time, the only question for us to consider is whether, on the trial of this action, brought by appellant, to recover damages of the individual members for his removal by the board, the court fully and correctly instructed the jury. It is alleged in the petition that appellant was discharged from the position maliciously, and with intent to injure him; and the lower court instructed the jury to find for him, if they believed, from the evidence, such was the fact. But they were, on the other hand, instructed to find for the defendant, if he was discharged for a failure or refusal to maintain proper discipline in the school, and that they in good faith believed there was sufficient and proper grounds for their action, and there was proper cause or reason for such action. It is true, as appears from the evidence, the action of the board was taken without previous notice to him, and the time of his discharge was in the middle of the school term, whereby the opportunity was lessened for him to get employment elsewhere. But, if the power was exercised without malice, or intent to injure him, and was in good faith believed by the board necessary for the success and proper conduct of the school, appellant had no cause of action, for not only did he agree that the power to remove him existed, but that it might, in such state of case, be exercised. The judgment is affirmed.

#### HALL v. DITTO et ux.

(Court of Appeals of Kentucky. Jan. 28, 1890.)

ESTOPPEL BY DEED—TRUSTS—LIMITATION OF ACTIONS.

1. A deed which in one portion purports to convey only the interest of the grantor, though in another portion it speaks of "the land" as being sold to the vendee, does not bind one who, without being named in it, signs and acknowledges while a minor, and reacknowledges it after attaining her majority, and she is not thereby estopped to claim the land.

2. A trustee under a deed purchased by parol the interest of his daughter, one of the beneficiaries, for two slaves, of which she at once took control, he beginning to claim her interest in the land. He sold the entire tract by parol to one who held and improved it for two years, using it as his own, and then surrendered it to the father, the daughter having knowledge of the transaction. The father then held it, claiming it as his own, un-

til he sold it. *Held*, that this amounted to an open renunciation of the trust, and an open and notorious adverse claim which set the statute of limitations running, and, the statute having begun to run in her life-time, it was not suspended by her death, as against her infant daughter, who married before attaining her majority.

Appeal from circuit court, Henry county.  
"Not to be officially reported."

Action by E. F. Ditto and wife against Charles A. Hall, to recover a one-sixteenth interest in certain land. Hall appeals from a judgment against him.

John D. Carroll and Wm. B. Moody, for appellant. Wm. Carroll, for appellees.

HOLT, J. December 17, 1855, David Adams, in consideration of affection, conveyed to John Adams, in trust for his eight children by his deceased wife, Sally Adams, who was a daughter of the grantor, 30 acres of land. One of them was Margaret Kephart, who died intestate in 1862, leaving two children, the appellee Mrs. Ditto being one of them, as her only heirs. John Adams inherited a portion of the land by the death of some of his children. He also appears to have purchased the interest of others, and in 1866 he, together with the adult children then living, conveyed the land to the appellant, Hall. The deed purports in one portion of it to convey only the interest of the grantors; but in another, after speaking of the entire tract, it says, "said land being now sold to said Charles A. Hall;" and it is evident it was a sale of all of it. The appellees, Ditto and wife, are not named in the body of the deed, but both of them signed and acknowledged it; and the wife being a minor when this was done, in 1867, she, after arriving at majority, in 1869, again acknowledged it. This action was brought by the appellees on September 27, 1887, for the one-sixteenth of the land. The defense is—*First*, that by the execution of the deed, and representations and conduct upon their part, they are estopped of a recovery; *second*, that the lapse of time prevents it.

The first defense is unsustainable. Manifestly the deed is not binding upon the appellees. They are not named in the body of it. They have not thereby granted anything, and no representation or conduct upon their part is shown to support the claim of an estoppel, save the mere fact that they signed and acknowledged the deed. This is insufficient for such a purpose.

The other defense, however, is, in light of the testimony, not free from difficulty. It appears the Adams' grandchildren derived little, if any, estate from their grandfather, David Adams, save slaves, two old and two young ones. The father, John Adams, appears to have taken control of the slaves, and in 1857 he and Mrs. Kephart, who as a widow was then *sui juris*, made a parol trade, by which he let her have the two old negroes, and she released to him her interest in the 30 acres of land and the other two slaves. It is proven by several witnesses that she

said she had made this trade, and often expressed herself as well pleased with it. She at once took control of the slaves, and her father, John Adams, began to claim her interest in the land. The evidence is somewhat conflicting as to the then value of the slaves she got; but, considering the opinions of the various witnesses relative thereto, and what her grandfather had given for them but a year or two before, we are of the opinion that the trade was a fair one as to her. It is true it does not appear what interest her father owned, if any, at that time in the slaves; but this is immaterial, as to the question of limitation. Certainly he thereafter became, if he was not then, the owner of an interest in them by inheritance from his deceased children, and, as the evidence tends to show, by purchase from some of the living ones; and, in any event, Mrs. Kephart held the slaves, hired one or both of them out, while he claimed her interest in the land, and the trade does not appear to have ever been questioned by any one who may have been interested in the slaves. Before the death of Mrs. Kephart, her father sold the entire 30 acres to one of his sons by parol, and it is quite certain that she knew of it, as she was then living with her father. The son held it under this purchase for two years, improving it in the mean time, when, being unable to pay for it, he surrendered it to his father, and the latter then held it, claiming it as his own, and so using it until the sale to appellant, in 1866. This certainly amounted to an open renunciation of the trust created by the deed, and a notorious and open claim adversely to her of her interest in the land. Unquestionably the statute then began to run against the *cestui que trust*. Moreover, Mrs. Kephart had been paid a fair consideration for her interest in the land, and there is no showing of any advantage taken of her, or concealment or fraud of any character. The statute of limitations having begun to run in Mrs. Kephart's life-time, it did not stop at her death, although Mrs. Ditto was then an infant, and married before attaining majority. The fact that the father was trustee did not prevent his possession from becoming adverse. The open and notorious renunciation of the trust, with claim in himself to the property, and a hostile holding of it with knowledge upon the part of the *cestui que trust*, brought the statute of limitations into life, and required steps to be taken within the statutory period of 15 years to prevent its creating a bar to a recovery. It matters not that the appellant when he purchased had actual notice of the trust formerly existing upon the part of John Adams. He knew that the trustee had held and used the land as his own, with the knowledge and consent of the *cestui que trust*; that he had repudiated the fiduciary relation; that its non-existence was recognized by both parties; and after his purchase, in 1866, he continued the adverse holding, so that when this action was brought it had lasted for nearly 30 years. Perry, Trusts, § 864, says:

"It has been held, however, that if a trustee repudiates the trust by clear and unequivocal acts or words, and claims thenceforth to hold the estate as his own, not subject to any trust, and such repudiation and claim are brought to the notice or knowledge of the *cestui que trust* in such manner that he is called upon to assert his equitable rights, the statute will begin to run from the time that such knowledge is brought home to the *cestui que trust*. \* \* \* Where the trustee makes a conveyance of the trust property in breach of the trust, and his grantees continue to hold adversely, the statute applies; and so where the relation of trustee and *cestui que trust* is absolutely ended, whether by breach of the trust or otherwise."

It is questionable, indeed, whether, in a case attended by circumstances like this one, a court of equity should not, aside from any question of limitation, refuse relief upon the ground that the long lapse of time, and the acts and conduct of the parties, have so obscured the trust, and created presumptions unfavorable to its existence, that complete justice cannot now be done. It is said, however, that the appellant claims under his deed. It is true he presents it in support of his claim to the land; but his pleadings, as amended, rely upon the adverse holding by himself and John Adams to defeat a recovery by the appellees, and, in our opinion, it is available to him for this purpose. The claim of the appellees is not of a character to address itself strongly to equitable consideration. Unquestionably the appellant paid a full and fair price for the land. He purchased it in good faith. The appellees have been very slow in asserting a claim to it. During the 21 years that the appellant held the land before the bringing of any suit, they appear to have lived near by, and never, during all that time, even once asserted any claim to it. It is of such an age as to be stale, and, under all the circumstances, a court of equity, aside from the bar by limitation, which under the circumstances it will gladly apply, might well hesitate to give it aid. Judgment reversed, with directions to dismiss the petition.

#### ATCHISON v. ATCHISON'S EX'RS.

(Court of Appeals of Kentucky. Jan. 30, 1890.)

DISTRIBUTIVE SHARE OF WIFE—ADOPTED CHILDREN.

Under Gen. St. Ky. c. 31, § 17, providing that a man and his wife may join in a petition for the adoption of a person as their heir at law, and that such a person will inherit from either in the same manner as a child in fact, the widow of the adoptive father, who dies intestate, is entitled to only one-third of the personality as provided by statute, as where the intestate leaves issue.

Appeal from circuit court, Bath county.

"To be officially reported."

Action by the executors and devisees of Jesse Atchison against Charlotte Atchison for order of distribution. The defendant appeals from an order allowing her one-third of the estate, instead of one-half.



*A. Duvall and R. Gudgell, for appellant.  
J. J. Nesbitt, for appellees.*

PRYOR, J. By section 17 of the General Statutes, (chapter 31,) "any person twenty-one years of age may, by petition filed in the circuit court of the county of his residence, state, in substance, that he is desirous of adopting a person, and making him capable of inheriting as heir at law of such petitioner, and said court shall have authority to make an order declaring such person heir at law of such petitioner, and, as such, capable of inheriting as though such person were the child of such petitioner; but no such order shall be made, if the petitioner be a married man or woman, unless the husband or the wife join in the petition." Under this statute, Jesse Atchison and his wife, Charlotte, adopted Mary Ann Myers heir at law, and, as such, capable of inheriting as though she was the natural child of Jesse and Charlotte Atchison. Atchison and his wife had no children, but undertook the care and custody of this adopted daughter. The daughter married one Anderson, and had by him one child, named W. S. Anderson. She died in the lifetime of her father, Jesse Atchison, leaving her son surviving her. In the year 1887, Jesse Atchison died, leaving a last will, by which he disposed of his entire estate. He devised to the son of his adopted daughter a valuable tract of land, and the balance of his estate he gave to his collateral kindred, restricting his widow, by the provisions of his will, to that portion of his estate to which she was entitled under the statute. The widow renounced the provisions of the will, and claims, as there was no issue born of the marriage, she is entitled to one-half of the personalty; the statute providing, as to personalty, that "if the intestate leaves issue his widow shall have one-third, and, if no issue, one-half, of such surplus." The executors and devisees brought this action, asking to be advised as to the manner of distribution, and the court below held that the act of adoption precluded the widow from a greater interest than one-third of the surplus personalty; and from that judgment she has appealed.

It appears from the petition filed by the appellant and her husband, in 1877, that both husband and wife desired to recognize as their child Mary Ann Myers, and to make her capable of inheriting as though she was their natural child. For this purpose, and no other, the petition was filed; and the child became entitled to inherit as if she had been their natural offspring. The mode of descent and distribution is regulated by the statute under which all of these parties would have taken; and, if there had been no will, where the adopted father dies intestate, the child, inheriting as if in fact the child of the decedent, can take in no other mode than that pointed out by the statute. What interest, then, has the widow of the adoptive father in her husband's estate? If he left a child to inherit his estate, then the widow, in dis-

tributing the personalty, would be entitled to one-third of the surplus, and, if no child, to one-half. In determining the extent of the widow's interest in the personalty, regardless of the statute, the word "issue" has always been construed to mean a child or children, or their descendants, born of the marriage, and capable of taking at the death of the intestate; but the statute in question has intervened, and on the application of both husband and wife the adopted child is made to inherit in the same manner as if a child in fact. It is insisted, however, that this cannot be; for the reason that it disturbs the marital rights of the wife, by lessening her interest in the estate of the husband, in the event she survives him. The argument would apply with much force if the wife had not united in the petition consenting to the proceeding, and in fact asking that the child be made capable of inheriting from both herself and husband. The statute in fact requires the consent of both husband and wife, where either the one or the other seeks to avail themselves of its provisions. This is required that both may fully understand the nature of the rights they are conferring on the child, and their obligation to care for and maintain it as if their own offspring. The case of *Barnes v. Allen*, reported in 25 Ind. 222, is not decisive of this case. Under that statute the wife was not required to be made a party to the proceeding by the husband. The children were the adopted heirs of the father, and could inherit only such part of the estate as he could deprive the wife of by the act of adoption. The wife had rights as well as the child; and the law of descent was not changed by the statute, or by the judgment of adoption, so as to deprive the wife of her distributable part of the estate. Here the child claiming is the adopted child of husband and wife; each invoking the aid of the statute that she might inherit, not a part of the estate of each, but such as by the law of descent and distribution a natural born child would inherit. In the case of *Power v. Hafley*, reported in 85 Ky. 671, 4 S. W. Rep. 688, the legislature, by an enactment at the instance of Frederick Hafley, made *Sylvania Floyd* his legal heir, and invested her with the right to take and hold his estate, by descent, as if she was his natural child. This court said, by reason of this enactment, *Sylvania* "was made a full legal heir, and was placed on precisely on the same footing, so far as taking and holding *Hafley's* property by descent was concerned, as a natural child." In that case, *Sylvania* married, and died leaving children, and after her death the adoptive father died intestate; and, in a controversy between the widow and children of *Sylvania*, this court held that by the event of adoption the child stood in the same light as a child born in lawful wedlock, and that her children inherited from their grandfather, and stood in that relation to him. In the case of *Humphries v. Davis*, 100 Ind. 369, the child, being adopted by the husband and

wife, inherited land from the adoptive mother, and died without children. It was held that the surviving husband and adoptive father would inherit the land in preference to the natural mother. In *Ross v. Ross*, 129 Mass. 243, a child was adopted in one state, and removed, with the one adopting him, to the state of Massachusetts, where the same law prevailed. The court held that the child, being entitled to inherit real estate at the place of the adoption, could inherit, in the same way, real estate in Massachusetts. The adoption, as authorized by our statute, gives the one adopted the *status* of a child, with all the capacity to inherit that it would have if in fact the child of the one adopting it; and this is the plain ruling of this court in *Powers v. Hadley*.

It is argued, however, that the adoptive parent in this case did not die intestate, and that this controversy is not between the child and its mother by adoption, but between the widow and the residuary devisees, and therefore there is no reason for applying the doctrine stated in *Powers v. Hadley*. As to the widow, who renounced the provisions of the will, the deviser must be regarded as having died intestate; for the will, as to her, can in no wise affect her rights, and by renouncing its provisions she obtains under the statute only what she would have been entitled to if no will had been made. If the child had been the offspring of Atchison and his wife, and the deviser had made the same will, the widow renouncing its provisions, she would have only been entitled to one-third of the personality after payment of debts, etc. So it is manifest, if the adopted child is made to occupy the legal *status* of a natural born child, the widow, who has made it capable of inheriting, in conjunction with her husband, cannot well say that it inherits only a part of what the husband owned, and that certain provisions of the statute of descents and distribution have no application to this case. In our opinion, the widow is entitled to only one-third of the surplus personality; and, the chancellor below so adjudging, that judgment is affirmed.

#### MORTON v. JUNGEMAN.

(Court of Appeals of Kentucky. Jan. 30, 1890.)

##### CITY COUNCIL—RULES OF PROCEDURE.

Under a regulation adopted by a city council, providing that "a majority of the members elected and voting shall be necessary to choose any officer elected by the board," a candidate who receives six votes of the twelve members present, three not voting, is legally elected.

Appeal from circuit court, Campbell county.  
"Not to be officially reported."

*Nelson & Desha* and *James C. Wright*, for appellant. *Charles J. Helm* and *George Washington*, for appellee.

PRYOR, J. This appeal involves the right to the office of city engineer for the city of Newport. The appellant is holding over for the reason that the appellee, as he contends,

was not elected by the city council in the mode prescribed by the charter of the city. Section 28 of the charter provides that the engineer shall be elected by the board of councilmen at its second meeting in January, and that "he shall be elected for one year, and until his successor is elected and qualified." By a regulation adopted by the council, the presiding officer is entitled to a vote only when the board is a tie, and by an additional regulation it is further provided that "a majority of the members elected and voting shall be necessary to choose any officer elected by the board." It is also a rule that, where nominations are made "after the fourth roll call, should there be no election, the candidate receiving the lowest number of votes shall be dropped, and so on, until an election is had, and, in case of a tie, the presiding officer shall decide." There were three nominations made, and four ballots taken without an election, and on the fifth ballot one of the candidates, under the rule prescribed, was dropped. On the sixth ballot the appellant obtained three votes and appellee six; the other three councilmen, there being twelve in all, not voting. It was then announced that the appellee was elected. It is urged that the appellee should have received a majority of the entire council, and that the mode of proceeding by which the appellee was elected is in violation of the organic law of the city. Besides, it is further argued that the three members, who declined to vote for either the appellee or the appellant, offered to cast their votes on the sixth ballot for the candidate who had been dropped, and this was denied them. We perceive no reason why the council could not adopt a rule which would facilitate the proceedings, and result in an election that otherwise would have prevented the election altogether at the whim of the minority. The charter did not require a majority of all the members present to vote in order to make the election valid. There were nine votes cast out of the twelve, three members declining to vote for either candidate; and, in the absence of an express statute requiring a majority of the entire body, a plurality of the votes cast, there being a quorum present and voting, elected the officer. Mr. Dillon says: "If all the members of the select body or committee, or if all of the agents, are assembled, or if all have been duly notified, and the minority refuse or neglect to meet with the others, a majority of those present may act, provided those present constitute a majority of the whole number. In other words, in such case, a major part of the whole is necessary to constitute a quorum, and a majority of the quorum may act." 1 Mun. Corp. 296. There was nothing unreasonable in the regulations adopted for the election, and, if there had been no such rule, the appellee was entitled to the office, because he obtained a majority of the nine votes cast, the entire body being present. The appellee being therefore entitled to the office, the judgment below is affirmed.

**HENDERSON BLDG. & LOAN ASS'N v.  
ZELLER et al.**

(Court of Appeals of Kentucky. Jan. 30, 1890.)

**BUILDING ASSOCIATIONS.**

Where there is actual usury in a transaction between a building association and a subscriber, the association cannot protect itself by a provision in its charter that "no dues, premiums, interest, or fines that may accrue to the association, in accordance with its charter, shall be deemed usurious." Following *Association v. Johnson*, 10 S. W. Rep. 787.

Appeal from circuit court, Henderson county.

"Not to be officially reported."

*Montgomery Merritt*, for appellant. *John Young Brown* and *Thos. E. Ward*, for appellees.

**LEWIS, C. J.** This is an action to recover back usury paid by appellees on a loan of money made to them by appellant, and the precise question involved was decided by this court in the case of *Association v. Johnson*, 10 S. W. Rep. 787, where it was held the power attempted to be conferred upon appellant by its charter to loan money at more than the legal rate of 6 per cent. interest was unconstitutional, and such contracts were void as to such excessive interest. The lower court did not, therefore, err in rendering judgment in favor of appellees for the usurious interest sued for, and the judgment is affirmed.

**GREEN v. GREEN.**

(Court of Appeals of Kentucky. Feb. 4, 1890.)

**ALIMONY.**

Where the care and maintenance of the only child is given the wife, who has obtained a decree of divorce on the ground of abandonment, and the husband is young and able to labor, the allowance, as alimony, of \$150 per annum for two years, during the pendency of the suit, \$50 attorney's fees, and \$100 per annum during their joint lives, is not excessive, though it does not appear that the husband has any property.

Appeal from court of common pleas, Madison county.

"Not to be officially reported."

*John Bennett*, for appellant. *James Caperton*, for appellee.

**PRYOR, J.** The question in this case arises from a judgment of divorce obtained by the appellee. The husband (appellant) is insisting that the allowance for alimony is excessive. There was one child, a son, born to the marriage, that is now living, and to the appellee, the mother, has been given its care and maintenance. She seems from the testimony to have been a kind and an affectionate wife, and committed no act calculated to disturb the marital relation. The only complaint is as to the allowance, none of which has been paid. The appellant is young and able to labor; has abandoned his wife, and left her to provide for their offspring. The chancellor allowed \$150 per annum for two years, during the pendency of the suit, \$50 attorney's fees, and

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\$100 per annum during the joint lives of the two, with the reservation in the judgment of the right to increase or diminish the amount. It does not appear that the husband has any property; still that is no reason why a just and proper allowance should not have been made. He has no cause of complaint. Judgment affirmed.

**HALL v. HALL.**

(Court of Appeals of Kentucky. Feb. 4, 1890.)

**MORTGAGES—PRIORITY—LATENT TRUST.**

Where a husband receives \$1,000 from his wife to invest in certain lands, for her benefit, purchases other lands, in his own name, and mortgages the same to secure debts contracted prior to the purchase, in the absence of any notice of the wife's claim to the mortgagee, she is not entitled by any equity to have the sum advanced by her allowed to her from the proceeds of the sale of the mortgaged premises.

Appeal from circuit court, Bullitt county.

"To be officially reported."

*Charles Carroll* and *John D. Carroll*, for appellant. *Patrieigh & Straus*, for appellee.

**BENNETT, J.** The controversy here is as to the appellant's, Maria Hall's, right to have settled upon her \$1,000 out of the proceeds of sale of a tract of land, the title to which was in Thomas Hall, husband of the appellant; the appellee, Robert Hall, claiming said sum as mortgagee of said land. The facts are briefly these: The appellant, in 1876, sold a tract of land lying in Bullitt county, that belonged to her, for \$1,000, and delivered this sum to her husband, Thomas Hall, under promise that he would invest said sum in Texas land, for her use and benefit; that he did not so invest the money, but about two years afterwards he purchased a piece of land in Jefferson county, Ky., and took the title to himself; that several years thereafter he sold this land, the appellant joining in the conveyance, and purchased the land in controversy, lying in Bullitt county, Ky., and took the title to himself. He was indebted to the appellee by judgments, and the executions were levied on this land, and a mortgage was given upon the land to secure these debts; and the executions were returned in consequence thereof. Said debts were created before the purchase of either tract of land by Thomas Hall. It is out of a part of the proceeds of this land that the appellant contends that her right to a settlement is superior to Robert Hall's mortgage right.

Whether or not the appellant's \$1,000 went into either tract of land is extremely doubtful; but, conceding that it did, then her case is in every substantial particular like those of *Meade v. Stairs*, 10 S. W. Rep. 272, and *Darnaby v. Darnaby*, 14 Bush, 485, except in the fact that in this case the debts were created before Thomas Hall acquired the title to either tract of land. Consequently, as it is contended, Robert Hall is not a creditor for value, upon the faith of Thomas Hall's title to said property. Therefore his right is

not superior to the equity of the appellant. The appellant surrendered the title and possession of this money to her husband, it is true, as she says, in trust for a certain purpose. The trust was not, however, carried out, but the legal title to this money passed to the husband, and he did in fact convert it to his own use; and the appellant was only left with an equitable right to have this money, or its equivalent, settled upon her as long as it remained in the hands of her husband, either in kind or in land, but subject to the rights of creditors without notice of this latent trust. Such trusts are latent, and cannot prevail against the rights of any creditor that has no notice of them. If it be true that an antecedent general creditor has no right, as against this latent trust, because he did not give credit on the faith of the property bought with the trust money, (which, however, we do not decide,) it does not follow that such antecedent creditor, whose right has attached to the thing itself by superior title, would be thus postponed. His right having attached to the thing itself, without notice of the trust, the trust would be thereby postponed to such right. The consideration for the mortgage was valuable, and sufficient to uphold the mortgage, even as against a prior mortgagee who had paid cash down, but had failed to record his mortgage, provided the latter had recorded his without notice, etc. So here the mortgagee obtains his mortgage to secure an antecedent debt, without any notice of the appellant's prior latent equity. Of course the appellee's right under the mortgage is superior to the appellant's equity. The judgment is affirmed.

**LEAR *et al.* v. PRATHER.**

(Court of Appeals of Kentucky. Jan. 30, 1890.)

**REFORMATION OF MORTGAGE.**

A mortgage which reserves to the mortgagor a homestead in the land will be corrected, where it appears that both parties supposed that the mortgagor had a homestead by law in the land, and they only intended the reservation as declaratory of that right, and fully intended to mortgage all of the land which was subject to mortgage; but it is incumbent on the mortgagee to prove these facts.

Appeal from circuit court, Garrard county.  
"To be officially reported."

*Anderson & Herndon*, for appellants. *R. H. Tomlinson*, for appellee.

**BENNETT, J.** The appellee, James M. Prather, on the 6th day of January, 1887, conveyed, by deed of mortgage, a tract of land upon which the appellee lived as a home. He had lived upon said land as a home for over 40 years, and had raised a large family thereon. He now lives upon said land, and, as he claims, has a crippled son and his family living with him, and, owing to the son's crippled condition, all are dependent upon him for a support. In the deed of mortgage the appellee expressly reserved a homestead in said land. So, by the terms of the agree-

ment, the appellee was to have a homestead in said land. The expression "homestead," by the law of this state, has a well-defined, and but one, meaning. It means that a person, with a family, living upon land, as a home, at the time the debt or obligation is created, is entitled to as much as \$1,000 worth of said land, if the land be of that much value, or, under certain conditions, to that much money, in lieu of the land itself, and if there be not as much as \$1,000 worth of land, the same must not be sold on account of said debt or obligation; also, the homestead must include the residence, etc. In a word, a homestead is an interest in the land not exceeding \$1,000 worth; and, if the land is allotted to the person, it must include the residence, etc. So, if the interest be that of not exceeding \$1,000 in the land, it is not to be realized out of any particular part of the land, but rests upon the whole. So there can be no just grounds of complaint as to the indefiniteness of the demand; or, if the claim is to be treated as embracing the land itself, such claim is to include the residence, etc., and it cannot be said that it is too indefinite to be enforced. Therefore, viewed in the light of definiteness, the reservation is valid.

What does this reservation mean? There can be but one answer to this question, which is that the appellee expressly reserved \$1,000 worth of land, if there was that much, from the operation of the mortgage, and the appellant, Lear, accepted the mortgage with that reservation in it. Substantially, the agreement was that \$1,000 worth of the land was not mortgaged. It is not said in the pleadings that this agreement was made in consideration of the fact that it was understood that the appellee lived on the land with a family dependent upon him, and was therefore entitled to a homestead by operation of law, and the exemption was simply made as declaratory of what the appellee's legal rights were, and all the land was mortgaged subject to that supposed legal right. But, as it turned out, the appellee had no such legal right; the entire tract was subject to the mortgage. The case here is silent in this regard, and stands upon the naked agreement of having excepted from the operation of the mortgage \$1,000 worth of land, which must be held as valid as if the parties had excepted 10 acres, or any other given quantity, of the land. But, if the entire tract was to be mortgaged to secure the payment of the debt; if any part of the land was not exempt by virtue of the statute, and it was only intended by the expressed reservation to express that fact,—then there exists no good reason for holding that the mortgage would not cover the entire tract, if the entire tract was in fact subject to said mortgage, and the expressed reservation was inserted in the mortgage by mistake in reference to that matter. The mistake should be corrected, upon the principle that, as the whole land was subject to said mortgage, and as the parties intended to mortgage all that was sub-

ject to a mortgage, and by mistake that was left out of the mortgage which the parties intended should be included in it, the mortgage should be so reformed as to include the excepted land. As said, the reservation, in itself, requires no consideration to uphold it. The fact that the same was not included in the mortgage is, if unexplained, quite sufficient, and it makes no difference whether or not the mortgagor was entitled to a homestead in the land, as against his debts. The fact that he was the owner of the land, whether or not it was exempted from the payment of his debts, gave him the right to mortgage it or not to mortgage it; and his reserving any portion of it—call it a "homestead," if you please—from the operation of the mortgage was perfectly consistent with his rights in that regard. Therefore, as just said, it was incumbent upon the mortgagee to allege and prove that all the land that was subject to a mortgage was intended to be mortgaged; and, as it turned out that the reservation of a homestead was inserted under the mistaken belief that the same was not subject to the mortgage, and but for which the same would have been mortgaged, the mortgage should be so reformed as to include said homestead. The appellee having no wife living at the time he made the mortgage, no question arises as to his power to mortgage his homestead. The judgment is affirmed.

#### TICHENOR v. YANKEE.

(Court of Appeals of Kentucky. Feb. 4, 1890.)

#### REFORMATION OF MORTGAGES—ACKNOWLEDGMENT BY MARRIED WOMAN.

1. Where it appears that the description of land in a mortgage was copied from a deed to the mortgagor which conveyed a tract by metes and bounds, and then excepted from the grant a portion of the tract, but the mortgage describes only the excepted portion, and the draughtsman testifies that the description of the excepted portion was copied into the mortgage, by mistake, instead of the portion conveyed by the deed, which was intended by the parties, the mortgage will be reformed.

2. Gen. St. Ky. c. 81, § 17, which provides that the certificate of an officer may be called in question for a mistake on his part, does not apply to a certificate acknowledgment of a deed by a married woman, given under chapter 24, § 21, which requires the officer to examine the married woman privily, to explain the deed, etc., and makes the certificate evidence of these facts; and such certificate cannot be contradicted by parol testimony. Following *Cox v. Gill*, 88 Ky. 669.

Appeal from circuit court, Daviess county.  
"To be officially reported."

J. C. Johnson and W. T. Ellis, for appellant. Joe Haycraft, for appellee.

HOLT, J. March 17, 1884, H. C. Yankee and his wife, who is the appellee, Sallie E. Yankee, executed a mortgage upon real estate to the appellant, T. C. Tichenor. The husband died in January, 1886; and, more than a year having elapsed without administration upon his estate, this action was brought on August 6, 1887, against his widow

and children to enforce the mortgage. No guardian *ad litem* was appointed for the children, all of whom are infants. This is immaterial, however, as the only relief asked was an enforcement of the mortgage lien, and the land belonged, not to the husband, but to the wife. She defends—*First*, upon the ground that the description in the mortgage does not embrace her land; *second*, that it was not voluntarily executed, and was not acknowledged by her upon privy examination before the clerk, and in the absence of her husband, as the statute requires in case of a conveyance by a *feme covert*. The deed to Mrs. Yankee conveys a certain boundary of land, describing it, and then excepts from the conveyance a portion of it, which is also described. The draughtsman of the mortgage, in giving the boundary of the land, by mistake copied that of the exclusion in the deed to Mrs. Yankee, so that the land in fact described in the mortgage belonged to a stranger at the time of its execution. The appellant, by an amended petition, set up this evident mistake, and asked that the mortgage be corrected in this respect, and enforced against the land which in fact belonged to Mrs. Yankee.

It is evident all parties understood, when the mortgage was executed, that she was mortgaging her land. The record tends to show that she then owned no other real estate save the land which had been conveyed to her by the deed containing this exclusion. It is true she testifies that she owns another small tract, but she does not say she was such owner when the mortgage was given. But, whether this be so or not, the description in the mortgage is that of the excluded land in the conveyance to her of the land which it is claimed it was intended to mortgage; and this fact is quite persuasive of the claim. Moreover the draughtsman of the mortgage testifies that it was intended to cover the land against which it is now sought to enforce it, and that by mistake the boundary of the land excluded from the conveyance to Mrs. Yankee was inserted. She certainly did not intend to mortgage land that did not belong to her; and, by non-denial in her testimony, virtually admits that it was intended to mortgage the land conveyed to her by the deed containing the exclusion, and that all the parties to the mortgage so understood it at the time. The mistake being clearly made out by evidence entirely satisfactory, it was proper to correct it, and then enforce the mortgage, if to do so be not improper for some other reason. It is not making a new contract for the parties, but merely carrying out the one in fact made. To do so but executes their intention, and corrects a mere error upon the part of the draughtsman.

There is some evidence tending to show that the husband of Mrs. Yankee threatened to leave her, and was guilty of improper conduct, by way of inducing her to execute the mortgage; but the appellant had no notice of

it, and was not a party to it in any manner. He was not present when the mortgage was executed; and it is not claimed there was any fraud, or improper conduct of any character, upon his part. If she did not voluntarily execute it, she should have said so when she acknowledged it. Our statute provides that the officer taking the acknowledgment of a married woman to a deed shall, previous thereto, explain to her, separate and apart from her husband, its contents and effect. If he be an officer of this state, he need only certify that it was acknowledged before him, and when it was done, which shall be evidence of the privy examination; that its contents were explained to her; that she voluntarily acknowledged it, and consented to its being recorded. Gen. St. c. 24, § 21. In this instance the certificate of the officer is in due form. He testifies that he took the wife's acknowledgment in the absence of her husband. She, upon the other hand, says he did not; and she is to some extent supported by another witness. Prior to the adoption of our present General Statutes, and under section 31, c. 24, of the Revised Statutes, the certificate of acknowledgment by a *feme covert* to a deed was merely *prima facie* evidence of its free execution. The officer was then only required to certify the date and fact of acknowledgment. Parol evidence was then admissible to rebut the legal inference arising from the certificate that it had been taken in conformity to the statute, but not to contradict any fact stated in the certificate. *Ford v. Teal*, 7 Bush, 156; *Harpending's Ex'rs v. Wylie*, 14 Bush, 380. Section 17 of chapter 81 of the General Statutes, however, provides: "Unless in a direct proceeding against himself or his sureties, no fact officially stated by an officer in respect of a matter about which he is by law required to make a statement in writing, either in the form of a certificate, return, or otherwise, shall be called in question, except upon the allegation of fraud in the party benefited thereby, or mistake on the part of the officer." Here the officer has said by his certificate, aided as it is by the construction which the statute gives to it, that he, in the absence of the husband, explained the deed to the wife; that she voluntarily acknowledged it, and consented to its being recorded. If the statutory provision last cited, owing to its providing that the facts certified by the officer may be called in question by reason of a mistake upon his part, authorizes a married woman, after acknowledging a deed, to claim that he did not explain it to her, or that it was not done in the absence of her husband, then the statute, considered in reference to the acknowledgment of a deed, amounts to but little. Such a construction would deprive the act of the officer of that final character which it is evident the statute intended to give to it. It is not a question of mistake on the part of the officer, but whether he did his duty; and, as to it, the certificate, by virtue of the statute, imports absolute verity.

Undoubtedly, the officer may sometimes fail to fully discharge his duty; but the greatly to be desired stability of title to real estate, and the protection of purchasers and of the public, demand the adoption of the statute. Individual hardships will occasionally result from the enforcement of any law, however salutary; and it would be exceedingly hazardous, as well as productive of much litigation, to permit the validity of such conveyances to depend upon parol evidence as to their due execution. If the certificate may be thus questioned as to whether the officer has done his duty, then the future vendee, however remote, has no protection. This court construed this statute in the case of *Cox, v. Gill*, 83 Ky. 669; and it was there held that the legislature, in providing that the certificate of an officer might be called in question for a mistake on his part, did not apply to the form or manner of acknowledgment of a deed of a married woman. If made before a proper officer, then his certificate as to when and how it was acknowledged cannot be assailed by parol testimony contradicting it, and showing that it was elsewhere acknowledged, or that the husband was present, or that the clerk failed to explain it to the wife. By virtue of the statute, it cannot be shown that the officer failed to do what his certificate imports. The law intended to give to it, to the extent indicated, absolute verity. Otherwise, no confidence can be placed in the record of conveyances. It is said that Mrs. Yankee might not have acknowledged the mortgage, had it properly described the land. We will not assume that she intended a fraud. As already said, all the parties, herself included, understood that she was mortgaging her land; and there is therefore no force in the suggestion. The mortgagee was an innocent creditor. He has been guilty of no fraud; and, while sympathy for the widow and the fatherless prompts the wish that this mortgage had never been executed, yet, judged by the law, it is a valid instrument, and must be enforced against the land of Mrs. Yankee. The judgment is therefore reversed, and cause remanded for a decree in accordance with this opinion.

LONDON & LANCASHIRE FIRE INS. CO. v.  
RUFER'S ADM'R.

(Court of Appeals of Kentucky. Feb. 6, 1890.)

JURY—EXAMINATION ON VOIR DIRE.

Gen. St. Ky. c. 63, art. 5, § 5, provides that in selecting jurors in civil cases 18 names shall be drawn from the jury-box, and each side shall strike 8 names from the list, and the remaining 10 shall constitute the jury. *Held*, that where the court asks the panel all questions desired by counsel, who announce themselves satisfied, and it appears that the jurors were competent, a refusal by the court to permit counsel to examine each individual juror to ascertain his bias, after the 18 names have been drawn and no challenge for cause is made, is proper.

Appeal from court of common pleas, Jefferson county.

"To be officially reported."

*Hargis & Eastin, P. B. Mutr, and D. W. Sanders, for appellant. Brown, Humphrey & Davie, for appellee.*

PRYOR, J. It is not necessary to discuss the facts of this case, as the identical questions of fact arising in the present case have been heretofore passed on by this court in more than one opinion, in which it was held, in effect, that the testimony authorized the verdicts rendered. The only remaining question to be considered is found in one of the grounds relied on by the appellant in its motion for a new trial. It is insisted that in the formation of the jury the court erred in refusing to permit counsel for the appellant to interrogate the members of the panel with a view of ascertaining whether they were competent or fit jurors to try the issue between the insurance company and the appellee. Under the jury system of this state, 24 of the jurors summoned constitute the regular panel, and in all civil cases, where either party requires it, the clerk shall draw from the box the names of 18 of the jury, having deposited in the box on slips of paper the name of each member constituting the panel, (24.) A list of the 18 is then delivered to the litigants, and each may strike 3 names from the list, and the first 12 names not erased shall constitute the jury to try the case. This is the statute on the subject. Before either party can be required to strike any name from the list of 18, he is entitled to challenge, for cause, any juror on the list, and have others drawn competent to try the case; and, when 18 men are selected who can give to the litigants a fair and impartial trial, the parties will be required to strike from the list if they desire, but not before. It is the practice in some of the circuits to interrogate the entire panel of 24, so as to have the panel composed of those free from bias or prejudice, and then their names placed in the box from which the 18 jurors are drawn. That seems to have been the proceeding adopted in this case, and, when the entire panel had been questioned by the court in such a manner as to show them all to be fair and impartial triers in the particular case, their names were deposited in the box, and the 18 names drawn from it. This certainly worked no injustice, but was the means of insuring to the appellant a fair trial. After the 18 had been drawn there was no challenge made of any juror for cause, but counsel, with a view of asking such questions as might show the juror biased in favor of plaintiff, offered to interrogate each individual juror or the entire jury, and this the court refused, for the reason, doubtless, that the jurors had already been examined as to their bias the one way or the other, and found competent to try the case. The examination of jurors for the purpose of acceptance by the one party or the other must necessarily be left to the judicial discretion of the judge, and, while pertinent questions should be al-

lowed to be asked by counsel, if the court should deny this right, and interrogate the juror from the bench so as to show that the juror is honest and impartial as between the litigants, that fact appearing of record, there can be no reason for reversing the judgment when neither party has been prejudiced by the action of the court. In this case the court propounded to the jury, and to certain members of the jury, all the questions desired to be asked by counsel, and until counsel announced themselves satisfied, and the fact clearly appears that the jurors selected had no bias the one way or the other, were not related to the parties, had neither formed nor expressed an opinion, and knew nothing as to the merits of the controversy. The statute provides that "before either party shall be required to strike, those on the list may be challenged for cause, and others drawn and placed on the list in the place of as many as may be set aside for cause." Gen. St. c. 62, § 5, art. 5. The objection made in this case is that the court interrogated jurors instead of counsel, and, while either party may interrogate a juror by counsel to know the condition of his mind with reference to the controversy, if the court has done this for him, and no challenge for cause was made and none existed, the denial of the right complained of does not demand a reversal. The judgment is therefore affirmed.

#### WESTERN UNION TEL. CO. v. MOORE.

(Supreme Court of Texas. Feb. 7, 1890.)

#### TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE.

A message delivered for transmission to a telegraph company, containing the words, "Billie is very low; come at once,"—is sufficient to apprise the company that the message refers to a near relative of the person to whom it is addressed, and of the fact that mental suffering is likely to result from a failure to transmit the message with diligence and dispatch.

Appeal from district court, Walker county.

*Stewart & Stewart, for appellant. McKinney & Leigh, for appellee.*

GAINES, J. In November, 1888, the appellee, who then resided at Trinity, Tex., had a sick brother at Dallas. The brother at the time resided with his sister at the latter place. Appellee, being informed of his brother's illness, wrote to his sister, and requested her to give him notice by telegraph of his brother's condition, in case he should grow worse. On the 19th day of the month above named, the sister caused a message signed by her to be delivered to the appellant's agent at Dallas, for transmission to the appellee at Trinity, which was in the following words: "Billie is very low; come at once." The message was not promptly delivered. The company's agent at Trinity gave it to a porter, to be handed to appellee, but the porter, not having found him, returned it to the agent, who deposited it in the post-office. The appellee received it on the 20th, at about



7 o'clock in the evening. He immediately went to Dallas, and found his brother dead. He testified that, if the message had been promptly delivered, he would have reached Dallas in time to have seen his brother alive. Appellee brought this suit to recover damages for his mental suffering alleged to have been caused by the default of the telegraph company in not delivering the message promptly, and by his consequent failure to arrive at the bedside of his brother in time to be with him in his last moments. The case appears to have been tried upon the theory the plaintiff could not recover beyond the amount paid for the transmission of the message, unless he should show by extrinsic evidence that the company had notice that the person named in the message was his brother. It is true that the damages recoverable in an action of this character are limited to such as may reasonably be presumed to have been in the contemplation of the parties at the time the contract is made. But in the case of *Telegraph Co. v. Adams*, ante, 857, (decided at the last Tyler term,) it was held, in effect, that a recovery could be had for mental suffering resulting from a failure to deliver with diligence a telegraphic message announcing the sickness or death of a relative, provided the language employed in the message was reasonably sufficient to put the company upon inquiry as to the relationship between such person and the party addressed, and to apprise them that its object was to afford the party an opportunity to attend upon his relative in his last sickness, or to be present at the funeral in the case of death. The same principle was affirmed in the case of *Telegraph Co. v. Feegles*, ante, 860, (decided at the same term.) We are of opinion that, tested by the rule announced in the cases cited, the message under consideration was sufficient to reasonably apprise the defendant of the consequences to plaintiff of its failure to deliver the message according to contract. The conclusion to be drawn from the language of the message is that a near relationship existed between the person mentioned in the message and the person to whom it was addressed, and that upon its receipt the latter would probably set out at once to attend his relative in his extremity. Such being the case, it would be unreasonable to hold that the company, upon the receipt of the message, should not have contemplated the consequences which were likely to result to plaintiff from a failure to transmit it with diligence and dispatch. The conclusion that the face of the message was sufficient to give the defendant company notice, and to render it liable for the damages claimed in this case, if in fact it made default, practically disposes of all the questions raised upon this appeal. The plaintiff testified that, some two or three days before the message was delivered at Dallas for transmission, he called upon the defendant's agent at Trinity, and informed him that he had a brother sick at Dallas, concerning whom he was expecting

a message, and requested that it should be sent to the hotel. The court charged, in effect, that, if plaintiff did so inform the agent, this would be sufficient notice to the company of the relationship between the plaintiff and the person mentioned in the message. It may be doubted whether or not this charge was correct. At the time the information is claimed to have been given, there were no contractual relations existing between the plaintiff and the company. Can it be held that the company's operator at Trinity was its agent to receive information to affect the damages recoverable for a breach of a contract subsequently to be made at a distant station? However this may be, the appellant was not prejudiced by the charge of the court. The company had notice from the face of the message, and it did not harm the defendant to instruct the jury that notice may have been conveyed in another way, although such charge may not have been correct in point of law. The defendant requested the court to instruct the jury "that the mere receipt of the message and negligence in delivery would not, of itself, entitle the plaintiff to recover beyond the amount paid for transmitting the message." It appears, from what has already been said, that we think that the request was properly refused.

It is also insisted that the verdict and judgment are contrary to the law, because there was no evidence that the defendant company ever had any notice of the relationship between the plaintiff and the person named in the message. The message itself was notice. For the same reason, the admission of the testimony of the witness Hughes, if error, was harmless. It tended merely to show that the defendant company had notice of the relationship of plaintiff and his brother. There is no error in the proceedings which demands a reversal of the judgment, and it is therefore affirmed.

#### CARLEY *et al.* v. PARTON.

(*Supreme Court of Texas. Nov. 12, 1889.*)

BOUNDARIES—ESTOPPEL—TRESPASS TO TRY TITLE—PARTIES.

1. A. and B., being tenants in common of a section of land, agreed that A. should have the south half, and B. the north half. A. deeded the south-west quarter, and by mistake located the upper boundary too far north. Her grantee deeded it to defendants without any reference to the northern boundary. B. deeded the north half to plaintiff, calling for the proper southern boundary. *Held*, that plaintiff was not estopped from claiming the boundary line described in his deed.

2. In trespass to try title to land beyond the limits of the boundaries in defendant's deed, in the absence of actual and notorious claim, the plea of 10 years' limitation is not good, unless the land has been actually inclosed for that period.

3. Where an action is in form trespass to try title, and defendants plead title and limitation, and evidence is introduced on these points at the trial, without objection, and these defenses are urged on appeal, it will be held to be in fact what it is in form; and a stipulation between the parties that the suit did not involve title, but was for the

purpose of establishing a boundary line, will be considered merely an admission of paper title.

4. Trespass to try title can be maintained by a tenant in common without joining his co-tenants.

Commissioners' decision. Appeal from district court, Limestone county; SAM R. FROST, Judge.

Action of trespass to try title, brought by G. W. Parton against A. B. Carley and J. H. Smith. Judgment for plaintiff, and defendants appeal.

*L. J. Farrar*, for appellants. *Burrow & Kincaid*, for appellee.

COLLARD, J. There was evidence sufficient to support the finding of the court below that Parton, the plaintiff, and Pringle, in 1878, while the latter owned and lived on the land now claimed by defendants, and under whom they claim, agreed to have the disputed line between them run out and established by McLendon, dividing the 640 acres into two equal parts, both parties concurring therein. It is not our province, in such case, to reverse the finding of the court.

Outside of this, however, if there had been no agreed location of the division line, there is evidence tending to show that the court was correct in fixing the boundary where he did. The line, as established by the court, divides the land into two equal parts, and gives to plaintiff the land on the north of the line. Plaintiff claimed under the heirs of Thomas Johnson, deceased, and defendants, under Johnson's widow, Sarah Johnson; the land having been their community property. The heirs sold the north half of the survey, and Mrs. Johnson sold the south half. None of the parties pretended to convey more than one-half of the land. There was never, so far as the record shows, any division line between the heirs and Mrs. Johnson; they conceding to her the right to sell the south half, and she conceding to them the right to sell the north half. In 1955, before she sold the south-west quarter section to J. M. Straughn, in anticipation of buying the land, the latter had the survey run out, extending it as far north as defendants claim it to be, marking the north line. At this time Mrs. Johnson and the heirs of Johnson were in Washington county. In 1859 she made the deed to Straughn, calling for the north-east corner at a stake from which a post oak, 12 inches in diameter, bore north, 5 deg. west, 65 *varas*; and witness, Phillips, who was present when the line was run, says there was such a tree at the north-east corner as run; that he pointed out the tree to Parton about the time he bought from the heirs, (a statement denied by Parton.) But there is no evidence showing that any of the parties knew that the line was too far north; none that Mrs. Johnson knew it, for her deed only purported to convey the south-west quarter, and calls for the east and west lines as 860 *varas* long, while they must be extended considerably over that to reach the line. Nor is there any pretense that the heirs of John-

son were in any way connected with the transaction, or knew anything about it. When the heirs conveyed to plaintiff, the description was for their interest in the north half of the section, calling for abutting surveys, and to the "south by the one-half of the Johnson survey and lines." This description does not indicate that the heirs were intending to adopt the Straughn line as their south boundary, or that they knew there was such a line. When Willie Straughn conveyed the 80 acres, or north half, of this quarter section to Pippin, the call for witness trees at the north-east and north-west corner was dropped, and he merely called for a stake in the prairie at each of the corners, without bearing trees, fixing the length of the east and west lines at 430 *varas*. The same description was followed in other mesne conveyances, until we come to the last deeds of Pringle to the defendants, made to one in 1883 and to the other in 1885, after the dispute arose, and when it was known the Straughn line was too far north. In Pringle's deeds he made the east line of the 80 acres 457 *varas* long, instead of 430 *varas*, as in Willie Straughn's deed, and the west line 483½ *varas* long, calling to run north to the original division line made by the Johnson heirs, thus assuming to designate the Straughn line. So we see there is nothing to show that the Johnson heirs were bound by the Straughn line, and that the court was justified by the facts, without regard to the agreed line between Parton and Pringle, in establishing the division line in the center of the 640-acre survey.

It follows from the above that the three-years statute of limitations will not apply, because defendants failed to show title to the land in controversy. The application of the five-years statute will not be discussed, because the assignment of error is abandoned.

There is ample evidence to show that defendants, and those under whom they hold, have been in possession of the 80 acres more than 10 years before the institution of the suit; but there is a difficulty in applying the 10-years statute to the occupancy proved. Generally, a mere adverse possession will be limited to boundaries designated in the deeds under which the occupant claims, (*Pearson v. Boyd*, 62 Tex. 541;) and where the improvements extend over the boundaries actually embraced in the deed, so as to include a small portion of the adjoining tract, limitation will not apply, except to the land actually inclosed, (*Bracken v. Jones*, 63 Tex. 187.) The deeds from Willie Straughn down to Pringle fail to describe the 80 acres further than as the N. ¼ of the S. W. ¼ of the section, and designate no lines or corners indicating that the north line was located where defendants say it was. The deed from Archer to Pringle in 1877 was recorded, and gave notice that Pringle was only claiming the 80 acres, whose east and west lines were only 430 *varas* long. There is nothing in the evidence, outside of the deeds, tending to show

that Pringle, or the parties under whom he holds, was claiming to the Straughn line, at least up to 1878, while McLendon was running the partition by agreement between the parties. It is in proof that at that time he repudiated the line then being run by McLendon, and said he claimed to the other line, though the court found as a fact that he agreed to the establishment of the McLendon line as the proper line between him and Parton. This line, the one adopted by the court as the true boundary, cut off 15 feet of Pringle's fence; and we might hold that defendants could recover the disputed land up to the fence, but for the fact that the evidence does not show that the fence was placed there 10 years prior to the suit. The evidence does not show that any of the improvements were made north of the center line, except the fence which was there in 1878. This being the case, we must say the evidence does not support the plea of 10 years' limitation. Constructive possession merely will not be extended beyond the limits of the boundaries in the deeds, in the absence of evidence showing actual and notorious claim or actual occupancy. We find no error in the court's judgment in this respect.

The questions presented in this case are not purely of boundary; that is, merely to ascertain where the line between the parties is. It is a suit against an alleged trespasser, showing that he claimed and occupied land of plaintiff unlawfully, to dispossess him, and to force him back upon his own land, to which defendants responded by pleas of title and limitation, which pleas were insisted on in the court below and in this court. The statement of fact shows that there was an agreement between the parties that the suit did not involve title, but was a suit to establish a boundary line, admitting that plaintiff claimed under the heirs of Johnson, and that defendants claimed under Mrs. Sarah Johnson, in whom the title was. But it is clear that neither the parties nor the court construed the agreement to limit the issues to boundary alone. Had such been the construction of the agreement, defendants could not have insisted on their pleas of limitation, and the investigation would have been at an end when the evidence as to boundary was admitted. The court and the parties treated the agreement on the trial as an admission of paper title only, leaving all the other issues to be tried, except the one of compensation for improvements set up by Carley, which it was stipulated he should have judgment for, to-wit, \$36.50, in case plaintiff recovered. Defendants pleaded title by limitation, which has not been abandoned. Evidence was heard without objection on the pleas; and the case comes here with the limitation question more prominent than others, and made so by the brief of defendants below. So we conclude that the suit was in fact, as it was in form, an action of trespass to try title. *Jones v. Andrews*, 9 S. W. Rep. 170, (decided at the Austin term,

1888;) *Spence v. McGowan*, 53 Tex. 30; *Barbee v. Stinnett*, 60 Tex. 167. Therefore, following other decisions of the supreme court of this state, we must hold that plaintiff, Parton, who only exhibited title to an undivided interest in the land in controversy, could maintain this action without joining his cotenants. *Pilcher v. Kirk*, 55 Tex. 208; *Sowers v. Peterson*, 59 Tex. 220; *Telfener v. Dillard*, 70 Tex. 139, 7 S. W. Rep. 847. Defendants' plea in abatement should not have been sustained. Finding no error in the judgment of the court below, our opinion is, it ought to be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

#### DAVIS v. GOLDBERG et al.

(Supreme Court of Texas. Nov. 5, 1889.)

##### EXECUTION—SALE—LIABILITY OF PURCHASERS.

A purchaser of a cotton crop at execution sale, "subject to landlord's lien," has the right, but is not bound, to gather and market the cotton, either for the benefit of the landlord or chattel mortgagees thereof; and, before the latter can recover any judgment against him, it is necessary for them to show that there was in his hands a balance of the net proceeds of the cotton gathered by him, after paying the landlord's lien.

Appeal from district court, Camp county; JOHN L. SHEPPARD, Judge.

*E. A. King*, for appellant. *John J. Ofel*, for appellees.

HENRY, J. Appellees sued appellant in a justice's court upon a cause of action described as "for the product of 17 acres of cotton produced, during the year 1887, by Sherman Hill, on the farm of J. W. Crow, in Camp county, mortgaged by Hill to plaintiffs." A. T. Diamond & Co., creditors of Hill, recovered a personal judgment against him, upon which they sued out an execution, and, before this suit was brought, caused the execution to be levied upon said 17 acres of cotton, then unpicked in the field, as expressed by the constable's return of the execution, "subject to landlord's lien." Appellant caused the cotton to be picked, paying the expense of gathering and marketing it, and sold it with another lot of cotton; the two lots together netting \$36. Appellant testified that only half of said cotton was off of the 17 acres belonging to Hill. Afterwards Crow, the landlord, in the assertion of his landlord's lien for a balance for which his tenant, Hill, remained indebted to him, after exhausting all of his other property subject to his lien or to execution, sued appellant Davis for conversion of the cotton, and in the same suit joined appellees, Goldberg & Smith, who claimed a chattel mortgage from Hill on the same cotton. Goldberg & Smith appeared, and pleaded that they should not be held to answer, because they had this suit pending against Davis for the conversion of the same cotton. The court rendered judg-

ment against Davis, in favor of Crow, for \$18, dismissing as to Goldberg & Smith, on the ground that they were not liable to Crow. Davis paid the judgment recovered against him by Crow. On the trial of the cause before us, Goldberg & Smith recovered of appellant, Davis, for the conversion of the same property, the sum of \$47.89. It is contended that this judgment is unsupported by the evidence.

There is evidence in the record going to show that there was more cotton on the 17 acres of land at the time it was purchased by Davis under the Diamond execution than was gathered by him, and the remainder was depredated upon by stock, and wasted. It is beyond controversy that Davis bought at execution sale subject to the landlord's (Crow's) special lien. Such a purchase, while it conferred upon him the right to do so, did not bind him to gather and market the cotton, either for the benefit of Crow, the landlord, or Goldberg & Smith, the holders of the chattel mortgage. We do not find in the record any evidence that he took exclusive possession of the field. Goldberg & Smith's lien was inferior to that of Crow, the landlord; and, before they were entitled to a judgment for any sum against Davis, it was necessary for them to show that there was in his hands a balance of the net proceeds of the cotton gathered by him, after paying the landlord's judgment. It was the right of Davis, as the result of his purchase of the tenant's (Hill's) title, to gather the cotton; and he was responsible to the lienholders, in the order of their priority, for the value of what he gathered and appropriated, after allowing him the necessary expenses of making it ready for market. It was quite proper for appellees to be made parties to the suit brought by the landlord, Crow, against appellant, to establish his landlord's lien on the cotton in controversy. The fact that appellees had this suit against appellant alone, to enforce their junior lien, in which suit Crow's right could not be determined, because he was not made a party, was no reason why they should not have litigated the matter in the cause where all the parties were before the court, or abide the result of that suit, as between Crow and Davis. In the suit brought by Crow, his judgment against appellant for \$18 was not, we are led to believe from the record, rendered for that sum because that was the full amount of his debt against Hill, but because it was the full value of the cotton converted by appellant. If that is the truth of the matter, then appellant, having accounted for the full value of the cotton converted by him to the landlord, as the superior lienholder, was not liable to be held to account, for a second time, to defendant, even if he did hold a valid junior incumbrance on it. The judgment will be reversed, and here rendered that plaintiffs take nothing by their suit, and that defendant recover all costs of suit in this court, and in the court below.

Reversed and rendered.

## HARGIS v. ST. LOUIS, A. & T. RY. CO.

(Supreme Court of Texas, Nov. 5, 1889.)

### RAILROAD COMPANIES—FRIGHTENING TEAMS—CONTRIBUTORY NEGLIGENCE.

One who voluntarily and unnecessarily halts his team near a railroad track, on which a freight train is standing, with knowledge that they are easily frightened at the noise of trains, cannot recover for personal injuries sustained by reason of the team's becoming unmanageable when the customary signals for starting the train were given.

Appeal from district court, Titus county; W. P. McLEAN, Judge.

*Snodgrass & Snodgrass*, for appellant.

GAINES, J. The appellant brought this suit against appellees to recover damages for personal injuries. The evidence showed that he had gone to Mount Pleasant in a wagon drawn by two mules, and had started home. On approaching defendant's road, near the depot in that town, he discovered a freight train, with its engine, near the crossing, standing on the track. His mules became frightened at the engine, and unmanageable, when he alighted from the wagon, and drove them across the track on foot. Having passed the crossing, he halted his team very near it, and while in the act of mounting his wagon the whistle of the engine was blown, causing the mules to run away. He became entangled in the lines, and was drawn a considerable distance, and thereby received the injuries of which he complains.

The assignments of error are mainly to the charge of the court as given, and the refusal to give instructions asked by appellant. The first is that "the court erred in its charge to the jury as a whole, in failing to charge the degree of diligence required of the employees of the defendant, under the evidence in this case, in operating or running its engine or trains across a public street in town." We think the objection to the charge is not well taken. The court correctly instructed the jury under what facts, if found by them, the plaintiff would be entitled to recover. It is commendable in that it contains no abstract propositions.

The second assignment is that "the court erred in the part of its charge in paragraph four which reads as follows: 'But he must also show by such preponderance of evidence that employees of defendant did intentionally frighten the team of plaintiff, and that he was thereby injured.'" If this instruction stood alone, the charge would perhaps be objectionable, on account of its failure to present the issue of the plaintiff's right to recover if defendant's employees blew the whistle knowing, or having reason to believe, that the noise would probably frighten the team, and endanger the safety of plaintiff. But in the same paragraph this issue is distinctly presented. It is again very clearly submitted in the subsequent paragraphs of the charge. The jury, in our opinion, could not have been misled by the instruction of which appellant complains.

The third assignment of error is as follows: "The court erred in those parts of its charge in paragraphs 6, 8, 9, 12, and 14, and other paragraphs of said charge similar in their effect, which charge the jury, in substance, to find for defendant, unless they believe from the evidence that the employe or employes of defendant company caused the whistle and bell on the engine to be sounded, or steam to escape, as shown by the evidence, with the knowledge or belief that such noise or noises would or might frighten plaintiff's team, and also for the purpose and with the intention to frighten plaintiff's team." Under this assignment, it is impliedly assumed, in the propositions in appellant's brief, that the defendant was liable although its employes did not know, and did not have reason to believe, that the noise would frighten the mules, and that it was the duty of the company's servants to watch for teams near the track, and so to operate the engine as not to frighten them. We do not understand that the company or its servants owe to persons in charge of vehicles near its track any such duty. It is the duty of the company, in running its trains, to keep a lookout along its track, so as not to injure persons who may be found thereon, at least at public crossings. But further than this, in our opinion, the duty does not extend. The law requires that under certain circumstances the whistle shall be blown or bell rung; and it may be presumed that the whistle and bell are necessarily used as signals in operating trains. It would seem to follow that persons in control of teams easily frightened, and unaccustomed to such noises, should exercise care in approaching trains, and should not unnecessarily stop in close proximity to them. The companies have a right to expect that this care will be exercised, and are not required to take steps to provide against the consequence of a failure to do so. However, we do not say that if the employes of a railroad company become aware that an unmanageable team is halted near the track it is not their duty to desist for a reasonable time from making such noises as may be avoided consistently with their other duties.

The assignment that there was error in the eleventh paragraph of the charge is not well taken. In that paragraph the jury are told, in substance, that if plaintiff knew that his team was afraid of the engine, and after crossing the track in safety he had time to have moved on to a safe distance, and stopped voluntarily and unnecessarily, and, "while so standing," the employes, for the purpose of backing the train, gave the usual signals, and frightened the team, the plaintiff could not recover. The instruction was correct. It is not to be seriously contended that a person, by voluntarily stopping an unsafe team near a train, could make it the duty of the employes of a railroad company to await his pleasure in driving on before resorting to the usual signals for starting the train. They would have the right to conclude that he knew his own busi-

ness best, and that he had his team under his control.

The court did not err in refusing the special charge asked by plaintiff. The excellent charge given by the court had already prescribed clearly the law applicable to any phase of the case made by the testimony, and additional instructions were neither necessary nor proper. There is no error in the judgment, and it is affirmed.

#### ELLIOTT *et al.* v. WESTERN UNION TEL. CO.

(Supreme Court of Texas. Nov. 5, 1889.)

##### TELEGRAPH COMPANIES—FAILURE TO DELIVER.

The saw in plaintiffs' mill having broken, they engaged S., of the firm of G. & S., to order them a new one from St. Louis by telegram. S. addressed a dispatch in his firm's name to a hardware company in St. Louis, directing them to ship a saw at once to plaintiffs, and delivered it to a traveling salesman of that company, with the money to pay the charges, and went with him to the telegraph office. The salesman wrote another dispatch, signed by himself, ordering the saw to be sent to G. & S. Neither dispatch was delivered. The message did not show that it was for plaintiffs' benefit, and the agent of the telegraph company had no knowledge of that fact. *Held*, that plaintiffs had no right of action against the company, either for the money paid for the transmission of the message, or for damages by reason of their mill being idle for want of a saw.

Appeal from district court, Titus county; JOHN L. SHEPPARD, Judge.

*Moore & Hart*, for appellants. *Stemmons & Field*, for appellee.

GAINES, J. This suit was brought by appellants against appellee to recover damages for the failure of the latter to deliver a message alleged to have been deposited with the company's agent for transmission to St. Louis. One of the plaintiffs testified that they were operating a saw-mill, and that, having broken their saw, he went to the town of Belden, and engaged one Stewart, a member of the firm of Galloway & Stewart, merchants, to order them a new saw from St. Louis by telegraph. Stewart testified that he wrote a dispatch on white paper, addressed to the Caruth & Byrnes Hardware Company, St. Louis, Mo., directing them to ship at once, to Galloway & Stewart, a saw of the description desired, and signed it in the name of his firm; that one McAllen, the traveling salesman of the St. Louis company, being in town, he handed the dispatch to McAllen, gave him the money to pay the charges, and went with him to the telegraph office. Upon cross-examination, he said that he remained at the door, and saw McAllen go to the operator's desk, where he remained some time, but did not see him deliver the telegram. The operator testified that McAllen wrote another dispatch for transmission, signed by himself, ordering the saw to be sent to Galloway & Stewart, and that he did not deliver to him the dispatch about which Stewart testified. The testimony showed that neither dispatch was delivered to the parties addressed. Upon this evidence, the court

charged the jury to find for defendant, and in so charging we think there was no error. It appears that, in delivering the dispatch written by himself, McAllen was not acting under the authority given him by Stewart, which was to cause to be transmitted the message written by the latter. Being the agent of the company who was addressed, he probably deemed it proper to make the order himself. He may have had a personal interest in transmitting it in his own name, since his commissions may have depended upon a sale made through himself. At all events, he was not authorized to send that dispatch for Stewart, and it was not, therefore, the dispatch of plaintiffs, though intended for his benefit. In the case of *Telegraph Co. v. Broesche*, 10 S. W. Rep. 734, the person who delivered the message for transmission was authorized to do so by the plaintiff, who was immediately present when it was delivered. The damages claimed were for losses accruing by reason of the plaintiff's mill lying idle for want of the saw. The face of the message did not advise the defendant that it was intended for the benefit of plaintiffs, or that such persons existed; and there was no evidence that defendant's agent knew of the fact that the mill was idle for want of the saw. Therefore plaintiffs could not have recovered damages for the loss resulting from this source. If they had proved that the message written by Stewart was delivered to the agent, they could, under the evidence, have recovered only the money paid for its transmission. There is no error in the judgment, and it is affirmed.

#### TEXAS & P. RY. CO. v. LESTER.

(Supreme Court of Texas. Nov. 8, 1889.)

#### RAILROAD COMPANIES—INJURIES TO EMPLOYEES— EVIDENCE—DAMAGES.

1. In an action to recover damages for the death of plaintiff's son, who, while acting as defendant's locomotive engineer, was crushed by the cars of his train, the admission of evidence that deceased "moaned until he died" is not prejudicial error, the jury having been instructed that his physical suffering was not in issue.

2. It appeared that the track was out of line, and so spread that the cars rolled off it, and onto deceased. *Held*, that a statement of a track-walker relative to the condition of the track, made half an hour before the accident, to the section boss or some of his men at work on the section where it occurred, was properly admitted in evidence as part of the *res gesta*.

3. Defendant requested an instruction that if the jury found that deceased, with notice of the condition of the track, ran his train at a rate of speed forbidden by his instructions, and that by reason of the increased speed he contributed directly to the accident, then they must find for defendant. *Held*, that it was rightly refused, as it ignored the precautions shown to have been taken by the deceased to regulate the speed of the train.

4. Deceased was shown to have been industrious and economical, and, at the age of 26 years, earning \$1,000 a year, out of which he was furnishing plaintiff, his mother, then 51 years old, \$200 per annum. *Held*, that a verdict of \$4,200 would not be disturbed.

Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

*Finch & Thompson*, for appellant. *D. W. Humphreys*, for appellee.

HENRY, J. This suit was brought by appellee to recover damages for the death of her son, who, while acting as a locomotive engineer for defendant, was killed by being crushed under some of the cars of the train that he was on. The petition charges, and the evidence establishes, that the road-bed, at the point where the injury occurred, was worn and weak, and that the track was out of line, and so spread that the engine and cars rolled off of it, and onto the son of plaintiff. The case was tried with a jury, who rendered a verdict for plaintiff for \$4,200. After the engineer was injured, he was taken to a hospital, and on the trial the fireman of the same train, being a witness for plaintiff, and giving an account of the occurrence, among other things testified, over the objection of defendant, that, "while we [Lester, the engineer, and himself] were at the hospital, there was only a partition between us, and I could hear Lester moaning until he died." The ruling of the court in permitting this statement to go to the jury is assigned as error, upon the ground that plaintiff can only recover in this action the pecuniary loss occasioned to her by the death of her son, and that his physical suffering was not in issue. This proposition is undoubtedly correct, as to what was the issue being tried. The court distinctly instructed the jury that such was the issue, and we cannot think that the mere statement that the deceased "moaned until he died" could have at all influenced the jury. Other evidence that his body was mangled, and that he died in a few hours after that occurred, was as fully suggestive of his suffering pain as evidence that he groaned could be. A witness for plaintiff, over the objection of defendant, testified that about 1 o'clock P. M. on the day of the accident, which was about half after 1 o'clock P. M., while witness was present where the section men were at work on the section where the accident occurred, the track-walker came up, and the section boss or some of his men asked him how things were down below. "He said, 'All right, except that the track is spread over beyond Rush; you had better look after it.'" The reply had reference to the place where the accident occurred. The admission of this evidence is assigned as error, and it is contended it was inadmissible, because it was the declaration of a third party, and hearsay. The evidence clearly indicates that the statement was made by a servant of defendant whose duty it was to ascertain the condition of the track, and report it to other servants, whose duty it was to repair it. The statement was part of the *res gesta*, and admissible.

Defendant pleaded that the engineer's own negligence, in running the train at a greater rate of speed than was allowed by the regulations of the company, caused or contributed

to his own injury. It was a freight train, and the evidence shows that, according to the rules in force at the time, such trains were required not to exceed a rate of speed of 15 miles per hour, and that an order had been issued and posted on bulletin boards, at 5 places on the railroad, reducing the rate of speed of all freight trains west of Arlington to 10 or 12 miles per hour. These bulletins were intended for the information of conductors and engineers, and it was their duty to examine them, to see what orders had been posted. The accident occurred west of Arlington. It is not shown when or how long such notices were posted, nor that Lester, the deceased, ever saw or heard of them, or that he was on the road while they were posted. The circumstances under which the wreck occurred are detailed by the fireman as follows: "We were running down said hill, engine shut off, and drawn along by the weight of the train, at a speed of twenty-five or thirty miles per hour. Lester was working with his pump. I had been oiling the valves, and when we reached the point aforesaid I looked ahead, and saw the track out of line for some thirty feet, it being perhaps two feet at the widest point. I at once said to Lester: 'Get off, Billie, the engine can't go over that track.' He at once reversed his engine, stepped to the left side to get off, and then went back to his place on the right side, and jumped off; falling on his face. The third car jumped the track, and fell on him. On that day we had come from Longview, and were several hours leaving Dallas, and when we left Arlington were running about twelve or fifteen miles per hour. As we turned down Arlington hill, Lester shot off steam. The train hands being all in the caboose caused the train to force the engine down faster, as no one was on top to apply the brakes. The hill was about three miles long, with a grade of about thirty-three feet to the mile. We did not see the defective track in time to avoid the accident, as it was on a curve. Lester being on the inside, and working with his pump, did not see it; and I, being on the outside, could not see it in time to avoid the accident. We were about 150 or 200 yards from the defective track when it was first discovered. The reason Lester was not looking ahead was that he had his head turned towards the floor to fix the lazy cock, which was out of order. It regulates the feed of the pump from the tank to the engine, and, to work on the pump, he had to turn square around, with his face to the floor, and in that position could not see ahead. Our schedule time was about fifteen miles per hour, but it was customary to run faster when train was behind time. The reason we did not stop was because we were too close to the defective place, and no brakeman on top to apply the brakes. The train could not have been stopped if we had been running twelve miles per hour. The engine we had was an eight-wheel Baldwin, and the brakes used on the train were the standard

freight-car brakes. After the speed of the train got to be over fifteen miles per hour, Lester called for brakes. This was immediately before the accident occurred. After defect in track was discovered, he called for brakes again, reversed engine, and jumped off. He called for brakes twice,—once at the top of the hill, and again just before the accident occurred." A number of locomotive engineers testified as to the distance within which such an engine, moving at a rate of speed from 12 to 15 miles per hour, on such a grade, could be stopped. The shortest distance stated by any of them was a quarter of a mile; the longest was three-quarters. The court instructed the jury "that when a person enters the service of a railroad company he thereby assumes all the risks ordinarily incident to his employment, and that he cannot recover for any injury resulting from his own want of care; and if you believe from the evidence that said W. H. Lester, at the time of the alleged injury, was himself guilty of negligence or want of care in the manner of operating his engine, which contributed to his injury, and that by the use of ordinary care on his part the injury would not have occurred, you should find for defendant, though you may believe that the road-bed at the place of the accident was in an unsafe condition, and though you may believe that said W. H. Lester was guilty of negligence in operating said train; yet unless you believe that his negligence (if any) contributed to the injury, and that the same could not have been avoided by the exercise of ordinary care on his part, or by those engaged with him in operating said train, then such negligence on his part would not exempt the defendant from liability, if guilty of the negligence which caused the injury." Appellee complains of the refusal of the court to give the following charge at its request: "You are further instructed that if you should believe from the evidence that the condition of the defendant's track had been called to the attention of plaintiff's deceased son, either by virtue of its schedule, bulletin board, or otherwise, and that he had been ordered not to run at a rate of speed in excess of twelve miles per hour at place of accident, and that in violation of his instructions and notice aforesaid, if any, he did at said place run at a rate of speed of twenty-five or thirty miles per hour, and by running at such rate of increased speed he contributed directly to the accident which caused his death, then you will find for defendant." We think this charge was correctly refused, both because the charge already given was as favorable to defendant as it had the right to demand, and because the charge requested left out of view the precautions taken by deceased to regulate the speed of the train.

We know of no authority for reducing to a mathematical certainty the amount of damages that a jury may find in such cases as this. At the same time the amount found



must be based, as far as can be, on facts proved, and is not within the uncontrolled discretion of the jury. The language of the statute is: "The jury may give such damages as they may think proportioned to the injury resulting from such death." Giving proper weight to the facts surrounding the parties at the time of the death, the jury may properly have referred to their own experience, observation, and judgment as to what the future contained for them. However useful such evidence may be, courts cannot hold juries bound by statistics or calculations of life expectancies. In this case the jury had the facts: That the son was industrious, economical, and temperate; and that at the age of 26 years he was earning \$1,000 a year, out of which he was furnishing, towards his mother's support, who was then 51 years of age, \$200 per annum. If they concluded that her advancing years would create a greater necessity, and that the son's disposition and increasing ability would probably lead him to meet the demand, we are not convinced that an interference by us with the result of that opinion would come any nearer to enforcing the purpose of the law. The judgment is affirmed.

DAVIS v. STATE *ex rel.* WREN.

(Supreme Court of Texas. Dec. 17, 1889.)

**ELECTION CONTESTS—PLEADING—EVIDENCE.**

1. An information in the nature of a *quo warranto* to oust a sheriff from office, alleging that certain persons, named, illegally voted at certain specified boxes for the respondent, and their votes were counted, and that eight legal votes cast for relator in a certain precinct specified were not counted for him by the managers of election, is not subject to general demurrer, and cannot be demurred to specially as too vague or general in its allegations.

2. The Texas statutes providing for election contests by information declare that citation shall issue "in like form as in civil actions," and that the respondent shall be entitled to all the rights in the trial "as in cases of trials in civil causes." *Held*, that the proceeding must be treated as a civil action, and that an amendment to the information setting up grounds essentially different from those alleged in the original should not be allowed.

3. Where the court orders a recount of the votes in certain boxes, an objection thereto must be made when the order is made, and after a report of said recount is made and filed a motion to strike it from the files will not be entertained.

4. Where the original information only alleges error in the count of the ballots in one box, but the amendment avers that none of the boxes were correctly counted, and alleges specifically the number of votes received by each of the contestants at each of the boxes, this amendment is sufficient to authorize a recount of the votes in all the boxes.

5. Where the testimony merely tends to show an opportunity for tampering with ballot-boxes by the friends of a relator, the respondent cannot on that account prevent a recount of the ballots.

6. The admission in evidence of declarations of voters on and before election day, as to their residence, is no ground of exception, when the statement of facts shows the same facts properly proven otherwise.

7. The declarations of a voter after he has voted, and after the election has closed, in regard to his qualifications, are not in derogation of any existing right, and cannot be admitted in evidence, as against interest.

8. Where a ballot contains the names of both candidates, and shows a distinct pencil erasure of the name of one, and a very faint pencil mark across the name of the other, the testimony of the witness who made out the ticket, to the effect that the latter mark was unintentional, is admissible.

9. Where a ballot contains the names of both candidates, and shows a broad line drawn just above one of the names, obliterating a part of the first initial, and barely touching the second, in the absence of proof explaining the ambiguity of the ballot, it is proper to treat the name as erased, and count the vote for the other candidate, whose name is not erased.

10. Where the judgment declares the vote a tie, but does not even show how many votes, in the opinion of the court, each candidate received, and there is nothing in the record to show whether a challenged vote was rejected or counted, an assignment that the court erred in not sustaining the challenge is not well taken.

11. 1 Sayles, Civil St. Tex. art. 1663a, provides that the commissioners' courts may change the election precincts in their respective counties, but that each justice's precinct should constitute an election precinct. Article 1664 provides that "in each incorporated city, town, or village each ward shall constitute an election precinct." *Held*, that the fact that the commissioners' court establishes only two voting precincts in an incorporated town having four wards does not invalidate an election held therein. *HEWAT, J.*, dissenting.

12. A paper in the transcript purporting to be a bill of exceptions, but not signed by the judge, cannot be considered.

13. An assignment of error complaining of the refusal of the court to count votes for relator, and its ruling in counting votes for respondent, cannot be considered where there are no findings of fact by the court showing which votes were received and counted, and which were rejected.

14. Where the court hears a cause without a jury, and judgment is rendered on the last day of the term, and a request is made at 9 p. m. that the court file conclusions of fact and law, it is proper to decline the request for want of time.

Appeal from district court, Hays county; H. TEICHMUELLER, Judge.

This was an information in the nature of a *quo warranto*, filed by the state upon the relation of J. A. Wren, against J. S. Davis, to oust the latter from the office of sheriff of Hays county. Judgment for plaintiff, and defendant appeals.

*Brown & Beasley, Kone & Vaughn, and Walton, Hill & Walton*, for appellant. *Jas. M. Bethany, Dist. Atty., W. O. Hutchinson, O. T. Brown, and Denman & Franklin*, for appellee.

GAINES, J. This was an information in the nature of a *quo warranto*, filed upon the relation of J. A. Wren against J. S. Davis, to oust the latter from the office of sheriff of Hays county. At the general election held on the — day of November, 1888, the relator and defendant were candidates for that office. The ground of the action was that, although the commissioners' court had declared the result in favor of Davis, Wren had actually received a majority of the legal votes. The case having been tried without a jury, the court found that the relator and respondent had received an equal number of votes, and entered judgment declaring there was no election, and ousting the respondent from the office. The original information, following the sworn relation, alleged that certain persons, who were named, voted at

certain specified boxes for the respondent; that their votes were counted for him; and that the votes were illegal. It was also alleged that eight legal votes for relator had been cast in a certain precinct, known as the "Buda Box," which were not counted for him by the managers of election. It was also averred that, by the official count, the respondent had a majority of only five votes. The information contains other allegations, which need not be set forth in this connection. The original information was filed January 28, 1889, and an amended information was filed March 7th. On the latter day, and, as may be presumed, before the filing of the amendment, the respondent answered, excepting generally and specially to the information "filed on the 28th day of January, 1889." The grounds of the special exception were: (1) That the allegations were "vague, uncertain, and indefinite, giving respondent no information of fact or facts against which he can make defense with certainty or knowledge, there being no box No. 2 in voting precinct No. 1 of said county;" (2) to so much of the information as sought a recovery of respondent for the fees of the office; and (3) that the facts alleged that San Marcos was an incorporated city, divided into wards, and that the commissioners had laid off the election precincts without reference to said wards, presented no grounds for setting aside the election as to any of the precincts. On the 8th of March other exceptions were filed: (1) "To all that part of plaintiff's petition which alleges that a true count of the votes cast will, when footed up at the several precincts, amount to the alleged quantities for relator and respondent, because the allegations are too general;" and (2) that the allegations were too general to warrant a recount of the votes. The general and special exceptions of respondent to the information were overruled.

The first assignment is that "the court erred in not sustaining the general demurrer to amended original petition." If the allegations were true, it is clear that the relator was duly elected sheriff, and that respondent was not elected, and had taken possession of the office. The information was therefore not subject to general demurrer. It is also complained that there was error in not sustaining the special exceptions. Waiving, for the present, the ruling as to the allegations which were intended to show the illegality of the election at the San Marcos boxes, we think the exceptions were properly overruled. The averments were as specific as ought, under the circumstances, to have been required. As to the alleged illegal votes, the names of the voters were given, the grounds of the alleged disqualification of each voter, and the precinct at which he voted, were stated. It is also alleged that there were mistakes in the count of the votes actually deposited, and the number of votes actually received by each of the parties at each of the boxes was distinctly averred.

Greater particularity should not have been required. It was practicable for relator to know and prove, if it were a fact, that the officers had made a mistake in summing up the votes; but it was impossible for him to ascertain the name of each voter whose vote had not been counted. The substance of the allegation as to this matter was not that any particular vote or class of votes had been excluded, but simply that errors had been committed in the summing up of the votes. In reference to that part of the information which attempted to show that the election at the San Marcos boxes was illegal, it is sufficient to say that it appears from the record that, although the exceptions were overruled, the court upon the final hearing held that the votes there cast should be counted. This is not distinctly shown, but we think it is a conclusion to be deduced from the fact that, if those boxes had been rejected, the result, from the pleading and evidence, would have been to give relator a majority of the votes. We infer, too, that the court finally determined in favor of the legality of the election at those boxes, because the point is not urged by appellant under the assignment now under consideration. Such being the case, the failure to sustain the exception to this part of the information did not harm appellant.

It is also claimed that the exceptions should have been sustained because the allegations in the amended petition do not conform to the relation. This was not made a ground of special exception, and the assignment does not raise the question. It is not fundamental error, as is contended. In view of a new trial, and that an exception may hereafter be presented based upon that ground, we deem it best to pass upon it. There seems to be some conflict of authority in other jurisdictions upon the question whether the remedy by an information in the nature of a *quo warranto* is to be treated as a civil or criminal action. High, Extr. Rem. §§ 710, 711. But we think that, under our statute, it is to be treated as a civil suit. The act authorizing this proceeding provides that a citation shall issue "in like form as in civil suits," (section 3,) and that the respondent "shall be entitled to all the rights in the trial and investigation of the matters alleged against him, as in cases of trial of civil causes in this state." (Section 4.) Excluding certain special provisions, intended to secure a speedy disposition of the case in the trial court and upon appeal, there is nothing in the act to indicate that the rules of practice prescribed in the Revised Statutes should not apply, as far as is consistent with the nature of the proceeding. We incline to the opinion that an amendment to the information should not be permitted which sets up grounds for the relief sought essentially different from those alleged in the original information; but we see no reason to doubt that, under our liberal system of amendment, one should be allowed which contains allegations merely in enlargement of, or germane to, the grounds originally al-

leged. The rule in other states appears to be to allow the information in a *quo warranto* proceeding to be amended.

Before the trial the court appointed two persons to open the ballot-boxes from all the precincts, to recount the votes cast for sheriff, and to make a report of the number of votes for each of the parties at each precinct, and at the same time to ascertain and report for whom each of the persons whose votes were alleged to be illegal, either by relator or respondent, had voted. In relation to this matter the appellant has assigned three errors. First, it is claimed that the court erred in making the appointment, and directing a recount, and in not striking out the report on motion. The bill of exceptions, as it is called, in regard to the order, shows the following facts: Before the case was called for trial, and before the amended information was filed, counsel for relator moved the court to appoint persons to recount the ballots in the box known as the "Buda Box," which was granted. Counsel for relator then moved that they be also ordered to recount the votes in the Kyle box. Counsel for relator objected, on the ground that there were no averments in the answer to warrant the recount of that box. The latter motion was nevertheless granted. Counsel for relator then moved that the order be extended to all the boxes, to which counsel for respondent first objected, and then withdrew their objection. They did not except at the time the order was made. Having withdrawn their objection, they, in effect, waived their exception. The respondent cannot now complain of the ruling. An order of the court of this character must be excepted to when made, and the object of a bill of exceptions is to show the fact, if the exception be in fact taken. The bill shows that no exception was taken to this ruling. It is shown, however, that, after the report was made and filed, respondent moved to strike it from the files, and that an exception was taken to the refusal of the court to grant the motion. This seems to us an immaterial matter, because, when the report was offered in evidence, it was objected to on the same grounds which were urged in the motion to strike it out. The assignment under consideration seems to complain of the ruling of the court in appointing the committee to recount, as well as of the refusal to strike the report from the files. We have therefore discussed both questions. It may be doubted if it be sufficient to raise the latter.

Upon the trial the report, under oath, of the persons appointed to recount the votes, was offered in evidence by the relator, and respondent objected upon the grounds: (1) That there was no pleading to warrant the recount; (2) in effect, that it appeared that the ballot-boxes had been accessible to the relator and his friends, and it did not appear that they had not been tampered with. The evidence was admitted, and the respondent excepted. After all the testimony was ad-

duced, which included the testimony of the county clerk and others, as to the manner in which the ballot-boxes had been kept, the respondent moved the court to exclude the report, and, the motion being refused, he again excepted. These rulings are made the grounds of two separate assignments of error, and may be considered together. The objections urged to the report were not well taken. The amended information was sufficient to authorize a recount of the ballots. The original information only alleges error in the count of the Buda box; but the amendment averred that none of the boxes were correctly counted, and alleged specifically the number of votes received by each of the parties at each of the boxes. The recount did not show quite as many votes for relator at some of the boxes as was alleged, but at none of them did it show more. The allegations were therefore broad enough to admit the evidence. In regard to the second ground of objection, this may be said: The testimony failed to show that the ballot-boxes had been disturbed. There was evidence that the lid of one of the boxes had been split, but there was other testimony which authorized the court to conclude that this was done when it was opened, by the persons who recounted the votes. The testimony tended to show a possible opportunity for tampering with the boxes; but we do not think this sufficient to warrant a refusal to recount the ballots. The ruling must stand or fall upon the objections to the evidence urged against its admission, and we think the objections shown by the bill of exceptions were not well taken. It was not objected that the ballots should have been counted by the court, or that the report was in the nature of hearsay evidence, and therefore illegal.

If there was error in permitting the witness Frank Holt to testify that the voter James De Loach, on being asked on the day of the election for whom he intended to vote, replied, "I can't vote, because I live in Comal county," it was harmless. The statement of facts contains the admission that "it was proved" that at the time of the election the voter did reside in Comal county. The same may be said of the ruling in admitting the declarations of the voters Ed. Christian and Robert Hills. Christian's declarations were that he was living at Burnett, keeping books. It was abundantly proved that he was living in Burnett at the time, and relator, who was his father-in-law, and testified as to his residence, did not dispute the fact. Hills himself testified that he was born in England, and the declarations proved were to the same effect. The declaration of Rodriguez was that he had come from San Antonio about the 1st of May, 1888. This did not show that he was not qualified to vote in Hays county in the November following, and we cannot see that the evidence objected to influenced the finding of the court upon the question of the illegality of the vote. It is not reversible error to admit improper testimony in a trial

before the judge without a jury, unless it should appear that he has considered it and given it weight. The fact that Rodriguez came from San Antonio about the 1st of May, 1888, was established by other proof. The issue was whether or not he came with the intention of changing his residence. The declarations of these voters, which were admitted in evidence, were all made before or on the day of the election. The declarations of the voters Albert S. Payne and Lewis Jackson, made after the election, were properly excluded. Upon this question we have no doubt. The declarations of a voter after he has voted, and after the election has closed, in regard to his qualification, are not in derogation of any existing right, and consequently cannot be treated as a declaration against interest. Besides, we think the admission of such testimony would contravene a sound public policy. It would open a door to fraud to permit a voter who may have changed his mind as to his choice of candidates, and who may have become dissatisfied as to the declared result, to affect the determination of a contest by his declarations. We understand the great weight of authority to be in accordance with this ruling.

During the trial a question arose as to the ballot of one Nearsom. The original ballot, which is in print, and shows the names of both candidates, has been sent up as a part of the record, and shows a distinct pencil erasure of the name of Wren, and a very faint pencil mark across the name of Davis. It is impossible to determine, from the face of the ballot, whether it was the intention to erase the name of Davis or not. The respondent offered to prove by a witness, who identified the ballot, that he made it out at the request of the voter, and that the apparent pencil line across the name of Davis was not intentionally made, and that it was not intended as an erasure. The testimony was excluded on the ground that the ballot must speak for itself, and that it could not be explained by evidence *aliunde*. We think this was error. The law seems to be that a ballot must be interpreted by the ordinary rules which apply to written instruments. If, upon the face of the ballot, the intention of the voter is clear, extrinsic evidence should not be admitted; least of all, his own evidence as to what his intention was. But if, from the face of the ballot, the intention be doubtful, then evidence of the circumstances under which it was made out, if calculated to throw light upon the intention, should be admitted. Mr. Cooley says: "We think evidence of such facts as may be called the circumstances surrounding the election—such as who were the candidates; \* \* \* if a ballot was printed imperfectly, how it came to be so printed; and the like—is admissible for the purpose of showing that an imperfect ballot was intended for a particular candidate, unless the name is so different that to thus apply it would be to contradict the ballot itself, or unless the ballot is so defective

that it fails to show any intention whatever, in which cases it is not admissible. And we also think that in any case, to allow a voter to testify, by way of explanation of a ballot otherwise fatally defective, that he voted the particular ballot and intended it for a particular candidate, is exceedingly dangerous, invites corruption and fraud, and ought not to be suffered." Cooley, Const. Lim. 768. See, also, McCrary, Elec. §§ 407-411. The name of Wren having been clearly erased, and the pencil mark across the name of Davis being so faint that it appeared that it may have been the result of accident, we think the testimony of the witness who made out the ticket, to the effect that it was unintentional, should have been admitted. Whether the ballot was counted for Davis or not, the record does not disclose. Upon its face, the court could have refused to count it, and probably should have so refused. If the trial judge had deemed the evidence admissible, and had admitted it, he would have been authorized to count the vote for Davis. One more vote for respondent would have changed the result of the suit, and the error was therefore material. "In cases where there is doubt as to the intention of the voter, because of some ambiguity on the face of the ballot, it is error to reject proper evidence offered to explain the ambiguity." McCrary, Elec. § 410, citing *People v. Love*, 68 Barb. 535. It is shown by a bill of exceptions that the court, over the objections of respondent, counted the vote of one George Rector for relator. The ground of the objection was that both names appeared upon the ballot, and that neither appeared to have been erased. The original ballot is in the record, and upon it, just above the name of Davis, which is above that of Wren, there is found a broad pencil line, obliterating a part of the first initial of the former's name, and barely touching the second. In discussing the two original ballots sent up with the record, we have spoken of erasures. We mean constructive erasures; that is to say, such lines drawn across the names as clearly show an intention to erase them. In both ballots the lines are made with a pencil, and are so faint that the printing beneath is perfectly legible. None of the names are actually erased. The line, however, is usually drawn through the name from the beginning to the end. In this case there is a broad line drawn just above the name of Davis, and very close to it, which it is to be presumed was drawn for some purpose. It does touch two letters of the name, and erases in part the first; that is to say, the distinctive legal initial. "It is not necessary to obliterate the name entirely." McCrary, Elec. § 411. We think, in the absence of proof explaining the ambiguity of the ballot, the court did not err in treating it as if Davis' name was erased, and in counting it for relator.

Appellant's twenty-first assignment is that "the court erred in sustaining the challenge as to the voter Ed. Christian, because the

evidence was full to the effect that he had resided in the county of Hays for five or six years prior to the election, and had at no time changed his residence prior to the election." This assignment is not well taken, because the record does not show whether the court rejected the vote or counted it for respondent. There are no conclusions of fact filed by the court, nor is there any bill of exception to the ruling rejecting the ballot of this voter. The judgment declares the vote a tie, but does not even show how many votes, in the opinion of the court, each candidate received. There is nothing in the record to show whether the vote in question was counted or not, except the assignment. The evidence adduced warranted the court, in our opinion, in counting it, if it did not make it imperative to do so. If the testimony of the respondent is to be believed, it could hardly be said that Hays had ceased to be the county of Christian's residence at the time he voted. Another witness swore substantially to the same facts testified to by relator, and they showed that he had not intended to change his residence. The evidence clearly proved that before the election he had lived in another county, keeping books, but failed to show, we think, that he had lived there with any fixed purpose of changing his domicile. In view of another trial, we have made these suggestions, though we cannot say there was error, because we do not know how the court ruled. There are numerous other assignments of like character to that we have just considered, being based upon alleged rulings of the court, and, there being nothing in the record showing how the court ruled, we cannot say there was error. In most instances there was a mere conflict of evidence, which authorized the court to rule either way.

Appellee has filed cross-assignments of error, which we will now proceed to consider. The first, in substance, is that the court erred in overruling an exception to so much of respondent's answer as set up facts intended to show that the election held at the San Marcos boxes was not illegal. The information attacked the validity of the election at these boxes on the ground that San Marcos was an incorporated city, and was divided into wards, and that the commissioners' court had established the election precincts without reference thereto. In answer to this, respondent alleged that the commissioners' court had established the precincts by an order duly entered on the 16th day of February, 1888, a copy of which was made a part of the answer, and that for a long number of years prior thereto the precincts had been laid out in a similar manner, and elections had been held in the two precincts so established without objection. The seventeenth assignment complained that the court erred in holding the election in the precincts now under consideration to be legal. The evidence showed that San Marcos had been incorporated, and was divided into

four wards, and that but two election precincts had been established in the city by the commissioners, and that these were established without reference to the wards, and that they included parts of the surrounding country. So far as appears, the validity of the order establishing the precincts was not questioned until this suit was brought. These two assignments may be considered together. The Revised Statutes provided that the election precincts, as then established, should constitute election precincts, but gave the commissioners' courts power to change them in their respective counties. Article 1663. An act passed by the same legislature which adopted the Revised Statutes granted the same power to these courts, but, among other things, provided that each justice's precinct should constitute an election precinct. 1 Sayles, Civil St. art. 1663a. Article 1664 of the Revised Statutes also reads as follows: "In each incorporated city, town, or village each ward shall constitute an election precinct." The difficulty grows out of the failure of the commissioners' court of Hays county to observe this last provision. But the question is, the court having established the precincts, not in conformity with this provision, and the election having been fairly held in the precincts so established, without objection from any quarter, should it be declared illegal? Provisions regulating the time and place for holding elections are usually considered mandatory. It is of the essence of a fair election that a time should be fixed and a place appointed where each qualified voter may cast his ballot or give his vote. But, as we construe the statutes in relation to this matter, it was the intention of the legislature to impose the duty upon the commissioners' courts of fixing the places in each county where the votes should be cast. Article 1666 provides "that there shall be designated by order of the commissioners' court one place within each election precinct at which all elections in said election precinct shall be held." Article 1665 also provides that "each election precinct shall, by order of the commissioners' court, be numbered, and no two election precincts shall in the same county be designated by the same number." In order to comply with these requirements, it is necessary for the courts to determine, as a preliminary inquiry, in the first place, whether or not there is an incorporated town, village, or city in their county; and, in the second, whether or not it is divided into wards. This is a necessary incident of the duty imposed and the power conferred upon them. Having, then, the jurisdiction to determine the questions, was it intended that their decision should be subject to attack in a collateral proceeding? Was it the purpose of article 1665 of the Revised Statutes not only to direct that the commissioners' courts should make each ward of an incorporated town, village, or city a voting precinct, but also to provide that, in the event of their

failure to do so, the election as to precincts, affected by such failure, should be declared a nullity? The main design of all election laws is, or should be, to secure a fair expression of the popular will, in the speediest and most convenient manner; and we think a failure to comply with provisions not essential to attain that object should not avoid the election, in the absence of language clearly showing that such was the legislative intent. But there is no express declaration in the statute that a failure of the commissioners' courts to make each ward an election precinct shall avoid the election. Nor does it contain any words from which it should be necessarily implied that such was the intention. If such is the meaning of the law, it must be arrived at by construction. It may be conceded that one purpose of the provision was to prevent illegal voting. The constitution required that each voter should vote in his precinct. Hence the provision that each ward of a town or city should constitute a precinct made it necessary that each voter should cast his vote in the vicinity where, as a general rule, his qualifications to vote were best known. So far it tended to secure the purity of the ballot-box. That consideration of public policy may in part may have led to the enactment of the statute. On the other hand, it may have been inserted for the convenience of the voters living in incorporated towns and cities. However that may be, there was a more important matter which ought to have been considered by the legislature in inserting the article, namely, the result of making a compliance with it an essential prerequisite of the validity of the election. That result would be to create confusion, to produce litigation, and to bring about the necessity for new elections in cases where the popular will has been fairly expressed. We think this was not intended. It is better to take the chances of a few fraudulent votes being cast, which may or may not change the result, than that an election should be set aside because of the failure of the commissioners' court to do their duty in particulars not affecting the general fairness of the ballot. It may be said that the language of the article is not persuasive merely, but imposes upon the court an imperative duty. Let it be conceded. It does not follow that a failure to perform the duty makes its action void. It is nevertheless the duty of a court, having jurisdiction of a suit at law, to render a judgment according to the law of the case. But, should it render a judgment directly contrary to the law, it cannot be controverted that such judgment is conclusive in every collateral inquiry. It may be said that the use of the word "shall" shows that the provision is mandatory. That it is a command to the commissioners' court may be granted; but it does not follow that it is mandatory in the sense that it make a compliance with the provisions essential to the legality of the election. The word "shall"

has been frequently construed as not mandatory, when the provision in which it was found did not confer a private right, and the public interest did not demand such construction. *Wheeler v. Chicago*, 24 Ill. 105; *Railroad Co. v. Hecht*, 95 U. S. 168; *Beasley v. People*, 89 Ill. 571; *Chicago v. Gage*, 95 Ill. 593; *Phillips v. Fadden*, 125 Mass. 201. We think that when the commissioners' courts have fixed the precincts, and the election has been held, it ought not to be set aside because they have failed to make each ward in a city an election precinct, unless it be shown that they have acted with a fraudulent purpose. The relator's exceptions to so much of the answer in reference to the San Marcos taxes was correctly overruled. The court did not err in counting the votes there cast. For the reasons already stated, we think the relator's demurrer to so much of the answer as set up facts tending to show the illegality of the election at Kyle should have been sustained. The appellee's third assignment, for the same reason, is also well taken. The fourth cross-assignment is predicated upon bill of exceptions No. 2. What purports to be bill of exceptions No. 2, in the transcript, is not signed by the judge. It cannot be considered. The appellee's other assignments of error complain of the refusal of the court to count votes for relator, and its ruling in counting votes for respondent. There being no bills of exceptions and no conclusions of fact filed, showing which votes were received and counted and which were rejected, we cannot tell from the record how the court ruled, and cannot say whether there was error or not. If the record had disclosed the court's ruling as to the legality of the particular voters whose votes were contested, we might have been able to render the proper judgment in this court. Since we have no findings of fact by the court, it is impossible to say what judgment should have been rendered. The failure to file conclusions of fact and law was the result of circumstances, and not the fault of counsel or of the court. The judgment was rendered on the last day of the term, and the request was not made until 9 o'clock P. M. of that day, which was the last day allowed by law for holding the court. The trial judge properly declined to file his conclusions of law and fact for want of time. The failure, it seems, was unavoidable; but it is to be regretted, since we are compelled to reverse the judgment and remand the cause for error prejudicial to appellant in refusing to admit evidence as to a single vote. The judgment is reversed, and the cause remanded.

HENRY, J., (*dissenting*.) I find myself unable to concur in so much of the opinion of the majority of the court as relates to the election held in the city of San Marcos, for the following reasons:

Articles 1664, 1666, Rev. St., read: "In each incorporated city, town, or village, each ward shall constitute an election precinct."

"There shall be designated, by order of the commissioners' court, one place within each election precinct at which all elections in said election precinct shall be held." The constitution provides that "all electors shall vote in the election precinct of their residence." Each ward of the city of San Marcos was a separate election precinct, without regard to any action or non-action of the county commissioners' court. That body had authority to name "one place" within each ward to hold the election, and appoint one presiding officer in each. The constitution forbade any person's voting in a ward which he did not, at the time, live in. Neither the constitution nor the law can be changed, disregarded, or silenced by the voter or by the county commissioners' court. An order of the court assuming to disregard the law that makes the boundaries of each ward define and limit one separate election precinct is a nullity; and the voter who casts his ballot in a ward in which he does not live disregards the constitution, and it necessarily results that his vote cannot be treated as lawful. The doctrine of *de facto* election precincts finds no place in the law. What it is unlawful for the commissioners' court and the voter to do in the first instance cannot become right or lawful by being repeated. The law, much less the constitution, cannot be repealed or superseded by such methods. Notwithstanding the wards were not recognized as election precincts, and that all votes cast in any ward by non-residents of that ward were illegal, yet, if there had been but one poll held in any ward, the votes of all residents of such ward, otherwise qualified to vote, ought to have been counted; and for such purpose it would have been proper to have examined into such ballot-box. The law does not, however, authorize two separate elections to be held in one ward, or any other election precinct. It directs and authorizes one only. For the purpose of preventing fraudulent voting, the policy of the law is that there shall be only one poll, at which one person can cast his vote.

Applying the foregoing rules, it follows that, as ballot-boxes 1 and 2 were both situated in the same ward of an incorporated town that had been divided into wards, the votes of all residents of the ward were unlawful, because two polling places were used in one election precinct or ward, instead of one only, as the law requires. And the votes of all non-residents of the ward were unlawful for that, and the additional reason that they were prohibited by the constitution from voting outside of the election precinct or ward of their residence. The prohibition upon voting outside of the precinct in which the voter resides was incorporated into the constitution to prevent fraudulent voting, and preserve the purity of the ballot-box. It took the place of registration, under the preceding constitution. It is the most important, if not the only, safeguard provided under our system against repeating and other descrip-

tions of fraudulent voting. It furnishes an easy means of detecting a fraudulent voter, as the fact of his residence in the precinct is easily susceptible of proof, on the one hand, and, on the other, may be disproved more easily than any other required qualification. It is of especial importance in cities, where the changes of population are greater, and the voters not so well known to each other as they are in the rural districts. The better known the limits of the election precinct are, and the longer it continues the same, the better will be the facilities for guarding elections held in it. This, no doubt, furnished to the legislature a reason for permanently establishing city wards as election precincts. While the rural election precincts may be changed yearly by the county commissioners, the wards of cities are more permanent, and as, in addition to other elections, those for the city are held in them, additional opportunities are furnished to voters to become acquainted with each other. If, in different elections held by the same voters, different precinct lines exist, confusion and uncertainty will be likely to result, that will not occur when they always remain identically the same. If, however, no good reasons could be urged in support of the policy of the law, it would still be sufficient to find that a law of the legislature has plainly said that "each ward shall constitute an election precinct," and the constitution demands that "all electors shall vote in the election precinct of their residence." The law has conferred upon the county commissioners' court the authority to divide all of the county into election precincts, except so much of the county as may be covered by an incorporated village, town, or city that is divided into wards. Jurisdiction, for that purpose, within the limits of such a corporation, has not been conferred, and, in my opinion, does not exist. If such an incorporation in fact exists, the law of the legislature divides it into wards, and the constitution commands their observance. If the fact exists, it is the duty of the commissioners' court to know and observe it. The act or the fact of incorporation does not depend upon the commissioners' court, but upon the people who incorporated the town. The town makes the wards, and the legislature makes them election precincts. The commissioners' court may neglect their duty, and not know of the corporation, (though it is difficult to see how that can be;) but still their neglect, or their ignorance of the fact, will not unmake the corporation, destroy the wards, or change the imperative commands of the constitution and the law of the legislature. The county commissioners' court may, in the discharge of duty, when dividing the county into election precincts, appointing places for holding elections, and appointing election officers, properly institute inquiries as to whether there exists in their county any village, town, or city divided into wards, and, if they shall find there is none, proceed to exercise jurisdiction over the whole county, if



they are correct in their finding. But, when such corporation does in fact exist, it cannot be less a fact because the commissioners' court fail, through error of law, judgment, or fact, to so find. It is the duty of the commissioners' court to ascertain and know whether there is an incorporated town, divided into wards, in their counties, in order that they may properly discharge their own duties of appointing election officers and a place to vote therein; but they have no power whatever to create, change, destroy, or in any manner affect the existence of such corporations, or the wards into which they are divided. They cannot repeal by non-observance, any more than they can by a direct act, a law of the legislature, or silence a mandate of the constitution. The commissioners' court may investigate and find there is no corporation divided into wards, and lay out election precincts over the territory; and yet if in fact, and for the observance of any right of the inhabitants, the proof shows there was such a corporation, the law that makes the wards election precincts comes in conflict with the opposing action of the commissioners, and overturns it. It will not be contended that commissioners' courts have the right to disregard the law; but, because they did in fact, disregard it, it is contended that it will be presumed that they ascertained the fact did not exist. It will, in other words, be presumed that such incorporation did not exist, because the commissioners' court acted contrary to it. That will not do, when there is positive evidence to the contrary. If the record before us contained no evidence on the subject, then a presumption would arise, from the disregard of it by the commissioners' court, that there was no such incorporation. It is well settled that presumptions are indulged in the absence of evidence, and never against it. If such a rule is to prevail, the constitutional and legislative provisions on this subject are dead letters, because the commissioners' court may disregard them in every instance, and, from the very fact and act of their disregarding them, the conclusive presumption will arise that they ascertained that such incorporated towns did not exist, notwithstanding the uncontroverted evidence may show that they did. My opinion is that every act of commissioners' courts, beyond appointing a place to vote and election officers, in incorporated villages, towns, and cities, divided into wards, whether it is done with or without investigation, is a nullity, and the actual election precincts established by law, and the duty of the voter, under the constitution, to observe them, stand unchanged. The failure of the commissioners' court to regard each ward as a lawful and separate precinct, or to appoint a place in each for voting, or to appoint officers to hold the election in each, cannot operate to disfranchise the voters, as they no doubt may assemble at a proper place in their ward, choose their officers, and, acting with proper publicity, hold a lawful election.

GALLAGHER *et al.* v. GOLDFRANK *et al.*

(Supreme Court of Texas. Jan. 14, 1890.)

ATTACHMENT—FRAUDULENT CONVEYANCE—ASSIGNMENT OF ERRORS.

1. Attachment on the ground that defendants have disposed of their property with intent to defraud creditors is justified where defendants, being in failing circumstances, have mortgaged substantially all their assets, in part to pay an existing debt, and in part to secure a large advancement of money, especially where the mortgage provides that the mortgagees may enter into possession, and sell the goods in due course of trade.

2. Assignments of error which are not accompanied by appropriate statements showing how the question arose, as required by the rules of court, will not be considered.

Appeal from district court, Gonzales county; W. S. DELANY, Special Judge.

*Fly & Davidson* and *Ponton & Fly*, for appellants. *Harwood & Harwood*, for appellees.

GAINES, J. The appellees brought this suit against appellants to recover a debt due them, and sued out a writ of attachment, upon the ground that the defendants had disposed of their property, in part, with intent to defraud their creditors. The defendants pleaded in reconviction, alleging that the attachment was wrongfully and maliciously issued, and claimed damages, both actual and exemplary. Upon the trial the defendants admitted the justice of the plaintiffs' demand, and there was a verdict and judgment for plaintiffs.

The view we take of the case renders it unnecessary to consider the numerous assignments of error copied in the brief for appellants. If the evidence, viewed in its most favorable aspect for appellants, shows that the ground upon which the writ was sued out in fact existed, then they were entitled to claim neither actual nor exemplary damages. The evidence shows that appellants were merchants doing business in Gonzales county, and that they were indebted in an amount nearly, if not quite, equal to the value of their assets. The attachment issued on the 5th of January, 1883. On the 6th of December, 1882, the appellants, being indebted to the firm of Carson & Ellis, executed a deed in trust to one Dilworth, to secure that indebtedness, upon all their stock of merchandise, their notes and accounts, and also upon sundry parcels of real estate. By the terms of this instrument the mortgagors were to remain in possession of the goods, to sell them in the usual course of business, to collect the notes and accounts, and to apply the proceeds to the payment of the debt intended to be secured. On the 23d of December, 1882, Carson & Ellis executed a release of this mortgage, and on the same day appellants executed to them another mortgage upon their goods, notes, and accounts to secure the same indebtedness. This last instrument contained a stipulation that the mortgagees should take possession of the property, and should dispose of it, "in a regular course of mercantile sales, at customary prices." The indebtedness

named in the mortgages was \$6,245.23. W. D. W. Peck, one of appellants, testified that when the mortgages were executed they were indebted to Carson & Ellis in about the sum of \$2,000, and that it was agreed between them that Carson & Ellis should place in bank, subject to their order, an additional sum of \$4,000, which was to be applied to the payment of their other debts. He also testified that their indebtedness amounted to \$15,000, and their assets to \$18,000, but that when the attachment issued all their property had been mortgaged to secure debts, except a tract of 320 acres of land, worth about \$2 per acre, upon which a vendor's lien existed. He also swore that after the attachment was issued in the present case some 30 or 40 other suits were brought against them, but that those debts upon which they were brought had been subsequently paid. The money which was deposited by Carson & Ellis to the credit of appellants, Peck testified, was intended to be paid upon these debts; but he admitted upon cross-examination that it was subject to their absolute control. The banker with whom it was placed also testified that it was subject to their check for any purpose.

The appellants, even though insolvent, had an undoubted right to secure the payment of their debt to Carson & Ellis by giving them a mortgage upon their goods. But being oppressed with debt, and being unable to meet their obligations, did they have the right to transfer practically all of their unincumbered property to secure, not only an existing debt, but also a new debt, created at the time of the transaction, for an advance to them of \$4,000 in cash? We think not. The effect of the transaction, if permitted to stand, would have been to place at least assets of the value of \$4,000 beyond the reach of other creditors. This court has repeatedly held that, although a creditor may accept from a debtor in failing circumstances property in payment of his debt, if not more than reasonably sufficient in value to discharge it, yet, if he receives a transfer of property exceeding in value the amount of his debt, and pay cash, or give a negotiable instrument, for the excess, the transaction is fraudulent. *Elser v. Graber*, 69 Tex. 222, 6 S. W. Rep. 560, and cases cited. So, also, a creditor may take a mortgage upon his debtor's property to secure his debt, even though the latter be in failing circumstances; but if, at the same time, he advances his debtor a sum of money, and leaves it subject to the latter's control, and attempts to secure its repayment in the same transaction, we see no reason why the same rule should not apply which obtains when he purchases the property in satisfaction, and pays in cash an additional consideration. The effect of both transactions, if permitted to stand, is to place property to the value of the money so paid or advanced beyond the reach of creditors, and thereby to defraud them in the collection of their debts.

But there is still another reason why the

mortgage to Carson & Ellis must be held fraudulent. The effect of the provision, that the mortgagees should sell the goods in due course of trade, and at customary prices, was to hinder and delay creditors. The mortgagees are not permitted to dispose of the goods promptly, and to pay their own debt, and then to leave the surplus subject to sale for the payment of other claims against the mortgagors. They have authority to sell only at the usual retail prices; and it is apparent that, unless the mortgages be set aside, the surplus over a sufficiency to pay the mortgagees' debt is placed beyond the reach of creditors for an indefinite time. The mortgage was void. The attachment was not wrongfully issued, and the defendants were entitled to no damages. A verdict for the plaintiffs was the only verdict authorized by the evidence in the case. The rulings of the court complained of by appellants, if erroneous, could not have prejudiced their case. The verdict should have been the same, if the rulings had been different. In such a case the judgment must be affirmed, without reference to errors not affecting the merits of the cause. *Bowles v. Brice*, 66 Tex. 724, 2 S. W. Rep. 729, and cases cited.

We call attention to the fact that appellants' brief in this case wholly fails to comply with the rules in many essential particulars. Many of the assignments of error are unaccompanied with either propositions or statements; some are followed by propositions, but have no statement showing, by reference to the record, how the questions arise. In the introduction to the brief there is a very full history of the cause, which was probably intended to supply the special statements under the several assignments. The rules require first a statement of the nature and result of the suit; that is to say, not a history of the case, but merely a brief designation of its character, and of the disposition of the cause in the final judgment. Many briefs which reach this court could be improved by giving more concise preliminary statements, and fuller expositions of the record under the assignments. Each assignment or proposition should be accompanied by an appropriate statement, when the matter has not been previously stated under some other proposition. Assignments so defectively presented as those shown by the brief in this case cannot be considered; but we feel safe in saying that appellees have not been prejudiced by the failure to comply with the rules in the present instance. The judgment is affirmed.

#### LITTLE v. STATE *ex rel.* PARSELL.

(*Supreme Court of Texas. Jan. 21, 1890.*)

#### ELECTION CONTESTS—PLEADING—EVIDENCE—JUDGE—QUALIFICATIONS—CONTINUANCE.

1. Where an information in the nature of a *quo warranto* to contest an election is not verified, the court may permit the filing of an amended information, duly verified.

2. An allegation that the office is reasonably worth \$2,000 is sufficient without specifying the

term, as such allegation is only to show that the court has jurisdiction.

3. Where respondent has been declared elected, has qualified, and entered into the office, relator need not show that he offered to qualify.

4. Under Const. Tex. art. 5, § 15, providing for the election in each county of "a county judge, who shall be well informed in the laws of the state," it is not competent, on the contest of an election for county judge, to examine the contestant as to his knowledge of law.

5. Evidence that witness knew S. Foster, and that he was the person known as "Squire Foster," and lived in an adjoining county, does not vary from an allegation that one S. Foster, not a qualified voter, voted for respondent; it not appearing that there was any other person so named in either county.

6. Testimony of relator that the office was worth \$1,200, and that respondent told him the commissioners had allowed that sum, if erroneous, is immaterial, since the allegation of value, being wholly jurisdictional, controls, in the absence of plea in abatement.

7. Evidence of conversations between witnesses, who challenged certain voters, and the officer of election, is admissible, as part of the *res gestæ*, to show the manner in which the officer treated objections.

8. County assessment rolls, showing assessment for poll-taxes, are not admissible to show that challenged voters lived in the county, especially when made up after the election, as such rolls, being made up from lists furnished by taxpayers, would be hearsay.

9. Remarks by the court, in the hearing of the jury, upon refusal to allow respondent, in a contest over the office of county judge, to ask contestant whether he was well informed in the laws of the state, that "this question has never been passed upon by the higher courts, and this is as good a time as any for them to decide it," is not erroneous as intimating an opinion that respondent would be defeated in the suit.

10. Under Const. Tex. art. 6, § 2, defining a qualified voter as one "who shall have resided in the state one year next preceding an election, and the last six months in the district or county in which he offers to vote," in a county election, the residence must have been for the last six months in the county, and not merely in the district of which the county forms part.

11. Refusal to charge that, to constitute a change of residence from one precinct to another, there must be an actual removal, is not error, where the jury have already been told that each voter must vote in the precinct of his residence, and has given the statutory requirements of residence.

12. A charge that, before the jury can reject a vote, they must know for whom it was polled, is properly refused where the original ballots had been offered by the opposite party, and withdrawn on objection, and there was sufficient evidence to enable the jury to find a verdict without knowing for whom any particular vote was cast.

13. A second continuance for absence of witnesses is properly refused where commissions to take depositions of those out of the state were mailed about six weeks before trial, without sending any money, or making any arrangements with the officers, and those in the state reside in the county from which the cause had been removed, and commissions to take their depositions were issued only a month before trial; no excuse being shown for the delay, and it not appearing that the depositions could not have been procured.

Appeal from district court, Lipscomb county; FRANK WILLIS, Judge.

W. H. Grigsby, Temple Houston, and W. H. Wordman, for appellant. Browning & Madden and B. M. Baker, for appellees.

GAINES, J. This is a proceeding in the nature of a *quo warranto*, instituted by the

attorney general and the district attorney of the thirty-first judicial district of the state, at the instance of A. A. Parsell, against appellant, to try the title to the office of county judge of Roberts county. The case was brought in the district court of that county, but was subsequently transferred to Lipscomb.

The original information was not supported by a sworn relation, nor were its allegations directly sworn to. It was, however, filed by order of the district judge. Before the trial a motion was made by the respondent to dismiss the information because it was not verified by affidavit. The court overruled the motion, and permitted the relator to file an amended information, accompanied with an affidavit that the facts therein alleged were true. The court did not err in its ruling. If it should be held that an information presented by the attorney general is not sufficiently supported by his official oath to authorize the judge to direct it to be filed, we think it was competent for the court to permit the defect to be cured by an amendment duly verified, or by a separate affidavit of the truth of the matters alleged in the original information. See *Davis v. State*, ante, 957. (Tyler term, 1889); *Hunnicut v. State*, ante, 106; *East Dallas v. State*, 11 S. W. Rep. 1030.

The appellant's second assignment of error is as follows: "The court erred in overruling respondent's exception to plaintiffs' second amended original petition, filed September 9, 1889, which exceptions were filed on September 9, 1889, for the reasons that said amended petition failed to show when the office was worth \$2,000; when the term would begin, and when it would end; how long it would continue in order to render it worth \$2,000. And the relator, A. A. Parsell, fails to show that he offered to qualify as county judge of Roberts county, Tex., or that he took any steps, or performed any act, showing a desire to be installed in said office. And because the original petition of plaintiffs was not verified by relator, nor any one else, and could have no legal standing in court, and such omission was of such a nature as could not relate back and cure the defects in the original petition, so as to give the district court of Lipscomb county jurisdiction by the amendment. And, further, the court erred in refusing to sustain the exception of defendant to that part of plaintiffs' second amended original petition wherein they charge fraud and conspiracy between the defendant and the officers of the election held in Roberts county on January 10, 1889, because said amended petition fails to set out the facts constituting said fraud, or state upon what the fraud is based, so as to apprise the defendant of the nature of the fraud charged against him, and enable him to defend against the same, as shown by defendant's bill of exception No. 2."

In regard to the first ground of exception, it is to be said that the only purpose of an allegation of the value of the office is to show

that the district court has jurisdiction of the suit, under the constitution, by reason of the amount in controversy, (*State v. De Gress*, 72 Tex. 242, 11 S. W. Rep. 1029,) and its value may be alleged in the same manner as the value of any tangible thing. The allegation is "that said office of county judge of said county is reasonably worth the sum of \$2,000." This is a specific allegation, and is sufficient even upon special exception.

As to the second ground, we do not see that the relator's failure to show that he offered to qualify could affect the question of his right to the office. The respondent had been declared elected, had qualified, and had entered upon the duties of the place. Relator's offer to qualify, under these circumstances, would have been a very useless ceremony. As to his desire to be installed into office, he has pursued the proper manner to insure that desire by causing this suit to be brought. The question of the failure to verify the information by affidavit has been already passed upon.

In regard to the fourth ground of special exception, it is sufficient to say that the fraud in the election at the two voting places in the county at which respondent received a majority of the votes is specifically alleged. This will distinctly appear in another part of this opinion.

It is complained that the court erred in overruling respondent's application for a continuance. It was a second application, and was for the want of the testimony of sundry witnesses. None of the witnesses resided in the county in which the suit was pending. Some resided, as the application shows, in another county in this state, and some in Kansas and New Mexico. It was shown that commissions had been issued and mailed to the county clerks of certain counties in New Mexico and Kansas, to take the depositions of the witnesses residing there, some six weeks before the trial. No money was sent, or arrangements made with the officers for the payment of their fees for taking the depositions. This was not diligence. The respondent also alleged that he placed a commission in the hands of a notary of Roberts county on the 20th of August, 1889, less than a month before the trial, to take the deposition of certain witnesses residing in that county. Why the interrogatories were not filed, and a commission issued to take their testimony, at an earlier day, does not appear. The necessity of taking the deposition of the witnesses residing in Roberts county must have been known to respondent as soon as the case was transferred to Lipscomb county. He could have proceeded as soon as the papers were received by the clerk, which seems to have been on the 25th of May, 1889. The delay is not explained by the application for continuance, nor is it shown that the depositions could not have been taken and returned into court after the officer received the commission, and before the case was called for trial. The application

failed to show diligence, and was therefore insufficient. The continuance was properly refused. *Railway Co. v. Hardin*, 62 Tex. 367.

During the progress of the trial, while the relator was being examined as a witness, counsel for respondent asked him certain questions, with a view to determine whether or not he was well informed in the laws of the state. They were such as would have been proper to ask an applicant for license to practice law. Upon objections being made, the court refused to require the questions to be answered. Section 15, art. 5, of the constitution provides that "there shall be established in each county in this state a county court, which shall be a court of record; and there shall be elected in each county, by the qualified voters, a county judge, who shall be well informed in the law of the state," etc. It may be that, if relator, at the time of the election, was qualified to hold the office, respondent was elected, although the former received a majority of the votes. Nevertheless, we are of opinion that it was never intended to fix a ground of qualification to hold office by terms so indefinite as the phrase "well informed in the law." It is apparent that county judges were not required to be lawyers, because that qualification is expressly provided by the constitution for judges of the higher courts. In this state, more than half the county judges who have been elected since the constitution was adopted have been persons who have never devoted a day to the study of the law; and probably there have been more lawyers elected to the position than was expected when the constitution was framed. Was it contemplated that these lay judges should be held disqualified because they could not swear that they were well informed in the law, or could not define a *mandamus* or an injunction? These were the questions asked by relator, and it was not error to refuse to allow them to be answered. If it had been intended to inquire into the extent of the legal learning of a county judge, in order to determine his qualification to hold the office, it would seem some examining board or committee would have been provided for to decide the question. It was certainly never contemplated that a jury should determine an aspirant's qualifications upon listening to his examination upon questions of law. We think the requirement that the county judge should be well informed in the law was intended as a direction to the voters, and that a majority of the ballots settles the question.

It was alleged in the information, in effect, that at the election S. Foster voted for respondent, and that he was not a qualified voter. A witness for relator was permitted to testify, over objection by respondent, that he knew S. Foster, and that he was the same person known as "Squire Foster," and that at the time of the election he resided in Hemphill county. The objection was that there was a variance between the pleading

and evidence. There was no variance, and the evidence was properly admitted. It did not appear that there was any other person, in either Hemphill or Roberts county, known as either "S. Foster" or "Squire Foster."

The relator was permitted on the trial to testify that the office of county judge of Roberts county was worth \$1,200, and that respondent had told him that the commissioners' court had allowed a salary of that amount, etc. It is urged that this was error; but, if error, it was wholly immaterial. The relator alleged the value of the office to be \$2,000. The jurisdiction of the court is fixed by the amount in controversy, as shown by the petition, unless there be a plea in abatement averring that the allegation as to value or amount is not true in fact, and has been made with the fraudulent purpose of giving jurisdiction to the court in which the suit is brought. There was no such plea in this case, and hence it was unnecessary for relator to prove the value of the office. If it had been necessary, we think the testimony admissible.

Appellant's sixth assignment is, in substance, that the court erred in permitting D. M. Hargrave, A. A. Parsell, and John Lard, witnesses for relator, over objection of defendant, to testify as to conversations which took place between said witnesses and D. E. Burns, the presiding officer of the election at Miami, precinct No. 1, and also as to conversations between said D. E. Burns and one W. A. Newman, at said polls, on said day. It was charged in the information that the poll-lists and tally-sheets showed that 62 votes were cast at Miami, but that there were the names of 14 persons upon the list who in fact did not vote at the election, and that all the votes at that box, but 1, were counted for respondent. It was also charged that, of those who did actually vote, there were 24 who were not qualified voters. There was direct evidence to support these averments. On the other hand, Burns, for respondent, testified that he was presiding officer at the election; that the votes were legal, so far as he knew; and that all the voters whose names appeared upon the poll-lists actually voted in the order in which their names appeared. The testimony objected to, as set out in the bill of exceptions, is as follows: That the witnesses (Hargrave, Parsell, and Lard) "were at the election polls at Miami on January 10, 1889, for the purpose of challenging illegal votes. That they challenged numerous voters; and that D. E. Burns, as presiding officer of said election, swore the several voters challenged. That Burns questioned the several proposed voters, in substance, as follows: 'Have you resided in the state of Texas one year? and have you resided in the district or county in which you offer to vote six months?' That said Burns asked no questions as to whether voters resided in the precinct. That said witnesses desired and requested the said Burns to ask the proposed voter if he had resided six months in Roberts county next be-

fore the election. That said Burns replied that he would ask such questions as he saw proper. That he stated to witness Hargrave, at the time he challenged the vote of W. A. Newman, and after Newman had stated that he lived in Gray county, and only came to Roberts county the night before, that he (Hargrave) had no more right to ask the proposed voter a question than a yellow dog in the street. That Burns directed the said voter (Newman) to hold on, and not to answer any questions except what he (Burns) asked. That said Burns interrogated the other voters whose votes were challenged by witness substantially the same way, and always received the vote; and that none of the other managers of the election said anything; and that no vote was put after the voter was challenged." The conversations were a part of the *res gesta* of the election, the fairness of which was in issue. The testimony conducted to show the *animus* of the presiding officer, and that his purpose was not to conduct the election fairly. The circumstances testified to tended to throw light upon a matter about which the direct evidence was conflicting, and were therefore admissible.

The respondent offered the assessment rolls of Roberts county for the year 1889, for the purpose of showing that certain persons who were challenged as illegal voters had been assessed for poll-tax, as residents of the county, for the year 1889. The assessment rolls were the compilation of the assessor, made up from lists rendered by the tax-payers, or of lists made out by himself from his knowledge, and, as to this controversy were in the nature of hearsay evidence, and therefore inadmissible. It was held by this court in *Davis v. State*, ante, 957, at the last Tyler term, that the declarations of a person who has voted at an election, concerning his qualifications to vote, made after the election, are not admissible in evidence. There was no assessor in Roberts county until after the election, and therefore the list rendered by the tax-payers themselves would not have been competent evidence. They could only have been made after the election.

The eighth assignment is that "the court erred in making use of the following language, in the presence and hearing of the jury, in refusing to permit respondent to ask relator, A. A. Parsell, whether or not he was well informed in the laws of this state, to-wit: 'This question has never been passed upon by the higher courts, and this is as good a time as any for them to decide it,'—because the same clearly intimated to the jury that the court was of opinion that defendant would be cast in the suit, and was calculated to convey to the minds of the jury impressions unfavorable to the merits of the defendant's cause." We fail to see that the language complained of conveyed any intimation to the jury prejudicial to appellant. It does not even remotely imply that the court was of opinion that the respondent would be cast in the suit. If the judgment had been

in favor of respondent, and relator had appealed, the question could have been brought before this court by a cross-assignment of error.

It is complained that the court erred in the following instruction to the jury, contained in the general charge: "By the language 'who shall have resided in the state one year next preceding an election, and the last six months in the district or county in which he offers to vote,' is meant, at any state or district election a person would be qualified to vote for state or district officers, if he possessed none of the disqualifications mentioned in paragraph 2 of this charge, and had lived one year in the state next preceding such election, and the last six months in the district in which he offered to vote; but at an election held for the purpose of locating a county-seat, and to elect county officers, only, the test as to residence, in order to be a qualified elector, would be one year in the state next preceding such election, and the last six months in the county in which he offered to vote." We think the court correctly interpreted the language quoted in the charge. It is found in section 2, art. 6, of the constitution. In our opinion, it admits of no other reasonable construction. When construed as meaning that a residence of six months in the district should qualify an elector to vote for district officers, we have no difficulty in determining what district is meant. But, if we should say that such residence gives a right to vote for county officers, we should be at a loss to know whether it is the congressional, judicial, senatorial, or legislative districts in which the voter was to reside in order to acquire the qualification. If such had been the intention, the kind of district would have been named, or there would have been some language in the provision indicating some rule by which the question could be determined. Besides, the construction claimed by appellant would render the words "or county" superfluous; because every county in the state is, and will in all probability continue to be, a part of some district. Since the district includes the county, it was unnecessary to have used the word "county," if it had been intended that a residence in the district should give the qualification to vote for county officers.

It is also assigned that the court erred in refusing to give the following instruction: "That an election precinct is any part of a county, fixed by law, within which the citizens residing therein must vote; and, to constitute a change of residence from one precinct to another, there must be an actual removal." We have found nothing in the testimony that made such an instruction necessary. The court, in its general charge, instructed the jury that each elector must have voted in the precinct of his residence, and gave them the statutory requirements of residence. There was some evidence tending to show that some three or four persons who resided in one precinct went to another,

and there voted. If the jury believed this, under the charge given, they must have disregarded their votes in determining their verdict.

The appellant asked the court to charge the jury as follows: "Before you can reject an illegal vote, you must know for whom it was polled. It cannot be taken from the majority candidate, unless proved to have been polled for him." The request was refused, and the refusal is assigned as error. The relator had offered the original ballots in evidence, and, respondent having objected, they had been withdrawn. There was no direct evidence in the case showing for which of the candidates many of the voters had cast their ballots. The information charged that, of the votes cast at box 1, but one was counted for relator, and that 61 were counted for respondent, of which 14 were never cast at all, and 24 were fictitious, and that at box 2, 48 votes were counted for respondent, and none for relator, of which 45 were fictitious or fraudulent. There was strong testimony introduced to support these allegations. There was testimony upon the other side in direct conflict with this. But the jury, without knowing for whom any particular vote was cast, had evidence before them sufficient to have authorized them to find a verdict for either party. In such a case the charge requested would have been erroneous.

There are other assignments, that are unaccompanied by either propositions or statements, and they will not be considered. *Gallagher v. Goldfrank*, ante, 964, (present term.) The twenty-first assignment is too general. But we think we have passed upon every question in the case worthy of consideration. We find no error in the admission of evidence, or in the giving or refusing of instructions. The testimony was conflicting upon the main issues, and the verdict of the jury cannot be disturbed. The judgment is therefore affirmed.

ST. LOUIS, A. & T. RY. CO. v. PRATHER  
*et al.*

(Supreme Court of Texas. Nov. 8, 1889.)

TENANTS IN COMMON—OUSTER—TRESPASS TO TRY TITLE.

1. A tenant in common who has been ousted of possession of the property by his co-tenant can recover his possession in trespass to try title.

2. Pleas of not guilty and of the statutes of limitations will be deemed equivalent to an ouster of plaintiff, under Rev. St. Tex. art. 4794, providing that the plea of not guilty, or other answer to the merits, shall be an admission by defendant, for the purposes of the action, that he was in possession of the premises sued for.

3. Affirmative relief in an action of trespass to try title cannot be granted a defendant upon the plea of not guilty.

Appeal from district court, Franklin county; E. W. TERHUNE, Judge.

J. B. Stringer, for appellees.

GAINES, J. This was an action of trespass to try title, brought by the appellees

against the appellant. The plaintiffs alleged in their petition that they were the owners of an undivided half interest in the lots in controversy, and that the defendant had unlawfully entered upon the property, and still withheld the possession from them. The defendant pleaded not guilty, and the statute of limitation. The conclusions of fact, found by the court, show that the lots were conveyed to one N. C. Prather while a single man; that he subsequently married, and died without issue, leaving his wife surviving him. The lots were the homestead of Prather and his wife at the time of his death, and continued to be occupied by the wife, as her place of residence, until the 9th day of April, 1889, when she sold and conveyed them to the defendant. The plaintiffs are the brothers and sisters of the deceased husband, and the descendants of his brothers and sisters. The court below correctly held that the plaintiffs were owners of an undivided one-half interest in the property, but ruled that they could not recover possession in the action of trespass to try title, and decreed a partition adjusting what was considered to be the equities between the parties. The defendant gave notice of appeal, and filed an appeal-bond, but has not filed briefs in this court. Its assignments of error are therefore considered as waived. The appellees filed cross-assignments, which are presented in their brief. The first is, in effect, that the court erred in holding that they were not entitled to recover on their action of trespass to try title. We think this assignment well taken. It is elementary law that one tenant in common may maintain an action of ejectment against his co-tenant, when the latter has ousted him of possession of the property owned in common. *Freem. Co-Tenancy*, § 291. The author cited says: "While an ouster is essential to the maintenance of an action of ejectment by one tenant in common against another, yet the circumstances of the case, or the condition of the pleadings, may be such as to concede the fact of ouster, and thus to dispense with proof of its existence. If the defendant, by his answer, claim the whole premises in his own right, as owner thereof in severalty, he releases the plaintiff from the necessity of proving an ouster at the trial." *Id.* § 292. Our statutes provide that the plea of not guilty, or other answer to the merits, "shall be an admission by the defendant, for the purpose of that action, that he was in possession of the premises sued for, or that he claimed title thereto at the time of commencing the action, unless he states distinctly in his answer the extent of his possession or claim, in which case it shall be an admission to such extent only." *Rev. St. art. 4794*. The defendant's pleas clearly show that it recognized no right of common ownership in the premises sued for. We think, therefore, that, for the purposes of the action, they should be deemed under the statute equivalent to an ouster. Hence we conclude that plaintiffs were entitled, upon

proof of their ownership of one-half of the lots, to a judgment admitting to possession of the property with defendant, and that it was not competent for the court to decree a partition. If the defendant desired a partition, it should have pleaded the facts, and asked a judgment accordingly. Affirmative relief in an action of trespass to try title cannot be granted a defendant upon the plea of not guilty. There must be a special answer, with an appropriate prayer for relief. For the error pointed out the judgment is reversed, and the cause remanded, at appellant's costs.

**MORRIS et al. v. BALKHAM et al.**

(*Supreme Court of Texas. Nov. 15, 1889.*)

**EXECUTION—AMENDMENT—HOMESTEAD—DECLARATIONS.**

1. A sale under an execution issued against "William V." on a judgment rendered against H. W. V., which is levied on the property of H. W. V., whose Christian name was Hiram Watkins, is void; and the defective execution cannot be cured by a motion to amend it, made after the sale.

2. In trespass to try title, evidence of declarations of the attorney of plaintiffs' ancestor, under whom she claims, made at a sale of the ancestor's property under execution, is inadmissible.

Appeal from district court, Anderson county; F. A. WILLIAMS, Judge.

*Gammage & Gammage*, for appellants.  
*Greenwood & Greenwood*, for appellees.

GAINES, J. This suit was brought by appellant, Adella Morris, joined by her husband, to recover of Hattie A. Balkham, F. C. Bailey, E. M. Fowler, J. A. Reddick, and Sam Berliner a half interest in a lot in the city of Palestine, and for partition. The husband of Hattie A. Balkham was made a party defendant. Fowler, Reddick, and Berliner disclaimed title to the premises in controversy. Bailey appears to have been a tenant of Mrs. Balkham, and in possession of the lot. Both parties claim title under a conveyance of the lot in controversy made February 4, 1881, by C. A. and Hattie Calhoun to H. W. Van Hogan. At that time the appellee Hattie A. Balkham was Van Hogan's wife. He died September 12, 1886, leaving plaintiff Adella Morris, his daughter by a former wife, his sole surviving descendant. On the 9th of December, 1884, Fowler, Reddick, and Berliner recovered a judgment in the district court of Bexar county against Charles Baker and H. W. Van Hogan for the sum of \$625.80 and costs. On the 27th day of March, 1886, a *pluries* execution was issued by the clerk of that court to the sheriff of Anderson county, against the property of Charles Baker and William Van Hogan, purporting to be upon a judgment corresponding in all respects with that above mentioned, except that William Van Hogan was named as defendant therein instead of H. W. Van Hogan. Under this execution the lot in controversy was levied upon and sold by the sheriff as the property of William Van Hogan, and was bid in, for the sum of \$500,



by the plaintiffs in execution. The sheriff made them a deed purporting to convey all the right, title, and interest of William Van Hogan in the property. H. W. Van Hogan's Christian name is shown to have been Hiram Watkins. After the death of Van Hogan a motion was made by the plaintiffs in the judgment, who were also purchasers at the sheriff's sale, in the district court of Bexar county, to amend the execution under which the lot was sold so as to make it appear as an execution against the property of H. W. Van Hogan, instead of William Van Hogan. The motion contains no prayer for notice to Van Hogan's heirs, and none appears to have been given; yet, on the 7th day of May, 1887, the court granted the motion, and entered an order amending the execution. On the same day, Fowler, Reddick, and Berliner conveyed the lot to defendant Hattie A. Balkham for the consideration of \$200. Such being the evidence, the court gave judgment for the defendants. In this we think there was error. We are aware that many courts have gone very far in allowing amendments of executions; and we have found one decision which holds that an execution may be amended, after a sale under it, by the substitution of the true Christian name of the defendant, as shown by the judgment, instead of another, inserted by mistake. *Vogt v. Ticknor*, 48 N. H. 242. But in *Battle v. Guedry*, 58 Tex. 111, it was held by this court that an execution against P. B. Clements was not supported by a judgment against J. P. Clements, and a sale under such an execution did not pass the title to property owned by the latter. We think it requires no argument to show that the ruling of our court is correct. In the present case the judgment was against H. W. Van Hogan, the execution against the property of William Van Hogan; and the sheriff's deed purports to convey the lot in controversy as the property of William Van Hogan. The only difference between the case last cited and that now before us is that in the present case there was an attempt to cure the irregularity by amending the execution after the sale. The order was entered without notice to the heirs of the defendant in execution, who was then dead. It was a nullity. In our judgment, if the proper notice had been given, it would not have been competent for the court to allow the amendment, so as to give validity to the sale. It would be an unjust rule to permit an execution against B., under which his title in a certain parcel of real estate had been sold and conveyed by the sheriff, to be amended so as to make it an execution against A., and to give to the sale the effect of passing the title of the latter in the property. We conclude that the evidence showed that the title of H. W. Van Hogan did not pass by the sheriff's sale, and that the court should have given the plaintiff Adella Morris judgment for one-half of the property in controversy, with a decree of partition.

It is also claimed by appellants that the title to the lot in controversy did not pass by the sheriff's sale, because it was the homestead of H. W. Van Hogan and his wife. It had been their homestead; but Mrs. Balkham testified that before the sale was made they had abandoned it as a place of residence, and had moved to San Antonio, with the intention never to return to it. This evidence was uncontradicted, and hence the court did not err in holding that it had ceased to be a homestead.

Neither was there error in refusing to allow plaintiffs to prove that when the lot was sold an attorney representing H. W. Van Hogan and wife gave notice that it was their homestead. Van Hogan and wife could not thus make evidence for themselves, nor can the plaintiff, as the heir of H. W. Van Hogan, avail herself of the declarations of his attorney as evidence in the case. For the error pointed out the judgment is reversed, and the cause remanded.

#### WILLIS *et al.* v. HEATH.

(*Supreme Court of Texas.* Nov. 15, 1889.)

#### GARNISHMENT—NEGOTIABLE INSTRUMENTS—ATTORNEY'S FEES.

1. In Texas, a debtor who gives his own negotiable note in payment of a debt is not chargeable before its maturity under a writ of garnishment, though the note was given with knowledge of the purpose of the payee to place the fund beyond the reach of his creditors.

2. Upon the discharge of a writ of garnishment upon the answer, it is proper to allow an attorney's fee to the garnishee for preparing his answer.

Appeal from district court, Camp county;  
JOHN L. SHEPPARD, Judge.

M. L. Morris, for appellants.

GAINES, J. Appellants, being judgment creditors of R. H. Heath and B. D. Wilson, partners, composing the firm of Heath & Wilson, sued out a writ of garnishment, and caused it to be served upon appellee. Appellee answered, denying that he owed the defendant, and that he had any of their effects in his possession. Appellants contested his answer, alleging, in substance, that after the accrual of the indebtedness of Heath & Wilson to them B. D. Wilson sold his interest in the partnership effects to his partner, R. H. Heath, who, in consideration therefor, executed to him four promissory notes for the same, in the aggregate of \$2,500, with the appellee as his surety; that, before the last note fell due, appellee purchased of R. H. Heath the store-house which had formerly belonged to Heath & Wilson, and the stock of goods belonging to R. H. Heath, and in the transaction assumed the payment of the balance due upon the notes, which amounted to \$1,735.35, and that for this sum appellee executed to Mrs. M. F. Wilson, the wife of B. D. Wilson, his promissory note, due two years after date. This last note was alleged to have been executed

on the day before the judgment in favor of appellants against Heath & Wilson was rendered. It was also alleged that at the time of its execution R. H. Heath and B. D. Wilson were insolvent, and that it was made for the purpose of hindering, delaying, and defrauding their creditors in the collection of their debts. The pleading contesting the answer was excepted to on the ground that the debt sought to be reached was evidenced by a negotiable promissory note, and was therefore not subject to the writ of garnishment; and the exception was sustained, and judgment rendered for the garnishee.

The allegations in appellants' pleading must be taken most strongly against them, and it must therefore be assumed that the note upon which the appellee is sought to be charged is a negotiable instrument. The appellants' counsel, in their brief, present the case upon that theory, and concede the general rule that the maker of a negotiable promissory note cannot be subjected to the payment of the same, under the writ of garnishment, before its maturity. They claim, however, that the present case is an exception to the rule, because the note in controversy was made negotiable, and payable to Mrs. Wilson, for the purpose of defrauding Wilson's creditors. We find no authority for the doctrine for which appellants contend. It is universally held that, although ordinarily the garnishee can be held liable under the writ only to the extent of his liability to the debtor of the plaintiff, yet he may be charged with property fraudulently transferred to him by such debtor, although the latter have no cause of action against him. This is but an application of the familiar doctrine that a fraudulent conveyance is void as to creditors, although good as between the parties. This doctrine is applicable in a case where the garnishee holds the effects of the debtor under a fraudulent assignment or transfer. The maker of a negotiable promissory instrument is not subject to be charged by a writ of garnishment, because, if this be done, he is liable to be made to pay the same debt twice over; and we find no authority for holding that the rule is different when he executes the note with the knowledge that it is the purpose of the payee to place the fund beyond the reach of his creditors. We think there would be as much reason for holding one who pays a debt, knowing that the person to whom it is paid intends to withhold it of his creditors. If the maker of a promissory note may be charged in garnishment, before its maturity, on the ground that he knew when he executed it that it was the purpose of the payee to place the fund beyond the reach of his creditors, we see no reason why one who pays a debt with a knowledge of a like intent on part of his creditor may not be compelled to pay again, at the suit of the creditors of him to whom he has made the payment. The giving of a negotiable promissory note is a mode of payment. The case of *Wood v. Bodwell*, 12 Pick. 268, is in point,

and holds that the maker of a negotiable instrument, under such circumstances, is not subject to be charged under the writ of garnishment. In states where the statutes permit the garnishment of a debt evidenced by negotiable instruments, a different rule may prevail. So, also, if, after the maturity of a note, it be shown that it is in the hands of one who has received it with a knowledge that the payee had transferred with intent to defraud his creditors, the maker may be held chargeable. There a different principle applies. We conclude that appellee was not chargeable in this case. We have treated the transaction as if the note had been payable to B. D. Wilson, instead of his wife.

We find no error in the action of the court allowing the garnishee an attorney's fee for preparing his answer. In *Johnson v. Blanks*, 68 Tex. 495, 4 S. W. Rep. 557, we held that such an allowance, in such a case, was proper, and that an amount fixed by the court, in the absence of testimony showing that it was too much, would be deemed conclusive. We find no error in the judgment, and it is affirmed.

#### MISSOURI PAC. RY. CO. v. JONES.

(Supreme Court of Texas. Nov. 19, 1893.)

#### MASTER AND SERVANT—PLEADING—PROOF—EXCESSIVE DAMAGES.

1. The complaint alleged that plaintiff was employed by the general yard-master of two or more railroad companies, and placed at work in the yard for defendant; that there was an agreement between defendant and another company by which the other company was to furnish laborers for defendant; that plaintiff and the yard-master received their pay from the other company, but that he was injured through defendant's negligence while working for it. *Held*, that these averments were sufficient to establish the relation of master and servant, and to show defendant's liability for the injury.

2. There was evidence that plaintiff had been at work for defendant several months, and was working for it when he received his injury; that he was employed by the general yard-master of two railroad companies, and that his duties were to make up trains in the yard; that defendant had control of the yard; and that the track on which the injury occurred was kept in repair by it, but that he received his pay from another company. There was also evidence that the yard-master performed services for defendant, and some evidence of an arrangement between defendant and the company from which plaintiff received pay for his work, by which plaintiff was to work in the yard for defendant. *Held*, that the evidence showed that plaintiff was the special servant of defendant at the time of receiving the injury.

3. The evidence showed that plaintiff was employed by defendant to couple cars; that defendant had caused the dirt to be thrown out between the cross-ties, leaving deep holes; and that the road-master had been informed of the danger, but failed to fill up the holes. There was no evidence that plaintiff had any knowledge of the existence of the holes, but it was shown that he could not have seen them while at work. There was a conflict of testimony as to whether it was the duty of plaintiff to remain between the cars in case he failed to effect a coupling at first, or to come out and signal the engineer. *Held*, that the evidence sustained a finding that defendant was guilty of negligence.

4. A verdict for \$8,000 for the loss of the use of one hand is not excessive.

Commissioners' decision. Appeal from district court, Tarrant county; R. E. BECKHAM.

Action by Charles G. Jones against the Missouri Pacific Railway Company to recover damages for injuries received while in the employ of the defendant. From a judgment in favor of plaintiff defendant appeals.

*Finch & Thompson*, for appellant. *D. W. Humphreys*, for appellee.

**HOBBY, J.** It is urged by the appellant that the petition shows no cause of action against it, and that it does show that plaintiff below was not in its employ, and that the defendant owed him no duty. The averments showing appellant's liability were that one Phailing, the general yard-master, employed plaintiff and placed him at work in the yards of the Missouri Pacific Railway Company to couple and uncouple cars for said company; that this was the result of an agreement between the appellant and the receivers of the Texas Pacific Railway Company, by which the latter were to furnish a crew to make up trains for the Missouri Pacific Railway Company in its yards; that plaintiff and Phailing, the yard-master, received their pay from the receivers, but that plaintiff was at the time working for the appellant, and he was injured without fault on his part, but by the negligence of appellant, in failing to keep its yard in repair, and allowing its road-bed and track, at the place of injury, to become dangerous by causing its servants to throw out the dirt between the cross-ties, thereby leaving deep and dangerous holes, which plaintiff did not see, and which, by stepping into, in attempting to couple the cars of appellant, the injury was done. These averments were sufficient to establish the relation of master and servant, by inference, from the service and connection of the companies, and showed the liability of appellant. *Gulf, C. & S. F. Ry. Co. v. Dorsey*, 66 Tex. 152.

The second assignment is that the evidence did not show that plaintiff was in the employ of appellant, nor did it show that the latter owed him any duty as an employee; that, if any liability was shown, it was upon the part of the Texas Pacific Railway Company, in whose employ plaintiff was at the time. The substance of appellant's contention, under this assignment, is that the case made by appellee showed him to be in the service and pay of one company, while recovering damages from another for an accident occurring on its premises, with no proof to sustain the denied averments of a contract by which he was shown to be rightfully there. Nor was there proof that appellant controlled the cars where he was at work. Upon this branch of the case the facts were that appellee was, at the time of, and for several months prior to, the injury, at work for appellant in its yards at Fort Worth, Tex. He was employed by Phailing, the yard-master, and received his pay from the Texas Pacific

Railway Company. Appellee's duties were to stay in the yard, and make up trains. The track on which the injury occurred was kept in repair by appellant. The appellant had control of the yard. It had the track on which appellee was injured dug out between the ties about a day before appellee was hurt. Holes were opened out, about where he was injured, and there were no ties to put in them. The road-master was informed of the danger, but the track was left in that condition. The facts show that appellee was the general servant of the Texas & Pacific, and the special servant of the appellant. He performed special services for the latter, while the general servant of the former, and while so performing this special service he was the servant of appellant at the time. There was no proof of an express contract showing the relation of master and servant between appellant and appellee, but the evidence of the service performed by Jones for the Missouri Pacific Railway Company, and the connection between the two companies, authorized the inference that this relation did exist. In the case of *Railway Co. v. Dorsey*, 4 Tex. Law Rev. 115, cited in *Gulf, C. & S. F. Ry. Co. v. Dorsey*, supra, the plaintiff was employed to serve the several companies in their respective yards. It was held that he was the servant of the one in whose yard he was when injured. The proof, we think, shows that by some arrangement, the precise nature of which could not be ascertained, between the Texas Pacific and the Missouri Pacific Railway Company, it was the duty of the appellee, who received his pay from the former company, to switch and couple and uncouple the cars in the yard of the appellant, and on its track, over which the appellant had exclusive control, and whose duty it was to keep said track in repair; and that at the time of performing these services for the Missouri Pacific he was injured by reason of its negligence. While engaged in this service for appellant, with its knowledge, and under its agreement that the appellee should perform such service, he was the servant of the appellant. It was immaterial that he was not paid directly by appellant. The inference was authorized that appellant paid the Texas Pacific for his services, which would be tantamount to a payment to him. The payment we believe to be immaterial under the facts of this case. He had for a long time prior to the injury worked for the appellant. His labor was accepted up to the time of the injury. These facts made appellee the servant of appellant in the transaction in which the damage was sustained, by reason of the service performed. The principles announced in *Gulf, C. & S. F. Ry. Co. v. Dorsey*, supra, fully authorize the recovery in this case against the Missouri Pacific Railway Company, upon the ground of the liability of said company to appellee. To the same effect is the case of *Vary v. Burlington, C. R. & M. R. Co.*, 42 Iowa, 248. In the case of *Snow v. Housatonic Ry. Co.*, 8 Allen,

441, which is in many of its features analogous to the case under consideration, Snow was in the employ and pay of the Western Railway Company, and operating its cars; and he was allowed to recover damages from the Housatonic Railway Company by reason of its negligence in permitting a hole to remain in its road-bed, into which Snow stepped while coupling, as in this case, a moving car of the Western Railway, which was passing over the road of the Housatonic Railway.

The next assignment is to the effect that the evidence did not show appellant guilty of negligence which ought to render it liable, and that appellee's want of care produced the injury complained of. The negligence of the appellant is very clearly shown by the evidence to have consisted in leaving the holes between the cross-ties on the track where the injury occurred, and this, too, after being warned of the danger. It is not made to appear that the appellee had any knowledge of this defect in the track, and it was shown by the evidence that he could not have seen these trenches without stooping down at the time; and this could not be done by reason of the moving cars, which prevented it. There was testimony that it was the duty of the appellee to remain in between the cars, after going in on the track, and try to effect a coupling. Some of the testimony of appellant's witnesses indicate that it was his duty to come out, and signal the engineer, if the coupling was not at first made. The evidence upon this point being conflicting as to whether appellee was himself negligent in the manner in which he conducted himself while endeavoring to make the coupling, as well as whether appellant's track was in such a condition for the proper discharge of the duties which devolved upon appellee by reason of his employment, as he had a right to expect, and as it was appellant's duty to have it, these were all questions of fact to be determined by the jury, and we cannot say that the evidence does not fully support their finding upon this point. *Railroad Co. v. Randall*, 50 Tex. 260.

The fifth assignment is that the verdict is excessive. It was for \$6,000. The injury was such as to deprive appellee of the use of one hand. In the case of *Oil Co. v. Malin*, 60 Tex. 651, the appellee had the flesh torn from his thumb and finger, and a verdict for \$4,000 was held not to be excessive. In the case of *Railway Co. v. Young*, 19 Kan. 493, a verdict of \$10,000 was decided not to be excessive for the amputation of a hand. As has been repeatedly said, this is a question peculiarly within the jury's province to determine, and only where it is made to appear that they have abused the discretion lodged in them will their action be set aside on this ground. We think there is no error in the judgment, and that it should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment is affirmed.

### HADOCK *et al.* v. HILL.

(*Supreme Court of Texas.* Nov. 23, 1889.)

#### FRAUDULENT CONVEYANCES—VENDOR.

The purchase of property from an insolvent debtor, and payment for it with a negotiable note, is not fraudulent as to creditors unless the purchaser had notice of the fraudulent intent of the debtor, or knew of such facts as would put a man of ordinary prudence on inquiry, and unless such inquiry would have resulted in finding out that the transfer was fraudulent.

Appeal from district court, Hunt county; E. W. TERHUNE, Judge.

B. F. Looney, for appellants. W. C. Jones and Matthews & Neyland, for appellee.

HENRY, J. J. M. Ragsdale, owning \$500 in an adjusted fire insurance policy, was insolvent, as was well known to Hill, the appellee. Ragsdale sold his interest in the insurance policy to Hill for \$500, and Hill executed to him, in payment, his negotiable promissory note for that sum. Appellants were creditors of Ragsdale for a large sum of money, and sued out against Hill a writ of garnishment. Hill answered, denying being indebted to Ragsdale, or having effects of his in his possession. Appellants contested the answer. The issues tendered by plaintiffs were to the effect that the transfer of the policy was made by Ragsdale when he was insolvent, for the purpose and with intent of defrauding his creditors, which was at the time well known to Hill. Appellants complain of the charge, because it did not inform the jury "that if Hill knew Ragsdale was insolvent at the time of purchase, it was his duty to see that the proceeds of the sale went to Ragsdale's credit;" and also because the court erred in refusing to charge, when requested by plaintiffs, as follows: "If you believe from the evidence that defendant purchased from J. M. Ragsdale an interest in an insurance policy, and that the said Ragsdale was at the time insolvent, and the defendant knew it, or was in the possession of such knowledge as would have put on notice a reasonably prudent man, and you further believe that the defendant, Hill, executed his negotiable promissory note to said Ragsdale for such property so purchased, you will find for the plaintiffs." Other assignments of error relate to charges given by the court. It is also insisted that the court erred in not granting appellants a new trial, "because the uncontroverted evidence is that Hill purchased from Ragsdale the interest in the policy, and executed to him his negotiable promissory note for the purchase money, knowing at the time that he was insolvent, without seeing that the consideration paid him went to discharge Ragsdale's debts, and thereby placing it within his power to defraud his creditors."

We think the rulings of the court were correct in every respect. The charge asked and refused embodied the proposition that the mere purchase of property from an insolvent debtor, and paying for it with the negotiable promissory note of the purchaser, is fraudulent.

lent as to creditors. The court evidently had the correct conception of the questions involved, and instructed the jury clearly and concisely to the effect that if the transfer was made by Ragsdale with intent to defraud his creditors, and "if Hill had notice of the fraudulent intent, or was in possession of such facts as would put an ordinarily prudent man on inquiry as to whether or not such transfer was made with intent to hinder, delay, or defraud creditors, and that such inquiry would have resulted in finding out that the transfer was fraudulent," then they should find for plaintiffs. The judgment is affirmed.

**RICKER et al. v. DOUGLAS et al.**

(*Supreme Court of Texas.* Nov. 22, 1889.)

**INJUNCTION—BOND.**

Where an order is made that an injunction issue on petitioner's executing a proper bond, and the record falls to show that any bond was given, a motion to dissolve the injunction on the ground that no sufficient bond was executed will be granted.

Appeal from district court, Hunt county; J. A. B. PUTMAN, Judge.

R. L. Porter, for plaintiffs in error. *Montrose & Toombs* and *Grubbs & Hafner*, for defendants in error.

HENRY, J. Appellants instituted this suit to enjoin a judgment entered against them by a justice of the peace, after pronouncing judgment in their favor and adjourning his court. Plaintiffs charged that they had no knowledge that such judgment had been rendered until four months afterwards. The district judge directed the issuance of the writ upon the petitioners' executing a proper bond. The defendants afterwards moved the court to dissolve the injunction, and the court so ordered. The ground upon which it was dissolved is not shown by the record. One ground, among others, assigned in the motion, was that no sufficient injunction bond was given. The record before us fails to show that any injunction bond was executed. This was good cause for dissolving the injunction. The judgment is affirmed.

**LICHTENSTEIN v. BROOKS.**

(*Supreme Court of Texas.* Nov. 22, 1889.)

**MASTER AND SERVANT—WRONGFUL DISCHARGE—ACTION.**

A wrongful discharge, under a contract of employment providing for the monthly payment of wages, gives rise to only a single cause of action, not for the wages, but for damages for the breach of contract, and may be prosecuted immediately or after the expiration of the period contracted for.

Appeal from district court, Hopkins county; E. W. TERHUNE, Judge.

*Peteet & Crosby*, for appellant. *E. B. Perkins* and *Leach & Templeton*, for appellee.

HENRY, J. Appellant was employed by appellee to work in his store from the 1st of

March, 1888, until the 1st of January, 1889. The wages were to be paid monthly at the end of each month. The contract was performed by both parties until the 16th day of June, when appellant was discharged, without cause, so far as the record before us discloses. In July appellant sued in justice's court, and recovered a judgment for the amount of wages due him in the month of June, which was paid by appellee. In each of the months of August, September, and October he instituted a suit for the amount of wages that would have been due him under the contract for the preceding month, claiming the same as damages for the breach of contract for each month, and was threatening to bring a separate suit for each month until the expiration of the time for which he had been employed, unless he sooner found employment. While the three suits were pending, appellee brought this suit in the district court to enjoin plaintiff from prosecuting them or instituting the other threatened suits on the same cause of action. The district court, on final hearing, perpetually enjoined the defendant from prosecuting each of said suits, and also from instituting another suit for damages for the breach of said contract of hiring. Appellant contends that as his wages were due at the end of each month, and the sum due for each month was fixed by the contract, each month's failure to pay was a separate breach of the contract, for which he can prosecute an independent suit, and he contends that as he could not sue in advance for the full amount of his damages, or even know in advance how much he may be damaged by the breach, he must be allowed to prosecute suits as each month's wages would have matured. In the case of *Meade v. Rutledge*, 11 Tex. 54, referring to a case analogous to this, it is said: "The rule for estimating his compensation is not the contract price for the whole period, but the damages and loss actually sustained, not, however, to exceed the amount to which he would have been entitled, had the contract been fulfilled." It is the duty of the injured party to find other employment if he can, and if he succeeds the amount of his damages will be reduced by the amount earned in the new employment. When the contract is broken without fault of one party, his cause of action is not for the wages contracted for, but it is for the damages for the breach of the contract. His right to recover the loss occasioned by the breach, not exceeding the contract price, arises at once. In such cases as this the difficulty is not as to what the cause of action is, nor when the suit may be brought, but it is knowing the amount of his loss. It may be that such loss cannot, under the rule referred to, be ascertained before the end of the period contracted for, or other employment is secured. Still there is but one cause of action, and only one suit can be brought. That may be brought at any time before the cause of action is barred by the statute of limitations, either immediately or

after the expiration of the time that the contract was made for. In either case no more damages can be recovered than have accrued at the trial. If it is not evident before the expiration of the contract period what the amount of damages really is, and the party is not willing to waive the unascertained portion, then the institution of his suit should be delayed until the whole loss is known.

The judgment is affirmed.

**ST. LOUIS A. & T. RY. CO. v. MATTHEWS.**

(Supreme Court of Texas. Nov. 12, 1889.)

**RAILROAD COMPANY—MECHANICS' LIENS.**

The word "laborer," as used in Sayles' Civil St. Tex. art. 8179a, giving a lien to "mechanics, laborers, and operatives who have performed labor or worked, with tools, teams, or otherwise, in the construction, operation, or repair of any railroad, locomotive, car, or other equipment of a railroad, and to whom wages are due and owing for such work," means one who performs manual services in construction, repair, or operation contemplated by the statute, and does not embrace one who may work in preparing materials to be used in the construction of the road.

Appeal from district court, Bowie county;  
JOHN L. SHEPARD, Judge.

Todd & Hudgins, for appellant. Vaughn & Leary, for appellee.

STAYTON, C. J. This action was brought by appellee against T. J. Lowe and the appellant company to recover from the former a sum claimed to be due from him, and to establish and foreclose a lien on appellant's railway, to enforce its payment. Appellee sought to recover \$329.50 from Lowe, who was alleged to have been a contractor engaged in furnishing railroad ties to appellant, to be used in construction and repair of its railway, to whom he claims to have delivered ties at fixed prices, which were used in the construction and repair of the railway. To show the character of his claim, appellee alleged that "he was a laborer employed by Lowe as such contractor; that Lowe requested plaintiff to make and deliver to him on said company's right of way \* \* \* certain cross-ties, for which he agreed and promised to pay the plaintiff, when the same should be inspected and received by the said railroad company, \* \* \* the sum of twenty-eight cents per tie for all good ties so delivered by plaintiff, and the sum of fourteen cents per tie for culled or faulty ties. \* \* \* That pursuant to said request of said Lowe the plaintiff made and delivered to said Lowe \* \* \* that said sums of money are due and owing the plaintiff for his personal services, as wages earned in the construction and repair of said railroad," etc. By exception, appellant questioned the jurisdiction of the court on two grounds: (1) because the amount sued for was not sufficient to give jurisdiction; (2) because the facts alleged did not show that appellee had a lien on the railway. There was no exception to the petition on account of its generality of statement; and, on hearing the excep-

tions to the jurisdiction of the court, these were overruled. A trial was had, which resulted in a judgment for appellee for a part of the sum claimed by him, with foreclosure of lien on that part of appellant's railway and equipments within this state.

The sum claimed not being sufficient to confer jurisdiction on the district court, the inquiry arises whether the petition stated such facts as gave a lien on the railway. The exceptions raised this question. The statute gives lien to "mechanics, laborers, and operatives who have performed labor, or worked, with tools, teams or otherwise, in the construction, operation, or repair of any railroad, locomotive, car, or other equipment of a railroad, and to whom wages are due and owing for such work." Sayles' Civil St. 8179a. But it does not give lien to persons who furnish material for such construction or repairs. The petition alleges that appellee was a "laborer employed by Lowe," and that the sum claimed by him "is due and owing to plaintiff for his personal services, as wages earned in construction and repair of said railroad." The statement that he was a "laborer," and that the sum claimed by him was due for his "personal services and wages," are but the statement of conclusions, which cannot be given effect unless the facts stated show him to have been a laborer and entitled to wages for personal services. The word "laborer," as used in the statute, evidently means one who performs manual services in construction, repair, or operation contemplated by the statute, and does not embrace one who may work in preparing something of his own to sell to a railway company, after it has been rendered suitable through his toil, to be used in the construction or repair of a railway. The words, "labor," "work," "personal services," and "wages," used in the statute, render this clear, if we attach to them their ordinary signification. The facts stated are that Lowe requested appellee to make and deliver ties, and promised to pay a sum named for each tie when inspected and received by appellant, and that he did make and deliver, as per request, a certain number of ties, which were inspected and received, for which, at the price agreed upon, he was entitled to recover the sum claimed. The legitimate inference from these averments is that appellee took a contract to furnish ties at a price named, and did so, and that in preparing and delivering them he bestowed his personal services; that he sold ties which may have been prepared by his own toil, but did not perform manual services in the construction, repair, or operation of appellant's railway. Looking to the averments of fact contained in the petition, under a liberal intendment, we are of opinion that the petition does not state facts giving a lien, and that the demurrers should have been sustained. The evidence in the case, which consisted solely of the testimony of appellee, tended to show that he was a seller of ties, rather than a laborer; and, had the

petition stated facts sufficient to give lien, we are of opinion that the evidence was not sufficient to sustain the judgment. The judgment will be reversed, and the cause remanded.

**CHAPPELL v. MISSOURI PAC. RY. CO.**

(*Supreme Court of Texas.* Nov. 12, 1889.)

**APPEAL—RECORD.**

Assignments of error not copied in appellant's brief as required by rule 29 of the supreme court of Texas, as amended February 10, 1888, will not be considered.

Commissioners' decision. Appeal from district court, Wood county; **FELIX J. McCORD**, Judge.

**B. B. Hart**, for appellant.

**ACKER, P. J.** On the 10th day of February, 1888, the supreme court, sitting at Galveston, made the following order: "Ordered, that rule 29 of rules of the supreme court be so amended as to read as follows: (29) The appellant or plaintiff in error, in order to prepare properly a case for submission when called, shall have filed a brief of the points relied on in accordance with and confined to the distinct specifications of error, (which assignments shall be copied in the brief,) and to such fundamental errors of law as are apparent upon the record, each ground of error being separately presented under the proper assignment; and each assignment not so copied and accompanied with its appropriate propositions and statements shall be regarded as abandoned. This rule will be enforced in cases returnable to the next term at Tyler, and thereafter, but not before." 68 Tex. x., 6 S. W. Rep. iii. The transcript and brief for appellant were filed in the supreme court on the 7th day of October, 1889. The assignments of error are not copied in the brief, as required by the rule, and the appellant has therefore failed to call our attention to any error. Appellant having designated no error in the judgment of the court below, we are of opinion that it should be affirmed.

**STAYTON, C. J.** Report of the commissioners of appeals examined, their opinion adopted, and the judgment affirmed.

**TABB v. SMART.**

(*Supreme Court of Texas.* Nov. 12, 1889.)

**APPEAL—RECORD.**

Assignments of error not copied into the brief as required by amended rule 29, supreme court, Texas, adopted February 10, 1888, will not be considered.

Appeal from district court, Titus county; **W. P. McLEAN**, Judge.

**W. H. Baldwin**, for appellant. **S. P. Ponders**, for appellee.

**STAYTON, C. J.** This action was brought in justice's court by appellee against appellant and John Newman, doubtless to recover v. 12a.w.no.28—62

the value of a horse. The claim filed in the justice's court was in the form of a sworn account, and the only defense shown by the transcript to have been entered in the justice's court, or in the district court on appeal, was a sworn denial of the account. It is evident, however, from the charge of the court, and from the evidence, that defenses not noted on the justice's docket, or pleaded in writing, were urged on the appeal. One of the defenses urged by appellant, as shown by the charge and the evidence, was that the horse was sold by appellee to Newman, and that there was no agreement on the part of appellant such as would be sufficient under the statute of frauds to bind him. The charge of the court presented correctly the law applicable to such a defense, and while there was a conflict in the evidence, there was evidence sufficient to show that the horse was sold to Newman, but that credit was given to appellant solely. We have looked into the record to see if there was any error on the trial fundamental in character, but do not feel called upon to examine the case further, because the brief of appellant does not set out the assignments of error as required by amended rule 29, adopted February 10, 1888, and published in 68 Tex. x., 6 S. W. Rep. iii. Assignments not copied into brief, as there required, must be deemed abandoned. Finding no error in the judgment that would require its reversal without any assignment of error, it will be affirmed.

**TEXAS & P. RY. CO. v. FT. WORTH ST. RY. CO. et al.**

(*Supreme Court of Texas.* Nov. 12, 1889.)

**APPEALABLE ORDERS.**

A judgment dismissing a petition and adjudging costs against plaintiff, leaving defendant's plea in reconvention to stand for hearing, is not a final judgment from which an appeal will lie.

Appeal from district court, Tarrant county; **R. J. BOYKIN**, Special Judge.

**Finch & Thompson**, for appellant. **Templeton & Carter**, for appellees.

**STAYTON, C. J.** Appellant brought this suit to enjoin appellees from constructing a street railway across its track, and the defendants filed sworn answers, which the court below doubtless held denied all the material allegations in the bill. After this, a motion was made to dissolve the injunction, on the ground that the bill failed to show equitable ground for the relief sought, and on the further ground that all the material allegations in the bill were denied in the answer. The defendants also pleaded in reconvention, seeking to recover damages for the wrongful suing out of the injunction. On hearing the motion to dissolve it was sustained, and appellant then waived its right to have the cause heard on the merits, and asked that final judgment be entered, which the court refused to do, whereupon appellant asked that its petition be dismissed, which was done, and costs adjudged



to appellees, who brought to the attention of the court the fact that they had pleaded in reconvention, and desired a hearing on the matters thus presented. The judgment entered does not show that the court did, or intended to do, more than to dismiss appellant's petition, and adjudged costs against it, leaving the pleas in reconvention to stand for hearing. From the judgment thus entered this appeal is prosecuted. Motion to dismiss the appeal is made on the ground that no final judgment was rendered in the cause, and, we are of opinion, must be sustained; for until there is a judgment which leaves nothing to be further litigated about in the case, unless it be something which relates to the execution of the judgment, there is no final judgment. *Linn v. Arambould*, 55 Tex. 611, and cases therein cited. No such judgment was rendered in the court below, and in the absence of such a judgment this court has no jurisdiction to revise the rulings made. For want of a final judgment this appeal must be dismissed. It is so ordered.

**BRISCOE v. PUCKETT.**

(*Supreme Court of Texas.* Nov. 15, 1889.)

**BOUNDARIES.**

Where a dividing line is established between tracts of land owned by a county, before purchases are made of land on each side of it, and the deeds under which parties claim have been made, and are known by the parties to have been made with reference to that line, they, and all the persons claiming through them, are bound by it.

Appeal from district court, Hunt county; B. F. LOONEY, Special Judge.

*Grubbs & Heffner*, for appellant. *M. M. Brooks and Perkins, Gilbert & Perkins*, for appellee.

STAYTON, C. J. Shelby county owning a large body of land, and, desiring to sell it, caused to be run and actually established a line running through the land. On each side of this line, and with reference to it, tracts were sold to many persons. Appellant bought a tract on the west of that line, and the vendor of appellee bought another on the east; that line being a common boundary between them, and well established and known by all parties. The deeds to neither party call for any natural or artificial objects, but call for corner and distance, which would give to appellant 141 acres, and to appellee 160. It appears that from the western line of appellee's land, as established as before stated, to the eastern line, if the eastern line of the land formerly owned by Shelby county be the eastern line of his tract, will contain an excess of about 16 acres, and that between the dividing line, before referred to, and the point which will be reached by the length of the northern and southern lines of both tracts, measured from the eastern line of the Shelby county tract, there will be a like deficiency in appellee's tract. It is not shown that there is any obstacle to

placing the western line of appellee's tract at the distance called for from the dividing line; but, if such obstacle exists, it cannot effect the right of the parties. The dividing lines between the tracts having been actually established before the purchases were made of tracts on each side of it, and the deeds under which they claim having been made, and known by the parties to have been made, with reference to that line, they, and all persons claiming through them, are bound by it. No question can arise between the original purchasers and their vendors, other than as to the true locality of the dividing line as established at the time the purchases were made. The court below so held, and its judgment will be affirmed.

**KIMBERLIN *et al.* v. WESTERMAN *et al.***

(*Supreme Court of Texas.* Nov. 15, 1889.)

**COMMUNITY PROPERTY.**

Where a deed is executed more than four years after the marriage of the grantee to a third wife, the presumption is that it is the community property of that marital union, and, to establish a trust in the land in favor of the heirs of the second wife, it must appear that the land was paid for with the funds belonging in common to the husband and the heirs of the second wife.

Appeal from district court, Hopkins county; E. W. TERHUNE, Judge.

Suit for partition of six tracts of land.

*King & Whittle*, for appellants. *Leach & Templeton and Hiram Glass*, for appellees.

GAINES, J. Wilson T. Westerman was first married in 1845. The wife of that marriage having died, he was again united in wedlock, in 1850, to one Margaret T. Smith. She died in 1857, and again, in 1858, he was married to Susan J. Davis. He died in 1864, leaving his last wife surviving him. He also left two children by his third wife, to-wit, H. B. Westerman and P. B. Westerman. By his first wife, Wilson T. Westerman left a son, Charles, and by his second, a son, John, and a daughter, Malinda, all of whom conveyed their interests in the lands in controversy to appellant, J. M. Kimberlin. By his second wife he also left a son, George, who died unmarried, and without issue, and a daughter, who married Kimberlin, and subsequently died, leaving two minor children. This suit was brought by the last wife, joined by her present husband and H. B. and P. B. Westerman, her sons by Wilson T. Westerman, against J. N. Kimberlin and his two minor children by Sclothe Westerman, for the partition of six tracts of land which were conveyed to Wilson T. Westerman in his lifetime. A decree was entered for a partition of the property among the parties according to the respective interests in each parcel as found by the court; and from that decree the defendants below prosecute this appeal, assigning only that the court erred in finding that a tract of land known as the "Sparks Survey" was community property

of W. T. Westerman and his third wife, and in not holding that it was the community property of him and his second wife. The deed to Westerman for this tract of land was executed in 1862, more than four years after his marriage to his third wife, and the presumption is, that it was the community property of that marital union. To establish a trust in the land it was necessary for the appellants to show that it was paid for with the property or funds which belonged in common to the husband and the heirs of the second wife. Upon this question the evidence was conflicting. There was some testimony introduced by appellants which tended to support this conclusion, but it was not of a satisfactory character. On the other hand, Mrs. Jones, the third wife, testified that the land was paid for with money made by the husband after their marriage. Under this state of case, the court did not err in the conclusion that the tract of land in question belonged to the community of Westerman and his third wife. There is no error in the proceedings pointed out by the assignment and the judgment is affirmed.

#### HENDERSON v. LINDLEY.

(Supreme Court of Texas. Nov. 22, 1889.)

##### ADMINISTRATOR'S SALE TO PAY DEBTS—PARTITION.

1. After a decree under Act Tex. Aug. 9, 1876, (Laws 15th Leg. 117,) providing for the distribution of decedent's estates after 12 months from the issue of letters, and the retention by the executor of sufficient assets to pay all debts that have been or may yet be established, the court has no authority to order a sale of any of the property so partitioned for the payment of debts, upon the amount retained proving insufficient.

2. An unrecorded decree in partition may be read in evidence against a purchaser at a void sale, who knew that the sale had been forbidden, as Rev. St. Tex. art. 4839, providing that no decree in partition or judgment in which title to land is recovered can be offered in evidence till it has been recorded in the county in which the land lies, is intended for the protection of *bona fide* purchasers without notice only.

3. The property of a decedent having been partitioned between the widow and her son, who subsequently died unmarried, a deed signed by her, as the administratrix and sole heir of her husband, passes her title, and, even if it does not, it cannot be questioned by one who claims title under a void sale of the property as that of the decedent.

4. The fact that the application for an order is addressed to a certain person as county judge creates no presumption that he was the county judge when the order was made.

Appeal from district court, Hopkins county; E. W. TERHUNE, Judge.

Trespass to try title by W. F. Henderson against Eli F. Lindley. Plaintiff appeals from a judgment for defendant.

*Henderson & Blocker and Croft & Croft*, for appellant. *Perkins, Gilbert & Perkins*, for appellee.

GAINES, J. This was an action of trespass to try title, brought by appellant against appellee. The facts which gave rise to the litigation are as follows: The land in con-

troversy was the property of J. M. Lindley at the time of his death, which occurred in 1873. He left as his sole heirs his wife, Mrs. Starkie Lindley, and a minor son. It appears that an administrator was appointed and qualified; that the estate was administered in part; and that the administration became vacant. At all events, it is clearly shown by the record in this case that some time in 1877 one Martin was appointed administrator *de bonis non* of the estate. During this administration, in September, 1877, Mrs. Lindley, in her own behalf, and as guardian of her minor son, made application to the county court for a partition of the real estate belonging to the intestate at the time of his death, alleging that all the debts against the estate had been paid except a certain claim in favor of one Solomon, which had been rejected, and upon which suit had been brought, and that enough money remained in the hands of the executor to pay that debt should it be established as a just claim against the estate. The prayer of the petition was granted, and the commissioners appointed made a partition of all the real estate which was the separate property of the deceased, allotting to Mrs. Lindley a life-estate in certain parcels, deemed to be a third in value of the estate, and to her minor son the remainder in such parcels, and all of the other lands divided in fee-simple. The parcels were specifically described, and embraced the tract of land in controversy in this suit. The report of the commissioners was approved, and the partition confirmed, by the county court, at the January term, 1878. The son subsequently died, being of very tender years, and Mrs. Lindley married one Spencer. In May, 1888, joined by her husband, she conveyed the land in controversy to appellee. In 1887 J. M. Blanding became administrator *de bonis non* of the estate. The Solomon claim against the estate having been established, and the fund set apart for its payment having been entirely lost by the default of the former administrator, Martin, an order was made directing a sale of the lands belonging to the estate for the payment of debts. Under this order the tract in controversy was sold by the administrator, and purchased by the appellant.

The main question in the case is as to the effect of the order of the court directing a partition of the lands of the estate, and that confirming the partition made by the commissioners in pursuance of the former order. Section 94 of the act of August 9, 1876, provides that "at any time after the first term of the court, after the expiration of 12 months from the original grant of letters testamentary, or of administration, the heirs, devisees, or legatees of the estate, or any of them, may by their complaint in writing filed in the county court, cause the executor or administrator, and the heirs, devisees, or legatees, to be cited to appear at a regular term of the court and show cause why a partition and distribution should not be made among the heirs, devisees, or legatees of the residue

of the estate, if any there be, after retaining in the hands of the executor or administrator a sufficient portion thereof to pay all debts of every kind against the estate that have been allowed and approved or established by suit, or that have been rejected by the executor or administrator, or not approved by the county judge, and may yet be established. If it shall appear to the judge after the service of such citation that there is any residue of the estate, he shall order it to be so partitioned and distributed." Laws 15th Leg. 117. The evident object of this provision was to enable the heirs to take possession of so much of the estate as was not necessary for the purpose of paying the debts of the decedent. A preceding section had provided that the payment of all claims not presented to the executor or administrator within 12 months from the grant of letters should be postponed until claims previously presented had been satisfied. Hence it was reasonable to conclude that after the 12 months had elapsed, as a rule, all claims would have been presented, and that it would then be practicable to determine with reasonable certainty how much of the estate was required to discharge the claims against it. It may also have been considered that it would be just to the heirs after that period that all of the estate not required for the payment of debts should be permanently withdrawn from the control of the court and turned over to them. We are of opinion, therefore, that the effect of a decree of partition made in the county court under the act of 1876 was to place the property beyond the jurisdiction of the probate court, and to leave it no longer subject to be administered. The result of a rule that would permit the partition of an estate, either in whole or in part, among the heirs, and then allow the administrator to resume control, and to sell it for the payment of debts, would lead to inextricable confusion, and in some cases to great injustice. We think, therefore, that the intention of the statute was that the partition, when made, should be final, and that property once partitioned, according to the law under consideration, should be deemed as effectually administered as if sold by the administrator, and should not be again subjected to the payment of debts through the jurisdiction of the county court. It follows that if the order of the court, confirming the partition of the property between Mrs. Lindley and her son, is to be held valid in this suit, the sale of the property in controversy by the subsequent administrator, by virtue of the order of the county court, was a nullity, and passed no title.

Many objections are urged to the validity of the orders of partition, but, with one exception, they are such as go to the regularity of the proceedings, rather than to the jurisdiction of the court. It may be doubted whether the partition was not in strict accordance with the act of 1876, since many of the provisions of the Revised Statutes on which the objections seemed to be based are not found

in that act. At all events, it was in substantial compliance with the law, and the final order was such as the court clearly had the jurisdiction to make. It is objected, however, that the orders are void, because the judge who made them was disqualified to sit in the case. It is claimed that S. R. Frost was the judge who made the orders, but this does not appear. The application was addressed to him as county judge, but it does not follow that he was county judge when the orders were made. We cannot judicially know who the county judge was at that time. *Lane v. Doak*, 48 Tex. 227. It is further claimed that he was counsel in the suit for the establishment of the Solomon claim against the estate. This conclusion is based upon the fact that it appears that Frost & Barry were attorneys for plaintiff in that suit; but neither does this court judicially know that S. R. Frost was a member of that firm, nor does the fact that Judge Frost, as attorney, in 1884, presented the established claim to the county court prove that he was the attorney who instituted and prosecuted the suit to judgment. This is not a matter in which we are to deal in remote presumptions. The court below found that it was not proved that Frost was the judge when the order was made, and we think the finding correct. We do not wish, however, to be understood as holding that even if Judge Frost were attorney in the case of Mrs. Solomon against the estate he was disqualified by reason of that fact to make the orders in question, if, indeed, he did make them.

When the defendant offered in evidence the orders of the county court, making a partition of the estate, the plaintiff objected, on the ground that it was not shown that they had ever been recorded in Hopkins county. By the literal terms of the statute no decree for the partition of land, or judgment in which the title to any land is recovered, can be offered in evidence in any case until it has been recorded in the county where the land lies. Rev. St. art. 4339. But in *Russell v. Farquhar*, 55 Tex. 355, it was held, in effect, that the object of the statute was merely to give notice to purchasers, and that such a judgment or decree could be introduced in evidence in any case, except as against a *bona fide* purchaser without notice. It is true that in that case the judgment was one between the parties to the suit in which it was admitted; but we apprehend there can be no difference in principle when it is offered in a second suit between the same parties, and when the second suit is between other parties. We are of opinion that in this case the appellant cannot claim to be a *bona fide* purchaser without notice, since he testified that before he bought the sale was forbidden by an attorney representing Mrs. Lindley or some other person. Besides, he could not be an innocent purchaser under a void sale.

It is urged in behalf of appellant that the court erred in admitting the decree of partition in the probate court, because the deed

from Mrs. Spencer, formerly Mrs. Lindley, to appellee is signed by her as administratrix of the estate of J. M. Lindley, and as his sole heir. It is argued that she had no order to sell as administrator, and that she was not sole heir. Technically she was not the sole heir, but by the death of her son she was the sole owner, and we think the conveyance passed her title, at least by estoppel. But it matters not if the title remained in her; the decree of partition showed that appellant acquired no title, and it did not matter whether the appellee had title or not. The appellant could only recover upon the strength of his own title. There are other assignments of error, but they are based upon rulings that in no manner affect the correctness of the judgment, and need not be considered. There is no error in the judgment, and it is affirmed.

### LEE v. HENDERSON.

(Supreme Court of Texas. Nov. 22, 1889.)

#### ADMINISTRATOR'S SALE TO PAY DEBTS—PARTITION—COMMUNITY PROPERTY.

1. An order of court, directing all the land belonging to a decedent's estate to be divided between his widow and son, may be revoked at any time before partition is actually made and any portion of the land ordered to be sold for the payment of debts.

2. A representation by an administrator, in an application to have his bond reduced, that all the estate was distributed except the money in his hands, does not, where the facts are otherwise, deprive the court of power to order a sale of the land belonging to the estate.

3. Community property is subject to the separate debts of the husband under the old law of Texas relating to husband and wife, which is substantially re-enacted by Rev. St. Tex. tit. 50.

Appeal from district court, Navarro county; N. G. KITTRELL, Judge.

J. F. Stout and W. W. Bellew, for appellant. *Stinkins & Neblett*, for appellee.

GAINES, J. This was an action of trespass to try title, brought by appellee against appellant to recover a lot in the city of Corsicana. The facts out of which this litigation arose are the same as those in the case of *Henderson v. Lindley*, ante, 979, (this day decided,) except in one particular, namely: The lot in controversy was the common property of J. M. Lindley and his wife, and was not set apart in the partition made by the commissioners and approved by the court. If it had actually been embraced in that partition, we should be compelled, upon the principles announced in the case referred to, to reverse the judgment from which this appeal is taken. Appellant contends that, although this lot was not actually set apart in partition, the order of the court, directing all the real property belonging to the estate to be divided between the widow and son of the deceased, had the effect to place it beyond the jurisdiction of the county court, and to render any subsequent order of the court for its sale for the payment of debts a nullity. We do not concur in this view. We are cited

by counsel for appellant, in support of their position, to that line of decisions in this court which holds that a judgment in the district court in a partition suit, which fixes the rights of the parties, is a final judgment, from which an appeal may be taken, although a subsequent decree is necessary in order to make an actual partition of the property. The argument is more plausible than sound. We do not think it was the intention of the legislature to give a mere order of partition the effect of taking away the jurisdiction of the county court to order a sale of the property. We are of opinion that at any time after such an order is entered, and before the partition is actually made and approved, it would be competent for the court, should a necessity appear, to revoke that order, and to direct a sale of any portion of the property to pay debts. When the administrator is ordered to turn the property over to the heirs, then, and not until then, the court loses its jurisdiction over it. Why this lot was omitted, when all the other real estate was divided, does not appear. It was specifically mentioned in the application for the partition, and it would seem not to have been inadvertently overlooked. It may be that the court or the administrator concluded that the amount retained to pay debts might not be sufficient, and that therefore the commissioners were ordered not to divide it. The lot in controversy not having been in fact distributed, and having, as we think, remained subject to the jurisdiction of the county court, the fact that the administrator, in an application to have his bond reduced, represented that all the estate had been distributed except the money in his hands, did not have the effect to take away the power of the court to order a sale of the property. It may be evidence that he thought all the lands had been partitioned, but his opinion neither changed the fact nor affected the law. It appears that the debt for which the property was sold was the separate debt of the husband, and it is claimed that, the lot being community property, the sale passed only the husband's interest therein. It was held, under the laws as they existed before the passage of the Revised Statutes, that community property was subject to the antenuptial debts of the wife, (*Taylor v. Murphy*, 50 Tex. 291,) and we think there is a stronger reason for holding such property subject to like debts of the husband. There has been some change of the language of the old statutes as incorporated into the new, but we think there is no substantial change intended. The commissioner who revised the statutes reported that title 50, upon "Husband and Wife," was substantially a reproduction of the old law." See 2 Sayles, Civil St. 728. We conclude that the administrator's sale to appellee passed the title of both the husband and wife in the lot in controversy.

We have passed upon the decisive questions in the case. The question of notice to appellee need not be considered. There are

many assignments and propositions in appellant's brief, but all depend upon the questions decided, and are too numerous to be considered in detail. The judgment is affirmed.

**CITY OF CORSICANA v. CARR.**

(*Supreme Court of Texas*. Nov. 26, 1889.)

**JURISDICTION—NEW TRIAL—ABSENCE OF WITNESS—MUNICIPAL CORPORATIONS—CONTRACTS.**

1. An objection to the jurisdiction of a district court on the ground that at the time of the trial a special judge was engaged in the trial of another cause, in the district court of the same county, is too late, if not made till after judgment.

2. The judge's qualification, appended to a bill of exceptions to the refusal of a continuance on account of the absence of a witness, stated that the witness is a merchant in business within six blocks of the court-house, and his presence could have been had, if desired by the party, and that it appeared on the trial that he could not have had any knowledge of the subject-matter at the time the cause of action arose, and that the motion for a new trial sets forth no facts that could have been proven by the witness. *Held*, that this did not show any reason to deprive the party of the privilege of having the witness sworn, and of process to bring him into court, nor that his attendance could have been procured at the trial; and the refusal of the continuance was erroneous.

3. A city ordinance instructing a committee "to have a map made" authorizes payment, not only for making the map, but also for the necessary surveying.

Appeal from district court, Navarro county; **RUFUS HARDY**, Judge.

Action by George W. Carr against the city of Corsicana for services as city engineer. The city appeals from a judgment for plaintiff.

*Simkins & Neblett*, for appellant.

**HENRY, J.** Appellee sued the city of Corsicana, alleging that as city engineer he had done certain surveying for the city, for doing which he was, by its ordinances, entitled to pay at the rate of 1 cent per foot for the distance necessarily and actually run, and 20 cents for each 100 words, for recording all field-notes. He sued for \$653.42, and recovered judgment for \$321, with interest thereon from the 5th day of June, 1888.

The cause was tried without a jury; and it appears from a bill of exceptions that when it was called, and during its trial, and when judgment in it was rendered, a special judge was engaged in the trial of another case in the district court of Navarro county, to try which the regular judge was disqualified. No objection on that account was raised to the trial of this cause until after judgment in it had been rendered. It was then made, on the ground of want of jurisdiction, because there could not lawfully be two district courts in session at the same time in Navarro county. The objection was taken too late. A party cannot be allowed to go through a trial without objection, and, upon failing to get a judgment, then object to the proceedings. If the objection went to the jurisdiction, it would be otherwise. Unless it can be shown that a party is deprived of some

substantial right by the fact that another trial is being conducted in the district court of the county, when his own case is put on trial, we see no reason why the two trials may not be proceeded with at the same time. It is not a jurisdictional question. There may be involved a question of substantial right. If such a question arises, it ought to be presented at the earliest opportunity. If not so presented, it should be treated as waived.

The defendant made an application for a continuance on account of the absence of Stephen Smith and three other witnesses. The application was for a first continuance, and complied with the law. All of the witnesses named, except Smith, appeared and testified. The judge appended the following statement to the bill of exceptions: "The witness Stephen Smith is a merchant doing business within six blocks of the court-house where the trial was had, and the presence of said witness, if desired by the city, could have been had on the trial, which lasted all of one day and part of the next. Said witness Smith was at the date of the trial, and is now, one of the city council, as appeared by the evidence on the trial; and it further appeared on the trial that said Smith could not have had any knowledge of the subject-matter of the litigation at the time the cause of action arose. This exception is also qualified by reference to motion for new trial, which fails to set forth any fact in any manner that could have been shown by said witness." In the case of *Campion v. Angier*, 16 Tex. 93, this court said: "It not unfrequently happens that we would be at a loss to discover upon what ground a continuance has been refused, were it not for reasons contained in the bill of exceptions. When called upon to sign a bill of exceptions, the court may state very satisfactory reasons, apparent to the court there, which would not otherwise be made to appear to this court, as that the evidence sought was in fact within the reach of the party, \* \* \* or there was evidence before the court that the affidavit was not in fact true." We do not think the most liberal application of the rule can be made to embrace such a case as this. We see no objection to the judge stating his reasons for making the ruling as a qualification to the bill of exceptions. But, if the refusal rests on a fact not supported by the affidavit of a credible witness, it ought at least to be within the personal knowledge of the judge, and not a mere conclusion from other facts known to him. The judge may have sufficiently known where the witness resided and did business to have justified his appending a statement thereof to the bill of exceptions; but he could not know what the witness would testify when sworn in any manner that would authorize him to deprive a litigant of the privilege of having him sworn, and, as a consequence, of process to bring him into court. While the qualification of the judge to the bill of exceptions shows that

the witness did business very near the courthouse, it falls very much short of showing that his attendance could have been procured at the trial; and that was the important question. We think the application was sufficient, and that a continuance ought to have been granted.

Plaintiff introduced in evidence what the record styles an "ordinance" of the city, in the following words: "The cemetery committee was instructed to have a map made of the new addition to the cemetery, and placed with the city sexton." He testified that he surveyed the addition to the cemetery, and laid it off into blocks and lots, projecting the streets and alleys of the old cemetery through the addition, and charged 1 cent a foot for the necessary surveying, amounting to \$155; that he staked off the corners, and made a map of the work, and recorded it, with the surveying done, in the engineer's record. For this last work his charge was \$84. It is objected that the ordinance quoted only authorized payment for making the map, and it was therefore error to allow pay for doing the surveying. It is evident that it was necessary to do the surveying in order to make the map, and there was no error in allowing pay for it. The dates of the performance of his work are not stated, and we are not able to determine whether plaintiff was entitled to any interest. We think it is a case for the application of the law allowing interest on open accounts, and that he was entitled to have judgment for such interest as accrued subsequent to the 1st day of January next following the accrual of the indebtedness. The judgment is reversed, and the cause remanded.

**BLAIR et al. v. FINLAY et al.**

(Supreme Court of Texas. Nov. 26, 1889.)

**FRAUDULENT CONVEYANCES—EVIDENCE.**

1. Statements by the manager of a corporation as to all of its debts, making no mention of one due his wife, the plaintiff, are inadmissible on the question of the existence of that debt, they having been made after the defendant's debt had accrued.

2. In an action by the beneficiary in a trust-deed to recover the proceeds of the property, which has been sold on attachment against the grantor in the deed, an instruction that a deed of trust is void as against other creditors, if any part of the debt, to secure which it is given, is fictitious, is erroneous where the pleadings do not allege that the deed conveyed all the debtor's property.

Appeal from district court, Navarro county; SAMUEL R. FROST, Judge.

Action by W. L. Blair and M. L. Blair, his wife, against Finlay & Brunswig, and the sheriff, to recover for Mrs. Blair the amount of debt due her by the Campbell Drug Company, whose property had been sold under an attachment against the company at the suit of Finlay & Brunswig, levied after the execution of a deed of trust for the benefit of Mrs. Blair. The plaintiffs appeal from a judgment for defendants.

*Simkins & Neblett*, for appellants. *Read & Grear* and *E. O. Call*, for appellees.

HENRY, J. The Campbell Drug Company was a corporation engaged in selling drugs. The capital stock consisted of 98 shares, of which one Freedman owned 76. It was claimed that the corporation was indebted, by open account, to Freedman for moneys advanced it by him in conducting its business, in the sum of \$1,282.97. Mrs. Blair, the appellant, owned a tract of land, which she sold and conveyed to Freedman, receiving, it is claimed, as part of the consideration, said stock and debt, which were transferred to her by Freedman. W. L. Blair, one of the appellants, was the husband of M. L. Blair, and when his wife purchased the stock in the corporation he became its active manager. After her purchase of the stock in the corporation, it is claimed, Mrs. Blair advanced it money until, with the debt purchased, it owed her, on the 8th day of April, 1888, the sum of \$1,652.97. On that date the corporation owed other debts, including a debt of \$700 to appellees, Finlay & Brunswig, and was insolvent. On the 10th day of April, 1888, the corporation executed a deed of trust upon all of its property, by which the trustee was authorized to take possession of the property and sell it, and apply the proceeds to the payment of another party for rent, and to the payment of Mrs. Blair's debt for the above-named sum. On the 17th day of April next following, Finlay & Brunswig sued the corporation to recover their debt, and at the same time caused a writ of attachment to be levied upon the property of the corporation. The property was sold under the attachment proceedings, and the proceeds were appropriated by the plaintiffs in attachment. This suit was instituted to recover for Mrs. Blair, from the sheriff and plaintiffs in attachment, the amount of her debt, charging that the property, at the time of its seizure, was worth \$2,000. Upon the verdict of a jury, judgment was rendered in favor of defendants.

A material issue on the trial of the cause was whether Mrs. Blair was a creditor of the corporation. On that issue defendants, over the objections of plaintiffs, were permitted to prove by a number of witnesses that at different times after the alleged accrual of Mrs. Blair's debt, and after the debt of Finlay & Brunswig had accrued, her husband, being the manager of the business of the corporation, made statements about the indebtedness of the corporation, mentioning its other debts as all that existed, but never mentioning or including any debt due to his wife. The admission of such evidence was error, for which the judgment must be reversed. It was incumbent upon appellants to show by satisfactory evidence the existence of the debt alleged to be owing to Mrs. Blair. It is not claimed that the credit extended by Finlay & Brunswig was influenced by any such representations, and no subsequent failure by the husband to mention her debt, or direct statements by him that it did not exist, can be allowed to divest the wife

of her property in the debt. The court charged the jury: "If you find from the evidence that the debt, or any part thereof claimed by Mrs. Blair, is unreal and fictitious, then the deed of trust is void as against Finlay & Brunswick, if they were creditors of the corporation." Appellants object to this charge, because plaintiffs were entitled to recover for so much of the claim sued on as was shown to be valid. The pleadings of defendant contain general allegations to the effect that the corporation was, at the date of the execution of the deed of trust to secure Mrs. Blair's debt, insolvent, and that it was made by it for the purpose of defrauding its creditors. The evidence shows that all of the property of the corporation was conveyed by the deed of trust. The pleadings do not contain that allegation. When an insolvent debtor conveys all of his property to secure or pay a debt that is partly or wholly fictitious, we think such charge as the one quoted above would be proper when the issue is made by both the pleadings and evidence. The pleadings in this case are not sufficient to warrant the charge. It is urged that there was no evidence to sustain either the charge or verdict. Without asserting anything as to the sufficiency of the evidence to sustain the verdict, we are not able to conclude that there was not sufficient to justify a charge to the jury on the question of the validity of plaintiff's debt. The judgment is reversed, and the cause remanded.

#### BAINES v. MENSING *et al.*

(Supreme Court of Texas. Nov. 26, 1889.)

##### VENUE IN CIVIL CASES—FRAUD—COSTS.

1. A petition alleging the breach of a verbal contract, which defendants confederated together to induce plaintiff to make, with the fraudulent intent to ruin him, and that their acts in violation of it were done in pursuance of the same scheme, but stating no fraudulent act, nor anything from which fraud might be inferred, does not confer jurisdiction on a court of a county other than that of defendant's residence, under Rev. St. Tex. art. 1198, providing that inhabitants of the state shall be sued only in the county of their residence, except on written obligations and in cases of fraud.

2. Under Rev. St. Tex. art. 1421, providing that the successful party to a suit shall recover costs of his adversary, a judgment for costs of a suit dismissed for want of jurisdiction is proper.

Commissioners' decision. Appeal from district court, Shelby county; JAMES I. PERKINS, Judge.

Action by J. H. Baines against Mensing Bros. & Co., to recover damages for breach of contract. J. H. Baines appeals from a judgment dismissing the action for want of jurisdiction of the persons defendant. Rev. St. Tex. art. 1198, provides that "no person who is an inhabitant of this state shall be sued out of the county in which he has his domicile, except in the following cases, to-wit: \* \* \* (5) Where a person has contracted in writing to perform an obligation in any particular county, in which case suit may be brought either in such county or where the

defendant has his domicile. \* \* \* (7) In all cases of fraud, and in cases of defalcation of public officers, in which cases suit may be instituted in the county in which the fraud was committed, or where the defalcation occurred, or where the defendant has his domicile." Article 1421 provides that "the successful party to a suit shall recover of his adversary all the costs expended or incurred therein, except where it is or may be otherwise provided by law."

*Drury Field* and *E. B. Wheeler*, for appellant. *Geo. W. Davis*, for appellees.

COLLARD, J. We have carefully examined the petition in this case, and failed to find any averment of fraud on the part of appellees that would justify an action for damages. The petition first shows that Mensing Bros. & Co., of Galveston, entered into an agreement with plaintiff, the appellant, to supply him with money to buy cotton at Timpson, in Shelby county, to pay off all his debts, and to enable him to carry on his mercantile business at that place during the season, commencing on the 1st day of October, 1886, and ending the last of April, 1887; that at the time the agreement was entered into he informed defendants' agent that he had arrangements with a house in Galveston, who had furnished and would furnish him all the money he needed in his business. He further alleged that defendants agreed to handle the cotton he was to ship to them under the contract at \$1.25 per bale, which was 25 cents less than his house in Galveston charged him. The petition further shows that he stopped business with his former house, and commenced with defendants under the contract; obtained from them \$2,500; expended \$1,300 of it in buying cotton, at which time, only 12 days after the contract was made, one of the Mensings came to him and demanded of him the return of the money not expended; that he protested, declaring that it would ruin him; but that he, finally, was compelled, by the persistent demand of defendants, to return the balance of the sum advanced, \$1,145; that he would have bought during the season 500 bales of cotton, and would have made a profit of \$5 per bale, and so, by the failure of defendants to comply with their contract, he was damaged \$2,500. It is alleged that the agreement was made by a verbal proposition on the one side, and so accepted on the other, and that the advances were to have been made at plaintiff's place of business in Shelby county. So far the suit is for actual damages claimed to be the result of a breach of the contract on the part of the defendants. Of the merits of the suit for such damages we need not express any opinion. Following the foregoing is an allegation that the defendants "wantonly and maliciously," violated their contract, and "that defendants confederated together to induce plaintiff to make the contract, with the fraudulent intent to ruin him, break up his business, and destroy his credit:



and that their acts were done in the furtherance of a scheme devised by them to ruin him, and as a result he was vexed and harassed with attachment suits, which required him to pay out large sums of money in attorneys' fees, in defending the suits, to-wit, \$1,200." The prayer is for \$2,500 actual and \$10,000 vindictive damages. The court, upon exceptions, dismissed the suit for want of jurisdiction of the persons of defendants.

Appellant insists that the court had jurisdiction, because the contract was to be performed in Shelby county, and therefore a breach of it gave him the right to sue in Shelby county. This is correct doctrine. *Durst v. Swift*, 11 Tex. 277. But the contract in this case, if it could bear the construction that it was to be performed in Shelby county, a question we will not discuss, is not a written obligation, and therefore does not come within the exception provided in the statute in such cases. Rev. St. art. 1198, subd. 5. The appellant insists that, because the petition sets up fraud on the part of defendants, they could be sued in the county where the fraud was committed, as provided in subdivision 7 of the article cited above. The reply to this is that the petition does not set up actionable fraud. It fails to state in what the fraud consists. No fraudulent act is designated; no device, trick, or covinous scheme is specified from which fraud, actual or constructive, can be inferred. The petition alleges substantially that plaintiff had a very advantageous contract with defendants, advantageous to him, which they refused to perform. The facts he sets up can amount to nothing more. The general averments that they induced him to make the contract with a fraudulent intent to ruin his business, and that the breach of it by them so crippled him that attachment suits were brought against him, or that their acts were done in the furtherance of a scheme to ruin him and break down his credit,—such general averments do not set up fraud in a legal sense. Merely to characterize an act as fraudulent does not make it a good allegation of fraud. The breach of the contract, under the circumstances in which plaintiff was placed, owing debts, and having no money of his own with which to discharge them, may have embarrassed his business. It may have moved his creditors to press their claims for payment, to attach his property, and put him to great trouble and inconvenience; but still it was nothing more than a breach of a contract, at last. No amount of mere denunciation of it as a fraud could make it so. The facts constituting the fraud must be alleged. If the failure of defendants to comply with the alleged agreement constituted a fraud, because it was so denominated by the petition, and because it resulted disastrously to plaintiff's business, there is no reason why the breach of any contract, the failure to pay a promissory note at maturity, would not be fraudulent, or made so by mere abstract allegation. *Neill v. Newton*, 24 Tex. 202; *Free-*

*man v. Kuechler*, 45 Tex. 592; *Graham v. Roder*, 5 Tex. 147; *Bracken v. Neill*, 15 Tex. 114; *Blankenship v. Berry*, 28 Tex. 449. So we conclude that the charge of fraud made in the petition, in the absence of alleged facts constituting fraud, was not sufficient, under the statute, to give the court jurisdiction of the persons of the defendants. Where there is fraud, and the suit relates to it, and asks relief from its effects, and it is properly alleged, then the suit may be brought in the county where the fraud was committed, as has been done in several cases. See *Watson v. Baker*, 67 Tex. 49, 2 S. W. Rep. 375; *Raleigh v. Cook*, 60 Tex. 440.

Appellant assigns as error the judgment of the court against plaintiff and the sureties on his cost bond for the costs of suit, the court, by its own judgment, having no jurisdiction of the parties. We deem it sufficient to say in reply to this that the court had the power to enter the orders of dismissal, and in favor of the successful party, for all costs. Rev. St. art. 1421. A party cannot attempt to invoke the jurisdiction of a court by suit, and say he is exempt from the costs of the proceeding on the ground that the court had no jurisdiction. We conclude that the judgment of the court below should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment is affirmed.

#### CARTER v. COMMISSIONERS OF VAN ZANDT COUNTY.

(*Supreme Court of Texas. Dec. 3, 1899.*)

##### JUSTICE OF THE PEACE—NEW TRIAL.

Under Rev. St. Tex. art. 1623, authorizing a justice, at any time within 10 days after rendering judgment, to grant a new trial on motion in writing, he cannot grant a new trial at the next term of his court, held after the expiration of the 10 days, though the motion is filed in time, and an order is made continuing it to the next term.

Appeal from district court, Van Zandt county; JOHN L. SHEPPARD, Judge.

Action by S. Y. Carter for a writ of *mandamus* against the commissioners of Van Zandt county. Plaintiff appeals from a judgment sustaining a demurrer to his petition, and dismissing the cause.

*Alex. Burge* and *T. R. Yantis*, for appellant. *J. G. Russell* and *Sam Allen*, for appellees.

HENRY, J. Appellant sued Van Zandt county in a justice's court. Judgment was rendered in favor of defendant. Plaintiff in due time filed a motion for new trial. Without his procurement, fault, or consent, the motion was not acted upon before the adjournment of the term, but an order was made by the justice continuing it until the next term of his court. At the next term, he granted a new trial, and on the second trial of the cause rendered judgment in favor of plaintiff. The commissioners' court refused to pay the amount adjudged; and this

suit was filed in the district court, against the county commissioners of said county, to compel them, by a writ of *mandamus*, to pay the judgment. The court sustained a demurrer to the petition, and dismissed the cause.

It appears that the first judgment by the justice was rendered on the 26th day of November, 1888, and the order for a new trial was not made until the 1st day of January, 1889. Article 1622 of the Revised Statutes reads: "Any justice of the peace may, at any time within ten days after the rendition of any other judgment in any suit tried before him, grant a new trial therein, on motion, in writing, showing that justice has not been done him in the trial of the cause." This limits the power of the justice; and, after the expiration of the 10 days given, he has no authority to set aside a judgment, or grant a new trial. The law requires district courts to act upon motions for new trials at the term when they are made, and this court has decided that such motions cannot be continued or granted after the term. *McKean v. Ziller*, 9 Tex. 58; *Bass v. Hays*, 38 Tex. 128. The judgment is affirmed.

#### SEBASTIAN v. MARTIN BROWN CO.

(Supreme Court of Texas. Dec. 3, 1889.)

##### TRESPASS TO TRY TITLE—EVIDENCE.

In trespass to try title, where plaintiff claims under a sheriff's deed, evidence that at the sheriff's sale the defendant gave notice that he claimed the land by purchase from the defendant in execution is of itself irrelevant, and in the absence of anything to show that the defendant's title had its origin after the acquisition of plaintiff's lien on the land is insufficient to support a judgment for plaintiff.

Appeal from district court, Rockwall county; ANSON RAINES, Judge.

Trespass to try title by the Martin Brown Company against C. A. Sebastian. Defendant appeals from a judgment for plaintiff.

*Word & Charlton*, for appellant.

GAINES, J. The appellee, a private corporation, brought this suit to recover of appellant an undivided one-half interest in a tract of land. The defendant pleaded not guilty. In proof of his title plaintiff introduced a judgment in an attachment suit in the district court of Tarrant county in its favor against one S. L. Sebastian, an order upon said judgment to the sheriff of Rockwall county, commanding him to sell the land in controversy as the property of the defendant in the judgment in satisfaction thereof, and a sheriff's deed to itself, conveying the land in pursuance of a sale made by virtue of that order. The plaintiff then proved by two witnesses, who were present at the sale, that when the property was offered the appellant gave notice that he claimed it by purchase from the defendant in execution, and that whoever bought the land would buy a lawsuit. The plaintiff then closed its evidence, and the defendant offered none. The testi-

mony of the witnesses as to defendant's declarations at the sheriff's sale were objected to by the defendant, and an exception to its admission taken. The assignments of error raise the question of the court's ruling in admitting this testimony, and in rendering judgment for the plaintiff.

The plaintiff, in an action of trespass to try title, can only recover upon the strength of his own title. He may succeed in his action either by showing a consecutive chain from the sovereignty of the soil, or by showing that both he and the defendant claim from the same source, and that his is the superior right, as derived from that source. *Keys v. Mason*, 44 Tex. 143. Waiving the question whether the plaintiff can show the common source by the parol admissions or declarations of the defendant, we are of opinion that the plaintiff here did not bring his case under the rule. Before the burden of proof shifts in any case, the plaintiff must establish his cause of action at least by *prima facie* proof. In an action of trespass to try title, in which he claims under a sheriff's deed, he does not make a *prima facie* case, merely introducing his judgment, execution, and deed, and by proving that his adversary claims under the defendant in execution without showing that the latter's title is inferior to his own. In *Hill v. Allison*, 51 Tex. 390, it was held by this court, in effect, that when the plaintiff shows that the defendant claims under a sheriff's deed, which, if valid, conveys the paramount title from the common source, he must not only prove title to himself from the common source, but must also show the invalidity of the sheriff's deed. It seems to us that the same principle applies in the present case. Here the plaintiff introduced in evidence his judgment, execution, and sheriff's deed, together with testimony tending to show that defendant claimed title from the defendant in execution. Whether the latter's title had its origin before or after the plaintiff acquired his lien on the land, by the levy of the writ of attachment, does not appear. We conclude that the testimony that the defendant in this suit gave notice at sheriff's sale that he claimed the land under the defendant in execution was of itself irrelevant, and should have been excluded, and that the evidence is insufficient to support the findings and judgment of the court, because it fails to show *prima facie* that the plaintiff had the superior title. The other questions discussed in appellant's brief will probably not arise upon another trial, and need not be considered. For the errors pointed out, the judgment is reversed, and the cause remanded.

#### PARKS v. YOUNG.

(Supreme Court of Texas. Dec. 3, 1889.)

##### ATTACHMENT—SUPPLEMENTAL PETITION—WRONGFUL ATTACHMENT—DAMAGES.

1. A supplemental petition, in an attachment suit, showing that since the suit was brought

plaintiff recovered a judgment against the defendant, and that the defendant has no effects other than the proceeds of the property attached, and praying that the surplus be applied to the payment of that judgment, is unauthorized.

2. In an attachment suit in which defendant counter-claims damages for wrongful attachment, and exceptions to the cause of action attempted to be set up by a supplemental pleading have been sustained, and defendant admits the original cause of action, less the credit allowed by the supplemental pleading, the burden is on the defendant on the only issue to be tried, and he is entitled to the opening and closing.

3. A verdict for actual damages for wrongful attachment, which is only about the value testified by the debtor, and \$200 less than that placed on it by the sheriff in his return, there being no other evidence as to the value, is not excessive.

4. The defendant had more than sufficient property to pay all his debts, and was disposing of his goods only in the usual course of trade. When plaintiff came to him for a settlement, he offered to give a mortgage on all his property except one parcel, already mortgaged. Plaintiff, by pretending to accede to this, procured a list of defendant's property, and then threatened to attach him, unless he at once paid all he owed plaintiff. Held sufficient to warrant a finding of malice.

5. Where the attachment is entirely unnecessary to secure plaintiff's debt, and has been sued out without probable cause, and defendant's business has been broken up, and his immediate actual loss amounts to nearly \$700, a verdict for \$500 exemplary damages is not excessive.

Appeal from district court, Ellis county; ANSON RAINEY, Judge.

Attachment by O. F. Parks against M. Young on open account, defendant pleading in reconviction for wrongful and malicious attachment. Plaintiff appeals from a judgment for defendant.

A. A. Kemble, for appellant. Grace & Templeton, for appellee.

GAINES, J. Appellant sued appellee on an open account for \$533.25, and caused a writ of attachment to issue against his property. Appellee pleaded in reconviction, alleging that the attachment was wrongfully and maliciously sued out, and claimed damages both actual and exemplary. The defendant's property levied upon by virtue of the writ was sold by order of the judge, and the fund, amounting to \$556, was paid into the hands of the clerk of the court. The plaintiff, in order to reach the surplus which would have remained after paying his original cause of action, filed a supplemental petition, alleging that since the institution of the suit he had recovered a judgment against the defendant in a justice's court for the sum of \$135.60, and that the defendant had no other effects, except that fund, from which he could obtain satisfaction of his judgment, and prayed that the surplus be applied to the payment of that indebtedness. In the same pleading he admitted that he had collected since the commencement of his action, from collaterals placed in his hands by defendant to secure his indebtedness, the sum of \$107.80.

The court sustained an exception to so much of the supplemental petition as asked a recovery upon the judgment; and in this there was no error. We know of no authority for bringing a second action upon a judg-

ment that is not dormant. In the district court, such a suit has been permitted, in order to establish a lien that had been lost; but even that practice would hardly now be allowed, since existing statutes provide for fixing a lien by filing an abstract of the judgment. A defendant should not be subjected to the costs of a second suit, on a judgment upon which execution may issue. Besides, the courts do not sit to do a futile act. It is quite too plain for argument that a party cannot by amendment set up an additional cause of action in an attachment suit, and thereby acquire a lien upon the property attached to secure its payment. It matters not that the defendant may be insolvent. There are no equities which will enable a plaintiff to extend the lien acquired by the levy of a writ of attachment over an indebtedness not embraced in the writ.

After the exceptions to the cause of action attempted to be set up in the supplemental petition had been sustained, the defendant admitted the plaintiff's cause of action stated in his original petition, less the credit allowed in the supplemental petition, and moved the court to allow him the opening and conclusion in the introduction of evidence, and in argument upon his cross-action. The court correctly granted the motion. Conceding, for the sake of the argument, that the plaintiff may have applied his credit to his judgment obtained in the justice's court, this he failed to do. He admitted it in his pleading as a credit upon his whole demand, and when the exception to the claim of a recovery on the judgment was sustained he failed to withdraw the allegation. This reduced the amount claimed in his petition to the sum admitted upon the record by the defendant. His entire cause of action having been admitted, the burden was upon the defendant upon the only issue to be tried, and he had the right to open and conclude the argument.

The jury found for the defendant \$736.09 actual and \$500 exemplary damages. It is claimed that the actual damages are excessive. But the only evidence as to the value of the property attached and sold was the testimony of the defendant, and the valuation placed upon the property by the sheriff in his return. The former placed the value at \$1,439.90, and the latter at \$935.05. The defendant's testimony would have warranted a verdict considerably larger in amount than that actually found by the jury. Under these circumstances, we cannot say the verdict for actual damages was excessive. In *Willis v. Lowry*, 66 Tex. 540, 2 S. W. Rep. 449, a verdict in a similar case was sustained which was supported by the testimony of the plaintiff alone as to the value of the goods, although the testimony of other witnesses placed their value at a much lower sum.

It is also insisted that the evidence failed to show malice, and that the verdict for exemplary damages is unwarranted. It was shown, however, that the ground alleged in

the affidavit for suing out the attachment was not true. The defendant testified that he was merely disposing of his goods in the usual course of trade, and that he was not about to dispose of his property with intent to defraud his creditors, as sworn to in the affidavit. His testimony showed that, while he was indebted, he had more than sufficient property to pay his debts; and there was no conflict upon these questions. He also testified that when plaintiff came to him for a settlement he offered to give him a mortgage upon all his property to secure his debt, except upon a parcel of broom-corn, already mortgaged to a bank, and that to this the plaintiff apparently acceded, and requested him to give him a list, so that he could have the instrument prepared, but that when he had prepared the list, and handed it to plaintiff, the latter said to him: "If you don't pay me, at once, all you owe me, I will attach you." This evidence amply warranted the jury in concluding at least that the plaintiff, if not actuated by an intent to injure the defendant, sued out the writ without probable cause, and with a deliberate intent to take a wrongful advantage of the attachment laws, in order to enforce a speedy collection of his debt. If so, the suing out of the writ was, in legal contemplation, malicious.

The attachment was not even necessary to secure the plaintiff's debt. There was no ground for suing it out. The defendant's business was broken up; and his immediate actual loss from the seizure and sale of the goods was, according to the finding of the jury, nearly \$700. Under such circumstances, a verdict for \$500 exemplary damages is not excessive. We find no error in the judgment, and it is affirmed.

**GALVESTON, H. & S. A. RY. CO. v. STATE.<sup>1</sup>**  
(Supreme Court of Texas. Dec. 18, 1889.)

**SCHOOL LANDS—EXTENT OF GRANT.**

1. Acts Tex. 1834 and of March 18, 1878, providing for grants of public land to railroads, require surveys to be made in sections, and numbered from one upwards, the even numbers to be reserved to the state, and the odd numbers to be granted to the railroad. Const. Tex. 1876, art. 7, § 2, provides that all lands theretofore set apart for the support of public schools, "all the alternate sections of land reserved by the state out of grants heretofore made, or that may hereafter be made, to railroads," and "half of the public domain of the state," etc., shall constitute a perpetual school fund. Held, that the reservation for the school fund of "half of the public domain," as well as the "alternate sections," does not entitle the state to half of the sections to be granted to the railroads, in addition to the sections reserved to the state.

2. In view of the provisions in the constitution for grants to railroads, for pre-emption of homesteads, for grants to counties for educational purposes, etc., it cannot be said that the reservation of "half of the public domain of the state" as a perpetual school fund was an appropriation of half of all the then existing public domain. Such reservation was intended to reach and hold beyond legislative control whatever portion of the public domain might remain after the execution of the enumerated purposes.

<sup>1</sup>For dissenting opinion, see 18 S. W. Rep. —.

Appeal from district court, Travis county; W. M. KEY, Judge.

This was an action of trespass to try title, brought by the state of Texas against the Galveston, Harrisburg & San Antonio Railway Company, to recover one-half of 40 sections of land patented to said corporation in December, 1878. Judgment for plaintiff, and defendant appeals.

E. P. HULL, for appellant. J. J. HOGG, Atty. Gen., and L. D. BROOKS, for appellee.

HENRY, J. In December, 1878, appellant, a railroad corporation, located 40 land certificates, granted to it by the state, upon public land lying in the county of Crockett. The certificates were for 640 acres each; and, at the same time, appellant caused to be surveyed 40 alternate sections for the state. The field-notes for the 80 sections were returned and filed in the general land-office in March, 1879, and in June, 1880, patents were issued to appellant for its 40 sections. The state instituted this suit against the railway company in a form of an action of trespass to try title to recover one-half of the 40 sections patented to it. The defendant pleaded not guilty. The cause was tried without a jury, and judgment was rendered in favor of plaintiff for the recovery of the land. The record contains the conclusions of the judge based on an agreed statement showing the following facts with regard to the public domain:

"The unappropriated public domain amounted, in acres, on the 18th day of April, 1876, (that being the day the constitution was adopted,) to 71,961,277. Since said date it has been disposed of as follows:

Surveyed by virtue of certificates and scrip.....	54,718,741
Surveyed under pre-emption claims....	1,683,688
Surveyed for the university under grant made by the constitution.....	1,000,000
Surveyed for the university under act of April 10, 1878.....	1,000,000
Lands surveyed and set apart for building the state capitol.....	3,050,000
Lands sold under the act of July 14, 1879	8,043,127
Surveyed and set apart for counties, as county school lands, under acts of March 26, 1881, and April 7, 1883, and other prior laws.....	1,515,721
Surveyed for common-school fund under act of April 10, 1883.....	1,000,000
Total surveys, for all purposes, since April 18, 1876.....	71,961,277

"(3) That of the said 54,718,741 acres, surveyed by virtue of certificates and scrip, there have been returned for the benefit of the school fund, in alternate sections, surveyed by virtue of alternate scrip issued to railroads and other corporations, 20,967,199 acres.

"(4) That of said 54,718,741 acres surveyed by virtue of certificates and scrip, as aforesaid, there were surveyed, under and by virtue of what are known as 'Confederate scrip,' 3,411,156 acres, of which there were returned for the benefit of said common-school fund, 1,705,578 acres.

"(5) That said 20,967,199 acres, surveyed

by virtue of alternate scrip issued to railroad and other corporations, and returned, as aforesaid, for the benefit of the common-school fund, and said 1,705,578 acres, surveyed in alternate sections by virtue of Confederate scrip, and returned for the benefit of the common-school fund, and 1,000,000 acres, surveyed for said common-school fund, under said act of April 10, 1888, together with 176,493 acres, surveyed and returned for the benefit of the common-school fund in the years 1876, 1877, and 1878, making in the aggregate 23,887,535 (a mistake in addition, the correct amount is 23,849,270) acres, constitute all the lands of said 71,961,277 acres of public domain that have been surveyed for the benefit of the common-school fund since the 18th day of April, 1876.

"(6) That of the said 54,718,741 acres of public domain, surveyed as aforesaid by virtue of certificates and scrip, there were surveyed, for the benefit of railroads and other corporations and individuals, 30,826,906 acres.

"(8) The lands sued for in this action were located and surveyed at the time and in the manner and by virtue of alternate railroad scrip issued to defendant in the year 1877, as alleged in plaintiff's petition.

"(9) There has been no partition of said 71,961,277 acres of public domain, or any part thereof, other than as herein stated.

"(10) That, of the lands that constituted the unappropriated public domain of the state of Texas immediately before the taking effect of the present constitution of said state, as much as one-half of the same remained unsurveyed on the 17th day of December, 1878, after the sections, part of which are sued for in this action, and the alternates thereto, had been surveyed for defendant."

We quote some of the provisions of the constitution of 1876 bearing on the questions: Section 8, art. 14: "The legislature shall have no power to grant any of the lands of this state to any railway company, except upon the following restrictions and conditions: (1) That there shall never be granted to any such corporation more than sixteen sections to the mile, and no reservation of any part of the public domain for the purpose of satisfying such grant shall ever be made. (2) That no land certificate shall be issued to such company until they have equipped, constructed, and in running order at least ten miles of road, and on the failure of such company to comply with the terms of its charter, or to alienate its land at a period to be fixed by law, in no event to exceed twelve years from the issuance of the patent, all said land shall be forfeited to the state, and become a portion of the public domain, and liable to location and survey." Section 15, art. 7: "In addition to the lands heretofore granted to the University of Texas, there is hereby set apart and appropriated, for the endowment, maintenance, and support of said university and its branches, one million acres of the unappropriated pub-

lic domain of the state, to be designated and surveyed as may be provided by law." Section 6, art. 7: "All lands heretofore or hereafter granted to the several counties of this state for education, or schools, are of right the property of said counties, respectively, to which they were granted, and title thereto is vested in said counties." Section 57, art. 16: "Three million acres of the public domain are hereby appropriated and set apart for the purpose of erecting a new state capitol and other necessary public buildings at the seat of government, said lands to be sold under the direction of the legislature; and the legislature shall pass suitable laws to carry this section into effect." Section 6, art. 14: "To every head of a family without a homestead there shall be donated one hundred and sixty acres of public land, upon condition that he will select and locate said land, and occupy the same three years, and pay the office fees due thereon. To all single men of eighteen years of age and upwards shall be donated eighty acres of public land, upon the terms and conditions prescribed for heads of families." Section 2, art. 14: "All unsatisfied genuine land certificates barred by section 4, art. 10, of the constitution of 1869, by reason of the holders or owners thereof failing to have them surveyed and returned to the land-office by the 1st day of January, 1875, are hereby revived. All unsatisfied genuine land certificates now in existence shall be surveyed and returned to the general land-office within five years after the adoption of this constitution, or be forever barred, and all genuine land certificates hereafter issued by the state shall be surveyed and returned to the general land-office within five years after issuance, or be forever barred: provided, that all genuine land certificates heretofore or hereafter issued shall be located, surveyed, and patented only upon vacant and unappropriated public domain." Section 2, art. 7: "All funds, lands, and other property heretofore set apart and appropriated for the support of public schools; all the alternate sections of land reserved by the state out of grants heretofore made, or that may hereafter be made, to railroads, or other corporations, of any nature whatsoever; one-half of the public domain of the state; and all sums of money that may come to the state from the sale of any portion of the same,—shall constitute a perpetual public school fund."

It is contended by appellee "that, by the constitution of 1876, there was unconditionally appropriated to the public free schools an undivided one-half of all the unappropriated public domain within the state at the time said constitution was adopted, in addition to such alternate surveys as shall thereafter be reserved from grants to corporations." It is insisted that the expression, "one-half of the public domain," must be given all the force that the words imply, unrestrained and unmodified by what precedes them in the same section, or by what is found in other articles of the constitution. It is in-

sisted that that clause in the constitution is self-executing, and had the immediate effect of appropriating to the school fund an undivided half of the then unappropriated public domain that was not otherwise appropriated by other provisions of the same constitution. The application of the proposition contended for is that, of the 71,961,277 acres then belonging to the unappropriated public domain, 4,000,000 acres were appropriated by the constitution for building a new capitol, and to the university, leaving a balance of 67,961,277 acres, of which one undivided half, or 33,980,638 acres, were, by the self-operating force of the constitution, appropriated to the school fund. If no land was surveyed for railroad or other corporations, it is not contended that the constitution appropriated more than one-half of the public domain; but if, under the constitution and laws, corporations became entitled to grants of land, and such lands were surveyed, as they must have been, in alternate sections, it is contended that, in addition to the alternate surveys set apart by the constitution to the school fund, that fund became the owner of one-half of the other, or the railroads alternate also. In other words, if none of the public domain should be acquired by corporations, only one-half of it was intended to be, or was in fact, appropriated to the school fund. If all of it was earned by corporations, then three-fourths of the whole was appropriated to the school fund. If less than the whole should be surveyed by corporations, then the school fund would own three-fourths of all that was so surveyed and one-half of the remainder. It is not easy to see why it was proposed to adopt such a rule of division, or, if it was intended to be adopted, why suitable language was not used to express it. The convention could have forbidden the grant of any land to railroads. It had the power to appropriate either one-half or three-fourths to the school fund, and, if it was intended that the fund should have three-fourths of it, no reason is apparent why the quantity of the appropriation was made uncertain, by its being made to depend upon the quantity earned by corporations. If the purpose was to favor the school fund by giving it three-fourths, this mode of appropriation would lead towards a defeat of such purpose; because its direct tendency would be, by lessening the interest of the corporations, to diminish the quantity earned by them, and, in the same proportion that the corporations took less, the school fund would have done the same thing. It stands to reason that if the design was to give the school fund three-fourths, or more than half, the constitution would have been made to so express in uncontented and unambiguous terms. The narrow rule of arriving at the meaning of an instrument by reference alone to any one clause, when it includes others, relating to the same subject, cannot be allowed in construing any written instrument, much less the constitution. If it be true that the constitution operated, of itself,

to appropriate an undivided one-half of the entire unappropriated public domain to the school fund, as it is contended it did, then it necessarily follows that since its adoption there has been no unappropriated public domain. Since, then, there has been no spot in Texas upon which a man could set down his foot without placing it on appropriated land, it is contended that the convention and people in creating the constitution intended to accomplish that result. It is clear that they did not. It is equally clear that, if they did so intend, they also designed that the location of the public domain should cease; because, as we have seen, section 2 of article 14 of the constitution contains a plain and positive command that "all genuine land certificates heretofore or hereafter issued shall be located, surveyed, or patented only upon vacant and unappropriated public domain." Did the convention intend to stop, or to even indefinitely delay, the location and survey of the public domain? If so, why does the constitution provide, as we have seen it does in the section last referred to, for reviving "all unsatisfied genuine land certificates" that were then barred by the provisions of the previous constitution? Why speak them into life, and in the same breath forbid their location? Why urge the speedy location of the revived and all other land certificates, providing for their extinguishment, if not located within five years, and at the same time forbid their location for an indefinite, or even a limited, time? When the constitution was urging dispatch in the location of the public domain, even to the extinguishment of the right, as a punishment for want of dispatch, is it reasonable to conclude that it intended to forbid locations until partition had been made of the public domain into two halves, and one had been set apart to the school fund, and the other for location, and at the same time neither made provision itself for such a partition or directed the legislature to make it? If the school fund appropriates an undivided half of the whole, so that no entirely unappropriated land can be found, how is section 6 of article 14 to be enforced? That section, as we have seen, donates, "to every head of a family, without a homestead, one hundred and sixty acres of public land." The constitution did not intend that an undivided half of the whole should vest in the school fund immediately upon its adoption, and still, for each actual settler, who so desired, to take 160 acres of it. No more could it have intended that the settler, instead of taking the 160 acres promised him, should have an undivided interest of 80 acres in either of the 160 acres or in the entire public domain.

The record in this case shows that 1,638,688 acres have been appropriated by actual settlers, under this section of the constitution. Was a title to an undivided half of these acres vested in the school fund by the constitution, and before their settlement? And may each settler be now sued by the state for title and partition? This court judicial-

ly knows that besides alternate land certificates granted to railroad and other corporations, prior to the adoption of the constitution, there were large numbers of genuine and unsatisfied certificates that had been issued to people who had, under the laws in force, the right to have them located on the unappropriated public domain in solid bodies. Did the convention intend to repudiate these claims? To the very contrary, when the vitality of some of them had been destroyed by limitation, it revived them. But if an undivided half of the whole domain out of which they were to be satisfied was appropriated by one provision of the constitution, and by another provision the owners were forbidden to locate them upon any land that had been appropriated, how were they to be satisfied? Why, then, were they recognized at all? Even if the constitution contained no prohibition against their being located on appropriated land, still if the school fund took, on the adoption of the constitution, an undivided one-half interest in the whole domain, such certificates would when located, instead of appropriating their quantity of land, take only half of it, and that an undivided interest.

If, as is contended by the attorney general, and as it was decided by the district judge, the constitution vested title in the school fund to an undivided one-half interest of the whole, so that no location on it could be made, so as to acquire title to the whole of the location, how was the right of counties to acquire land, recognized by section 6 of article 7, to be enforced? Certainly the constitution did not intend that counties should be either delayed or have less than the whole of the land located for them. With regard to counties, the expressive language was used, "and title thereto is vested in said counties." If the same result was intended, the same thing could have been said about the lands donated to the school fund. The attorney general contends that the constitution, from the date of its adoption, held in abeyance all locations of the public domain until one-half of the whole had been partitioned and set off to the school fund. If he is correct in his contention that the title to one-half of the whole vested in the school fund, as an undivided owner, by the adoption of the constitution, it is true that such a partition would, in that view, have had to be made, before other scrip owners could have located and acquired for themselves the full quantities called for by their certificates. But, in the absence of any direction or provision in the constitution for making such a partition, by whom and how was it to be accomplished? As to the method, could it have been intended that the whole public domain should be surveyed and valued? Values, and not acres, are the criterions by which divisions of properties between tenants in common are made. If the state resorts to the remedy of partition, we can see no good reason why it should not observe the well-known rules governing that remedy, which would

require it to partition the whole of the land it claims in one suit, in which all adverse interests are parties. We cannot believe that the constitution contemplates that any such suit should ever be prosecuted. But still less do we believe that it contemplates that the state may have a separate suit for partition against the owner of every tract of land that has been located and surveyed since its adoption, and recover judgment for one-half of the land, as it did in this case, on its claim to own an undivided half interest in the whole, without giving any account of the value of what it has received and still holds, and notwithstanding the fact that when the location it attacks was made there remained, unlocated, much more of the public domain than was required to meet its demand, when measured by its own contention. We do not mean to be understood as saying that the state must seek its remedy by a partition suit, and subject to the ordinary rules of that remedy. What we do mean to say is that, when it may properly resort to such remedy, it must, unless specially relieved by law from their operation, be governed by such rules in the same manner that other litigants are. Neither do we believe that it was ever contemplated that by the action of the legislature, or any officer of the government, by estimation, calculation, or otherwise, one-half of the public domain should be set apart for the school fund, by counties, or by lines of longitude or latitude, or in any other manner, so that the lands subject to location would lie in bodies to themselves. We think, if such an unaccustomed proceeding had been intended, it would have been clearly expressed. To the contrary, it seems evident, from the whole instrument, that no such purpose existed. Section 3 of article 14 of the constitution contains an express recognition of the power of the legislature to grant lands to railroad corporations, but directs "that no reservation of any part of the public domain for the purpose of satisfying such grant shall ever be made." If, by any means, a separation of the public domain into distinct parts, of two or more, was practicable, so as to distinguish the land belonging to the school fund from that subject to location, it seems to us such designation of the particular part for the location of the railroad's certificates would be such a reservation as is prohibited by this provision. No doubt, one cause of prohibiting a reservation setting apart certain lands for the location of railroad certificates was to aid in distributing the construction of the roads to all parts of the state, more than would be the case if the land earned by them lay only in any one section.

There have always existed, with the people of this state, three prominent objects which, through their constitutions and laws, they have worked to accomplish by means of the public domain. These objects were to secure immigration, promote education, and encourage the construction of railroads. It cannot be disputed that the constitution of



1876 had in view, not one alone, but all, of these objects; and one of them no more than another can be disregarded when engaged in the task of ascertaining its true meaning. The attorney general contends that one-half of the public domain was set apart for the benefit of schools by the constitution. It must be admitted that 1,000,000 acres was set apart to the university, and 8,000,000 for building a new capitol. It will not be contended, however, that the claims of others had to be held in abeyance until the university and capitol grants were satisfied. The convention, evidently, did not believe that the general expression, that lands for these purposes were set apart and appropriated, would be self-executing and therefore, with reference to the university land, it made the further direction, that it should be "designated and surveyed as may be provided by law;" and with regard to the capitol lands it commanded the legislature to pass "suitable laws" to carry the provision into effect. We see no escape from the conclusion that had it been intended that one-half of the whole domain should be preserved, intact, for the school fund, some similar direction would have been made to give effect to such intention. The language used with regard to the capitol and university lands is that they are "set apart," and the same language is used in the very section under discussion with regard to property previously appropriated, but not so with regard to "one-half of the public domain."

The conclusions of law upon which the judgment of the district court in favor of the state was rendered are thus stated in the findings of the judge: "When the constitution was adopted, the state owned nearly 72,000,000 acres of land that had never been surveyed or appropriated in any way, and was commonly designated as 'public domain.' It seems to me that, according to the plain meaning of the language used, it should be held to grant an undivided half of the 72,000,000 acres, and that whatever other grants were made or authorized by the constitution should be taken out of the other half, after partition and segregation of the half so granted." "It was evidently expected by the framers of the constitution that, as soon as practicable after its adoption, the legislature would provide for a partition of the public domain, and have the moiety appropriated by the constitution to the school fund surveyed and set apart from the balance; and, if this had been done, every provision of the constitution could have been enforced, without producing embarrassing results." The attorney general, in his argument filed in this court, says: "As 'one-half' of the public domain was unconditionally appropriated to the schools, appellant's title to any of the land might be seriously questioned, for its surveys were made with notice that no partition had ever been made, so as to give the school fund its part, and that, therefore, none of the lands it located were, in fact or in law, unappropriated. If the state is con-

tent, the appellant certainly ought to be." In the year 1854 the legislature passed an act to encourage the construction of railroads by donation of lands. The act provided for a grant of 16 sections per mile of constructed road, and directed that the surveys should be made in sections of 640 acres each, and that no location should be made unless at least two surveys connected together could be obtained. The act required the surveys to be numbered by the commissioner of the general land-office, from one upwards, and provided that "the even numbers shall be reserved to the state, and the odd numbers granted to the company having such surveys made." The constitution of 1869 forbade the grant of land by the state to aid in the construction of railroads. This constitutional prohibition having been removed by an amendment of the constitution authorizing the legislature to make such grants, the legislature, on the 18th day of March, 1873, passed an act, among other things, providing that "all land certificates heretofore issued, as well as those hereafter issued, to any railroad company or other corporation of any nature whatever, for internal improvements, or any other object, or any lands hereafter granted in any manner to any of said companies or corporations, for any such object, shall be located and surveyed in alternate sections of six hundred and forty acres each, and as directed by the act of 1854." No general law granting lands to railroads, under the amendment to the constitution, was passed until 1876, after the adoption of the present constitution; but subsequent to the amendment, and previous to the adoption of the constitution of 1876, many such grants were made in the acts chartering such corporations, and were in force at the date of the adoption of the constitution, and the lands under such grants were then in process of being earned.

It will be seen that the constitution speaks of grants to railroads only by the use of the words "alternate sections," without defining the meaning of the words themselves, or in any way explaining or defining how much, or by what process, land granted in that way was to be known or secured. It is a necessary inference that the words were used with reference to laws then in force, explaining what was meant by "alternate sections," and showing how they were surveyed and to whom they belonged, when surveyed. As we have seen, the general law on this subject referred, for specifications in these particulars, to the act of January 30, 1854, by which the odd-numbered sections of alternate surveys were "granted to the company having such survey made." Interpreted by these laws, the necessary construction of the constitution, in the use of the language, "set apart and appropriated, for the support of public schools, all the alternate sections of land reserved by the state out of grants heretofore made, or that may hereafter be made, to railroads," is that the school fund should have one section, and the corporation

the other. It cannot be disputed that the interpretation of the clause was intended to be made in the light of existing and previous legislation on the subject. Even without such aid, the constitution, standing alone, must, by every recognized rule of construction, be held to mean that one section is to belong to the school fund, and the other one to the corporation. Construing the whole section, either by itself or in connection with all of the provisions of the constitution by which it may be affected, we are of the opinion that its true meaning and intention is that all then existing lawful claims should be surveyed out of the whole body of unsurveyed public domain, and that alternate surveys for corporations, pre-emptions, and lands granted to counties for educational purposes should be surveyed in the same way, until the legislature had caused to be surveyed and set apart 4,000,000 acres for the university and new capitol, after which these lands would be excluded from survey; and future surveys, for any of the purposes enumerated, would be confined to the unsurveyed portion of the public domain. We believe that the object of the clause granting "one-half of the public domain to the school fund" was to reach and hold, beyond legislative control, whatever portion of the public domain remained after the execution of the enumerated purposes. It was known that existing claims that were entitled to be located in solid bodies would appropriate only a few millions of acres, and comparatively a small part of the whole. It was not believed that donations to the counties for school purposes and pre-emptions combined would consume more than a few millions, still leaving a large balance. It was not known that railroad or other corporations would, under the system of making alternate surveys, consume all of the balance, and hence, in order to reach any undisposed-of quantity, after supplying the purposes mentioned in the constitution, and to prevent the appropriation by the legislature of more than half of such remainder to purposes not mentioned in the constitution, said clause was put in, by which the legislature is deprived of the power to appropriate more than half of the public domain that remains at any time to other purposes.

While the legislature was bound, at all times, to respect the locations already made by settlers under the pre-emption laws, and surveys made for counties for school purposes, and those made for corporations, and all other vested rights, it was at no time required to abstain from disposing of the one-half that was subject to its control, to await the acquisition of future claims for any of said purposes. Whenever and however the legislature undertook, at any given period, to dispose of what then remained of the public domain, after the satisfaction of the then acquired rights, the constitution required a recognition of the school fund's claim to one-half of such remainder. The only partition or segregation of the interest of the school

fund from the body of the whole public domain was intended to be made primarily through the system of alternate grants to corporations which had long been in use, and was, at the same time, the safest and the least expensive system that could be devised in behalf of the state. In the next place, it was contemplated that with the power that existed in the legislature at any time to provide for the sale of, and make other proper disposition of, the balance or uninvested remainder of the domain, it would be easily within its power to provide for a division with the school fund until the last acre was gone. The constitution trusted the legislature in that respect, and, as it provided no other remedy, it must be held that the purpose was to abide by the division made under its direction, through whatever instrumentality it was accomplished. If at any time a part of the remainder, as it then existed, has been devoted to a purpose not recognized by the constitution, without any recognition of the interest of the school fund in the act, and without its being otherwise provided in any prior or subsequent law, the question thereby raised is different from the one before us, and does not require an answer from us now. Not only is it incorrect to hold that the constitution appropriated or intended to provide for the appropriation of one-half of the whole domain, and, in addition thereto, one-half of the corporations' alternate surveys, but it is equally incorrect to say that it absolutely appropriated, or intended that there should be appropriated, a full one-half of the then unappropriated public domain for the school fund. As we have said, the provisions of equal dignity, and unlimited, with regard to pre-emptions and counties, if not its recognition of the claims of private scrip-holders, forbid such a conclusion. The construction placed upon the constitution by the legislature, both as to what was granted to the school fund and the mode of partitioning and segregating the land to which it was entitled from the body of the public domain, has not been left in doubt. It caused an actual survey to be made of the grants for building a new capitol, and for the university. The first legislature that assembled after the adoption of the constitution passed a general law granting to railroad companies 16 sections of land for each mile of road constructed, to be surveyed in alternate surveys, one to belong to the corporation, and the other "to the state for the benefit of the public school fund." The next legislature disposed of all the lands in Greer county, appropriating one-half of them to the school fund. Act Feb. 25, 1879. Again, the act of July 14, 1879, that directed the sale of all the public domain in Nolan and 53 other counties named in the act, set apart one-half of the net proceeds arising from the sales to the public free schools, and the balance to the payment of the bonded debt of the state. The act of April 9, 1881, granting lands to disabled Confederate soldiers, made the required division, by direct-

ing that the certificates should be located in alternate surveys, one of which was expressed in the act to be for "the benefit of the permanent school fund." The act does not, in words, say that the other one shall belong to the soldier or owner of the certificate, but no one has hesitated to give it that construction.

The quotations we have made sufficiently show that the legislature interpreted the constitution to intend that scrip-holders, at the date of its adoption, were authorized to survey their certificates in solid bodies, and that it intended that the lands granted to settlers and to counties should be surveyed in solid bodies; and that railroads were entitled to hold the alternate sections surveyed by them, after which the remainder of the public domain was to be equally divided by some appropriate direction of the legislature by which it was disposed of. The only instance in which the legislature failed to provide for such partition, that has come under our observation, was in the act of April 26, 1876, commonly known as the "Veteran Act," by which the certificates granted were allowed to be located in solid bodies, without regard to any claim of the school fund. It will be seen, from the agreed statement of facts included in the findings of the court, that of 71,961,277 acres of unappropriated domain, or the 67,961,277 acres that, it is claimed, was to be equally divided with the school fund, 54,718,741 acres were surveyed by virtue of scrip, of which, the court finds, the school fund received only 23,887,535 acres. It is evident that the failure to get the full half of the 54,718,741 acres must have resulted from the location of such scrip as the constitution and laws authorized to be located in solid bodies. The quantity that was so located is not shown by the record before us. It is not claimed or shown that the school fund has not acquired its full one-half of all the lands surveyed by corporations. In some respects, we do not think that the conclusions from the facts agreed upon by the parties, or as found by the court, gives a quite correct representation of how much less than half of the original 71,961,277 acres, or, as diminished by the capitol and university grants, of the 67,961,277 acres, the school fund has received. In the first place, we think the quantity ought to be still further diminished by the 1,515,721 acres, and the 1,638,688 acres, surveyed for counties and settlers under other provisions of the constitution, thus reducing the quantity to 64,806,868 acres, one-half of which is 32,403,434. It seems quite clear that to the estimate of what the school fund has received ought to be added at least one-half of the 8,043,563 acres, sold under the act of July 14, 1879, one-half of the proceeds of which were directed to be paid to the school fund. This makes the quantity actually received by the school fund amount to 27,871,552 acres. This calculation leaves the school fund 5,282,153 acres short of one-half of the public domain not

consumed by specified appropriations under the direction of the constitution,—a deficiency that we are left to conclude was created mainly by the location of the land scrip authorized by the constitution, and veteran scrip directed by the legislature, both in solid bodies. The record before us fails to show what quantity of veteran scrip was so located. Instead of devoting only one-half of the 8,043,127 acres sold under act of July 14, 1879, to the school fund, and appropriating the other half to the payment of the public debt, it was certainly within the power of the legislature to have appropriated the whole of it to the school fund. If that had been done, that fund would be very little short of having in fact received full one-half of the whole. It is not clear that a proper construction of the concluding words in section 2 of article 7, reading, "and all sums of money that may come to the state from any portion of the same," does not make the whole of the proceeds of all sales of the public domain belong to the school fund. Speaking for myself, I think a correct construction of the last two clauses, reading, "one-half of the public domain of the state, and all sums of money that may come to the state from the sale of any portion of the same, shall constitute a perpetual public school fund," does appropriate the whole, instead of one-half, of the proceeds of such sales to said fund. While it remains land, it is one-half; but, if the land shall be converted into money, then it is the whole. The meaning must be determined by answering the inquiry, to what do the words, "any portion of the same," refer? To construe them as referring to the expression, "one-half of the public domain," is to make the last clause surplusage, and of no effect; as without them the preceding expressions would unquestionably include the proceeds, when it should be sold, as well as the land itself. Some effect can be given the last clause only by making it refer to the words "public domain," and it ought to be given some effect, rather than to make it meaningless and surplusage. There is nothing inconsistent with other parts of the same section, or with other parts of the constitution, in so construing the clause; and, indeed, it might well have been considered a useful means of equalizing the division of the domain, when making it, as was intended, through the passage of laws, rather than by actual surveys of the ground. If a wrong to the school fund has been committed in this respect, it is still in the power of the legislature to repair it. If we are right in the conclusion that the constitution left it for the legislature to make the division of the public domain subject alone to such rights and limitations as the constitution itself recognizes, it results that what it has done in the premises must be held final and binding on the state. It will be conclusively presumed that through such division the school fund has acquired all of the domain that it was entitled to under the constitution. It

is proper to say, in conclusion, that no disregard of any mandate of the constitution, by either the legislature or the executive departments of the state government, however often repeated or long continued, can be, for one moment, tolerated by the judicial department as a reason for a like disregard by that department. But when, as in this case, seven successive legislatures have, through a period of 13 years, acted upon a given construction of the constitution; when the department intrusted with the immediate administration of the land system of the state has uniformly concurred in that construction; and when successive governors of the state, eminent for their patriotism and intelligence, (more than one of them having served with distinguished success in this court,) have approved it,—we feel that nothing less than an absolute conviction that they have all been wrong would justify us in so deciding. The duty to decide correctly was as incumbent on them as it can be on ourselves. The people who made the constitution, with the knowledge of the construction that was being given to it, have, without protesting, year after year, sent up to the capital other legislatures to pursue the same policy. The lands have been assessed, and taxes upon them have been demanded and received, by the state, and the people, with unhesitating trust in the intelligence and honor of the state government, have bought and sold them. Our opinion is that the judgment of the district court ought to be reversed, and judgment here rendered in favor of defendant, and it is so ordered.

STAYTON, O. J., not concurring.

**EAST LINE & R. R. CO. v. SCOTT.**

(*Supreme Court of Texas. Nov. 12, 1889.*)

**CONTRACTS—PLEADING—AMENDMENT.**

Plaintiff's original petition alleged that defendant agreed and promised that it would, when plaintiff should ask for and accept service and employment from it as a locomotive engineer on its road, give him such employment "for whatever length of time plaintiff should desire to retain it." His amended petition alleged as the contract "that defendant promised to give plaintiff employment on its road as a locomotive engineer for the period and term of the natural life of plaintiff." *Held*, that the amendment set up a new cause of action.

Appeal from district court, Marion county; JOHN L. SHEPPARD, Judge.

*F. H. Prendergast*, for appellant. *H. McKay* and *C. A. Culbertson*, for appellee.

HENRY, J. Plaintiff was injured in a wreck on the defendant's railroad. He instituted suit for damages in the district court. Afterwards that suit was compromised and dismissed, the defendant paying him a sum of money. On the 10th day of November, 1886, plaintiff filed his original petition in this suit, in which he alleged that by the terms of the compromise of the first suit, in addition to the money consideration paid to him, de-

fendant agreed and promised that it would thereafter, when plaintiff should ask for and accept service and employment from it as a locomotive engineer on its road, give him such employment "for whatever length of time plaintiff should desire to retain it," at the reasonable and customary rate of pay for such employment. The original and amended petition charges that on the 1st day of July, 1886, plaintiff offered himself to defendant for said employment, but the company refused to employ him. Under this state of the pleadings there was a trial and judgment for plaintiff, which, on appeal by defendant to this court, was reversed. 10 S. W. Rep. 102. In reversing the case, Chief Justice STAYTON says: "The evidence tends to show that the promise made on compromise was to give to appellee employment during his life, but it does not show that when appellee sought employment he proposed to render service for any named period, or so long as he might live and be able to perform the services contemplated. We must take the contract as alleged in the petition to be the contract on which appellee must recover, if at all; and, looking to that, there can be no doubt that whether appellee should serve appellant, and the term of such service depended upon his own will, it is very generally, if not uniformly, held, when the term of service is left to the discretion of either party, or the term left indefinite or determinable by either party, that either may put an end to it at will, and so without cause." In the district court, on the 7th day of January, 1889, plaintiff amended his petition as to the contract of employment so as to make it read, in that particular, "that defendant promised to give plaintiff employment on its road as a locomotive engineer for the period and term of the natural life of plaintiff;" in other respects, including the date of the breach of the contract, this amended petition contained substantially the same allegations that the original petition did. Among other issues, the defendant pleaded the statute of limitations of two years to the cause of action set up by the amended petition. The facts were proved to be as follows: (1) Plaintiff was injured in August, 1882, and filed a suit on May 22, 1884, which he compromised for \$4,500 in money, and an agreement to be employed as an engineer for life, to begin as soon as he was able to go to work. (2) Plaintiff was unable to work until about July 1, 1886, at which time he applied for work, and was refused. (3) Plaintiff filed his original petition herein on November 10, 1886, which is copied into the statement of facts, and shows that the cause of action therein alleged was as we have stated above. (4) That the amended petition was filed on January 7, 1889. Defendant requested the court to charge that the amended petition set up a different cause of action, which was barred by the two-years statute of limitations. The refusal of the court to give this charge is assigned as error, and is the only question in the case.

We think the amended petition sets up an essentially different contract from the one alleged in the original petition. The parties and the inducement or consideration are the same, but these do not, in either instance, constitute the whole of the undertaking. The contract alleged in the amended petition is substantially the one proved upon the trial of the original petition. If the contract, as now alleged, is substantially the same that it was then, the same objections might be urged to it now that were urged then. The difficulty on the former trial was of substance, and not of form. The amendment set up a new cause of action, and the proof, with nothing to the contrary, showed that the cause of action was barred when it was first pleaded. The court having committed error in refusing the charge requested, the judgment is reversed, and the cause is remanded.

*BEHAN et al. v. GHIO et al.*

(Supreme Court of Texas. Nov. 13, 1889.)

**DONATIONS TO SECURE COUNTY-SEAT—PUBLIC POLICY—CONTRIBUTIONS.**

1. Plaintiffs and defendants bound themselves to furnish a court-house for the county, in the event the county-seat was removed to Texarkana, or to pay \$500 per annum for five years. The county-seat was removed. The defendants did nothing towards complying with the contract; and the plaintiffs performed it, and took for their protection a transfer of the bond. *Held*, that defendants were bound to contribute their part of the expense towards reimbursing plaintiffs.

2. If the offer of donations to secure the removal of a county-seat, more than sufficient to pay the expenses of such removal, is the holding out of improper inducements to unduly influence voters, the contract to secure the payment of the donations will not be held to be void, unless it is shown that the amount offered is more than a sufficient indemnity.

3. A lease of the building furnished by plaintiffs for a court-house, containing a provision that, should the commissioners' court at any time select another court-house, the leased premises should revert to the lessors, gave the court the power at any time to terminate the lease, by providing another building for court-house purposes, and it would be presumed that, upon the destruction of the building by fire, they at once exercised this power; and plaintiff's recovery was properly confined to the time which elapsed between the making of the lease and the destruction of the building.

4. The fact that one of the defendants signed the contract on Sunday did not make it void as to him.

5. A false allegation as to the legal effect of an instrument annexed to a pleading is cured by the writing itself.

Appeal from district court, Bowie county; JOHN L. SHEPPARD, Judge.

*H. C. Hynson and Talbot & Turner*, for appellants. *F. M. Henry and A. L. Ghio*, for appellees.

**GAINES, J.** In the year 1885, an election was ordered in Bowie county to determine the question of the removal of the county-seat from Boston, the county-seat then existing. Texarkana and two other places were candidates for the permanent location. In September of that year, and before the day fixed for the election, the appellants and appellees, and

three others, who have not appealed, entered into a joint obligation to pay Bowie county the sum of \$2,500 in annual installments of \$500 each, on condition that the county-seat of the county was located at Texarkana, and they failed to provide for the use of the county a suitable court-house for the period of five years. The bond was duly acknowledged by the obligors, and was filed in the office of the county clerk. At the election, Texarkana was selected as the county-seat; and thereupon appellees leased to the county, as a court-house, a portion of a building known as "Ghio & Henry's Opera-House," for the term of five years. The consideration as expressed is: "The sum of twenty-five hundred dollars in hand paid." The real consideration was the transfer to appellees, by the county judge and the commissioners, of the bond above described. The demised premises were proved to be worth \$600 per year. They were occupied as a court-house from November 11, 1885, until January 21, 1889, when the house was destroyed by fire. There were 11 obligors on the bond; and this suit was brought by appellants to recover of their co-obligors nine-elevenths of \$2,000, that being the amount of the rent of the leased premises for 4 years. It resulted in a judgment in favor of appellees, against each of the other obligors on the bond, for one-eleventh of the rent from November, 1885, to January, 1889, at the rate of \$500 per annum; that is to say, against each for the sum of \$166.14. It appears from the record that upon the filing of the original petition the bond which is made the foundation of the action was properly marked and filed with the petition, and, by a proper reference, made a part thereof, but that it had been withdrawn by the counsel for plaintiffs for safe-keeping, and was not again deposited with the papers until the trial had begun. It was offered in evidence, and was objected to upon the ground that it varied in tenor and effect from that declared on in the petition. On account of its withdrawal, the court declined to consider it a part of the petition, and sustained the objection. Thereupon plaintiffs were permitted to withdraw their announcement, and to amend their petition by making the bond a part thereof. They then again announced ready, and the defendants moved the court to continue the case on the ground of surprise. The motion was overruled; and the ruling was excepted to, and is now assigned as error.

The statement of the trial judge, appended to the bill of exceptions, shows that he knew of his own knowledge that, upon an argument upon a demurrer to the petition on a former day, the obligation had been read to the court, and that he was satisfied that the counsel for the defendants were apprised of the contents of the instrument. No application was filed showing that it was probable that any additional testimony could be procured to meet the issues presented by the amendment, or that any was desired. Under these circumstances, we think the court did

not err in requiring defendants to proceed with the trial. We do not understand that, upon the coming in of an amendment presenting new issues, the party who claims surprise is entitled to a continuance as a matter of absolute right. If the court be satisfied, upon sufficient grounds, that in fact there is no surprise, and that he is as ready to proceed as if the amendment had been filed a sufficient length of time to enable him to prepare his case for trial, and that the application to continue is for delay only, the continuance should be refused.

The second assignment of error is that "the court erred in admitting in evidence, over objections of defendants, the contract or bond offered by plaintiffs, marked 'Exhibit Z,' because there is a fatal variance between said instrument offered and the one described in plaintiff's said petition, and because said contract and exhibit so offered had not been attached to said petition, nor filed among the papers of said cause, as such, before the trial began, and was not so attached and filed until at the very time of the announcement of ready for trial by plaintiffs and defendants." When the bond by amendment was attached to and made a part of the petition, it was not error to admit it in evidence, although the pleader, in the body of his petition, may have erroneously declared its legal tenor and effect. To say that there is a variance in such a case would be to say that an instrument can vary from itself. The question has been repeatedly decided in this court. *Peters v. Crittenden*, 8 Tex. 131; *Greenwood v. Anderson*, Id. 225; *Spencer v. McCarty*, 46 Tex. 213. In *Pyron v. Grinder*, 25 Tex. Supp. 162, Judge WHEELER states the ground to be "that the instrument itself, thus made a part of the petition, and filed with it, for the inspection of the defendant, must control, and cure any misdescription of it in the body of the petition." So, also, it is the duty of the court to construe the instrument itself so declared on and attached, and to give it its proper legal tenor and effect, and thereby to control the legal effect as alleged in the petition. It follows that a false allegation as to the legal effect of an instrument annexed to a pleading is cured by the writing itself.

We are of the opinion that if the court erred in admitting the testimony of appellees as to what occurred at a public meeting in Texarkana, in regard to leasing the opera-house for a court-house, it affords no ground for a reversal of the judgment. The case was tried by the court; and there was evidence to sustain the judgment, without the aid of this testimony. The uncontroverted facts, as shown by the evidence, are that the plaintiffs and defendants bound themselves to furnish a court-house for the county, in the event the county-seat was removed to Texarkana, or to pay \$500 per annum for five years. The county-seat was removed. The defendants did nothing towards complying with the contract; and the plaintiffs performed it, and took for their protection a

transfer of the bond. It would seem but just that the other obligors should contribute their part of the expense towards reimbursing plaintiffs. The latter did what they, as well as defendants, were bound to do, and what defendants failed to do; and we think they are entitled to receive contribution. It seems to us, therefore, wholly immaterial whether or not the defendants signed the obligation with the understanding that the opera-house was to be used for the purpose of a court-house.

Appellants' fourth assignment of error raises the question of the legality of the contract evidenced by the bond. It may be admitted that every contract made for the purpose of obstructing a free election of any character, though not positively prohibited by statute, is contrary to public policy, and void. But the question arises, is the contract under consideration of that nature? Considerations of convenience and expense are likely to enter into most contracts for the location of a county-seat; and we think it not unusual for individuals directly interested in the question to hold out inducements, by way of donations of land or money, to influence the action of those who are charged with the duty of making the selection. In fixing the sites of public institutions in our state, the legislature have authorized such inducements, and made it the duty of the state's agent to take them into consideration in choosing a location. In case of an election for a county-seat, we can see no great reason why those favoring any particular locality should not be permitted at least to offer enough to reimburse the county, either in whole or in part, for any additional expense which would result from a removal to such locality. To do so much would serve to remove, at least to a certain extent, the question of expense to the county from the contest, and leave the voters free to vote mainly from considerations of public interest, and their own private convenience. There is nothing in such a result which contravenes the policy of the law. On the contrary, it tends to subserve the public interest. Should it be admitted, therefore, that the offer of donations to secure the removal of a county-seat, more than sufficient to reimburse the probable expense to the county of such removal, is the holding out of inducement to the voters in the way of relief from taxes, which was calculated unduly to influence their votes, and to induce them to vote against the general convenience, it would not avail the appellants here, since it is not shown that the amount offered by the bond sued on in this case was such as to bring about any such result. We have no evidence upon that question; and we are not to assume that a contract is illegal because, under a certain state of facts, which are not pleaded or proved, it may have been contrary to public policy, and void. We do not, however, wish to be understood as holding even that, should the amount offered have been

more than sufficient to indemnify the county for the expense of removal, the contract would have been against public policy. We have found no case which holds that doctrine. On the contrary, it has been expressly held that such contracts are valid, in the courts of last resort of three of the states. *Dishon v. Smith*, 10 Iowa, 212; *State v. Elting*, 29 Kan. 397; *Hall v. Marshall*, 80 Ky. 552. These decisions seem to be based upon the ground that the location of a county-seat is not like the election of an officer, which involves a question of personal fitness, but is mainly a matter of business, in which the question of pecuniary advantage or disadvantage to the county is necessarily involved, and in voting upon which every voter has the right to consider his pecuniary interest in the result. See, also, *Pepin Co. v. Prindle*, 61 Wis. 801, 21 N. W. Rep. 254; *State v. Johnson*, 52 Ind. 197; *Odineal v. Barry*, 24 Miss. 9.

What has already been said we deem sufficient to dispose of the sixth assignment of error. If the court erred in rendering judgment against each defendant for his proportion of the indebtedness, instead of rendering it jointly against all, the judgment is favorable to defendants, and they cannot complain. It was pleaded and proved by defendant Hoffman that he signed the contract on Sunday; and it is insisted that, upon that ground, the contract was void as to him. Contracts made upon Sunday, when not made in the course of a business prohibited upon that day by statutory law, are valid. *Bish. Cont. § 536*; *Schneider v. Sansom*, 62 Tex. 201. This disposes of appellants' assignments, and we find no error in the judgment which entitles them to a reversal.

Appellees have filed a cross-assignment, in which it is claimed that the court erred in confining their recovery to the time which elapsed between the making of the lease and the destruction of the building. They prayed in their petition for a recovery of defendants of their proportional part of the rent for the term of four years. This claim seems to be based upon the theory that when the plaintiffs had furnished a court-room for five years defendants became liable to them for their proportional part of the entire rent, payable, however, in annual installments, and that four installments were due when the amended petition was filed. We do not, however, concur in this view. The lease contains a provision that, should the commissioners' court at any time select another court-house, the leased premises should revert to the lessors. This gave the court the power at any time to terminate the lease by providing another building for use of the courts and their officers, and it is to be presumed that upon the destruction of the building by fire they at once exercised this power. Moreover, it may be that, without this provision, the legal effect of the contract was that the lease should cease upon the destruction of the building, of

which the demised premises constituted only a part. The lot was not leased, and it would seem that after the fire there was nothing to which the lease would attach. As we view the case, the right of plaintiffs was to demand that their co-obligors, the defendants, should each bear ratably an equal part of the expense incurred in carrying out the joint contract. This was the rent of the rooms during the time they were occupied as a court-house. We conclude that the cross-assignment of error is not well taken. There being no error in the judgment, it is affirmed.

#### JONES *et al.* v. ROSEDALE ST. RY. CO.

(*Supreme Court of Texas*. Dec. 10, 1889.)

##### INJUNCTION BOND—ATTORNEY'S FEES.

Counsel fees paid for procuring the dissolution of an injunction cannot be recovered in a suit on the injunction bond. *Following Railway Co. v. Ware*, 11 S. W. Rep. 918.

Commissioners' decision. Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

Action by the Rosedale Street Railway Company against the Texas & Pacific Railway Company and its sureties on a bond given on injunction. Morgan Jones and another, the sureties, appeal from a judgment for plaintiff.

*Finch & Thompson*, for appellants. *Hunter, Stewart & Dunklin*, for appellee.

ACKER, P. J. The Texas & Pacific Railway Company sued out a temporary injunction restraining appellee from building or operating its railway across the yards, right of way, and track of the complainant company. An injunction bond, as required by statute, was executed in the sum of \$5,000, with appellants as sureties thereon. The injunction was dissolved on motion of appellee, and this suit was brought by it on the injunction bond, to recover the amount of money expended by it in attorney's fees, to procure the dissolution of the injunction. The trial was without a jury, and resulted in judgment for plaintiff for \$350, from which the defendants appealed.

The only question in the case is, can money paid as attorney's fees for obtaining the dissolution of an injunction be recovered by suit on the injunction bond? We do not think this is now an open question in this state. In the case of *Railway Co. v. Ware*, 11 S. W. Rep. 918, (following *Oelrichs v. Spain*, 15 Wall. 211,) it was expressly decided that such recovery could not be had. We are therefore of opinion that the judgment of the district court should be reversed, and the cause dismissed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment is reversed; and cause dismissed.



DAVIS et al. v. ROSEDALE ST. RY. CO.

(Supreme Court of Texas. Dec. 10, 1889.)

Commissioners' decision. Appeal from district court, Tarrant county; R. E. BROOKHAM, Judge. *Wynne & Steadman*, for appellants. *Hunter, Stewart & Dunklin*, for appellee.

ACKER, P. J. Appellants sued out a temporary injunction restraining appellee from constructing its railroad track along Houston street, in the city of Fort Worth. The injunction was dissolved on motion of appellee; and it brought this suit on the injunction bond to recover the amount of money expended by it, in attorney's fees, to procure the dissolution of the injunction. There was verdict and judgment for appellee for \$500, from which this appeal is prosecuted. The only question in the case is, can money paid as attorney's fees for procuring the dissolution of an injunction be recovered by suit on the injunction bond? This question was answered in the negative by the decision of this court in the case of *Morgan Jones et al. against the appellee in this case*, ante, 996, (decided at this term upon the authority of the case of *Railway Co. v. Ware*, 11 S. W. Rep. 918.) We are therefore of opinion that the judgment of the court below should be reversed, and the cause dismissed.

STATTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment reversed, and cause dismissed.

GULF, C. & ST. F. RY. CO. v. HATHAWAY.

(Supreme Court of Texas. Jan. 10, 1890.)

RAILROAD COMPANIES—NEGLIGENCE—ACTIONS—VERDICT.

1. It is competent for one of two railroad companies joined in an action for collision to ask for judgment over against its co-defendant in case judgment shall be rendered against it.

2. Where, in an action against two railroad companies for negligence, one demands judgment over against its co-defendant in case of judgment against it, a verdict reading, "We, the jury, find for the plaintiff against the G., C. & S. F. Rwy. Co., and for Southern Pacific Company, damages to the amount of \$4,000," is unintelligible, as without the pleadings it appears to be for the Southern Pacific, and by the pleadings both that company and plaintiff demand judgment.

Appeal from district court, Fort Bend county; H. W. BURKHART, Judge.

J. W. Terry, for appellant. *Parker & Pearson and Brady & Ring*, for appellees.

HENRY, J. Appellee instituted this suit against appellant and the Southern Pacific Company, both railroad corporations, to recover damages. Plaintiff charged that he was a passenger on a train being operated by the Southern Pacific Company, when it came in violent collision with a locomotive engine obstructing the track, causing the car in which he was riding to be derailed and wrecked; that, in order to avoid the apparent danger of being crushed in the wreck, he jumped from the wrecked car, and was, without fault on his part, permanently injured by having his ankle terribly wrenched and sprained. The petition alleges that the obstruction of the track was caused by the servants of appellant, who negligently pushed the obstructing engine so near the track over which plaintiff was being transported as to cause the collision, and that the Southern Pacific Company was guilty of neg-

ligence in failing to discover and remove the obstruction before the arrival of the colliding train.

Among other defenses the Southern Pacific Company pleaded that plaintiff's injury was caused solely by the gross negligence of its co-defendant, and it prayed that, if any judgment was rendered against it in favor of plaintiff, judgment over be rendered in its favor against its co-defendant for the amount of such verdict. Appellant excepted to the answer of its co-defendant seeking judgment over, upon the grounds that it was not a plaintiff, and not entitled to such relief in this proceeding. It is contended that the court erred in overruling this exception, but it is not stated in what the error consisted, and we can see no satisfactory reason why such relief may not be administered if the evidence shall justify it.

The jury returned a verdict, reading: "We, the jury, find for the plaintiff against the G., C. & S. F. Rwy. Co., and for Southern Pacific Company, damages to the amount of (\$4,000.00) four thousand dollars." Upon this verdict the court rendered judgment in favor of plaintiff against appellant for the amount specified in the verdict, and discharging the Southern Pacific Company, with costs. Appellant complains that the verdict is "unintelligible, indefinite, and uncertain." We think the objections are well taken. Without the aid of the pleadings we think the verdict would be construed to be in favor of the Southern Pacific Company for the amount of damages given, and would not show what was found in favor of plaintiff against appellant. As both plaintiff and the Southern Pacific Company pray for the same money judgment against appellant, the pleadings do not remove the difficulty produced by the phraseology of the verdict. It is true that the verdict does not show that the only contingency upon which a verdict was asked by the Southern Pacific Company arose. It is not difficult to make verdicts express the conclusions of the jury, and while they may be liberally aided by the contents of the record, and enforced, when, if so aided, there can be no uncertainty as to the intention of the jury, mere conjecture cannot be resorted to. In this case we are not able to give to the verdict, aided by the pleadings or the charge of the court, a construction that will support the judgment. *Moore v. Moore*, 67 Tex. 297, 8 S. W. Rep. 284. The other questions raised by the assignment of errors are not such as are likely to occur on another trial. The judgment is reversed, and the cause remanded.

ENGELKE et al. v. SCHLENDER.

(Supreme Court of Texas. Jan. 14, 1890.)

TAXATION—NATIONAL BANK STOCK—CUSTOM.

1. In an action to restrain collection of taxes on national bank shares, as being higher than those on other moneyed capital, a custom to assess property at 50 per cent. of its value is not established

by evidence of the assessment of a few parties at that rate.

2. Statutes of Texas permitting private banks to deduct their deposits from their taxable assets do not discriminate against national banks, which are, by act of March 31, 1885, required to render a sworn statement of the number of their shares, each share for its actual cash value, less its proportion of real estate, which is taxed separately, since, to determine such value, it is necessary to deduct deposits, as debts against the bank.

Appeal from district court, Washington county; C. C. GARRETT, Judge.

*J. T. Swearingen*, for appellants. *Ben S. Rogers*, for appellee.

HENRY, J. This suit was brought to enjoin the collection of state and county taxes on shares of national bank stock, on the ground that the assessment of the taxes was in violation of the constitution of this state, as well as of the act of congress forbidding a higher rate of taxation of national bank stock than of other moneyed capital. It appears from the evidence, and the findings of fact by the court, that plaintiffs are the holders of the capital stock of the First National Bank of Brenham, which consists of \$100,000, divided into shares of \$100 each. The shares had an intrinsic as well as market value above \$100 each. The bank owned real estate, which was assessed for taxes at the value of \$15,000. The shareholders insisted upon their right to have the shares assessed at \$60 each. They were assessed at their par value, less the value of the real estate, or at \$85 each. The plaintiffs introduced in evidence the assessments of a few parties, among them of one private banking firm, and proved that the property in each case was assessed at about one-half of its true value. They contend that it was the custom of the assessor and the board of equalization of Washington county to list or assess property at a uniform valuation of about 50 per cent. of its true value. The court found that no such custom existed. This finding is assigned as error.

The evidence above referred to was all that was offered of the existence of such a custom. The court correctly concluded that it was not established. Even if it had been established, it could not have properly affected the result of this suit. It appears that appellants' property was not assessed beyond its true value.

It is complained that our statutes that permit private banks to deduct the amount of their deposits from their taxable assets withhold that privilege from national banks, and thereby make a discrimination against the national banks. By the act of March 31, 1885, national banks are required to render their real estate for taxation, and at the same time to render a sworn statement showing the number and amount of the shares of said bank, for the purpose of being assessed, "each share only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed." The real estate of the corporation is intended to be taxed in its own name, and its personal

property in the names of its shareholders. The law provides for it to be done through the agency of the officers of the corporation and the assessor. The general deposits with a bank are debts against it. As was said by this court in the case of *Rosenberg v. Weekes*, 67 Tex. 584, 4 S. W. Rep. 899: "The value of a bank share depends upon the value of its franchise, capital, and property of all kinds, less the amount of its debts." We find no error in the proceedings, and the judgment is affirmed.

#### BOOTHE v. BEST et al.

(Supreme Court of Texas. Jan. 14, 1890.)

#### ADVERSE POSSESSION—ALLOWANCE FOR IMPROVEMENTS.

1. In trespass to try title it appeared that in 1838 a conditional land certificate was issued to B.; that in 1848 an unconditional certificate was issued to plaintiffs, who were his heirs, and to his personal representatives; and that the land was patented to them in 1853. There was nothing to show that the certificate or the land was sold either by B. or his representatives, or by plaintiffs. In 1855 a third person conveyed the certificate to one S., who located it on the land in 1857, and asserted title thereto, plaintiffs having knowledge of such claim as early as 1860. In 1883 one whose right does not appear conveyed the land without consideration, and his grantee took possession, and paid the taxes, though his possession was not hostile to plaintiffs' claim. In 1884 the grantee conveyed to defendant, who took possession, paid the taxes, made improvements, and held adversely until 1887, when plaintiffs sued. Defendant had also taken a deed from the heirs of S. Held, that the evidence does not sufficiently show adverse possession to establish title by limitation as against plaintiffs.

2. Allowance is properly made for improvements by defendant where plaintiffs have for more than 40 years failed to assert their title, and it does not appear that defendant knew that the possession of the one from whom he purchased was not adverse.

Appeal from district court, De Witt county; H. C. PLEASANTS, Judge.

*Fly & Davidson* and *Stockdale & Proctor*, for appellant. *Harwood & Harwood* and *R. A. Pleasants*, for appellees.

HENRY, J. Appellees, who are the heirs of Richard Best, deceased, brought this suit in the form of an action of trespass to try title to recover a survey of 640 acres of land patented in the year 1858 to the heirs and legal representatives of said Richard Best. It appears from the record that a conditional certificate was issued to Richard Best in the year 1838. Best died in 1839, and administration was opened upon his estate in Galveston county in the year that he died. An unconditional certificate was issued in 1848 to the heirs and legal representatives of Richard Best. The administration was closed in 1841, and there is no evidence that the land certificate was sold or conveyed by the administrator. In the year 1855 one Robert Neal conveyed the certificate to one J. A. Sherburne, who, in the year 1857, located it on the land in controversy. Sherburne asserted title to the land for many years, as was known to the heirs of Best as early as the year 1860. In the year 1882 one

J. T. Morris, without consideration, conveyed the land to his brother E. W. Morris, by a deed which was recorded on the day it was made. The land was inclosed on all sides by E. W. Morris and persons owning adjoining lands, the fences being on the lines of the adjoining lands. From the date of his purchase, in January, 1882, until he conveyed it to appellant, in 1884, E. W. Morris was in possession of the land, and paid all taxes against it. The evidence shows that his possession was not in fact hostile to the claim of the true owners, but it does not show that appellant was aware, when he purchased, that it was held in subordination to the title of the true owners. The appellant, desiring to purchase the title, and having tried, without success, to discover the heirs of Richard Best, in the year 1884, purchased the land for an inadequate consideration from E. W. Morris, who made to him a quitclaim deed for it. He took possession under this deed and held it adversely, paying all taxes against it until this suit was instituted on the 27th day of December, 1887. In the year 1885 appellant was advised by an attorney, whom he consulted with regard to the title, that it was in the heirs of Sherburne, by whom the certificate had been located. The attorney who gave him this advice represented to him that he was the attorney of the said Sherburne heirs, and upon his recommendation appellant purchased and received conveyances of the land from said heirs, paying for it much less than its real value. Subsequent to the last conveyances to him, appellant put upon the land permanent improvements of the value of \$2,165, for which the court gave him judgment, and rendered judgment against him in favor of plaintiffs for the land.

We deem it unnecessary to mention in detail appellant's assignments of error. The conditional certificate having been issued to Richard Best, and both the unconditional certificate and the patent having been issued to his heirs, and the record showing no sale or conveyance by Best during his life, or by his administrator or his heirs subsequent to his death, of either the certificate or the land, the title necessarily remains in his heirs unless it has been divested by adverse possession under the statute of limitations. The evidence is, we think, insufficient to show title by limitation. No question is made about the sufficiency of the evidence to establish that plaintiffs are the heirs of Richard Best.

Appellee assigns error, complaining of so much of the decree as allows appellant compensation for his improvements. Without repeating the evidence, or undertaking to discuss it, with regard to this issue, it is proper to say that, while the record fails to show a sale of the land certificate by the administrator of Richard Best, one item of the final report of the administrator is a charge against himself and in favor of the estate of an amount of money "received for headright." This report was filed in 1841. Seventeen

years afterwards the certificate was found in the possession of Sherburne, who claimed to be its owner, and caused the land to be located. For more than 40 years plaintiffs forbore to assert their claim in a way to make it known. Possession of the land had been held long enough to give title by limitation, if it had been of a sufficiently pronounced adverse character, about which want it is not clear that appellant was not misinformed or misled. Not to mention other facts relating to the issue, we do not think a case is presented to us justifying a reversal of the finding of the district judge upon this issue. The judgment is affirmed.

#### GULF, C. & S. F. RY. CO. v. DWYER.

(Supreme Court of Texas. Jan. 14, 1890.)

CARRIERS OF FREIGHT—REFUSAL TO DELIVER—CONNECTING LINES—INTERSTATE COMMERCE.

1. Laws Tex. 17th Leg. 85, imposing a penalty on a railroad company for refusing to deliver freight, upon the payment or tender of the charges shown in the bill of lading, is not unconstitutional, as a regulation of interstate commerce, though applied to freight shipped from a point without the state.

2. As Rev. St. Tex. art. 4251, makes it obligatory on a railroad company in the state, without delay, to carry over its road cars, freight, etc., received from any connecting company, a railroad company is not bound by a through bill of lading, under which it receives freight, in ignorance of its terms, the original carrier having no authority to contract for it.

3. The way-bill of the company showing that, at the time the defendant company received the freight, it paid accrued charges, amounting to as much as the amount fixed in the bill of lading for the entire transportation, is admissible as evidence that it did not intend to ratify the original contract.

4. It is not necessary that the bill of lading shall be shown at the time, to make the tender of the charges effectual, unless its production is demanded.

Appeal from district court, Washington county; J. B. McFARLAND, Judge.

Action by Thomas Dwyer against the Gulf, Colorado & Santa Fe Railway Company, to recover a statutory penalty. The defendant appeals from a judgment for plaintiff.

J. W. Terry, for appellant. Bassett, Muse & Muse, for appellee.

GAINES, J. This case was before this court at a former term, and was reversed, and remanded for a new trial in accordance with an opinion, which is reported in 69 Tex. 707, 7 S. W. Rep. 504. The question then presented is not now involved. The action was brought by appellee against appellant to recover the penalty prescribed by the act of May 6, 1882, for the failure of the company to deliver to him certain merchandise transported by it, upon his tender of the charges for carriage specified in the bill of lading. The defendant interposed an exception to the petition, and now insists that the court erred in overruling it.

The bill of lading was for a certain carload of nails received at the city of Pittsburgh, in the state of Pennsylvania, by the Pittsburgh, Cincinnati & St. Louis Railway

Company, and bound that company to transport the merchandise from that city to the city of Brenham, in the state of Texas, for a freight charge of \$197.50. The statute under which the proceeding was instituted reads as follows: "That any railroad company, its officers, agents, or employees, that shall refuse to deliver to the owner, agent, or consignee, any freight, goods, wares, and merchandise of any kind or character whatever, upon the payment or tender of payment of the freight charges due as shown by the bill of lading, the said railroad company shall be liable in damages to the owner of said freight, goods, wares, or merchandise to an amount equal to the amount of the freight charges, for every day said freight, goods, wares, and merchandise is held after payment or tender of payment of the charges due as shown by the bill of lading, to be recovered in any court of competent jurisdiction." Laws Called Sess. 17th Leg. 35. It is urged that the law as applied to the transaction alleged in the petition is a regulation of commerce between the states, and is such as only the congress of the United States has the power to make. If so, the legislature had no power to make such a law in reference to bills of lading for the carriage of goods from another state into this state; and it would be our duty either to construe the act as not applying to such bills of lading, or to hold that, as so applied, it is in contravention of the constitution of the United States, and therefore void. We would not, however, in construing the act, give it an application that would render any part of it void, unless the intent to so apply it was made manifest by the language of the act itself.

But the question recurs, is the provision under consideration in contravention of the federal constitution? As to what laws passed by the legislature of a state are to be deemed a regulation of commerce between the states, within the meaning of that constitution, there have been numerous decisions in the courts of the United States. Considering the all-pervading influence of the commerce of the country, and that any state law, in relation to commercial transactions not confined to those begun and completed within the state, would almost necessarily affect in some degree the commerce between the states, the result is not surprising. From the opinions delivered in the case of *Railway Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. Rep. 4, it would seem that the decisions of the supreme court of the United States upon these questions have not been altogether consistent; but it also appears, from that and later cases in the same court, that the tendency now is to extend the power of congress over matters affecting interstate commerce, and correspondingly to restrict that of the states. We think, however, that by the decisions of that court (which are authoritative upon these questions) the following propositions must be deemed to have been settled: (1) That a state can make no law regulating the rate of freight

for the carriage of goods between that and another state, although the regulation be construed as applying only to so much of the line of transit as lies within its own borders, (*Railway Co. v. Illinois*, supra;) (2) that it can make no law which empowers, either directly or indirectly, a burden by way of taxation upon interstate commerce, (*Pickard v. Car Co.*) 117 U. S. 34, 6 Sup. Ct. Rep. 635; *State Freight Tax Case*, 15 Wall. 232; *Ferry Co. v. Pennsylvania*, 114, U. S. 196, 5 Sup. Ct. Rep. 826; *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. Rep. 454; *Telegraph Co. v. Texas*, 105 U. S. 460; *County of Mobile v. Kimball*, 102 U. S. 691; *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592; *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. Rep. 1380; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. Rep. 1; (3) that wharves and bridges and ferries across streams, constituting the boundaries between the states, may be established and regulated by the states, in the absence of legislation on the same subject by congress, provided no burden other than an ordinary charge for their use be imposed upon the commerce passing over them, (*Gilman v. Philadelphia*, 3 Wall. 718; *Escanaba Co. v. Chicago*, 107 U. S. 678, 2 Sup. Ct. Rep. 185; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 2 Sup. Ct. Rep. 732;) and (4) that, in the exercise of these police powers, the states may enact laws which, though they affect commerce between the states, are not to be considered regulations of that commerce, within the meaning of the constitution of the United States, (*Railroad Co. v. Fuller*, 17 Wall. 560, and cases there cited; *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. Rep. 564.)

Is the law in question in this suit a proper exercise of the police power of the state? This power relates to such a number and variety of subjects that it is impossible to define it, except in terms so general that the definition is of but little practical utility in any case difficult of solution. We think, however, the opinions in the cases last cited throw much light upon the question before us. In *Railroad Co. v. Fuller* the question was as to the validity of a statute of Iowa which required all railroad companies in the state, in September of each year, to fix their rates of fare for passengers and freight, and on the 1st day of October following to post up at their depots a printed copy of such rates, and to cause a copy to remain posted during the year, and subjected the companies to penalties in case of a failure to comply with its provisions. In the conclusion of their opinion the court use this language: "If the requirements of the statute here in question were \* \* \* regulations of commerce, the question would arise whether, regarded in the light of the authorities referred to, and of reason and principle, they are not regulations of such a character as to be valid until superseded by the paramount action of congress. But, as we are unanimously of the opinion that they are merely police regulations, it is unnecessary to pursue the sub-

ject." In *Smith v. Alabama*, supra, the court say: "A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable, according to the laws of the state, for acts of non-feasance or misfeasance committed within its limits. If he fail to deliver goods to the proper consignee at the right time or place, he is liable in an action for damages, under the laws of the state, in its courts; or if, by negligence in transportation, he inflicts injury upon the person of a passenger brought from another state, a right of action for the consequent damage is given by the local law. In neither case would it be a defense that the law giving the right to redress was void as being an unconstitutional regulation of commerce by the state. This, indeed, was the very point decided in *Sherlock v. Alling*, 98 U. S. 99."

The statute we have under consideration, like every other law which gives a remedy to the shipper against the carrier for a violation of his contract, does in some remote degree affect interstate commerce, when applied to a contract of carriage from one state to another. But it imposes no tax. It neither fixes nor regulates any rates. It makes no discrimination between commerce wholly within the state and that between the state and other states. It imposes no duty upon any carrier not already imposed by the common law. It applies to all railroad companies in the state and to all contracts of carriage alike, and merely provides a penalty for the purpose of enforcing a compliance with an obligation which already existed at common law. In respect of the question before us, the statute is not distinguishable from any other law affording a remedy for the breach of a contract of carriage of goods between two states. We conclude that the statute was a proper exercise of the police power reserved to the state, and is therefore valid. The court, therefore, did not err in overruling the defendant's exception to the petition.

In answer to the petition, the defendant pleaded that the shipment which gave rise to this controversy was over the Pittsburgh, Cincinnati & St. Louis Railway to St. Louis, and thence over the Texas & St. Louis Railway to McGregor, Tex., where the freight was delivered to its road for transportation to Brenham; that the Pittsburgh, Cincinnati & St. Louis Company had no authority to contract for the carriage of the nails over its road, and that its agents at McGregor received the freight for transportation to Brenham at its customary rates, without having any knowledge of the bill of lading executed by that company; that upon receipt of the freight it paid the accrued charges, as shown by the way-bill to be \$197.50, and that its charges in addition amounted to \$35. The entire charges, as shown by the bill of lading, were \$197.50. The defendant introduced evidence of the facts alleged in its answer, and the court charged the jury as follows: "If the jury believe, from the evidence, that the de-

fendant company received the nails at the town of McGregor from another company, and transported them to the town of Brenham, this would constitute an affirmation of the original contract of shipment, and the defendant thereby became bound by the terms of the shipment as shown in the bill of lading." In this we think there was error. Our statutes make it obligatory upon any railroad company in this state to draw over their road, without delay, the passengers, merchandise, and cars of every other railroad company which may enter and connect with their road. Rev. St. art. 4251. See, also, articles 4226, 4227, 4251-4254. In the absence of a provision of this character, it might be proper to hold that a carrier who has received freight from another carrier upon a through bill of lading, without any express agreement as to the charges, should be presumed to have ratified the bill of lading, though made without its authority, and to have become a party to the contract. But certainly, when the carrier is bound by statute to receive and transport the goods without delay upon tender by the connecting carrier, no such presumption should be indulged. Such a rule would be to force a contract upon a carrier to which he had not given his consent, and compel to carry at a rate fixed by another company. The result of the construction of the law by the court below is that a railroad company is not permitted to refuse to receive the goods for transportation; yet, if it does receive them, it ratifies by that act a bill of lading made without his authority. This, in our opinion, cannot be tolerated. We so held at the last Tyler term in a case not yet [officially] reported. *Railway Co. v. Baird*, ante, 530. Should a railroad company in Arkansas receive freight to be transported to El Paso, in this state, for a less charge for the whole distance than the customary charge of the Texan road for the transportation over its own line, could the latter be forced to accept the contract? We think not. We do not think the legislature intended that such a construction should be given to the statute under consideration. Our opinion is that the act only applies when the railroad company that is sought to be charged in damages has either itself executed the bill of lading, or authorized another company to execute it, or has ratified it by some voluntary act on its part. Instead of the charge complained of, the court should have given an instruction, in substance, the same as charge No. 1, requested by defendant.

We think the court should not have excluded the original way-bill, when offered in evidence. In connection with other testimony, it showed that defendant paid, at the time it received the nails, accrued charges amounting to as much as the entire charge agreed upon on the bill of lading, for the transportation of the property for the whole distance, and tended to show that it never intended to ratify that contract. We infer from the statement appended to the bill of

exceptions that the depositions of the witnesses Murray and Dodge were objected to in writing, and were suppressed at a term of the court previous to the trial. If so, the bill of exceptions should have been then taken, and the depositions were properly excluded when offered on the trial.

The plaintiff has filed cross-assignments of error. The goods were first demanded on the 15th of December, 1884, and again on the 27th of January, 1885. On both occasions the charges shown by the bill of lading were tendered. There was a dispute whether or not the bill of lading was presented at the time of the first demand. It was formally exhibited to the company's agent when the second tender and demand were made. Under these circumstances, the court charged the jury, in effect, that, in order to make the demand effectual under the statute, the plaintiff must at the time have exhibited his bill of lading, and refused to charge that such presentation of the instrument was not necessary. We are of opinion that the court erred in these rulings. The statute does not expressly require that the bill of lading shall be shown to the agent of the railroad company when the goods are demanded, nor do we find anything either in the words of the act, or the nature of the business, from which it ought reasonably to be inferred that the legislature so intended. It is to be presumed, as a matter of law, that a party to a contract knows its contracts; and, as a matter of fact, it is not unreasonable to suppose that the agents of a railroad company, who receive freight at its destination, know the charges which the company is entitled to receive as shown by the bill of lading. We think, therefore, that it was not intended that the exhibition of the bill of lading at the time of the tender of the money and demand of the goods should be a condition precedent to the recovery of the damages. But the statute is strictly penal, and the penalty is severe, and we think a case may arise in which the owner of the goods should not recover if he has refused to exhibit his contract. It is only for a willful disregard of the law that its penalties should be inflicted. Hence, if there should be a mistake, if the agent of the company should not in fact know the contents of the bill, and should the owner of the goods having it in his power refuse to produce it, he would not be entitled to recover. In regard to appellee's second assignment of error, it is sufficient to say that it was decided upon the former appeal that the defendant had no right to require of plaintiff a receipt for the overcharge; and that if such a right should be insisted upon, on another trial, it would be proper to instruct the jury that it did not exist. If no issue should be again made upon the question, we do not see that such an instruction would be either necessary or proper. For the errors pointed out, the judgment is reversed and the cause remanded. Each party will pay one-half of the costs of this appeal.

# KRUEGER v. KRUEGER.

(Supreme Court of Texas. Jan. 31, 1890.)

## LIMITATION OF ACTIONS—NEW PROMISE.

A letter stating that defendant had tried to raise some money for plaintiff, and promising to send some, but not all, "because we must live first," and to pay whatever he can every year, and saying that he had not signed a note sent him because it was just as good without, as they knew how they stood, is not sufficient to remove a barred note from the statute of limitations.

Commissioners' decision. Appeal from district court, Fayette county; H. TENCH-MUELLER, Judge.

C. K. Bell, for appellant. Robson & Rosenthal, for appellee.

ACKER, P. J. Appellee brought this suit on the 14th day of May, 1888, against appellant, in the district court of Fayette county, and alleged in his petition that the defendant resided in Hamilton county, Tex., and that on the first day of January, 1880, the defendant executed and delivered to him his promissory note set out in the petition, as follows: "\$2,061.00. Round Top, January 1st, 1880. We, the undersigned, or either one of us, promise to pay to the order of John Krueger, in the town of Round Top, Fayette Co., Texas, the sum of two thousand and sixty-one dollars, American coin, with interest from date at the rate of ten per cent. per annum, interest payable annually, for value received. It is further provided that we are to pay any and all expenses, including attorney's fees, should the collection of the note be made by an attorney. G. KRUEGER." It was further alleged that the defendant, in a letter written by him to plaintiff in regard to his indebtedness on the 10th day of August, 1887, admitted the justness of the debt, and promised to pay it. The letter is as follows: "Hamilton, 10th August, 1887. Dear Father: I have done my best to raise some money, but I cannot do it now, because the little money which I had yet, I bought wheat for, which was cheap still. I bought it at 68 cents yet, and then hauled 40 miles; and corn for feed I must also buy, because that is very slim here, as rain was wanted. Cotton, too, don't look the best. But some money we will send you, but not all, because we must live first, and that in Brenham we must pay too; that was a hard lick for us. Dear father, you sent me a note that I don't sign. I will pay you some every year, but whenever I can, but I sign no more papers, for I think it is just as good without, because we all know how we stand; but you must be satisfied with what you will get every year, for I will do whatever I can. \* \* \* G. KRUEGER."

The defendant pleaded his privilege of being sued in the county of his residence, and claimed that, while the original note was payable in Fayette county, it was barred, and the suit was on the alleged admission and promise contained in defendant's letter of August 10, 1887, which did not stipulate for payment in Fayette county. The defendant interposed the same defense by special

exception, and also especially excepted on the ground that the note set out in the petition was barred by the four-years statute of limitations, and that "the letter sued on as a new promise does not show any promise to pay any certain sum of money, nor does it show any acknowledgment of the justness of any demand of plaintiff against defendant." The plea and exceptions were overruled, and the trial, without a jury, resulted in judgment for plaintiff for principal, interest, and attorney's fees, according to the terms of the note.

Under proper assignment of error, it is contended that the court erred in holding that defendant's letter to plaintiff was sufficient to take the barred note out of the statute of limitations, and this is the only question we think it necessary to consider. It is conceded that the original debt was barred. When a debt is barred, the new promise relied on must acknowledge the justness of the claim, and express a willingness to pay it. *Coles v. Kelsey*, 2 Tex. 555. An acknowledgment which will take a debt out of the bar of the statute of limitations must be clear and unequivocal, and neither qualified by conditions nor limitations. *McDonald v. Grey*, 29 Tex. 83; *Dickinson v. Lott*, Id. 173; *Madox v. Humphries*, 24 Tex. 196; *Smith v. Fly*, Id. 853. Considered in the light of these authorities, we think it too clear for argument that the letter relied on by plaintiff to take the barred note out of the operation of the statute of limitations is not sufficient for that purpose. It does not contain a clear, unequivocal, and unconditional acknowledgment of the justness of plaintiff's demand, nor does it contain an expression of a willingness to pay. We think it settled by the authorities, *supra*, that the acknowledgment, to relieve the claim from the operation of the statute of limitations, must contain an unqualified admission of a just, subsisting indebtedness, and express a willingness to pay it. If the expression of a willingness to pay is coupled with conditions, it devolves upon the plaintiff to prove that the named conditions have taken place. *Leigh v. Linthecum*, 30 Tex. 103. We think the court below erred in its construction of the letter from defendant to plaintiff, and are of the opinion that its judgment should be reversed, and the cause dismissed.

STAYTON, C. J. Report of commission of appeals examined, opinion adopted, judgment reversed, and cause dismissed.

#### MEULY et al. v. CORKILL.

(Supreme Court of Texas. Jan. 17, 1890.)

##### CONTRACTS—CONSTRUCTION.

1. Under a contract to pasture cattle at a given rate per month, for a term not longer than eight months, and give all possible protection for their safety and benefit, the owners reserving the right to remove them whenever liable to loss for lack of

grass or water, paying for the time that has expired, the owner of the pasture does not bind himself to furnish pasture for the full eight months, and may recover for the time it is used whenever the cattle are withdrawn.

2. The pasture, in such case, being of sufficient area, and known to both parties, the owner of the cattle cannot recoup damages sustained by the insufficiency of the grass and water.

Appeal from district court, Nueces county; J. C. RUSSELL, Judge.

Action by E. Corkill against Meuly Bros. to recover for pasturage of cattle. The petition set out the contract between the parties, and alleged that on or about the 24th of August, 1886, the defendants, by virtue of this contract, placed on the plaintiff's range, and put to pasture with him, 527 head of cattle, and they were pastured by the plaintiff until March 8, 1887, when the defendants owed him therefor \$428.18, and that on September 8, 1886, the defendants, by virtue of said contract, placed to pasture with the plaintiff 1,170 more head of cattle, and that they were also pastured by him until said date of March 8, 1887, and on this date the defendants became liable to him, for such pasturage, for the additional sum of \$887.50. The petition also contained an averment of full performance by plaintiff. Defendants filed a general demurrer, and a special demurrer that the plaintiff's petition did not show with sufficient certainty that the plaintiff had complied with the contract by furnishing the defendant's cattle the pasturage contracted for; and also a plea in reconviction; the special demurrer being based on the ground that the petition did not show that the cattle had been pastured eight months, according to the contract, or any excuse for non-performance. Judgment was given for plaintiff, and defendants appeal.

G. R. Scott & Bro., for appellants. Wells, Stayton & Kleberg and J. O. Luby, for appellee.

HENRY, J. Appellee brought this suit to recover from appellants money due them for pasturing cattle, in pursuance of the following agreement:

"This agreement, entered into by and between E. Corkill, party of the first part, and Meuly Bros., parties of the second part, to this effect: The said E. Corkill, party of the first part, agrees to pasture, for the parties or the second part, about 2,000 head of cattle, at the rate 12½ cents per month, for a term not longer than eight months, and give all possible protection for the safety and benefit of said cattle. The said parties of the second part agree to pasture about 2,000 head of cattle with the said party of the first part, and pay for same at the rate of 12½c. per head per month, to commence from the time said cattle are put on the range, calculated to be within the next twenty days; reserving the right to move said cattle at any time that they may be liable to loss for lack of grass or water, and paying at the above rate for the time expired. Witness our sig-



natures, at Realitos, Texas, this 24th day of August, 1886. E. CORKILL. MEULY BROTHERS."

The plaintiff set out the agreement, and alleged that defendants, at dates named, placed upon his range specified numbers of cattle, which were pastured by him, as he had contracted to do, until the 8th day of March, 1887, for which he prayed judgment according to the contract price, with interest from the last-named date. The defendants demurred generally and specially, and pleaded in reconvention that plaintiff did not comply with the terms of his contract, and furnish their cattle with sufficient grass and water, by reason of which a specified number of them, of a specified value, died from starvation, and the remainder became poor and unfit for market, whereby they were damaged a specified sum, for which and for defendants' being compelled to be at an increased expense in removing their cattle from the pasture before they were prepared to do so, and for plaintiff's willful and malicious misconduct in not furnishing sufficient pasturage, they pray judgment for damages.

We think the exceptions were properly overruled.

Other assignments of error relate to charges given and refused. The evidence as to the supply of grass and water in the pasture was conflicting, and the errors complained of with regard to the charges relate to that issue. The evidence shows that defendants became dissatisfied with the pasture, and the condition of their cattle, in the latter part of February, 1887, and promptly withdrew the cattle from the pasture. Plaintiff received all of the cattle offered by defendant. No question is made about the sufficiency of the area of the pasture, or as to the want of protection furnished the cattle, or to anything except as to the convenience and quantity of the supply of water and grass. We think it clear that plaintiff did not bind himself to furnish pasture for the cattle for the full period of eight months, or any longer than he in fact did furnish it. There is nothing in the record to indicate that the situation and condition of the pasture were not open to the observation of defendants, or not known to them in all respects, when they made the contract. The evidence shows that the pasture, all the time that it was occupied by defendants' cattle, contained both grass and water. The contract did not make plaintiff responsible for the continuance of the supply of either; but, on the contrary, defendants expressly reserved to themselves the right of determining as to these things, and of protecting themselves from such loss by withdrawing their cattle at any time. They as expressly agreed that when they did exercise their right of withdrawing their cattle they would pay the stipulated price for the time they permitted them to remain in the pasture. The agreement seems to have been carried out in all respects, except that when defend-

ants withdrew the cattle they failed to pay for their pasturage.

The jury returned a verdict in favor of plaintiff, on which judgment was rendered, including an excess of interest. This error was called to the attention of the court during the term, and, a *remittitur* of the excessive interest having been filed, the judgment was reformed, and corrected. We find no error in the proceedings, and the judgment is affirmed.

STAYTON, C. J., not sitting.

#### CARDWELL v. ROGERS.

(Supreme Court of Texas. Jan. 17, 1890.)

HUSBAND AND WIFE—CONVEYANCES—EXECUTORS—ESTOPPEL—MESNE PROFITS AND IMPROVEMENTS.

1. In Texas, a power of attorney executed by the wife alone, and properly acknowledged, confers no authority on her husband to sell her separate estate.

2. A married woman devised all her land to her daughter, appointing her husband executor, with power to manage the estate, and sell any part thereof, and invest in other property, and to surrender it to the daughter when deemed for her interest. The land described in the will was conveyed in exchange for other land, after the execution of the will, by her husband under an invalid power of attorney previously given by her, and after her death he took possession of the land received, sold a part of it, and managed it as decedent's estate until the daughter was of age. *Held*, that the power given being with reference to the particular land described, and it not appearing that the wife knew of or ratified the exchange, the acts of the executor did not amount to an estoppel or ratification of the invalid conveyance.

3. The daughter, having brought suit within seven months after her majority, is not estopped to deny the validity of an exchange of her property for that on which she has lived with her father during minority, and which she has not offered to reconvey.

4. The grantee of the husband under an invalid power of attorney from the wife is entitled to compensation for improvements, where the husband, as executor of the wife, with power to sell and invest in other land, retains the land given in exchange during the minority of plaintiff.

Appeal from district court, Gonzales county; GEORGE MCCORMICK, Judge.

*Harwood & Harwood*, for appellant. *W. S. Fly*, for appellee.

STAYTON, C. J. The land in controversy belonged to Ann E. Rogers and Mary S. Rogers as tenants in common. They were both married women when the conveyance out of which this litigation arises was made; the former being the wife of John S. Rogers, and the latter the wife of Byrd R. Rogers. Appellee is the child of Ann E. and John S. Rogers, and was born on April 29, 1866. On the 23d of February, 1877, Byrd R. Rogers entered into a memorandum agreement with the defendant, William Cardwell, by the terms of which the defendant agreed to sell and convey in exchange his lands situated in Caldwell county, known as the "Cardwell Sour Springs Place," which consisted of 440 acres of land, and a half interest in 8 acres on which was situated mineral springs, with

a commodious hotel, all fitted up for entertaining visitors. Byrd R. Rogers, for himself and his wife, and his brother John S. and his wife, agreed to convey to defendant the 771 acres described in the petition. It was not shown that Byrd R. had any written power or other authority to bind his associates in said contract. On August 4, 1876, the mother of appellee executed to her husband a power of attorney which in terms empowered him "to make sale of and convey all of my interest" in the tract of land in controversy, which was acknowledged by her before a notary public as required to be done in conveyances made by married women of their separate estates, the husband not joining therein. On March 15, 1877, in pursuance of the agreement of February 23d, Cardwell conveyed to Mary S. and Ann E. Rogers his lands in Caldwell county, and Byrd R. Rogers and wife and John S. Rogers, acting for himself and for and in the name of his wife, under the power before referred to, conveyed the land in controversy to Cardwell. The transaction was an exchange of lands, the respective deeds showing that the lands conveyed on the one side were the consideration for the conveyance from the other. The court below found that the transaction was fair and in good faith, and, in effect, that the properties at the time were of about equal value. Mrs. Ann E. Rogers died testate on May 1, 1877, her will bearing date February 5, 1876. Her will was probated, and contained the following provisions: "*First.* I give all and entire my real and personal property to my dearly beloved daughter and only child, Ann Maria Rogers, said property consisting of the following lands, viz.: One-half undivided interest in and to (1,555) acres out of the headright of Green De Witt, known as the 'Broadnax Place,' about six miles above the town of Gonzales, in Gonzales county." "*Third.* I nominate and appoint my husband, John S. Rogers, executor of this my last will and testament, and direct that no security shall be required of him as executor. *Fourth.* It is my will that my executor heretofore named have power to manage fully my estate, with power to sell any part thereof, and invest in other property as may appear to him most conducive to the interest of my said daughter, Ann Maria Rogers. *Fifth.* It is my will and desire that my said executor be empowered to surrender my estate hereby delivered to my said heir at such time as he may deem proper for her interest." The executor returned an inventory of the estate of his decedent wife on September 18, 1877, and therein embraced the interest of his wife in the property conveyed by Cardwell as the consideration for the land sued for, which was appraised at \$4,000. In January, 1878, John S. Rogers, with his minor daughter, appellee, and Byrd R. Rogers, took possession of the land conveyed by Cardwell, and thereon remained and continued until the trial of this cause; but on November 19, 1879, Byrd

R. Rogers, joined by his wife and John S. Rogers, acting under the power conferred on him by the will of his wife, conveyed to one Vogle 198 acres of the land conveyed by Cardwell, for a consideration of \$700, which Vogle's heirs occupy and claim under that deed. The court found that "at the date of the exchange and the date when the Rogerses took possession of the Caldwell county property, the hotel was a large new building of new lumber, well finished, and well furnished with new furniture, for hotel purposes, and also a good family dwelling-house, and that the spring was walled up, and well fixed, with two bath-houses. That there was a good barn and stables and crib, and the farm was inclosed with a good substantial fence, and in good state of cultivation. That now, and at the time of the commencement of this suit, the hotel was in a dilapidated condition, the furniture all gone, one side of the house fallen down, and now used for storing hay, and for a stable, and in an uninhabitable condition, the bath-houses and other improvements all decayed, and from neglect had mostly disappeared, the fences around the farm mostly removed, and used for fire-wood, the farm grown up in bushes, leaving but a few acres now in cultivation; also the timber on the land mostly cut down and destroyed. That the place in Gonzales county sued for has been greatly improved by defendant, Cardwell, the dwelling has been repaired with new roof, new floors, the field has been enlarged by taking more land, and is in good condition, with new fences; also he has built five new tenant-houses, and new stables, cribs, lots, garden, and orchard, all done before the commencement of this suit." The court further found that the entire tract, one-half of which is involved in this action, at time of trial was worth \$5,600, and that the Caldwell county property, conveyed by Cardwell to Mrs. Mary S. Rogers and the mother of appellee, was then worth \$2,000. That John S. Rogers, Byrd R. Rogers, his wife, and appellee are insolvent, and that Cardwell has paid all taxes on the land in controversy since he took possession, on January 1, 1878. Appellee has not reconveyed, or offered to reconvey, to Cardwell the interest in the land which passed to her mother under the conveyance made by him, but in her pleadings disclaims any interest in it. This suit was brought by appellee on November 17, 1887, to recover one-half of the land conveyed to appellant, and the answer of defendant set up the facts on which the defenses hereafter to be noticed were founded; but under these he sought only to defeat appellee's action, and made no prayer for any affirmative equitable relief based on the facts pleaded, but he did set up claim for improvements made in good faith, on which the court below, it seems, took no action. There was a judgment for appellee for the land claimed by her, from which this appeal is prosecuted.

The court below having found that the

power of attorney executed by the mother of appellee to her father did not give him lawful power to make the conveyance to appellant, it is urged this holding was erroneous. The facts bearing on this question are in all essential respects the same as were the facts in the case of *Cannon v. Boutwell*, 53 Tex. 626, (decided in 1880.) In that case, as in this, the power of attorney to the husband was executed by the wife alone, and acknowledged by her as instruments are required to be to convey the separate property of a married woman. In each case the instrument attempted to empower a husband to sell the separate property of his wife specifically described in it, and in executing the power the husbands joined in the deeds in their own rights, and as attorneys in fact executed them in the names of their wives. The case referred to was followed in *Peak v. Brinson*, 71 Tex. 316, 11 S. W. Rep. 269, and there is authority to support it. The importance of having settled and uniform rules for the acquisition and transmission of property cannot be too highly estimated, and, if an established rule be thought not to be entirely defensible theoretically, it better subserves the public good to adhere to it until such time as the legislature may change it, than to uproot it by a judicial decision, which in its turn may share the same fate at the hands of succeeding judges. The rule established by the case of *Cannon v. Boutwell* has doubtless been recognized by the bar and people as that by which to adjust their rights, and on the faith of it property rights have been acquired. The legislature has frequently met since the decision was made, but no statute has been enacted establishing a different rule; and were we inclined to the opinion that a different rule would be more in harmony with existing statutes, which we do not wish to be understood to intimate, still we would feel it our duty to adhere to the rule established, and for this reason now decline to enter into a discussion of it.

The power of attorney not conferring on the husband the power to sell and convey the land, it becomes unnecessary to inquire whether, had the instrument been valid, it would have empowered him to convey the land in exchange for other lands; but we may say that the transaction was not what at common law was technically known as an "exchange," which carried with it incidents which the mutual conveyances now before us would not. The transaction can receive no aid from the agreement for conveyance of the land made by Byrd R. Rogers on 23d February, 1877; for he was without power to make any agreement which would bind the mother of appellee, or in any manner affect her separate estate.

The third assignment of error, which is argumentative, is as follows: "The court erred in his conclusion of law marked '(3),' in which it is held 'that the legal effect of the will of Ann E. Rogers, nor the acts of John S. Rogers, the executor and testament-

ary guardian, cannot legally bind the plaintiff herein, and that, therefore, there is no such ratification of the deed made under the power of attorney as can affect the rights of the plaintiff,' in this: That (1) the legal effect of the will was to invest the executor and testamentary guardian with large discretionary power, to-wit, 'power to manage fully decedent's estate, with power to sell any part thereof, and invest it in other property as might appear to him most conducive to the interest of his said daughter,' the plaintiff; and, further, 'that said executor be empowered to surrender my estate hereby delivered to said heir at such time as he may deem proper for her interest;' and all acts done by the said executor, within the scope of the powers conferred by the will, are binding on the ward and devisee. (2) The acts of the executor and testamentary guardian, in claiming the property in Caldwell county as the property of decedent's estate by placing it on the inventory, and causing it to be duly appraised as a part of decedent's estate, and in taking possession of it in January, 1878, and making it the homestead of himself and plaintiff, and in subsequently conveying 196 acres of the land so inventoried to one Vogle, reciting in said deed that he did so by virtue of the power conferred upon him by the said will, (all of which is shown in the findings of facts,) was such 'ratification' of the sale and conveyance made to defendant as would bind the plaintiff. (3) The findings of fact show that the plaintiff is now and has continued since her majority to retain possession of the Caldwell county land, and has never offered to surrender possession, or to convey any title or interest she has to the defendant Cardwell, which acts show ratification on her part, and she is estopped from now repudiating the exchange of property."

The will of Mrs. Rogers was made before the transaction occurred out of which grew this litigation, and by its express terms the land in controversy was devised to appellee, then a child in her eleventh year; and it cannot be claimed that there is any provision in the will which can, by force of its terms, give validity to the conveyance under which appellant claims, or within itself vest appellant with title to the land. So far as the record shows, it does not appear that Mrs. Rogers actually knew that her husband had executed the deed under which appellant claims, and it does appear that neither party took possession of the lands conveyed to them until after her death; but if she had known of the transaction, and with her husband had entered upon the land conveyed to her by appellant, and there remained until her death, this would not have passed her title to the land in controversy, nor have operated as an estoppel. Under this assignment we understand the proposition to be that the acts of the executor, under the powers conferred on him by the will, amount to a ratification by appellee of the deed under which appellant asserts title, or

that his acts estop her. The power conferred on John S. Rogers was a power, as executor, to manage the estate left to his daughter until such time as he might deem it to her interest to deliver the estate to her, which it ought not to be presumed was intended to continue after her majority; title to the estate, under the terms of the will, vesting in appellee. He was given the further power to sell any part of the estate devised, and to invest the proceeds in other property, if he deemed it to the interest of appellee to do so. These powers, however, were conferred with reference to particular property, for Mrs. Rogers specified the particular real estate—doubtless, as the will declares, understood by her to be all the real estate owned by her—to which the power should apply. Her will must be understood to speak at the time of her death; and, thus read, the enumeration in her will of all her real estate, in which was embraced the land in controversy, while that conveyed to her by appellant was not mentioned, ought to be held sufficient evidence of the fact that she did not know of the transaction between her husband and appellant, or that she did not deem it binding on her, and repudiated it. In view of the fact that all the lands claimed by the testatrix were enumerated in the will, the power conferred by it on the executor ought to be held to have been intended to be limited to acts to be done in reference to such lands only as she claimed to own, and to exclude any intention to confer on the executor any power whatever over the lands appellant had conveyed to her. If she did not know the lands had been conveyed to her, she could not have intended to confer a power on him to manage or sell them; and if she knew of the conveyance, but repudiated it, she could not have intended the power conferred on the executor to extend to lands not embraced in it. The fact that appellee may have been the sole devisee would not affect this question, in view of the fact that all the lands claimed are enumerated in the will. The will empowered the executor to exercise his best judgment in reference to the property which the testatrix declared should through it vest in her daughter, and if, in his judgment, it would be to her interest, to sell it, or any part of it, and reinvest in other property; but this did not confer on him the power by election to bind his daughter by a contract not binding on his wife. The acts of the executor tend to show that he regarded the conveyance which, as agent, he had attempted to make for his wife, as a valid transfer of her right; but the power to determine such a question, and bind appellee by his determination, was not the power conferred on him by the will. It is true that the executor might have sold the interest of his daughter in the land in controversy, and invested the proceeds in the lands which appellant had conveyed to his wife, which neither she nor her daughter in good conscience could hold; and, having power to sell and reinvest, it may be that he could

have consummated, by proper conveyance, the practical exchange of lands he had attempted to make during the life of his wife; but, having no power under the will to bind appellee by his own election, he could have accomplished this only through the exercise of the power to sell conferred on him by the will. Title of appellee never having been thus divested, nor divested by her own act, we do not perceive on what reasonable ground she can be held to have lost the right to assert the title which vested in her under the will, by reason of any act of the executor.

If, after majority, appellee, with a full knowledge of all the facts, had elected to hold the lands conveyed to her mother by appellant, on the clearest principle of right she ought to be held bound by such election, and denied the right to recover the land in controversy, invalid though the attempted conveyance from her mother was. The facts do not show such an election. She was a minor when her mother died, and so continued until less than seven months before this suit was brought. She resided on the land conveyed to her mother as a member of her father's family, with her uncle and aunt, who were legally entitled to occupy the land. Her father was the guardian of her person, and had the right to determine where she should reside. It is not shown that she has received any part of the money for which the executor and Byrd R. Rogers and wife sold part of the land conveyed by appellant to her mother and aunt, nor that she has claimed or accepted, as owner or otherwise, any benefit therefrom. Were the conveyance which her father attempted to make for her mother one made by herself during minority, and for this reason voidable, it could not be held that she did not repudiate it within a reasonable time after majority. The conveyance, however, under which appellant claims, in so far as it purports to bind the mother of appellee, is void; and nothing short of some affirmative act on part of appellee divesting her title, or in conscience forbidding her asserting it, can defeat her right to recover. Appellee is but seeking the enforcement of a legal right, and under her pleadings, had appellant requested it, the court below would no doubt have vested in him the title to the interest in the land he conveyed to her mother, and we would not feel authorized to reverse the judgment because she did not tender a reconveyance, which under the facts it is very doubtful if she was under any obligation to do.

A claim was made by appellant for the value of improvements made by him on the lands in controversy, but the record does not show that such evidence was introduced as would have enabled the court to have done this. Under the facts of this case, we are of opinion that appellant is entitled to have compensation for improvements made in good faith on the land, under the general rules applicable to that subject, although made by a tenant in common, that fact being given proper effect; but the parties may have

thought that all equities thus resulting might be adjusted in a partition of the land hereafter to be made. That the court did not dispose of that matter is not assigned as error; in fact, all the assignments go to the rulings on the question of title. We find no error in the judgment, and it will be affirmed, without prejudice to the right of appellant hereafter to have an adjustment of any equities growing out of improvements made by him on the land in controversy. It is so ordered.

### CUDD v. STATE.

(Court of Appeals of Texas. Oct. 30, 1889.)

#### HOMICIDE—PLEADING AND PROOF—TIME OF DEATH.

1. An indictment which charges that defendant "on or about August 26, 1888, and anterior to the presentment of this indictment, in the county and state aforesaid, did then and there, unlawfully, and with malice aforethought, kill and murder, \* \* \* by cutting and stabbing him, the said \* \* \*, with a knife, against the peace and dignity of the state," is sufficient, and implies that deceased died on the day named; and the addition of the words that he "inflicted upon him, the said \* \* \*, one mortal wound, from which said mortal wound he, said \* \* \*, died," is surplusage.

2. Evidence that deceased died on a day subsequent to that named in the indictment is admissible, and the variance is immaterial as long as the death occurred before the bringing of the indictment.

Appeal from district court, De Witt county; H. C. PLEASANTS, Judge.

*Friend & Pleasants and Crain, Kleberg & Grimes*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. Defendant made a motion in arrest of judgment which attacked the sufficiency of the indictment, and claimed that it was wholly defective, in "that the said indictment fails to state when Campbell Taylor, with whose murder defendant is attempted to be charged, died." The charge, as set forth in the indictment, is "that Tom Cudd, on or about the 26th day of August, one thousand eight hundred and eighty-eight, and anterior to the presentment of this indictment, in the county and state aforesaid, did then and there, unlawfully, and with malice aforethought, kill and murder Campbell Taylor by cutting and stabbing him, the said Campbell Taylor, with a knife, *inflicting upon him, the said Campbell Taylor, one mortal wound, from which said mortal wound he, the said Campbell Taylor, died*; against the peace and dignity of the state." This motion in arrest, having been overruled, is assigned for error on this appeal, and the proposition based upon the assignment is that "it must appear affirmatively from the face of an indictment for murder that death ensued within a year and a day from the alleged infliction of the mortal wound; and an indictment which fails to allege the date of the death of the deceased, either in exact words or by necessary implication, as that he

'then and there' instantly died, is fatally defective."

In copying the charging part of the indictment it will be seen that we have italicized the words "inflicting upon him, the said Campbell Taylor, one mortal wound, from which said mortal wound he, the said Campbell Taylor, died." Now, if the italicized words be stricken out, and eliminated from the indictment, there can be no doubt of its sufficiency under the well-established rules and forms which have been recognized in this state. The well-settled rule is that allegations not essential to constitute the offense, and which might be entirely omitted without affecting the charge against the defendant, and without detriment to the indictment, are treated as mere surplusage, and may be entirely disregarded. *Mayo v. State*, 7 Tex. App. 842; *Holden v. State*, 18 Tex. App. 91; *McConnell v. State*, 22 Tex. App. 354, 3 S. W. Rep. 699. Eliminating these words, we have an indictment complying in every essential with No. 388, the general form for murder found in Willson, *Crim. Forms*, 173, which form, since its publication, has repeatedly been held sufficient by this court. *Lucas v. State*, 19 Tex. App. 79; *Walker v. State*, Id. 176; *Stephens v. State*, 20 Tex. App. 255; *Banks v. State*, 24 Tex. App. 559, 7 S. W. Rep. 327; *Rather v. State*, 25 Tex. App. 623, 9 S. W. Rep. 69. See, also, *Wilson, Crim. St. § 1980*, form No. 2. In *Strickland's Case*, 19 Tex. App. 518, Judge HURT, says: "At common law it was essentially necessary to set forth particularly the manner of the killing, and the means by which it was effected. This is rendered unnecessary by the act of March 26, 1881. *Wilson, Crim. St. § 1980*, form No. 2. But this act, known as the 'Common Sense Bill,' does not render unnecessary the allegation that the accused killed the deceased. The form therein prescribed requires such an allegation, and we here hold that an indictment for murder, drawn under this form, is sufficient, because it (the form) contained each and every element of which murder is composed. Upon this subject Mr. Wharton says: 'The wound must be alleged to be mortal, and death therefrom must be distinctly averred. The averment that the defendant killed the deceased on a certain day implies that the latter died on such day.' 1 *Whart. Crim. Law*, §§ 536, 537. \* \* \* Since the act of March 26, 1881, it is not necessary for the indictment to describe the wound in any manner, nor to allege that it was mortal, nor to allege in terms that the deceased died therefrom. The allegation that the defendant, with his malice aforethought, with certain means, did kill and murder deceased, is sufficient." *Wilson, Crim. St. § 1035*. "An averment that the defendant killed the deceased on a day certain implies that the latter died on such day." 9 *Amer. & Eng. Cyclop. Law*, 636. Expunging the surplusage as above indicated from the indictment in this case, and the charge is that defendant "on or

about the 26th day of August, one thousand eight hundred and eighty-eight, and anterior to the presentment of this indictment, in the county and state aforesaid, did then and there, unlawfully, and with malice aforethought, kill and murder Campbell Taylor by cutting and stabbing him, the said Campbell Taylor, with a knife; against the peace and dignity of the state." This is sufficient under our statute and approved forms, and certainly implies, if it does not directly aver, that Campbell Taylor, the deceased, died on the 26th day of August.

But it is again insisted for appellant that if said indictment be held sufficient, and if it be held that it alleges that the deceased died on the 26th of August, the court erred in allowing the prosecution to introduce, over defendant's objections, evidence showing that the wounded man did not in fact die on that day, but lingered and languished in great pain and suffering for the space of seven or eight days afterwards. Defendant's objection to the evidence is not tenable. While it is required that the indictment must set forth the time of the alleged acts causing the death, it is nevertheless a general rule that the proof need not strictly conform to the averments. Where an indictment charged that a blow was given on the 27th of December, and that the deceased then and there instantly died, and the evidence was that he lived twenty days after receiving the blow, and then died, it was held that the variance was not material." *State v. Baker*, 1 Jones, (N. C.) 267. See, also, 1 Archb. Crim. Pl. & Pr. 786, (8th Ed., Pom. notes;) 9 Amer. & Eng. Cyclop. Law, 635, 636. In the early case of *O'Connell v. State* our supreme court say: "There is no precedent or authority for any such distinction as that sought to be maintained by the counsel for the appellant, that the homicide may be proved to have been committed before, but not after, the time charged in the indictment, as applicable to such a case. 'The time of the commission of an offense laid in the indictment is not material, and does not confine the proof within the limits of that period; the indictment will be satisfied by proof of the offense on any day anterior to the finding.' Whart. Amer. Crim. Law, 220." 18 Tex. 366. Mr. Bishop says: "In general, the proof of the offense need not correspond in day of the month and year with the allegation. Any day before or after, within the statute of limitations and before the bringing of the prosecution, will suffice." 1 Bish. Crim. Proc. (3d Ed.) § 400; *Wilson*, Crim. St. § 1049; *Lucas v. State*, 27 Tex. App. 322, 11 S. W. Rep. 443. In this case the deceased died on the eighth day after the 26th day of August. The indictment, however, was not found, presented, and filed in court until the 11th day of the following December. It was not error to admit the evidence, and the evidence created no material variance between the allegation and proof.

The only other matter of contention raised by appellant's counsel in the able oral argu-

ment and brief upon which they have submitted the case is that the evidence is insufficient to support the verdict and judgment, which were for manslaughter. In this we cannot concur with them. If the witnesses for the prosecution are to be believed, then at least a case of manslaughter was fully made out. No complaint has been made of the charge of the court, and we have found no material error in it. We are of opinion that the appellant has had a fair and impartial trial, and, the record of his trial being free from reversible error, the judgment is affirmed.

#### MARTIN et al. v. TAYLOR et al.

(Supreme Court of Arkansas. Jan. 11, 1890.)

#### ASSIGNMENT FOR BENEFIT OF CREDITORS—TITLE OF ASSIGNEE—PAROL EVIDENCE—FRAUD.

1. Parol evidence is not admissible to show that plaintiffs signed an agreement by which attachments against the property of an insolvent firm were discharged, and the property conveyed to trustees for the benefit of creditors, on condition that one of the trustees should be removed, and another person put in his place, where the instrument and property were delivered to the trustees, and accepted by them, and where there is nothing in the instrument to show that it was to take effect only on the happening of a future contingency.

2. Where the creditors of an insolvent sign a release of their liens on the property of the insolvent acquired by attachment, and the property is conveyed to trustees for their benefit, and the trustees accept the trust, one of the creditors cannot afterwards divest the trustees of title by erasing his name from the instrument without the consent of all the other parties interested.

3. One who is induced to sign a written instrument by a parol promise made to him before the execution of the instrument by some of the parties, but not assented to by others who are interested, cannot have the instrument declared void as to him because of the failure to perform the parol promise.

4. Where a creditor signs an agreement made between creditors and their insolvent debtor, which is also a conveyance of the property of the debtor to trustees for the benefit of the creditors, he is concluded from afterwards attacking the instrument on the ground that it was executed to defraud creditors.

Appeal from circuit court, Woodruff county; M. T. SANDERS, Judge.

*J. W. House*, for appellants. *J. M. Moore* and *W. G. Weatherford*, for appellees.

BATTLE, J. In April, 1886, J. J. Cook & Bro., grocers and merchants in the town of Augusta, became insolvent. Several of their creditors brought suits, and sued out orders of attachment against them. The claims sued on amounted to about \$22,000. The property of Cook & Bro. was seized under these orders of attachment. This brought about a general conference and concert of action upon the part of their creditors. Many of them had an informal meeting in Augusta, and afterwards, on April 30, 1886, held a meeting in the city of Memphis, when a contract or agreement was entered into by Cook & Bro. and their creditors, including all the creditors who had sued out orders of attachment, and all others, except one or two, to whom only small amounts were due. This

contract was reduced to writing, and signed by the parties. By it, Cook & Bro. transferred, assigned, and conveyed all their property of every kind and description to Branch Martin and Thomas E. Erwin in trust for the benefit of all their creditors. It was thereby agreed that Martin and Erwin, upon giving bond, were to take charge of all their property, including real estate, merchandise, notes, mortgages, book-accounts, etc.; that the attachments should be dismissed; and that payments should be made as follows, to-wit: *First*, the expenses of the trust; *second*, to Friedman Bros.; *third*, to Dillard & Coffin, \$7,000; *fourth*, to Eckerly, Stone & Co., \$1,305; *fifth*, the balance to all other creditors, including balance due to Dillard & Coffin and Eckerly, Stone & Co., *pro rata*, and the balance, if any, to Cook & Bro. Friedman Bros. were preferred creditors to the full extent of their claim. Dillard & Coffin and Eckerly, Stone & Co. were preferred only as to a part of their debts. These creditors were preferred because they were the first attaching creditors, and because, if they had enforced their attachments, all the assets of Cook & Bro. would have been exhausted, and nothing would have been left to pay other creditors. By this agreement a committee consisting of John W. Dillard, L. C. Tyler, and F. T. Ryan, creditors of Cook & Bro., were appointed. It was empowered to superintend and direct the execution of the trust, to regulate and direct the purchases and expenditures in connection with the same, and to fill vacancies in the trusteeship, if any occurred. Its action was to be subject to the approval or rejection of the creditors as a body, and consistent with the object and purposes of the trust. The trustees were empowered to continue the business of Cook & Bro.; and the subscribing creditors agreed to furnish them, through the committee, such supplies, to the amount of \$2,600, or such other sums as they might find necessary to advance to the customers of Cook & Bro. to enable them to make their crops, and thereby to pay what they owed, as well as for the supplies furnished. If the trust was not closed by the 1st of March, 1887, the trustees were directed to sell the assets remaining on hand, or enough thereof to satisfy the trust, at private or public sale, as they should think best. This contract was signed by W. F. Taylor & Co., the attaching creditors, and others, amounting in all to about 30 creditors, and delivered to the trustees. The attaching creditors then discharged the property from the attachments, and delivered it to Martin and Erwin. Afterwards, W. F. Taylor & Co., the appellees, caused their signatures to be erased from the agreement, brought suit on their demand, and on the 19th day of August, 1886, obtained a judgment against Cook & Bro. for \$645.12. They caused an execution to be issued on this judgment, and levied on one and a half town lots and some corn, a part of the property of Cook & Bro. transferred and conveyed to Martin

and Erwin, and caused the sheriff to advertise the same to be sold to satisfy their judgment. Before the day of sale, Martin and Erwin, claiming the property, in order to suspend the sale, executed, with J. H. Campbell as surety, a bond to the plaintiffs in the execution, to the effect that if it should be adjudged that the property levied on, or any part of it, was subject to the execution, they would pay to the plaintiffs the value of the property so subject, and 10 per cent. thereon, not exceeding the amount due on the execution, and 10 per cent. thereon; and it was approved. Thereupon Taylor & Co. brought this action. They alleged in their complaint that the conveyance to Martin and Erwin, and contract signed by Cook & Bro. and their creditors, was and is illegal, fraudulent, and void as to them—*First*, because it does not specify any time within which creditors are to accept its provisions; *second*, because the same provides that property therein conveyed is to be administered and closed up, under the supervision of the creditors, through a committee; *third*, because it provides that the business is to be carried on beyond the time allowed by the statute; *fourth*, because the same provides for the disposition of the assets at private sale; and, *fifth*, because it provides that the surplus, if any, shall be paid to Cook & Bro.,—and asked that the transfer and conveyance made by Cook & Bro. in the agreement with their creditors be set aside, and for judgment against Martin, Erwin, and Campbell, on their bond, for the full amount due on their judgment. And the defendants answered, and alleged substantially the facts stated: that the erasure of plaintiffs' names was made without authority; that the contract between Cook & Bro. and their creditors was made in good faith; and that plaintiffs are estopped from disputing its validity. On a hearing, the court, sitting as a jury, found the facts as follows: "The plaintiffs declined to participate in the meeting of the creditors and debtors at which the agreement was entered into, and refused to sign it. Subsequently, however, they were induced by the so-called 'managing' or 'supervising' committee, upon certain conditions, to sign, and did sign, the paper. They consented to do so upon the express condition and representation that one Estes, at a salary of \$75 a month, should be substituted in place of Martin, who was objectionable to plaintiffs, and was to get a salary of \$200 per month. This condition was not complied with; and the chairman of said managers, on the part of the assenting creditors, on demand of plaintiffs, and without objection, immediately caused plaintiffs' signature to the agreement to be erased therefrom. Plaintiffs had no other connection with the parties to this agreement; were never called on to contribute any part of the money the creditors were to advance to carry out its provisions; and their withdrawal from it seems to have been acquiesced in, particularly by the defendants. The erasure was made when the instrument



was in the hands of the defendants Martin and Erwin, and they in possession of the property, but before they had proceeded to dispose of it, and before the instrument had been filed for record. Neither Martin nor Erwin offered any objection to erasing the signature when it was done, or at any time thereafter; neither did Cook & Bro., who were on the ground, nor the creditors, who had knowledge of it. With a knowledge of these facts, the defendants Martin and Erwin proceeded to dispose of the assets of Cook & Bro. according to the terms of the instrument; and, among other things, declared the law as follows: "The instrument of writing by which defendants set up a claim to the property on which plaintiffs' execution was levied is absolutely void as a deed of assignment for the benefit of creditors; nor is it valid as a deed of trust or mortgage security. If the instrument has any validity in law, it is merely as an agreement in writing between debtor and creditors, by which the assets of the debtor were placed in the hands of a third party to be disposed of under the supervision and direction of the creditors for their benefit. It did not affect the rights of any creditor who was not a party to the agreement," and "conferred upon the assignees in this case no right or title to the possession of the property;" and that "plaintiffs were not estopped from prosecuting their claim against Cook & Bro. to judgment, and levying executions on property in the possession of Martin and Erwin;" and that "parol evidence was admissible to explain the erasure." — and rendered judgment in favor of the plaintiffs, against the defendants, for the full amount of the execution; and the defendants appealed to this court.

The instrument in question is a conveyance by Cook & Bro. of their property to trustees for the benefit of creditors, and is also a contract between the subscribing parties thereto. Martin and Erwin were the trustees. It provides that the committee selected to supervise shall have the authority to fill any vacancy which might occur in the places of the trustees. When it was first presented to the appellees they refused to sign it. Finally, at the instance of one or two members of the committee, they signed it, with the understanding that T. H. Estes should be made trustee in the place of Martin. No change, however, was made in the instrument on account of their signature. Martin and Erwin still remained, as before, the trustees in the deed. The said members of the committee immediately ascertained that one of the creditors would not consent to the removal of Martin, and so informed appellees. They at once demanded the erasure of their names; and the members of the committee, at whose instance they signed, without delay, caused it to be done. They now insist that they are in no manner affected by the instrument, and that the property in controversy was liable to be seized to satisfy their execution.

The first inquiry which presents itself for our consideration is, did the instrument in question go into operation as to all who signed it? Appellees say that they signed it on condition that Estes should be made a trustee in the place of Martin; but there is no evidence to show that it was not to be delivered until that condition was performed. On the contrary, they wrote to a member of the firm of Cook & Bro. that they had signed it "upon condition that Mr. Martin goes over and receives the property under the instrument of writing, and then turns it over to Mr. Estes." After it was signed the creditors discharged the property thereby conveyed from the attachments, and both the instrument and the property were delivered to Martin and Erwin. They accepted the trust, and proceeded to comply with its terms. All the parties to the instrument, it appears, understood that it was to take effect and become operative as a conveyance in trust when it was signed by them, and delivered to Martin and Erwin. Nothing is said in it as to its taking effect upon the happening of a future contingency. It purports to be a full and complete conveyance and contract. Upon delivery to the trustees it became obligatory, and went into immediate operation, as to all who had signed it. To permit any of the parties to show by parol evidence that it was conditional would be to allow them to thereby vary or add to the terms of a written contract, and to violate a fundamental rule of evidence. The evidence relied on by appellees to show that it was conditional as to them was a parol agreement between them and two of the supervisory committee that Estes should be made a trustee in place of Martin, and was clearly inadmissible. *Scott v. Bank*, 9 Ark. 36; *Chandler v. Chandler*, 21 Ark. 98; *Ward v. Lewis*, 4 Pick. 520; *Cocks v. Barker*, 49 N. Y. 110; *Lawton v. Sager*, 11 Barb. 349; *Massmann v. Holscher*, 49 Mo. 87; *Jones v. Shaw*, 67 Mo. 667; *Railroad Co. v. Duff*, 13 Ohio St. 235; *Dawson v. Hall*, 2 Mich. 390.

The next inquiry is, did the erasure of the names of the appellees affect the rights of the other subscribing creditors and the trustees to the property in controversy? It has been held by this court that the destruction of a title-deed by a grantee does not divest him of the title to the land thereby conveyed; and it is well settled that the alteration of such a deed does not affect the title. *Mr. Greenleaf*, in his work on Evidence, says: "If the grantee of land alter or destroy his title-deed, yet his title to the land is not gone. It passed to him by the deed. The deed has performed its office as an instrument of conveyance, and its continued existence is not necessary to the continuance of title in the grantee; but the estate remains in him until it has passed to another by some mode of conveyance recognized by the law. The same principle applies to contracts executed, in regard to the acts done under them." What is said of land is equally true of personal property. When the title to it passes, it cannot be di-

vested, except in some mode of transfer recognized by the law. 1 Greenl. Ev. (14th Ed.) § 568; Strawn v. Norris, 21 Ark. 80; Taliaferro v. Rolton, 34 Ark. 508; Cunningham v. Williams, 42 Ark. 170; Davidson v. Cooper, 11 Mees. & W. 798; Chessman v. Whittemore, 23 Pick. 231; Withers v. Atkinson, 1 Watts. 248; 2 Pars. Cont. (5th Ed.) 724; 2 Whart. Cont. § 704.

In this case, debtors and creditors were doubtless of the opinion that the instrument in question would be invalid as to non-assenting creditors. Not until all the creditors except one or two, to whom the debts owing were very small, had signed, were the instrument and the property delivered. After the execution of the instrument, the attaching creditors, believing that they were as well secured thereby as by their attachments, discharged the property from seizure, and caused it to be delivered to the trustees. Nothing remained for Cook & Bro., and their subscribing creditors, to do, to complete the transfer and conveyance of the property, when the erasure was made. The result was the property vested in Martin and Erwin in trust, according to the terms of the instrument. Did the erasure impair their title? It is said that the court found that it "was made when the instrument was in the hands of Martin and Erwin, and they in possession of the property, but before they had proceeded to dispose of it, and before the instrument had been filed for record;" and that neither Martin, Erwin, Cook & Bro., nor any of the creditors, who had knowledge of it, made any objection to the erasure when it was made, or at any time thereafter. This may be true; but it is also true that Cook & Bro., the trustees, and the subscribing creditors, except appellees, never consented to surrender the property conveyed by the instrument, or any part of it, or to release any hold upon it, on account of the erasure. On the contrary, Martin and Erwin still claimed and held it in trust, and proceeded to dispose of it according to the terms of the instrument. The consequence is, the title to it was not divested by the erasure, as to any of the parties who had signed. Surely appellees could not, so far as they were concerned, divest the trustees of title, or impair the same, by a stroke of the pen, against the will of the other parties. That is not a mode of transfer recognized by the law.

It is contended by appellees that they were induced, by the agreement that Martin should be removed and Estes put in his place, to sign the instrument. Did the failure to carry this agreement into effect render the instrument fraudulent and void as to them? It was entered into before the execution of the instrument, rested wholly in parol, and formed no part of the written contract; was of no effect, and was binding on no one. It vested no right; its violation was no legal wrong. No one had a right to rely on it. Consequently there was no fraud in the failure to carry it into execution. On the con-

trary, the evidence shows that it was entered into in good faith by two members of the committee selected to supervise the execution of the trust; and that immediately after appellees signed the instrument they ascertained that one of the subscribers would not consent to the removal of Martin, and reported that fact to the appellees; and that upon the demand of appellees, one or both of them, without authority, caused the erasure of their signatures to be made. The failure to perform a promise made in good faith is no indication of fraud. Long v. Woodman, 58 Me. 49; Bigelow, Frauds, p. 483, § 4, and the cases cited.

There is another reason why appellees cannot attack the instrument in question for fraud. The parties to it had the right to make the agreement contained therein, and bind themselves thereby. Appellees were contracting parties. One of the moving causes and considerations of the transfer, and conveyance evidenced thereby, was their written assent thereto. They have, consequently, concluded themselves from attacking it on the ground that it was executed to defraud creditors. Rapalee v. Stewart, 27 N. Y. 310; Hone v. Henriquez, 13 Wend. 243.

For the errors indicated the judgment of the circuit court is reversed, and this cause is remanded for a new trial.

#### STIEWELL v. STATE.

(*Supreme Court of Arkansas. Jan. 25, 1890.*)

##### CARRYING WEAPONS—CREDIBILITY OF WITNESS.

On a trial for carrying a pistol as a weapon, the defense was that at the time of his arrest defendant was on a journey. Defendant's witnesses testified that defendant had started by train to go to Fort Smith, 50 miles from his home, and while the train was waiting at Coal Hill, 7 miles from his home, he became involved in a difficulty, and was arrested for having a pistol. A witness for the state testified that, after defendant's arrest, defendant's brother had admitted that defendant was spending the evening at Coal Hill at the brother's invitation, and that defendant had intended to go back to his home that night; that nothing had been said about defendant's journey to Fort Smith. Held that, as the jury are the judges of the credibility of witnesses, a conviction would not be set aside on the ground of the insufficiency of the evidence to support the verdict. Richardson v. State, 2 S. W. Rep. 187, followed.

Appeal from circuit court, Johnson county; G. S. CUNNINGHAM, Judge.

H. I. Stiewell was arrested for carrying a pistol as a weapon. He was tried by a jury before a justice of the peace, convicted, and fined \$50. He appealed to the circuit court, where there was a new trial, also before a jury. The state proved by two witnesses that defendant was at Coal Hill, Saturday and Sunday, October 13 and 14, 1888, having in his possession a small pocket pistol. Defendant set up as a defense that he was on a journey. Defendant testified that he went to Pennsylvania, to get miners to work in the coal mines of Stiewell & Co., at Spadra, which he superintended, returning on the passenger train, Friday, October 12, 1888. Had

his pistol with him. Got off of train at Spadra. Gave brief orders to his workmen, stopping only 15 or 20 minutes, and had not time to go to his residence. Boarded a freight train, and went to Coal Hill, to see his brother Ed. S. Stiewell, who resides there, and runs the Coal Hill mines of Stiewell & Co. He and his brother came down to Spadra, on passenger train, Saturday, 13th. They determined that appellant should go on passenger train on Sunday, October 14th, to Fort Smith and Hackett City, Ark., some 50 miles distant, to get miners. Accordingly he went with his brother, on Sunday, intending to go on to Fort Smith, and at Coal Hill got off the train to assist his brother to carry some packages to his residence near by, intending to get back on the train immediately, and go on. When he got off the train, he was attacked by witness Russ, and officers arrested him, and took the pistol from him. He was held until the train left, and he gave bond, and returned that night to Spadra. In this he was substantially corroborated by three other witnesses. In rebuttal, the state called a witness, who testified that after defendant's arrest his brother had said that defendant was doing nothing at Spadra, and had come up to Coal Hill to spend the evening, intending to go back to Spadra that night. Witness heard nothing that evening from either the brother or defendant that defendant was on his way to Fort Smith or Hackett City. There was a verdict of guilty, and defendant was again sentenced to pay a fine of \$50. From an order overruling his motion for a new trial, he appeals, assigning as error that the testimony was insufficient to warrant the conviction.

*A. S. McKennon*, for appellant. *W. E. Atkinson*, Atty. Gen., and *T. D. Crawford*, for the State.

**PER CURIAM.** The judgment is controlled by the principles announced in *Richardson v. State*, 47 Ark. 562, 2 S. W. Rep. 187, and *Davis v. State*, 45 Ark. 359. Affirmed.

#### JENKINS v. NEAL.

(*Supreme Court of Arkansas. Jan. 25, 1890.*)

##### SET-OFF—PROMISSORY NOTES.

A note that has been transferred by the payee cannot be set off, in an action against him by the maker, though suit has been brought on the indorsement.

Appeal from circuit court, Jefferson county; *JOHN A. WILLIAMS*, Judge.

Action by Josephine R. Jenkins against Charles M. Neal, to recover \$960, collected by him on a note which she alleges was placed in his hands for collection, but which he claims was given him as collateral security. Defendant also pleaded a set-off, among the items being a note of plaintiff for \$1,700, which note defendant had transferred to the Hanover National Bank; and, it not being paid, suit had been brought against him on his indorsement. The set-off was allowed,

and judgment given for defendant, and plaintiff appeals.

*White & Parker*, for appellant. *M. S. Bell*, for appellee.

**PER CURIAM.** The defendant, under the facts shown in this case, was not entitled to judgment against the plaintiff upon his set-off. He was not the owner of the note for \$1,700, and to allow the \$960 to him in this action would subject Mrs. Jenkins to a second payment of that sum at the suit of the Hanover Bank. Mrs. Jenkins is not entitled to recover the \$960 of Neal, if the note upon which it was collected was given to him as collateral security, until she pays the \$1,700 note; nor is Neal entitled to judgment for the \$1,700 note, until he has recovered it from the Hanover Bank, by payment of his debt or otherwise. Reversed, and remanded for a new trial.

#### JEFFRIES v. STATE.

(*Supreme Court of Arkansas. Jan. 25, 1890.*)

##### INTOXICATING LIQUORS—SALES BY MANUFACTURERS.

1. Act Ark. March 8, 1879, § 15, prohibiting the sale of liquor, the keeping of a dram-shop without a license, and which provides that "this act shall not be held to apply to one who manufactures and sells wines, \* \* \* and who sells no other liquors," exempts such manufacturer from the penalty for keeping a drinking saloon or dram-shop without license, as well as from the penalty for selling without license. *COCKRILL, C. J.*, dissenting.

2. Under such act, the manufacturer may sell by agents.

Appeal from circuit court, Woodruff county; *M. T. SANDERS*, Judge.

*Stanley & House*, for appellant. *W. E. Atkinson*, Atty. Gen., and *T. D. Crawford*, for the State.

**PER CURIAM.** But three questions arise upon this record: (1) Can a manufacturer of wine sell only by his personal contracts and deliveries, or may he sell through clerks and agents? (2) Does section 15 of the act of March 8, 1879, exempt the manufacturer and seller from the operation of the fourteenth section of that act, as well as from that of section 1? (3) Does the evidence show that defendants kept a dram-shop?

Upon the first, we hold that, as in all other commercial transactions, the manufacturer may sell by his agents.

Upon the second, we hold that by section 15 of said act the manufacturer of wine, who sells no other liquors, is exempted from the operation of the entire act.

As this disposes of the cause, it is unnecessary to decide the third question. Reverse and remand.

*COCKRILL, C. J.*, (*dissenting*.) The license act of 1879 creates two offenses. One is the unlicensed selling of liquor; and the other, keeping a "drinking saloon or dram-shop" without license. The fifteenth section pro-

vides that "this act shall not be held to apply to one who manufactures and sells wines in this state from native grapes or berries, or other fruits, \* \* \* and who sells no other liquors, ardent, malt, vinous, or fermented." Does this provision exempt the wine manufacturer from the penalties denounced against both offenses, or against that of selling alone? The answer must be drawn from the language of the act, and the mischief to be suppressed. The object of the fifteenth section, as we found in an examination of the subject in *Chamberlain v. State*, 50 Ark. 132, 6 S. W. Rep. 524, was to encourage the planting of vineyards and the manufacture of wine. To accomplish the object, it was necessary to allow the manufacturer to sell the product of his vines; but it was not essential to his business that he should be empowered to keep a dram-shop. Accordingly we find that the act does not provide simply that it shall not apply to one who manufactures wines. A general provision of that nature would have left no doubt of the intent of the law-makers to exempt the manufacturer from liability from all the penalties of the act. But it is argued that the drinking-saloon or dram-shop keeper sells, and therefore that he is in terms excepted from all the penalties of the act. To that argument there are two answers:

In the first place, it requires no sale of liquor to constitute a drinking saloon. Dram-drinking may be, and often is, accomplished without price, as by giving away liquor. If it is to be drank then and there, the place where that is habitually done would be a drinking saloon. Such a contingency is no more unlikely than that a free ferry should be run as an adjunct to a whisky business, as we found had been done in *Shinn v. Cotton*, 52 Ark. —, ante, 157. A free drink is as likely to be offered as a free ride, as an attraction to customers. In *Minor v. State*, 63 Ga. 319, a place where the members of a social club dispensed their liquors among themselves, without selling it, was held to be a tipping-house. In this state it has been frequently ruled that one may be guilty of keeping a dram-shop without proof of a sale, as under the old law against unlicensed groceries, construed in *Hensley v. State*, 6 Ark. 252; and in *Marre v. State*, 86 Ark. 222; *Patten v. City of Centralia*, 47 Ill. 370. The statute under consideration declares that each day the dram-shop is kept shall be considered a separate offense, but it may be kept without a successful sale on each day. Selling without a license does not alone constitute the offense of keeping a drinking saloon or dram-shop. Even habitual selling, to the extent of carrying on business as a liquor seller, is not enough. *State v. Inness*, 53 Me. 539. Each is a distinct offense against the law, but in neither case is the offender punished for keeping an unlicensed dram-shop. The latter offense is distinct from each of the others; and the sale of liquor, when offered in evidence to sustain a conviction, is at most only one of its constituent elements of the offense. It is not itself the offense.

The absurdity of pronouncing one guilty of keeping a drinking saloon if it is kept for some purpose other than or without the sale of liquor, and not guilty if kept to sell liquor, or by selling, is not to be attributed to the legislature. And yet, as the act professes to exempt only the manufacturer of wine who sells, that is the logical reduction of the appellant's contention.

The second reason to be assigned against the argument is that it is but fair to presume that the legislature used the word "sell" in the fifteenth section in the same sense given to it in all the other sections of the act. That being true, it would follow that, when it is declared in that section that the act shall not apply to one who sells wine of his manufacture, exemption from the penalties denounced against selling only were in contemplation. By no other construction is any meaning at all given to the clause "and sells;" for, if it is omitted altogether, the action would have the meaning the court now holds it has with it. But the rules of construction which the courts adopt as guides to the legislative intent require that some meaning should be given these words. Believing that the exemption claimed by the appellant is not within the letter of the exception, and not within the evil it was intended to relieve against, I think the judgment should be affirmed.

#### CAMPBELL v. JONES et al.

(Supreme Court of Arkansas. Feb. 1, 1890.)

##### HOMESTEAD—JUDGMENT—DEED.

1. Defendant exchanged his homestead with B. for 1,600 acres of land, with an understanding at the time the conveyances were made that defendant would divide the lands conveyed to him among his children, and would then cancel B.'s deed to him, and have B. make deeds to the children. Defendant, after making the division among his children, canceled B.'s deed to him, and B. conveyed 1,440 acres of the land to the children, they paying nothing therefor, and 160 acres to defendant. Held, that no title vested in the children, and, the 160 acres being all that was allowed defendant as a homestead under the constitution and laws of Arkansas, the portion conveyed to them was liable for defendant's debts.

2. A judgment that has been standing for 10 years cannot be attacked collaterally, where no motion has ever been made to vacate or modify it, and no good reason is shown for the failure to do so.

3. Where a deed is delivered directly to the grantee, it cannot be treated as an escrow.

Appeal from circuit court, Arkansas county; JOHN H. WILLIAMS, Judge.

Gibson & Holt, for appellant. W. H. Halliburton, for appellees.

HUGHES, J. On the 1st day of August, 1885, appellant recovered a judgment against John C. Jones, one of the appellees, and the father of the other appellees, in Desha circuit court, in Arkansas, in the sum of \$3,661.93, and on 23d of October, 1885, had an execution issued on said judgment, which, on 23d of December, 1885, was returned unsatisfied. He then filed his bill in equity to set aside as fraudulent, and have declared void as to his

debt, certain conveyances of land which John C. Jones had procured to be made to his children by one Talmadge E. Brown. The bill was dismissed, and he appealed. John C. Jones owned, near Des Moines, Iowa, a 40-acre tract of land, which had been set aside to him as a homestead, and which, under the laws of that state, could not be taken in execution for his debts. In November, 1877, John C. Jones exchanged his 40-acre homestead with one Talmadge E. Brown for 1,600 acres of land, in what was then a part of Desha county, in the state of Arkansas, but which was afterwards attached to Arkansas county. He had the deed to the Arkansas lands made to himself, and conveyed his homestead in Iowa to Brown, with an understanding, at the time the conveyances were made, that he would visit Arkansas, examine the lands purchased of Brown, determine how he would divide them between his children, and that he would then cancel and deliver up Brown's deed to him for the lands, and that Brown would thereupon make deeds according to his division of the lands and his directions. He canceled, in writing across its face, Brown's deed to him. He and his wife signed and acknowledged the cancellation, and delivered the deed to Brown, who then made to John C. Jones a deed for 160 acres, and to his children deeds for 1,440 acres of the Arkansas lands. Two of the children were minors. The lands were wild and unimproved. The father, John C. Jones, settled upon and improved, and claims as a homestead, the 160 acres conveyed to him. The only consideration for the conveyances from Brown to John C. Jones and his children for the Arkansas lands was the conveyance by John C., the father, of his homestead in Iowa to said Brown. No consideration moved from the children to the father. At the time John C. Jones made this exchange of lands with Brown there was a subsisting unsatisfied judgment against him in favor of appellant, Campbell, in Iowa, where his homestead was situated, and that judgment was the foundation of the judgment in Desha county, Ark., and was recovered in the supreme court of Iowa on appeal, March 18, 1875. 40 Iowa, 691. No motion was ever made or step taken to set aside, vacate, or modify the judgment recovered in Desha county, Ark., and no good reason is given for the failure by appellee John C. to make such motion, or take such step, and yet he asks to be allowed to attack the judgment collaterally, which it is hardly necessary to say cannot be done.

Appellees insist that the exchange of his homestead in Iowa for the lands in Arkansas was not made to defraud his creditors, but in good faith, and to procure homes for his children; that neither his homestead in Iowa, nor the proceeds of the sale thereof, when sold by him, could have been taken in execution for his debts; that he had a right to reinvest the proceeds of the sale of the same for the benefit of his family, and that the property

purchased therewith could not have been taken in execution for his debts; that, his homestead in Iowa being exempt, there were no creditors as to it, and that any disposition he might have made of it would not have been a fraud upon his creditors; that having invested his homestead, thus exempt, in Iowa, in lands in Arkansas for himself and his children, the lands in Arkansas taken in exchange cannot be taken in execution for this debt. It is also contended for appellees that the deed first made by Brown to John C. Jones was an escrow, and that the title to the lands described therein did not pass thereby, nor until the conveyances were made by Brown to him and his children, according to John C. Jones' division of the lands, and after the cancellation of the first deed. But this theory is not supported by the evidence, the preponderance of which, as to this, is that the deed first made by Brown to appellee John C. Jones for all the lands was delivered to him directly. There is no evidence to the contrary.

It is well settled that a voluntary conveyance, made to hinder, delay, or defraud creditors, is void as to them; the grantor being insolvent without the property so conveyed. *Bank v. Norwood*, 50 Ark. 42, 6 S. W. Rep. 823; *Adams v. Edgerton*, 48 Ark. 419, 8 S. W. Rep. 628; *Hershy v. Latham*, 46 Ark. 542; *Reeves v. Sherwood*, 45 Ark. 520; *Danley v. Rector*, 10 Ark. 225; *Leach v. Fowler*, 22 Ark. 145; *Bertrand v. Elder*, 28 Ark. 494; *Massie v. Enyart*, 32 Ark. 251; *Oliphant v. Hartley*, Id. 465; *Bennett v. Hutson*, 38 Ark. 762, 767. But it is as well settled that it is incumbent on a creditor, who complains of a fraudulent conveyance, to show that his debtor has disposed of property that might otherwise have been subjected to the satisfaction of his debt. Until this is done, no injury appears. Creditors cannot complain that a conveyance of a homestead is fraudulent as to debts, for the payment of which it cannot be taken in execution. They could not reach it if not conveyed, and hence the motives for the conveyance do not concern them. *Stanley v. Snyder*, 43 Ark. 430; *Erb v. Cole*, 31 Ark. 557; *Clark v. Anthony*, Id. 546; *Meux v. Anthony*, 11 Ark. 411; *Hempstead v. Johnston*, 18 Ark. 124; *Bogan v. Cleveland*, 52 Ark. —, ante, 159, (October 12, 1889.) But when the deed to the 1,600 acres of land in Arkansas was made and delivered to appellee John C. Jones, the title thereto vested in him, and the same became liable, *eo instanti*, to sale under execution for the payment of his debts, except such part as he might be entitled to fix and claim a homestead upon. That it was not competent for him to divest the title thus acquired by simple cancellation and surrender of the deed, first made to him by Talmadge E. Brown, for the 1,600 acres of land in Arkansas, is, we apprehend, well settled. *Bird v. Jones*, 37 Ark. 195; *Tallaferro v. Rolton*, 34 Ark. 503; *Neal v. Speigle*, 33 Ark. 63; *Strawn v. Norris*, 21 Ark. 80; *Wil-*

son v. Hill, 13 N. J. Eq. 143; Bank v. Eastman, 44 N. H. 438; Holbrook v. Tirrell, 9 Pick. 108; Gilbert v. Bulkley, 5 Conn. 262; Fawcetts v. Kimmey, 33 Ala. 264; Conway v. Deerfield, 11 Mass. 332; Lord v. Morris, 18 Cal. 491; Rogers v. Rogers, 53 Wis. 36, 10 N. W. Rep. 2; 1 Greenl. Ev. § 265; Steel v. Steel, 4 Allen, 422; Holmes v. Trout, 7 Pet. 171; Patterson v. Yeaton, 47 Me. 308; Fonda v. Sage, 46 Barb. 122; Howard v. Huffman, 3 Head, 562.

The appellee John C. Jones is entitled to claim and have set aside to him as a homestead the 160 acres of land conveyed to him by Talmadge E. Brown, and claimed by him as a homestead in his amended answer, and upon which he had fixed his homestead before the commencement of this suit, and before the recovery of appellant's judgment in Desha county. More than this he could not claim under the constitution and laws of Arkansas, which limit the homestead to 160 acres of land. The title to all the lands sought to be subjected to the payment of appellant's debt having once vested in him, and become subject to his debts, save that which he might claim as his homestead, the appellee John C. Jones could not, by cancellation of the conveyance to him, and the procuring of conveyance to be made to his children, which were voluntary, defeat appellant's right, as one of his creditors, to have the lands thus conveyed subjected to the satisfaction of his debt.

It is insisted that appellant's right to relief was barred before the commencement of his suit. But the lands were wild and unimproved, and it follows from what has been said that no title ever vested in the children of appellee John C. Jones to the 1,440 acres of land conveyed to them by Brown, as he had previously conveyed his title to John C. Jones, the father, in whom it still resides, not having been divested by the cancellation and surrender of the first deed made to him for all the 1,600 acres of land by Brown. Besides, in the answers filed by the children of John C. Jones to the appellant's complaint, they aver that they did not know that deeds to the lands had been made to them until 1882. The complaint in that case was filed the 4th day of February, 1886. The decree of the Arkansas circuit court in chancery is reversed, with directions to the court below to enter a decree in accordance with this opinion.

#### LOUISVILLE & N. R. CO. v. GILBERT *et al.*

(Supreme Court of Tennessee. Jan. 30, 1890.)

##### CARRIERS—LIMITING LIABILITY.

1. A railroad company that has made no reduction in its freight rates in consideration of a stipulation in a bill of lading exempting it from loss by fire; that has furnished its agent with no form for a bill of lading not containing the "fire clause;" and that has given him no authority to submit to the shipper the alternative of paying a higher rate for a shipment with the common-law responsibility attaching to the company,—is liable

for goods destroyed by fire, though the company's officers testify that the company had two freight rates,—one under the restricted liability, the other without,—and that, if the shipper had so requested, permission would have been given to ship under a contract without the "fire clause" in it. The stipulation, being unreasonable and unjust, is not a valid limitation of the company's common-law liability as a common carrier. *FOLKES, J., dissenting.*

2. Where the railroad company has given its customers no choice as to whether they would ship with or without the "fire clause," the acquiescence of the shipping public in the form of the bill of lading containing the "fire clause" does not establish the reasonableness of the exemption.

3. Newly-discovered facts in respect to matters occurring subsequent to the shipment and loss of the goods, and in nowise connected therewith, afford no ground for a new trial of an action against a railroad company for their destruction by fire.

Appeal in error from circuit court, Davidson county; *WILLIAM K. MCALISTER, Jr., Judge.*

*Baxter Smith*, for appellant. *Dickinson & Frazier*, for appellees.

*CALDWELL, J.* On the 18th day of October, 1885, W. F. Embry, as agent of Gilbert, Parks & Co., delivered seven bales of cotton to the Louisville & Nashville Railroad Company at Columbia, Tenn., for shipment to his principals, at Nashville. Before its departure, and while yet in the depot of the company at Columbia, it was destroyed by fire. Thereafter Gilbert, Parks & Co. sued the railroad company for non-delivery. The action originated before a justice of the peace, from whose judgment there was an appeal to the circuit court at Nashville. Here the case was tried by his honor, the circuit judge, without a jury, and judgment was rendered in favor of the plaintiffs for the agreed value of the cotton, interest, and costs. The railroad company has prosecuted an appeal in error to this court.

There is no controversy about the consignment, loss, and value of the cotton; nor is there any denial that the defendant company would be liable for the loss, under the rules of the common law. These are all conceded. But it is insisted in behalf of the company that its common-law liability was limited by special contract, and that special contract is relied upon in bar of any recovery. The bill of lading under which the shipment was to be made is produced in evidence. It contains a fire clause which stipulates that the company shall not be liable for loss or damage by fire. This is the special contract through which exemption from liability is sought. The plaintiffs deny the validity of that stipulation, and thus the issue for our determination is presented.

It is now too well settled to admit of debate that the common-law liability of common carriers may be limited by special contract, even to the extent of denuding them of the character of insurers, except as against their own negligence, or that of their agents and servants; and the limitation may be, and is generally, embraced in the bill of lading de-

livered to the shippers at the time. It is not every such special contract, however, that is effective. To be valid, it must be fairly obtained, and just and reasonable. Under the English railway and canal traffic act of 1854, (17 & 18 Vict. c. 31, § 7,) such stipulations are called "conditions," and they can be upheld only when they "shall be adjudged \* \* \* to be just and reasonable." The same criterion is uniformly applied in this country, and no limitations of the carrier's common-law liability, in whatever form made, will afford protection unless just and reasonable in the eyes of the law. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Hart v. Railroad Co.*, 112 U. S. 338, 5 Sup. Ct. Rep. 151; *Marr v. Telegraph Co.*, 1 Pickle, 542, 3 S. W. Rep. 496; *Transportation Co. v. Bloch*, 2 Pickle, 397, 6 S. W. Rep. 881. Though such is the generally accepted test, the use of these words ("just and reasonable") will not always meet the requirements of investigation. What will be just and reasonable in one case may not be so in another. The justness and reasonableness of the condition or limitation must of necessity depend upon the peculiar facts and circumstances of every case,—the nature of the article to be conveyed, the hazard of the transportation, the surroundings of the parties at the time, and the mutual advantages given and received.

Referring to the burden and weight of proof, an eminent British author says: "The burden of proving the reasonableness of a condition lies upon the company. The most cogent evidence in favor of reasonableness is to show that the condition was not forced upon the customer, but that he had a fair alternative of getting rid of the condition, and yet agreed to it." *Redman, Law Ry. Carr.* (2d Ed.) p. 66; citing *Lewis v. Railway Co.*, 47 Law J. Q. B. 181. In further treating on the same subject, the same writer, on page 71, says: "To enable a company to rely on an alternative contract offered to the customer, it must appear that such alternative was itself reasonable. A company cannot offer the choice of two unreasonable conditions, and then rely on the one actually chosen." Citing *Lloyd v. Railway Co.*, 15 Ir. C. L. 37. To the same effect as the latter quotation is the *Marr Case*, decided by this court in 1886. There the telegraph company was shown to have had four different rates of charges, with as many different degrees of liability. They were all held to be unreasonable, and the fact that the customer choosing one rate had the option of taking any one of the other three was of no avail to the company, in an action for damages. *Marr v. Telegraph Co.*, 1 Pickle, 545, 3 S. W. Rep. 496. The alternative must be both reasonable and *bona fide*. If either unreasonable or colorable only, it will be unavailing as a defense to the action against a carrier. A company standing before the public as a common carrier, and enjoying the advantages and franchises as such, must be ready to do the business of a common carrier, with the

full measure of responsibility imposed by the common law; and it may at the same time offer to do the same business with a limited liability, the limitation resting upon a sufficient consideration. An offer or readiness to transport the goods of its customer with the one or the other degree of responsibility, at his option, is as little as can be required of any common carrier. Less than this does not present a *bona fide* and reasonable alternative. Reduction of freight charges is the usual consideration for the diminution of responsibility on the part of the company. One of the leading principles deducible from the English cases is stated by Mr. Redman in these words: "A condition is reasonable which reduces a company's liability to a minimum, if it is coupled with compensating advantages to the customer, (such as cheapness of carriage,) and the latter has the alternative of getting rid of the condition by paying a reasonably higher rate." *Redman, Law Ry. Carr.* p. 75, § 2. This language puts the law clearly, and meets our unqualified approval. It is reproduced as the law of the two countries in a recent American work. 2 Amer. & Eng. Cyclop. Law, 819.

These clauses, similar to the one before us, when based upon a sufficient consideration, have by the supreme court of the United States, and by this court, been held to be valid, and to protect the company from liability for loss by fire, caused otherwise than by the negligence of the company or its agents. *York Co. v. Railroad Co.*, 3 Wall. 107; *Dillard v. Railroad Co.*, 2 Lea, 288. In the latter case, the court said: "A lower rate of freight, or something equivalent, will be a sufficient consideration for the stipulation." 2 Lea, 293. In the former it is broadly intimated that a reduction of charges will be presumed to be the consideration for such a stipulation, the language of the court being: "\* \* \* There is no evidence that a consideration was not given for the stipulation. The company, probably, had rates of charges proportioned to the risks they assumed from the nature of the goods carried, and the exemption of losses by fire must necessarily have affected the compensation demanded." 3 Wall. 113. In speaking of a stipulation for a limited liability in a railroad ticket, the New York court of appeals said: "Like all contracts, to render such an one valid, it is indispensable that it have some consideration, which it would not have if the passenger paid the full fare fixed by law. \* \* \* If the service is reduced, the amount of the reward must be reduced in proportion; and, if the company is relieved from risk, it must make compensation for that relief by the reduction of fare or otherwise." *Bissell v. Railroad Co.*, 25 N. Y. 442. The performance of an act which a party is under a legal obligation to perform does not constitute a good consideration for a promise. *Add. Cont.* § 4. Hence a mere agreement by a common carrier to transport goods furnishes no consideration for a stipulation for less



than common-law liability. Lawson, Carr. § 212.

Having laid down the principles of law by which this case must be decided, we proceed to give them application to the facts disclosed on the trial. In doing this it is necessary to state the material facts not already recited. I. Bailey says: "Have been freight agent at Columbia for the L. & N. R. R. for about 9 years. I received the cotton in question from W. F. Embry, agent of plaintiffs. Nothing was said about accepting the bill of lading. No objection was made to the same. The regular rate on the bill of lading was one dollar a bale. The regular tariff rate for each 100 pounds is 37 cents, and, estimating a bale of cotton at 500 pounds, would make the cost of shipping between those points (Columbia and Nashville) \$1.85 per bale. If this bill of lading had been declined, (the one the cotton was shipped under,) the shipper would have had to ship by the regular tariff rates, \$1.85 per bale, without the fire clause. I do not know how long this form of bill of lading has been in use, but it has been in use for several years, and was acceptable to the shipping public, and no complaint had been made of it. I do not think there was any fire clause in the one used prior to this. At the time the cotton was shipped I had no other form of bill of lading to ship cotton under. I had no authority as freight agent to make any different contract, or to ship goods under any other bill of lading, than the one under which these goods were shipped. Nothing was said between Mr. Embry and myself about a special rate, but he took the bill of lading offered without objection, and shipped under this. I would not have shipped this cotton any other way. The rate of \$1.00 a bale has been such about six years, under the bill of lading such as this cotton was shipped under. I have no bill of lading to issue where goods are shipped under tariff rates. No cotton has ever been shipped under tariff rates. Every shipper in Columbia knows that I have the tariff rates posted up in my office. Have told W. F. Embry about the tariff rates, but do not remember when. The rate on cotton was the same before the insertion of the fire clause as it is now. If objection had been made about this bill of lading, I would have refused to receive the goods until I had authority from Mr. Champe. A schedule with the exemptions was posted up in a conspicuous place in my office at Columbia, but the name 'cotton' did not appear in it, but it would have come under our losses; and had frequently talked with Mr. Embry, plaintiff's agent, about the two rates before this shipping." Mr. Champe testified, "I am general freight agent of the L. & N. R. R. Co. at Nashville. If Mr. Bailey, our freight agent at Columbia, had informed me that Mr. Embry refused to ship his cotton under this bill of lading, in this case I would have instructed him (Mr. Bailey) to ship the said cotton by the regular rates of 37 cents per 100 pounds, which would have been done

by telegraph. The only two rates we have are the rates under this bill of lading and the tariff rates. This bill of lading, as far as I know, has been in use a long number of years." The foregoing is the whole of the testimony of these two witnesses. It is quoted at length, to show the whole case as made by the defendant. It introduced no other witness. Leonard Parks, one of the plaintiffs, stated, in substance, that he had been a shipper over the Louisville & Nashville Railroad Company many years; that the Merchants' Exchange at Nashville protested against the introduction of the fire clause in the defendant's form for bills of lading, and gave the company notice of that protest; and that the rate from Columbia to Nashville was not reduced when the fire clause was inserted, but remained the same as before.

Under these facts, we agree with the learned circuit judges in holding that the company is liable for the value of the cotton. The special contract for exemption from liability for loss or damage by fire is by this record shown not to be just and reasonable. It was the primary duty of the company to hold itself in readiness to transport goods, under the rules of the common law, with all the responsibility of a common carrier. This it did not do. Its agent was furnished with no form for bill of lading for such a shipment. More than that, he had no authority to receive the goods for shipment with such responsibility attaching to the company. He says he had no authority to make any contract but the one he did make, and that he "would not have shipped this cotton any other way." He submitted no alternative to the plaintiffs, and had no authority from his principal to do so, and would not have done so if requested. True, he says he would have asked for permission to ship under contract without fire clause if the bill of lading with it had been refused by the customer, and Mr. Champe says he would have granted such permission. What stronger proof could there be that the company was not offering, or ready, or was pretending, to do business, except upon the most restricted liability? Why the necessity of asking and granting permission to do a thing which the law requires it to be in constant readiness to do? This is the permission that should have been granted in the first instance. From the moment of his employment, the agent should certainly have been clothed with authority to do that which the law required him to do, and after that he could have been authorized to do that which the law permitted him to do. That he frequently talked with Embry "about the two rates" is an unimportant circumstance as we see it. If he at the same time told Embry what he tells the court,—that he was authorized to issue but the one bill of lading, and that he would ship the cotton no other way,—he would certainly not have made the case any better for the company; and, if he withheld those additional facts, they remain facts in the case neverthe-

less, and cannot be rejected because not disclosed to the customer.

Again, no consideration for the fire clause passed to the shipper. The responsibility of the carrier is reduced to a minimum, it is true, but there is no corresponding reduction in freight charges. There is no reciprocal concession of legal rights by carrier and shipper. The advantage is all on one side. It is distinctly shown that the rate charged under the bill of lading in this case is the same that was charged before the insertion of the fire clause, and that no reduction was ever pretended to be made on account of the introduction of such clause, and the customer's assent thereto. The agreement to carry for a price which the company was accustomed to charge, without the fire clause, is no consideration for the diminution of liability by the insertion of such clause. It is said that it is bad faith on the part of plaintiffs to complain of this clause now, when they may have received the benefit of reduced rates in the past on account thereof. It is unnecessary to decide what force there might be in the suggestion, if based upon the real facts of the case. The answer to it upon this record is that no such benefit has been enjoyed by the plaintiffs. It is true one of the plaintiffs says he has been the defendant's customer for many years, both before and since the introduction of the fire clause; but it is also true, as already seen, that the price charged has been the same all the time.

It is still further suggested that the shipping public at Columbia have acquiesced in this form of bill of lading for some years without complaint. Such is the proof in the case; and this fact would go towards establishing the justness and reasonableness of the exemption claimed, if the company had all the while been ready to carry goods with or without the fire clause, and had accordingly given its customers a fair opportunity of selecting for themselves which they would take. But acquiescence alone will not justify the limitation. The words of Mr. Justice BRADLEY in the Lockwood Case are pertinent at this point: "The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgie, or stand out and seek redress in the courts. His business will not admit such a course. He prefers rather to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business." From defendant's own showing, our conclusion is that the stipulation relied upon is invalid, and affords no protection whatever.

The second and last assignment of error relates alone to new facts declared in an affidavit produced on the motion for a new trial. As to this, it is sufficient to say that such facts, if considered, could not possibly have changed the result, being alone with respect to matters transpiring subsequently to the

shipment and loss of the cotton, and in no wise connected therewith. Let the judgment be affirmed.

FOLKES, J., (*dissenting*.) I regret exceedingly my inability to concur with the majority of the court in the opinion just rendered. To my mind, a most dangerous and perplexing innovation is established, though clothed in the garb of harmless and well-settled propositions. The objections to the opinion do not lie on the surface, but lurk in the application of those general principles to the particular facts of the case. Let us analyze the decision, and ascertain what is exactly the point adjudged. It is this: That a railroad company, dealing with a merchant who has been engaged for twenty years as a shipper over its road, issues a bill of lading for a reduced rate, containing the familiar, if not now almost universal, clause of exemption from loss by fire. The shipper has been in the habit of shipping the same character of freight, on the same character of bill of lading, for six or nine years, containing the same exemption. Nearly three years after the goods were lost by fire, without negligence on the part of the company, (so far as any proof tends to show,) the shipper institutes a suit before a magistrate, in which it is stated upon the face of the warrant that it is for a "debt due by failure to carry and deliver cotton according to contract." A judgment is rendered for the plaintiff, simply and alone because it was developed in the proof that the agent of the railroad company did not have on hand, at the time of shipment, any other form of bill of lading than the one used, and that no demand or request was made for any other form of bill of lading; but that, if the shipper had requested a form of bill of lading with the common-law liability of the carrier unlimited, there would have been delay in the issuance of the same until such a time as it would have taken the agent to telegraph from Columbia, the point of shipment, to Nashville, to the office of the head of the transportation department, when a reply would have been instantly returned authorizing the agent to issue the form of bill of lading requested; in which event the freight charge would have been \$1.85 per bale, instead of \$1 per bale, the amount charged upon the bill of lading issued with the limited liability. That it is between 40 and 50 miles from Columbia to Nashville, and it does not appear that there was any immediate occasion for haste in the shipment of the cotton, nor that the time taken in telegraphing for instruction would have delayed shipment beyond the period that it would necessarily have been delayed in waiting for the next regular freight train.

Such a conclusion and such a holding is not sustained by the authorities as I understand them. On the contrary, it appears to me to be in direct opposition to the principles settled in cases of the highest authority, which have been approved and announced by

our own court. It is stated to be placed, by the majority of the court, upon the general principle that all contracts for the limitation of the common-law liability of carriers must be fair and reasonable,—a doctrine sound in its statement, but, as I respectfully submit, misconceived in its application to the case at bar. The reasonableness *per se* of the rule which allows a stipulation for exemption from loss by fire, not occasioned by the negligence of the carrier, is abundantly established by the overwhelming weight of authority; and in the language of this court in the case of *Dillard v. Railroad Co.*, 2 Lea, 293, "it subjects to less restraint the great interests of the commerce, upon which so much of our modern civilization rests;" quoting in this case the language of the supreme court of the United States in *Railroad Co. v. Lockwood*, 17 Wall. 360, where it is said by Mr. Justice BRADLEY: "A modification of the strict rule of responsibility, exempting the carrier from liability for accidental losses, where it can be safely done, enables the carrying interest to reduce its rates of compensation, thus proportionately relieving the transportation of produce and merchandise from some of the burden with which it is loaded." Again: "The natural presumption would be that the shipper was apprised of the contents of the receipt, and assented to its terms, and that a lower rate of freight, or something equivalent, will be a sufficient consideration for the stipulation;" and, to quote from the language of Judge McFARLAND in the case of *Olwell v. Express Co.*, 1 Cent. Law J. 188, "this \* \* \* would certainly be so where the terms of the contract were in accordance with the course of business of the company, to which the shipper had assented in previous transactions." The length to which the opinion of the majority goes, makes extremely pertinent the language of this court in the case of *Dillard v. Railroad Co.*, supra: "Some courts, while yielding to the current of authority on the main point, have at the same time run counter to it, and involved themselves in useless refinements, by refusing to recognize what Judge McFARLAND very properly calls the 'natural presumption' arising from the acceptance by the shipper of a bill of lading embodying the stipulations, and by requiring an uncertain quantum of evidence *aliunde* to establish a contract. It were better to adhere to the old law, and refuse to recognize the modern innovations, than to resort to such niceties, which must lead to harassing litigation, and render it difficult, if not impossible, for the profession to advise. It is the dictate of common sense that, when a written instrument is received in the execution of a contract, its contents are known and assented to, and *a fortiori* if there be nothing to raise a contrary presumption."

Now, I respectfully, but earnestly, submit that the opinion of the majority in this case is doing just exactly what was so earnestly reprehended in the case from which we have

quoted, where the language of Judge McFARLAND in the *Olwell* Case was adopted, as deploing the introduction of any modification requiring an "uncertain quantum of evidence, and resorting to such niceties as must lead to harassing litigation, and render it difficult, if not impossible, for the profession to advise." Heretofore, when the shipper presented to his counsel a bill of lading containing the "fire clause," further inquiry was made for the ascertainment as to whether or not there had been any negligence on the part of the company, and, when told that there was no proof of negligence attainable, the lawyer could with certainty state that there was no liability. Under the new order of things which this opinion establishes, as I understand it, the attorney would proceed to inquire whether the shipper had been tendered or offered any other form of bill of lading, and when told that no such offer had been made he would then be told the company was liable because he, the shipper, "had not had an opportunity of exercising the option" of accepting a limited or unlimited liability bill of lading; and if the shipper should further inform his attorney that he had made no request for a different form of bill of lading, and that he had for years been shipping on identically the same form of bill of lading, he would be told that that would not prevent a recovery for the value of the freight, for the reason that in the case of *Louisville & N. R. Co. v. Gilbert*, it had been decided that the railroad company would be liable unless it should, with the burden of proof upon it, affirmatively show that such opportunity had been tendered to the shipper, and declined by him; and that it would make no difference if in 20 years as a shipper no such bill of lading had been asked for, where the company had failed to provide such a form, or authorized its agent to issue one, if the shipper had asked for it. In other words, it is not necessary to show that the shipper wanted another form of bill of lading, and it is not sufficient to show that he knowingly accepted the bill of lading containing the "fire clause," but you must go further, and ascertain whether the agent of the railroad company would have issued him another form, containing the common-law liability, if he had asked for it. I very much fear that such a conclusion cannot but lead to unnecessary litigation, and great confusion and uncertainty in the administration of justice. It invites and renders necessary the performance of an idle ceremony, meaningless and deceptive, as a preliminary to the obtaining of the benefit by the common carriers of the country of the privilege that is abundantly and universally admitted to exist. The carrier must have on hand and tender a form of bill of lading which the previous dealings with the shipper has informed the carrier is not wanted. The plaintiff shows by his own testimony that he knew all the facts; that for 20 years he had been a shipper of cotton over this road. The opin-

ion of the majority is not as full as it might be in its statement of the testimony of the plaintiff Parkes, in this: that after stating that the Merchants' Exchange, in Nashville, had protested against the introduction of the "fire clause" in the defendant's form of bill of lading, and had given notice of that protest, it fails to show that this was after the loss of these goods by fire, or, at least, that the language of the witness is susceptible of this interpretation. The language of this plaintiff is as follows: "As a member of the Merchants' Exchange I know that the exchange held a meeting and protested against the insertion of this fire clause in this bill of lading and a copy of this protest was served against the railroad company after the loss of these goods by fire. I went to Louisville to see Mr. Knott who is the general traffic manager of this railroad. I told him that myself and other merchants of Nashville were anxious that he should make two rates for the shipment of cotton, one of which should exclude the fire clause." There being no punctuation of the above in the transcript, it is difficult to say whether the language, "after the loss of these goods by fire," applied to the time of the protest, or to the time of his going to Louisville to see Mr. Knott. But it is immaterial, for the reason that, if it applies to the time of the protest, it shows affirmatively that he had knowledge of the fire clause, and that with that knowledge purposely accepted a bill of lading giving him the benefit of a reduced tariff, without calling for the common-law liability; and, if it applies to the time of his going to Louisville, of course it was incompetent, and should not have been admitted in evidence.

That the "fire clause" is not unfavorably considered, is shown by the case of *York Co. v. Railroad Co.*, 8 Wall. 107. In that case the plaintiff's positions were—*First*, that Trout & Co., agents at Memphis, who shipped the cotton and received the bill of lading, had no authority to consent to such a condition; *second*, that it did not appear that any consideration existed for such limited liability in the reduced rate of fare or otherwise. Let us see how this tribunal answered these questions. It said: "The first of these positions is answered by the fact that it nowhere appears that the agents disclosed their agency when contracting for the transportation of the cotton. So far as the defendant could see, they were themselves the owners. The second position is answered by the fact that there is no evidence that a consideration was not given for the stipulation. The company, probably, had rates of charges proportioned to the risks they assume from the nature of the goods carried, and the exception of losses by fire must necessarily have affected the compensation demanded. Be this as it may, the consideration expressed was sufficient to support the entire contract made." This case has, in terms, been approved by this court in *Olwell v. Express Co.*, *supra*. If the spirit

of this decision is followed, there is no trouble in reaching a fair and reasonable result in the case at bar. It would say that Embry did not disclose his principals. He confessedly knew of the fact that the company had two rates,—one with, and one without, the "fire clause,"—for he had, in the language of the witness, "frequently talked with Embry, the plaintiff's agent, about the two rates before this shipment," and that his knowledge and acceptance was the knowledge and acceptance of the plaintiff. Second, it would say that the proof shows that if dissatisfaction had been expressed with the \$1 rate, accompanied with the limited liability, the shipper could have obtained the \$1.85 rate, if he had waited for a few moments for a telegram from the agent at Nashville, and that, in the absence of proof that the necessity for the shipment of the cotton was so pressing that a delay would have been injurious, such delay would not be wrong or negligence on the part of the carrier, especially where it does not appear that there would have been any delay in the shipment; for the company was under no obligation to send this cotton by a special lightning express, but had the right to hold it until the next regular freight train coming to Nashville. It would further say that a limitation in favor of the company, and with a reduced rate, will not deprive the company of its benefit, when the shipper has had the advantage of such reduced rate, simply because it appears, in a suit brought nearly three years afterwards, that the company did not have on hand a form of common-law bill of lading. Moreover, it would have been held that, having gotten the benefit of the lower rate for the six or nine years, it was too late now to say that he was not bound because he was not offered any other rate.

The shipper is charged with knowledge of the law that authorized him to demand a common-law liability of the carrier, and his acceptance in silence of the bill of lading with the "fire clause" is a waiver of such demand or right, in the absence of fraud, where it appears that there was a difference in the freight charges for a limited and for an unlimited liability. Not having spoken when it was his duty to have done so, the law now enjoins silence, when he has for years pocketed the fruits of his silence heretofore. The limitation of the carrier's liability as an insurer against fire is not to be confused with limitations that are not favored, and with efforts to avoid the consequences of the negligence of the carrier or his agents. When, therefore, we have to deal with a limitation against loss by fire, without fault or negligence on the part of the carrier, there is no reason why the same general principles applicable to knowledge and estoppel between individuals other than carriers should not apply. For instance, the presumption of acquiescence is made where the shipper receives a bill of lading containing this limitation without complaint; and that he is es-

topped to say that he was ignorant of the contents of the bill of lading, as we have already seen, is fully established in this state in Railroad Co. v. Brumley, 5 Lea, 401, and Dillard v. Railroad Co., 2 Lea, 288. But suppose our predecessors had looked at the cases cited, and decided them in the spirit and on the logic of the case at bar, such presumption and estoppel would have been refused recognition. In the language of the opinion of the majority here, the inquiry there would have been, is the limitation "fair and reasonable," to be determined upon the facts of each case as it arises, "with the burden of proof on the carrier to show it fair and reasonable in each case?" And it would have been held unfair and unreasonable to bind the shipper to a loss that, in his ignorance of the terms of the bill of lading, he had never assented to.

But we have only to turn to approved textbooks to see that this fire limitation is favored, and that knowledge does estop in a contract with a common carrier, as with other people. Mr. Hutchinson, in his excellent work on Carriers, says, speaking of knowledge: "The theory upon which they all stand is that if a party, knowing his published terms, employs the carrier without objection, a contract according to those terms is implied between the employed and employer." Again, this author says: "Every man of ordinary intelligence knows that no individual or company engaged in the business of carrying to distant places now undertakes to carry his goods subject to the old common-law liability of the carrier. He knows, moreover, that bills of lading are constantly given, not only as the evidence of the receipt of the goods, but as an express and direct notice that they will be carried on certain terms. Knowing this, he cannot be willfully blind, and plead ignorance, when it was his duty to know; and knowing in such cases is assenting. If it was his intention to hold the carrier to his common-law liability, he should have said so, and have either declined to employ him, or sued him for his refusal, after tendering a reasonable sum for his services or risk." And he says this is in accordance with the English and American decisions, and adds: "Nor is there anything unreasonable in this." Hutch. Carr. §§ 238-240. Now, if this be true of a shipper making his first shipment, how much more emphatic is it by way of estoppel against a shipper of twenty years with the same company, where the last six or nine years' business was upon the identical bill of lading sued on here. Does not his previous acquiescence and acceptance of this particular bill of lading, without complaint or demand, amount to a waiver of the offer or tender of another form? It would seem so. And if the offer or tender be waived, then it must be that the company need not, as to such shipper certainly, have had on hand, or been prepared to issue *instantly*, a common-law bill of lading, that the shipper's long course of deal-

ing led the carrier to believe would not be called for. Again, at section 241 of Hutchinson on Carriers, it is said. "Accordingly, when the owner of the goods accepts a [bill of lading or receipt] he is conclusively presumed, in the absence of fraud and imposition, to have assented to all the terms and conditions."

We have at the present term held, what had been heretofore approved by this court, that an insurance company would be conclusively adjudged to have waived a written stipulation in its policy, concerning the void character of insurance upon property on leased ground, where that fact is not written on the policy, because it would be a fraud upon the insurer to allow the insurance company to hold the premium on a policy known by it to have been void at the time of its issuance. Insurance Co. v. Bank, ante, 915. Now, we are unable to see why the same principle would not preclude a party, who has for years accepted the benefit of a reduced rate of freight in consideration of a limited liability of the carrier, from defeating that stipulation by saying, after the loss, that "you did not give me an opportunity to elect which form of bill of lading I would take." The shipper, having gotten the benefit of the reduced rate, should not be heard to say the contract was void, and so known to him at the time. If the one proposition can be accepted as sound, I see no occasion for refusing to apply the same principle to this case. They both relate to insurance against fire only. It will not do to say that the public character and the public duties of the carrier require that a different rule should be applied to it than would be applied in the case of the insurance company; for in the case at bar it concerns alone the benefit or advantage that the particular shipper has already derived by his silence, and gives the company the benefit of a clause which has been repeatedly said to be reasonable. Nor does it suffice to say that this court has held in Marr v. Telegraph Co., 1 Pickle, 529, 8 S. W. Rep. 496, that it is not necessary for a party dealing with one of these public corporations to speak. In the Marr Case there were four alternatives presented, all of which were held to be "unreasonable and oppressive," and the effort was to escape liability for a loss occasioned by the negligence of the telegraph company, while the exemption of the carrier from the liability of an insurer, for a sufficient consideration, is not unreasonable nor unfavored; on the contrary, as we have seen and have said, adopting the language of the supreme court of the United States in York Co. v. Railroad Co., 3 Wall. 112, there is no "good reason on principle why parties should not be permitted to contract for a limited responsibility. The transaction concerns them only. It involves simply rights of property, and the public can have no interest in requiring the responsibility of insurance to accompany the service of transportation in face of a special agreement for its relinquishment." But the

opinion of the majority attempt to make out a case, and seems to take it for granted that it has made out a case, where as a matter of fact there was no consideration for such limited liability, because, forsooth, it is said the rate of one dollar on the bill of lading with the "fire clause" was the same as the rate six or nine years before on the bill of lading without such "fire clause." The fact that the rate to-day on the bill of lading with the fire limitation is the same as it was years ago without such limitation is no proof that the rate of to-day is not fixed in consequence of such limited liability, even in the absence of all other proof on the subject. Before any probative effect can be given this fact or circumstance, to overcome the presumption of a consideration, you have to negative the idea and destroy the right of the carrier to change its tariff of charges from time to time, to meet competition, and other exigencies. I say, in the absence of proof, (except that relied on by the majority as showing no consideration, to-wit, one dollar before and one dollar after the adoption of the "fire clause,") it does not follow that at the time of the issuance of the particular bill of lading sued on here there was not another and a higher rate for the full common-law liability. The consideration need not be great, because, in the language of the books, some consideration, however slight, is sufficient, and the consideration will be presumed from the manifest and absolutely necessary difference of responsibility.

But we are not left to fall back on these well-settled principles, nor to indulge in presumption; for the proof is clear and uncontradicted that at the time of the issuance of this bill of lading the rate for cotton, with the common-law liability, was \$1.85. This positive and uncontroverted proof surely cannot be overcome by a presumption predicated upon the mere fact that six or nine years before this time the company carried the common-law liability at one dollar, the same price that it now charges for the limited liability; nor can this proof be affected, one way or the other, by the fact that the company had no printed bill of lading on hand, and had not instructed its agent in relation thereto. While, in the opinion of the majority, this fact may make the company liable, as not giving the shipper opportunity to get something he did not ask for, and did not want, it cannot disprove the uncontradicted fact that there were two rates, one of which could be obtained *instantly* at \$1 with the limitation, and the other at \$1.85 without any limitation, obtainable by waiting until the agent could telegraph to the general freight department at Nashville. It must be noticed that there was no occasion to telegraph to Nashville to ascertain what the common-law liability rate was. This was known to the agent, and is positively testified to by him, and that it was \$1.85 per bale, and this was also known to the plaintiffs through their agent, Mr. Embry. The telegram was there-

fore necessary, not to ascertain the rate, but merely to get instructions as to the issuing of such a form. It does not seem that there was any more necessity for the company to keep on hand a form of bill of lading that was never called for than there would be for a merchant to keep on hand goods for which there is no demand. Indeed, it may be safe to say that the company would have a right to make a rule that where it was to be held liable as an insurer against loss by fire, for such combustible material as cotton, notice should be given the home office by the local agent, so that special provision might be made to protect itself by obtaining reinsurance, provided that it did not cause such delay as would incommode or injure the shipper. If the shipper wanted insurance, there were two avenues open to him to obtain it,—one by paying the company the increased rate of freight; the other, by insuring in a regular insurance company,—and it is a matter of common information that insurance can be obtained from an insurance company, generally, for a smaller amount than is usually charged by the carriers for the insurance liability. Certainly it seems to me, with due deference to my learned associates, that every principle of justice and fairness revolts at the idea of allowing the shipper to have insurance where he has knowingly refused to apply and pay for it, either to the transportation company or to the insurance company. To hold the transportation company now liable as an insurer is to do so upon *ex post facto* inquiry, *aliunde* the contract, and in violation of what I regard as elementary principles of law and morals.

If the opinion of the majority concerned alone the disposition of the case in hand, I would have been content with the mere announcement of my non-concurrence. But where the spirit and tendency of the decision appears to me hurtful, I deem it my duty to point out, even at the expense of weariness to myself and the bar, the dangers to which it may lead. The spirit and tendency to which I refer is to be found in the strictness with which the common-law liability of the carrier is sought to be enforced, and the severe conditions imposed as necessary to obtaining the benefit of a contract for limited liability. Indeed, the difference between myself and the majority may be said to be that, in my opinion, a contract for exemption from loss by fire, not resulting from the negligence of the carrier, should be construed liberally and fairly, in accordance with the intention of the parties, in the absence of fraud or imposition, while the majority opinion applies a degree of strictness in considering such contract which, in many cases in practice, would amount to prohibition. It seems to me that every exemption or condition is, in the opinion of the majority, placed upon the same footing, and construed with equal strictness, without regard to the policy which should govern in the treatment of the sundry exemptions. This is happily illustrated by

the quotation with which the majority opinion closes, as follows: "The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higggle or stand out, and seek redress in the courts. His business will not admit of such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents, often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business." Such language may be well enough in the case in which it was used, when applied, as was done there, to a case where the carrier was seeking to obtain the benefit of a contract exempting it from a claim for damages for a personal injury to a passenger occasioned by the carrier's own negligence; but the same language, when applied to a contract exemption for loss by fire, without negligence, becomes misleading, and tends, though unintentionally, to inflame the mind of the trier, whether judge or jury. The quotation I respectfully suggest is as inapplicable to the facts of the case at bar as it is to the law. To my mind the case in hand, instead of being viewed in the light of the quotation above, should have been decided in the light of the language of the same judge, in the same case; where, speaking of such exemption as is the subject of decision in the case at bar, he says: "A modification of the strict rules of responsibility, exempting the carrier from liability for accidental losses, where it can be safely done, enables the carrying interest to reduce its rate of compensation, thus proportionally relieving the transportation of produce and merchandise from some of the burdens with which it is loaded;" which, as we have seen, has been approved by our own court. For the reasons stated, I am constrained to dissent from the views of the majority, both as to the conclusion reached, and the reasoning upon which such conclusion rests. This I do with great respect for my esteemed associates, whose views are the result of a careful consideration of the case. From my point of view, the judgment of the circuit court should be reversed, and judgment rendered here for the defendant.

In re VANVAVER.

STATON v. TYLER, Judge.

(Supreme Court of Tennessee. Feb. 4, 1890.)

CRIMINAL LAW—VOID JUDGMENT.

A judgment, on *habeas corpus* proceedings, rendered by a court having jurisdiction of the person and power to grant the relief prayed, that certain jail rules giving "good time" to prisoners were valid, and that consequently petitioner's sentence had expired, and that he should be released from custody, though erroneous, is not void.

On petition for rehearing. For former hearing, see ante, 786.

*West & Burney and Wm. M. Daniel*, for Tyler and Vanvaver. *Leech & Savage*, for Staton.

**TURNER, C. J.** This matter is again before us, on petition to rehear. It is insisted that "when it appeared to the criminal court that the prisoner had not served his sentence, but was detained under the sentence, the court had no power under the *habeas corpus* proceeding but to remand; that, we having decided the prisoner's time had not expired, and that fact appearing in the order releasing him, therefore, when the same fact appeared to the criminal court, the statute required it to remand the prisoner, and any other order was absolutely void, as beyond the jurisdiction of the court."

That a court's having jurisdiction of the person and crime, or the subject-matter of the litigation, does not always determine its jurisdiction to render a particular judgment, is obvious. If, upon an indictment for larceny, there was a capital judgment, it is clear that, although there was jurisdiction of the person and the offense, still the sentence would be beyond the law, without the power of the court, and void. That is not this case. The question which the criminal court had jurisdiction to try was, had the prisoner's time expired? This it undertook to decide, and decided erroneously. The question was one of law, arising upon the validity of certain jail rules giving "good time," and antedating the sentence. The validity of these rules was a matter for judicial determination. The decision, whether right or wrong, was the announcement of a valid judgment within the power of the court. The distinction between sentences and judgments void and erroneous is one of every-day cognizance, and was not overlooked in this case, but treated as not needing elucidation. The statement of the case made it plain the court had jurisdiction of the person, and to grant the relief prayed, if, in its opinion, the term of the sentence had expired. This judgment was not void, but erroneous. *Ex parte Parks*, 93 U. S. 18.

The sentence was not for a fine of \$100 and imprisonment for 10 days. Such sentence would have been in excess of the power of the court. There were two distinct contempts; in each a fine of \$50, and in one 10 days' imprisonment. The other questions in the petition are all passed upon in the opinion heretofore filed. Petition dismissed.

MORTON v. HART et al.

(Supreme Court of Tennessee. Jan. 27, 1890.)

FOREIGN INSURANCE COMPANIES—LIABILITY OF AGENTS.

1. Money was sent to insurance agents, with the instruction that if they could not give the sender a good company to return his money. They insured him in a company that had not complied with the requirements of Mill. & V. Code Tenn. § 2535, making it unlawful for any company not organized or incorporated by the laws of Tennessee to transact any business in the state unless possessed of at least \$200,000 paid-up capital. Held that, the company being insolvent, they were liable for the loss.



2. A charge "that, if defendants knowingly insured plaintiff in a company which had not complied with the law of the state, this fact might be considered by the jury in determining defendants' negligence," is error.

Appeal from circuit court, Davidson county; WILLIAM K. MCALISTER, Jr., Judge.

Action by F. L. Morton against Hart Bros. to recover on a policy of insurance issued to plaintiff by defendants as insurance agents. From a judgment in favor of defendants, plaintiff appeals.

*Whitman & Gamble*, for appellant. *Bryan & Cartwright*, for appellees.

TURNER, C. J. Plaintiff applied to defendants, insurance agents, for a policy on his stock of goods. He directed them, if they could not give him a good company, to send his money back. They sent him a policy in the Louisiana Insurance Company of New Orleans, for \$500. That company had not complied with the law of this state making it unlawful "for any insurance company not organized under or incorporated by the laws of this state to transact any business of insurance in this state, through agents or otherwise, unless possessed of at least two hundred thousand dollars of paid-up, actual cash capital, of which at least one hundred thousand dollars shall be invested in bonds of the United States, or some one or more of the states, reckoning the same at their current market value, nor until such company, in addition to the other requirements of this article, shall have filed with the commissioner of insurance a written instrument duly signed and sealed, authorizing said commissioner to acknowledge service," etc., (Mill. & V. Code, § 2565,) nor with other provisions touching foreign insurance companies doing business in this state. The goods were lost by fire, and the insurance company is insolvent. So that it follows that the defendants were undertaking to do an unlawful and prohibited business. In such undertaking they must be held to guaranty the solvency of the concern they represent to the extent of the requirements of our statutes, as cited, and that losses will be paid here. That law was intended to protect the citizen policy-holder, and give him redress in the courts of the state. If the company was not worth \$200,000 in actual, paid-up cash capital, the undertaking of the agent supplies that want for the benefit of the insured; and if a loss occurs the agent must respond to the assured, and look to his principal for indemnity. His wrongful act has brought about the loss, and he must sustain it.

The charge of the court on the second trial, "That, if defendants knowingly insured plaintiff in a company which had not complied with the laws of the state, this fact might be considered by the jury in determining defendants' negligence," was error. The charge on the first trial was in substantial compliance with the law as stated in this opinion, and it was error to set aside the ver-

dict and judgment for plaintiff. The last judgment is reversed, and the first affirmed, with interest and all costs.

CITY OF NASHVILLE v. COMER *et al.*

(*Supreme Court of Tennessee*. Jan. 25, 1890.)

DAMAGES—EVIDENCE—PERMANENT INJURY.

In an action against a city for damages caused by discharges from an unskillfully constructed sewer, the value of the premises of plaintiff before and after the alleged wrong cannot be shown as a means of ascertaining the amount of damages, as it is not to be presumed that the city will always maintain the sewer in a defective condition.

Appeal from circuit court, Davidson county; WILLIAM K. MCALISTER, Jr., Judge.

Action by M. Comer and wife against the mayor and city council of Nashville to recover damages caused by discharges from a sewer. From a judgment in favor of plaintiffs, defendant appeals.

*J. M. Anderson*, for appellant. *Albert D. Marks* and *W. H. Washington*, for appellees.

LURTON, J. This is an action at law by defendants in error to recover damages resulting from an alleged negligent construction of a sewer, whereby both storm and sewage water, in times of unusual freshet, have been discharged from the sewer upon the premises owned by them. The market value of the freehold is charged to have been depreciated, and damages are sought both for injury and destruction of household furniture, as well as for permanent impairment of value of the realty. There was evidence admitted going to show value of the premises before and after the alleged wrong. The trial judge charged the jury that, if they found from the evidence "that the market value of the plaintiff's property has been permanently impaired by the construction of the sewer, its proximity and liability to back up surface water, and discharge offensive sewage matter upon his premises, he would be entitled to recover the difference in the market value of the property before and since the building of the sewer." This is assigned as error.

The sewer complained of was erected by the city, and is upon the public street upon which the property of Comer abuts. A private tributary sewer, erected and maintained by Comer, crosses his property, and passes under his house, and enters the public sewer. The supposed defect in the public sewer seems to be that in times of unusual rains it has not capacity sufficient to carry off the storm water flowing into it, and upon several occasions the accumulated sewage and storm water has been so great as to result in backing the water into the smaller and tributary sewer of Comer, whereby his premises have been flooded. Assuming that defendants in error were entitled to recover damages, the question is, what damages? Were they limited to such actual damage as they had sustained up to the time of their bringing of their suit,

or may they recover not only past, but prospective, damages? If the latter, then the charge of his honor is correct; but, if limited to damages already sustained, then the charge is erroneous. The learned counsel for Comer and wife defend the measure of damages stated to the jury by the circuit judge upon the suggestion that "the sewer was a permanent improvement, and whatever damage it occasioned is of a permanent character," and that for this reason plaintiff cannot bring successive actions, but must recover his damage once for all. The recovery of prospective damages can only be justified upon the assumption that the premises of Comer will for all time to come be subject to the same disgusting invasion of sewage as has heretofore occurred. Damages assessed upon this basis, as is frankly conceded by counsel, would operate as a perpetual license to the city to continue the wrong of which it has been convicted. This we hold to be the consequence of a recovery upon a similar charge in a case of an action for a nuisance, where the judgment was submitted to by the defendant. *Harmon v. Railroad Co.*, 3 Pickle, 614, 11 S. W. Rep. 708. See, to same effect, 3 Suth. Dam. 412, 414.

Is it just or right to assume that the wrong of which Comer complains is produced from a cause permanent in its character? That the sewer is a permanent improvement, and cost a great deal of money, will not, as we shall undertake to show, be a conclusive factor in the settlement of the question. It was lawfully constructed by the city, upon a public street. It was not erected with any purpose to discharge its sewage upon the premises of Comer, but, rather, to carry off the drainage, as well as that of others in the same territory. The complaint is not that the city has been guilty of any misconduct in erecting a sewer where this has been constructed, but that its servants have so unskillfully built it that upon the recurrence of certain unusual conditions it discharges its contents upon the premises of defendants in error. Now, upon what authority is it to be assumed that the negligence or unskillfulness of the servants of the city in the construction of this sewer will not be remedied? The argument is advanced that, inasmuch as it will require the expenditure of human labor to remedy the defects in this sewer, therefore the damages are to be treated as permanent and original, and recoverable in one action. This test is supported by the opinion of Judge BELL, who delivered the opinion of the court in the case of *Troy v. Railroad Co.*, 3 Fost. (N. H.) 83. In that case it appears that the railway company had built its roadway in and upon a public highway, in such manner as to obstruct and destroy its value as a street. The town was held entitled to recover as for a permanent occupation of the street, and damages were assessed accordingly. Now, if the railway was lawfully upon the street, then the damages recoverable were properly

recovered in one suit. *Harmon v. Railroad Co.*, supra. But, if it was unlawfully there, then it was a trespass, and an abatable nuisance, and successive actions would lie so long as it continued thereon; the recovery in such actions being limited to damages already accrued, and subsequent to the last recovery. Whether there rightfully or as a trespasser does not appear from the report of the case before us, but the inference is that it was not a trespasser; for otherwise there would have been no occasion for propounding the rule by which the permanent character of an injury is to be determined. This rule, as announced by Judge BELL, was that "wherever the nuisance is of such a character that its continuance is necessarily an injury, and where it is of a permanent character, that will continue without change from any cause but human labor, then the damage is an original damage, and may be at once fully compensated." 3 Fost. (N. H.) 102. This seems to us as an artificial and arbitrary test. There are supposable nuisances, which, by the effect of time, might at last abate themselves, but by far the greater number of trespasses, wrongs, and nuisances would continue indefinitely, without the expenditure of human labor to remove or abate them. It is a rule which does not recommend itself by either its reasonableness, its certainty of application, or its justice. It seems, however, to have commended itself to the supreme court of Iowa, who adopted it as a light sufficient to guide their decisions. One of the most signal illustrations of the unfortunate results flowing from a departure from the general rule which allows successive actions so long as a wrong in the nature of nuisance is continued, is found in this Iowa case. The facts of that case were that the plaintiff's lots were washed and cut by a ditch dug by the city, into which a natural water-course was turned. After the cutting and removal of the soil had gone on for several years, the plaintiff sued for damages, alleging the negligent cutting of the ditch. It was held that his entire damages had accrued when the diverted stream first began to injure him, and that, not having then sued, he was bound by the statute of limitations. The judge who delivered the opinion, after quoting the principle above cited from *Troy v. Railroad Co.*, said: "If we apply the principle above stated to the case at bar, we must hold that the damages were original. The plaintiff's ground of complaint is that the ditch was improperly constructed. As constructed, it resulted in the excavation of the plaintiff's lots. The damage consisted, not in excavating the lots, but in doing an act which resulted in their excavation. The result, too, was a necessary one, the ditch remaining as constructed. The cause of the difficulty was a permanent one, in that it would not grow less unless remedied by human labor. The case, therefore, is strictly within the rule applied in *Troy v. Railroad Co.*, above cited." *Powers v. City*

of Council Bluffs, 45 Iowa, 656. Thus the application of the rule now contended for would require a plaintiff to foresee all the possible results, and to convince a jury of what he, with prophetic ken, is required to foresee, on penalty of subsequently having to quietly endure consequences which he could not reasonably have conjectured as likely to result from what at first seemed a trifling injury. The cases of *City of North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. Rep. 821; *Fowle v. Northampton Co.*, 112 Mass. 334, —have been examined, and we find that they do measurably support the contention of defendants in error. None of these cases are satisfactory in their reasoning, and the decided weight of authority is opposed to them. They are all reviewed in the case of *Uline v. Railroad Co.*, 101 N. Y. 98, 4 N. E. Rep. 536, and an opposite conclusion reached. In reviewing the case of *City of North Vernon v. Voegler*, a case more analogous to the one under consideration than any other to which we have been referred, *EARL, J.*, said: "What right was there to assume that the street would be left permanently in a negligent condition, and then hold that the plaintiff could recover damages upon the theory that the carelessness would forever continue? A municipality or a railroad corporation, under proper authority, may erect an embankment in a street; and if the work be carefully and skillfully done it cannot be made liable for the consequential damages to adjacent property. But if it be carelessly and unskillfully done it can be made liable. It may cease to be careless, or remedy the effects of its carelessness, and it may apply the requisite skill to the embankment; and this it may do after its carelessness and unskillfulness, and the consequent damages, have been established by a recovery in an action. The moment an action has been commenced, shall the defendant, in such a case, be precluded from remedying its wrong? Shall it be so precluded after a recovery against it? Does it establish the right to continue to be a wrong-doer forever by the payment of a recovery against it? Shall it have no benefit by discontinuing the wrong? And shall it not be left the option to discontinue it?" 101 N. Y. 125, 4 N. E. Rep. 552. This assumption that a wrong-doer is to be presumed from the mere character of the work to intend to continue in his wrong, and that he will not remedy his defective or unskillful work, is repudiated in the majority of American cases. In *Hargreaves v. Kimberly*, 26 W. Va. 787, the action was for diverting the course of a stream so as to throw surface water upon the lands of plaintiff. The damages were limited to such as had been already sustained, the court saying "that in all those cases where the cause of the injury is in its nature permanent, and a recovery for such injury would confer a license on the defendant to continue the cause, the entire damage must be recovered in a single action. But where the cause of the injury is in the nature of a nuisance, and not permanent in

its character, but of such a character that it may be assumed that the defendant would remove it rather than suffer at once the entire damage which it might inflict, if permanent, then the entire damage cannot be recovered in a single action, but actions may be maintained, from time to time, as long as the cause of the injury continues." In the case of *Plate v. Railroad Co.*, the plaintiff in a former action had recovered damages of defendant for injuries sustained by the flooding of his land resulting from the negligent construction of its embankment and ditches, causing water to flow back upon his land. The same cause continuing, and other damages accruing, a second action was brought. It was held that the former judgment only established the right of plaintiff to recover damages subsequently sustained from the same cause. 37 N. Y. 472. In *Thayer v. Brooks*, 17 Ohio, 489, the action was for damage for diverting water from the mill of the plaintiff by means of a canal cut by defendant. The jury were charged that they might render judgment for such damages as plaintiff has sustained by the mill-site having been diminished in value in consequence of the diversion of the water. The case was reversed, the supreme court saying: "This was going too far. \* \* \* He was only liable \* \* \* for the damages actually sustained prior to the commencement of the suit." In *Duryea v. Mayor*, etc., the action was for wrongfully discharging water and sewage upon the premises of the plaintiff. Recovery was limited to damages actually sustained. 26 Hun. 120. In *Bare v. Hoffman* the action was for diverting water from plaintiff's tannery by means of a pipe laid on the defendant's land. The jury were charged that they might recover the permanent damages to the freehold. The supreme court said a severance of the connection of the pipe with the stream would remove the whole cause of the complaint. " \* \* \* The act he committed was not of such a permanent character as to assume it to continue through all coming time, and to justify the assessment of damages accordingly. The general rule is that successive actions may be brought as long as the obstruction is maintained. A recovery in the first action establishes the plaintiff's right. Subsequent actions are to recover damages for a continuance of the obstruction." 79 Pa. St. 71. Cases might be indefinitely multiplied in line with those cited. The line of cases presented by defendants in error is reviewed by Mr. Sutherland, who says, as to the effect of a recovery based upon the assumption of the permanent character of the wrong, that "such recovery will have the effect to give the defendant a permanent right to do the acts which constitute the nuisance, as fully as though there had been a condemnation of the property by the exercise of the power of eminent domain. But the option to recover permanent damages in a common-law action, with this effect, is not generally admitted in this coun-

try, and is wholly unknown in England." 3 Suth. Dam. 413, 414. The weight of authority and the weight of reason alike condemn, as contrary to a true public policy, any rule by which a wrong-doer may thus procure a license to continue his misconduct. Such a rule would in many instances operate as a method by which private property would be condemned to private use against the will of the owner. It seems to us that the true rule deducible from the authorities is that the law will not presume the continuance of a wrong, nor allow a license to continue a wrong, where the causing the injury is of such a nature as to be abatable either by the expenditure of labor or money; and that, where the cause of the injury is one not presumed to continue, the damages recoverable from the wrong-doer are only such as have accrued before action brought, and that successive actions may be brought for the subsequent continuance of the wrong or nuisance.

It follows that it was error to admit proof as to the effect of the overflowing sewer upon the market value of Comer's property, and error to charge the jury that they could assess the damages upon any assumption that the wrong of the city would be perpetuated.

Reverse, and remand for new trial.

#### CARTWRIGHT v. DICKINSON.

(Supreme Court of Tennessee. Feb. 4, 1890.)

CORPORATIONS—STOCKHOLDERS—INSOLVENCY—ACTION BY ASSIGNEE.

1. The facts that the manager of a corporation, at the request of a shareholder to dispose of his shares, procures an additional subscription to the capital stock, in an amount nearly equal to the shares to be disposed of, and that the balance due against the shareholder for unpaid calls is charged off on the books of the corporation, and credit given him on his personal account for the amount paid in by him, are inoperative to cancel his shares, or to discharge his obligation to pay for them.

2. The fact that the corporation has received from the new subscribers the same amount of money that was to be contributed by the old shareholders will not be allowed to operate as a substitution of their capital for his, as the new subscribers, as well as the old, have a right to demand that every shareholder be compelled to pay his shares up according to contract.

3. The issuance of shares of stock by a corporation in excess of the amount authorized by its by-laws and charter is no defense to an action for calls due from a shareholder on shares subscribed for by him before the alleged unlawful issue.

4. An assignee of an insolvent corporation, who has not resigned his trust, may maintain an action for calls due from a shareholder, so long as there are creditors for whose claims he must provide, though he has suffered the shareholders to resume business, and the greater part of the debts have been compromised.

Appeal from chancery court, Davidson county; A. ALLISON, Chancellor.

*E. B. Rucker and Whitman & Gamble*, for appellant. *Dickinson & Frazer*, for appellee.

LURTON, J. The Grubbs Cracker Company is a corporation organized July, 1885, under the general incorporation law of this

state. In October, 1887, being insolvent, it made a deed of assignment to Dickinson as trustee, to equally secure all creditors. The original bill was filed by Cartwright, claiming to be a creditor of the corporation, for the purpose of enforcing payment out of the assets in defendant's hands. One of the demands set up is not now resisted. The other is contested as being without consideration. The assignee, after answering, filed a cross-bill to recover some \$6,000 alleged to be due upon unpaid calls on stock owned by Cartwright in the cracker company, and to recover \$1,000 paid back to him by the secretary and treasurer of that company upon an alleged insufficient cancellation and rescission of his liability as a subscriber for stock. Cartwright, before the charter was obtained, subscribed for \$8,000 of the stock of the proposed corporation. A charter was obtained by the usual application provided for by the act of 1875. The subscribers thereupon met, and organized, by accepting the charter, adopting by-laws, and electing directors. He was present at this meeting, and was elected a director, and acted as such for a year thereafter. The act of 1875 does not require the amount of the capital stock of a corporation to be stated in the application for the charter, but authorizes the capital to be fixed subsequently by by-law. Such a by-law was adopted at the organization, and the capital settled at \$40,000, to be divided into shares of \$100 each. A few days thereafter, Cartwright paid the first call of 25 per cent., amounting to \$2,000, and took the receipt of the secretary and treasurer for that sum, as a payment upon his stock. The remainder of the sum due, \$6,000, he has never paid, and now claims that his contract has been canceled or rescinded, and that he is not liable therefor. The facts upon which this defense is placed are these. In July, 1886, one year after the company began business, Cartwright, desiring to withdraw therefrom, spoke to Mr. Grubbs, and asked him to dispose of his stock. Grubbs was the brother-in-law of Cartwright, was the largest stockholder in the corporation, and was its secretary and treasurer, and general manager. Grubbs, it seems, did accordingly undertake to dispose of his stock, which appears at that date to have been salable at par, September 2, 1886. Grubbs told him he had made a disposition of the shares, and by his direction the proper entries were made on the books of the company, by which the balance due as for unpaid calls was charged off, and the \$2,000 theretofore paid in on first call was credited to the personal account of Cartwright. Of this credit, \$600 were then paid in cash, same being credited on the stock receipt previously taken for amount of first call. Subsequently this receipt was surrendered, and the note of the corporation executed to Cartwright for the remainder. This note was afterwards reduced by payment, and a new note executed, which is the smaller of the two demands upon which the orig-

inal bill is filed. What Grubbs did, which he supposed authorized him to rescind the contract by which Cartwright had purchased shares, was this: He went upon the streets, and solicited new subscriptions to the stock of his company; and when he had obtained these he regarded himself as authorized to rescind the contract of Cartwright, and release him from all obligation as a shareholder indebted on account of his shares. To carry out his purpose, he caused the books to show that Cartwright, instead of being debtor, was a creditor, to the extent of the capital which he was allowed to withdraw. The proof does not show any transfer of Cartwright's stock to other persons, or any agreement that it should be transferred to others, or that they should be substituted to his rights and liabilities. There is no pretense of the purchase of shares from Cartwright by other persons. On the contrary, they were procured to subscribe for new shares, just as Cartwright had done in the first instance.

Before the organization of the corporation, and acceptance of the subscription of Cartwright, the promoters might, perhaps, agree to release a subscriber by substituting other names for his, and erasing from the list that of the recalcitrant. Cook, Stocks, § 75. But, at the moment when the conditions required by law as preliminary to the granting of a charter were complied with, the subscribers became shareholders, entitled to a voice, as shareholders, in all subsequent proceedings, and to compel a specific performance of the contract of membership. At the same time, all the obligations of a shareholder were assumed, and the liability to pay the amount of the shares became fixed and absolute. This liability to pay calls as they should be made upon the shares is a mere incident of membership; and the fact that such payments have not been made does not affect the *status* of the member as a shareholder until a forfeiture has been declared in such manner as provided by the charter. The fact that certificates of shares have not been issued does not affect the question. Such certificate is never essential to constitute one a shareholder, being mere evidence of ownership of shares. 1 Mor. Priv. Corp. § 56, and cases cited. This view of the effect of a certificate has been heretofore settled in this state. Cornick v. Richards, 3 Lea, 1; State v. Butler, 2 Pickle, 621, 8 S. W. Rep. 586; Young v. Iron Co., 1 Pickle, 189, 2 S. W. Rep. 202.

It follows that Cartwright was the owner of 80 shares of the capital stock of this corporation. This stock he has never assigned or transferred to any other person. No other person claims to own his stock, or to be in any way legally or equitably entitled to have it transferred to them. The cancellation of his subscription was inoperative to cancel his shares, or discharge his obligations to pay for them. Unless the charter authorizes a forfeiture of shares for non-payment of calls, there is no power in the corporation to for-

feit, cancel, or annul shares once lawfully issued. The contract of shareholders is a mutual one. Without the consent of all, one cannot be released from liability. Even a board of directors cannot discharge the contract of a shareholder to pay for his shares according to his contract, or disfranchise him by a forfeiture declared without express authority of law. Chase v. Railroad Co., 5 Lea, 415; 1 Mor. Priv. Corp. § 309, and cases cited.

The argument, that if in fact the corporation received from their new subscribers the same amount of money which Cartwright was to contribute, in that case, whatever was done would in effect be the substitution of the capital of one for that which another was bound to contribute, is plausible, but is unsound in law, and unsustained by the facts of this case. Unsound in law, because the mere fact of obtaining certain new and original capital cannot operate to empower the corporation to return capital theretofore embarked in the enterprise. These new subscribers, by their subscription, undertook to contribute additional capital, and not to substitute their capital for money to be withdrawn. This was not their engagement. This is the difference between the purchase of Cartwright's shares and the subscribing for new shares, and the distinction between the effect of buying shares already issued and subscribing for new shares. In the latter case, new capital is contributed, while in the former only the legal title of shares is changed. The new subscriber, as well as the old, had a right to demand that every shareholder be compelled to pay his shares up according to contract. There was no more authority to cancel Cartwright's shares, and release him from liability, after this additional capital was contributed than there was before. The contention is not sound in fact. Mr. Grubbs seems to have supposed that he had the right to release shareholders from their obligations, just as suited them or him. He seems likewise to have supposed that he was authorized to take new subscribers, to take the place of such as chose to withdraw, and to furnish new capital as the necessities of the business demanded. The share-list shows several shareholders, who, after experimenting with the cracker business, withdrew, and had their money returned. So, when Mr. Grubbs undertook to get new stock, to take the place of old stock owned by Cartwright, he seems to have had other arrangements of some sort to carry out; for he says that he got these new subscribers to "cover" Cartwright's stock, and that of others to whom he made the same promise. The fact that the authorized limit of \$40,000 had been reached does not seem to have been any embarrassment whatever. He says he got an amount of new subscriptions, after he agreed to place Cartwright's stock, equal to his, or greater. In this he is shown, by a careful examination of the stock-list, to have been mistaken. The total of

stock subscriptions July 1, 1886, was \$50,000. The stock in October, 1886, inclusive of Cartwright's, was about \$57,000. Then, to cover Cartwright's \$8,000, and that of others to whom he had made the same promise, there could not have been over \$7,000 obtained. Then it is not even the case of money of a new subscriber having fully taken the place of an old one suffered to withdraw. That the corporation at the time had actually received the full sum of \$40,000, and that that was the limit of its authorized capital, cannot avail Cartwright. If the shares subscribed after the limits of \$40,000 had been reached were valid and lawful, then the corporation was entitled to a much larger sum than \$40,000. If, on the other hand, these subscriptions were void, then they were not enforceable; and money actually paid could not be lawfully held, if demanded by such subscriber, creditors out of the way. If the transaction be looked at as a purchase of the shares held by the corporation, then it is equally ineffective. Whatever power a corporation may have to deal in its own shares for purpose of sale, or to secure a debt, it is too clear for argument that it cannot reduce its authorized capital by purchasing its own shares for cancellation. 1 Mor. Priv. Corp. §§ 111-113. The case of *Jackson v. Manufacturing Co.*, 1 Lea, 210, does not hold a contrary doctrine, as argued by counsel. The sale of stock sustained in that case was not a sale to the corporation, but to one Sloan, a stranger.

The next defense urged is that the corporation has violated its charter by increasing its capital stock, and that it has already issued stock certificates in excess of its lawful capital, and that therefore it is not in the power of the corporation to issue valid shares to him. The capital fixed by by-law, of \$40,000, was, as we have already seen, exceeded by the action of Grubbs in obtaining subscriptions in excess of that limit. This was unauthorized by the shareholders, or the directors. Such subscriptions for new shares, after \$40,000 had been taken, were null and void. In February, 1887, the shareholders amended their by-laws so as to increase their authorized capital to \$100,000. This was intended to legalize the excess of shares already taken, and authorize a further increase. Under this amendment new stock was taken, until the whole list reached about \$76,000. After the assignment to Dickinson, a scheme for the reorganization of this business was conceived, and the shareholders again amended their by-laws so as to declare all stock theretofore issued "common" stock, and to authorize issuance of "preferred" stock to the amount of \$30,000; the latter to have a preference, to the extent of 6 per cent., in payment of dividends, over the common stock. It appears that under this scheme some \$23,000 of preferred stock has been sold, thus bringing the total of shares, excluding Cartwright's, to something over \$99,000. Neither of these amendments of the by-laws were made in pursuance of the act of 1883, p. 212,

concerning the amendment of charters so as to allow an increase of capital stock. The question as to whether the capital stock, having been once fixed by by-law, as provided by the general incorporation law of 1875, can be increased without an amendment of the charter in the manner pointed out by the act of 1883, is a grave one, and is reserved, for the reason that, in the view we have of this case, it need not be decided. This question cannot affect Cartwright's liability to pay for his shares. By his subscription, as we have seen already, he became a shareholder. His shares are not affected by the subsequent issue of shares in excess of charter limits. If these shares were issued without power upon the part of the corporation to issue them, they are absolutely void, and confer no rights of membership upon those who hold them. In a contest between them and the holder of shares subscribed before the capital was all taken, they would be excluded from all participation in the management or profits of the business. *Scovill v. Thayer*, 105 U. S. 143. That the corporation has been guilty of a violation of its charter in this or any other matter is no defense to an action for calls due from a shareholder upon his shares. The remedy was against the corporation, to restrain such alleged illegal action, or is against the agents personally, for any wrong and injury done him. It furnishes no reason why he shall not carry out his own contract. The usual rule, by which the breach of a contract upon one side justifies its breach or abandonment by the other, has little application in cases of this character. 1 Mor. Priv. Corp. § 116, and cases cited. The question as to whether the issuance of preferred stock was valid and effectual as against shareholders not assenting then or subsequently we do not determine. Operative or inoperative, it does not affect the contract to pay for the shares by the owner because of his contract of subscription. The fact that he has not had notice of subsequent meetings of shareholders, or opportunity to attend, or protect himself against the action of the other shareholders affecting the value of his stock, cannot operate to release him from his contract. Neither the directors nor the shareholders had any knowledge of the arrangement by which he supposed he was released. In January 1887, several months after his arrangement with Mr. Grubbs had been perfected, the latter informed the board of directors that there was a vacancy in the board, Mr. Cartwright having sold his stock. The vacancy was thereupon filled. The directors and shareholders thereafter assumed that his shares had been in fact sold to others. Grubbs, in so far as he undertook to dispose of his shares, was the agent of Cartwright in such disposition. If Cartwright was misled and deceived by the statement of Grubbs that he had sold his shares, and thereby lulled into a course of action or non-action, whereby he has suffered, he can look only to his agent for recompense. If, on the other hand, he knew the

exact facts upon which Grubbs assumed authority to cancel his shares, and acted either upon the opinion of Grubbs or his own opinion, or their concurrent opinion, that upon such facts the law empowered Grubbs to do what he did do, and that he had a legal right to release him from his contract, then both mistook the law. That a shareholder should release himself from liability to pay for his shares by proof that he was misinformed as to a fact by his own agent, or misled as to the effect of certain known facts upon his contract, or was ignorant of the law which prevented any shareholder from being released, or his subscription canceled, without the consent of the other shareholders, would be a most disastrous doctrine. The rule that a mistake of law does not relieve in equity any more than at law is well settled. *Upton v. Tribilcock*, 91 U. S. 50.

The next and last assignment of error necessary to consider is that this action cannot be maintained by Dickinson as assignee. This argument is based upon the facts that subsequent to the assignment the shareholders, other than himself, by means raised by the issuance of preferred stock, heretofore mentioned, and with borrowed money, compromised the greater part of the debts of the corporation, and that the assignee has suffered them to resume business with the machinery assigned to him, they having given bond for its protection. The assets thus in their hands are probably abundant to pay such creditors as have not yet been settled with. The only effect of this is to strip the assignee of any advantages which creditors might be supposed to have in a suit to compel a shareholder to pay his call, over the same action by the corporation. We have accordingly treated each question just as if it were a controversy between Cartwright and the Grubbs Cracker Company. That Dickinson is entitled to maintain this suit follows from the fact that he has not resigned his trust, and that there are creditors whose claims he must provide for. The claim is an asset in his hands, and it, together with other assets, remains in his control as trustee, and he may and ought to reduce them to money, and pay off remaining creditors, and account for the surplus to the assignors. The decree of the chancellor must be affirmed, with cost.

#### COVINGTON *et al.* v. BASS *et al.*

(*Supreme Court of Tennessee. Feb. 6, 1890.*)

#### ATTORNEYS' LIENS — COMPROMISE — APPEAL — EFFECT.

1. An attorney's lien on a judgment exists notwithstanding the judgment is compromised pending appeal, as, under the Tennessee practice, an appeal does not vacate the judgment.

2. A defendant who compromises a judgment against him is conclusively presumed to have known all it contained, and is not entitled to actual notice of an attorney's lien.

3. Where a judgment is compromised, pending appeal, without notice to the attorneys of the successful plaintiff, they may enforce their lien against defendant in equity.

Appeal from chancery court, Davidson county; A. ALLISON, Chancellor.

*Vertrees & Vertrees*, for appellants. *J. C. Bradfor*, for appellees.

TURNER, C. J. Plaintiffs, as attorneys for Knott, recovered judgment against Bass for \$1,500. The judgment was entered in the usual form. At a later day of the same term, plaintiffs, by leave of court, entered an additional order, giving them a lien on the recovery for their reasonable fees. Bass appealed in error to this court. Pending the appeal, Bass mortgaged real estate to the defendant creditors. Subsequently a compromise was had between Knott and Bass, Bass paying to Knott \$300 in satisfaction of the judgment. This was done without consultation with, or notice to, complainants. The bill is filed to enforce the attorney's lien against Bass and the beneficiaries in the mortgage. The defense is that the parties had the right to settle the matter between themselves, and further, that, as there was no final judgment, there was no lien.

Many authorities have been cited, by solicitors on each side, bearing upon the question; but in none of them was this direct question presented. Consequently, we must determine it upon what seems to us the better reason. It is quite usual for attorneys who recover money or property judgments to have a declaration of lien on the recovery for their fees. The courts invariably recognize the right, when it is asked. Such practice, and its recognition, must be understood to have a substantial meaning and purpose, and, to a certain extent, embarrass the right of the plaintiff to appropriate the recovery without the consent of the lawyers who rendered him valuable services in its obtainment. The payment to the attorneys of record discharges the officer holding an execution from liability to the plaintiff in the execution. Under our practice, an appeal to this court from a judgment at law does not vacate, but merely suspends, that judgment, and such liens as the law attaches to it. On affirmance, the liens attach with full force as against purchasers after the rendition in the court below, and for 12 months after affirmance. Code, Mill. & V. 3697. While, in the present case, there was no affirmance, but a compromise instead, still the lien existed.

It is not necessary that Bass should have had actual notice of the lien expressed. He was the defendant, and bound to take notice of the judgment against him, in all its parts. When he undertook to settle it, he is conclusively presumed to have known all it contained, and to have settled upon that basis. There was judgment against him, although superseded. That judgment defined an interest in complainants, and he should have fortified against that interest. That interest was as clearly expressed, though not defined in amount, as was the interest of the plaintiff Knott. His payment of the \$350 was a distinct recognition, to that extent, of his ob-



ligation to all under the terms of the judgment.

Ordinarily, if attorneys allow judgments to go in this court without contending or declaring liens, they will lose them, as to the adverse party. In this case, however, they were ignorant of what was being done, and without opportunity to protect themselves. The case was disposed of out of its regular order, and when the attorneys were not required by their duty to their client, nor expected, to be present, and when the judgment and lien were in as full force as to them as to their clients. With notice of negotiations between the parties, they could, by injunction, at least have prevented the payment to Knott until their fees were paid. Why, then, may they not come into equity, and compel Bass to do that equity provided for in the judgment he claims to have compromised? The lien of the judgment on the lands of Bass existed to the same extent, and for the same reasons, as the lien of complainants on the judgment, and was in the same way superseded.

The proof shows \$400 to be a reasonable fee to complainants. For that amount they are entitled to their decree against Knott.

As there is no proof showing that Bass was guilty of actual fraud, and as parties may compromise in good faith, although they compromise at less than the attorney's fee, a decree will be rendered against him for \$350, with interest from the date of his payment of that amount to Knott. He may, if he desires, take a decree over against Knott. The real estate mortgaged by Bass will be sold as directed by the chancellor, and the proceeds, after paying complainants, will be applied to the mortgage. The decree, modified as indicated, is affirmed, with costs.

#### STATE to Use of DAVIS *et al.* v. THOMAS *et al.*

(Supreme Court of Tennessee. Feb. 6, 1890.)

##### INSURANCE COMMISSIONER—LIABILITIES.

1. Mill. & V. Code Tenn. § 2575, provides that whenever any insurance company shall have fully complied with all of the requirements of the statute, and the commissioner is satisfied that the affairs of such company are in a sound condition, he shall issue certificates of authority to such persons as the company may designate to transact business for the company in the state. *Held*, that the action of the commissioner is judicial, and no liability will attach to him for such action unless it is corrupt.

2. An allegation of a bill that the commissioner knowingly issued a license to an insurance company in violation of law is not equivalent to a charge that he willfully and maliciously violated the law.

3. The official bond of the state treasurer of Tennessee, who is *ex officio* insurance commissioner, does not cover his liability to individuals for his acts as commissioner.

Appeal from chancery court, Davidson county; A. ALLISON, Chancellor.

*Haynes & Haynes* and *J. C. McReynolds*, for appellants. *Vertrees & Vertrees*, *J. G. Wallace*, *Wm. House*, *H. H. Cook*, and *Hearn & Berry*, for appellees.

SNODGRASS, J. The defendant Thomas was treasurer of the state for the years 1887-88. The other defendants were sureties on his official bond as such. He was *ex officio* insurance commissioner during his term, and as such issued license to one Reves Walker, as agent of the Northwestern Mutual Insurance Company of Washington, Dak., and authorized said company to do an insurance business in Tennessee for the year 1887. The license issued recited that the company had complied with the law of Tennessee, and was authorized, according to its provisions, to carry on the business of insurance. The complainants took out policies in said company of said agent, sustained losses by fire, and discovering, as they allege, that the company was insolvent, brought this suit against Mr. Thomas, and the sureties on his official bond as treasurer, to recover of them the amount of the losses sustained, on the ground that he knowingly issued the license in violation of law. The defendants demurred to the bill on several grounds; the sureties insisting, among other things, that the bond of treasurer covered no such liability as that alleged; that the bond of treasurer was only to secure the performance of his duties as such to the public, and, under statute, specially devolving upon him any pecuniary liability to individuals. For instance, Code, § 2568. This defense is clearly well founded, and need be no further noticed.

The question of Mr. Thomas' personal liability depends upon other considerations. The chancellor dismissed the bill as to all, and complainants appealed. The complainants insist that to knowingly issue license in violation of law is to willfully and maliciously do so, and that, if not the same, is equivalent to a corrupt violation of duty, and renders him liable. If this construction were correct, the bill would state a case against him personally; but this is not a correct construction. The complainants had alleged that defendant willfully, maliciously, and knowingly violated the law in the issuance of the license, but on the hearing below, in open court, withdrew "so much of the bill and charges thereof as stated and charged that the action of the commissioner was willful, malicious, or corrupt, save and so far as the same may be predicated upon the fact that he, as commissioner, knowingly issued the certificate, and permitted the company to do business in Tennessee in violation of law." The elimination of the charge stating or implying corruption left only the allegation that he knowingly did the act complained of. In answer to this charge, the defendant claims authority to license the company under an act of the legislature passed March 23, 1887, (Acts 1887, p. 303,) which does authorize the licensing of mutual companies. But complainants insist that this law, which is of doubtful construction, did not authorize the licensing of fire insurance companies, and, if it did, it is unconstitutional, for various reasons, not necessary here to state.

The argument is then made that the treasurer is bound to know the law; is bound to know the proper construction of this statute, if good, and its unconstitutionality, if bad. Granting that all this is true, it proves that he may technically, and by fiction of law, know what he in fact does not know, and demonstrates that a man, in legal fiction, can do a thing "knowingly," according to a proper legal construction of that term, and yet not do it willfully and maliciously in fact, and proves the first proposition asserted, that the charge that Mr. Thomas knowingly violated the law is not a charge, or equivalent to a charge, that he willfully and maliciously violated the law.

By no construction, then, can the charge of the bill be treated as implying corrupt action; and this is necessary to fix a personal responsibility on Mr. Thomas, unless he acted in a purely ministerial capacity in the issuance of the license. If his action was purely ministerial, and required the exercise of no judicial discretion, then he might be liable without corruption. But his action was not purely ministerial. The statute provides that "whenever any insurance company shall have fully complied with all the requirements of this article, [and among these requirements is to answer, to the satisfaction of the commissioner, such inquiries as may in his judgment be necessary to elicit a full exhibit of the business and standing of such company, in addition to all special requirements enumerated,] and the commissioner is satisfied that the affairs of such company are in sound condition, he shall issue certificates of authority to such persons as such company may designate, authorizing them to transact the business of insurance for and in behalf of such company in this state." Mill. & V. Code, §§ 2575, 2568. He is clearly vested with a discretion to grant, and he is also invested with discretion to revoke, the license of an insurance company, under certain circumstances appearing to his satisfaction. *Id.* § 2572. It follows that his action in issuing the license was discretionary, and therefore judicial. No liability, consequently, attached, unless it were corrupt; and, no corruption being alleged, the bill, on this ground, was properly dismissed. It is not necessary to discuss other grounds of demurrer. The decree is affirmed, and bill dismissed, with costs.

#### HENSON *et al.* v. WRIGHT *et al.*

(Supreme Court of Tennessee. Feb. 11, 1890.)

##### TRUSTS—INTEREST OF BENEFICIARY.

1. Under a conveyance of lands in trust "for the only proper use and benefit of the" beneficiary, "for and during the term of his natural life," the trustee "to hold said lands for the benefit of" the beneficiary "only, and to account to him or his guardian for the rents or yearly issues," the beneficiary's interest is assignable.

2. A conveyance of land in trust, the trustee to take, hold, and convey the remainder, on the death of the beneficiary for life, to persons who shall then be entitled thereto under the provisions of the deed, creates an active trust, which pre-

vents the merger of the legal and equitable estates, so that a mortgage of the beneficiary's interest must be joined in both by the trustee and by the beneficiary.

Appeal from chancery court, Davidson county; A. ALLISON, Chancellor.

*Stokes & Parkes*, for appellants. *T. M. Steger*, for R. W. Turner and R. V. Wright. *Whitworth & Jackson*, for S. A. Hamilton.

LURTON, J. Andrew Hamilton, in 1864, for love and affection, conveyed by deed certain lands to James Henson, "in trust, to hold said two tracts to the only proper use and benefit of my young friend, William A. Hamilton, who is now a scholar at the school of E. L. Crocker, in Davidson county, in the state of Tennessee. He is to hold said land for the benefit of said William only, and to account to him or his guardian for the rents or yearly issues of said land. He is to hold said two tracts for the only proper use and benefit of him, the said Wm. A. Hamilton, for and during the term of his natural life. At the death of said Wm. A. Hamilton, leaving children, or the descendants of children, he is to convey said lands to the children, to be held by them as tenants in common, the descendants to represent their ancestor. If the said Wm. A. Hamilton should die in my life-time, leaving no children, or the descendants of such, said trustee is to convey said land to me. If said Wm. A. Hamilton should die after I do, and leave no children, or the descendants, then said trustee is to convey said lands to my heirs, whoever they may be." In 1885 the trustee and the beneficiary joined in the execution of a mortgage upon the estate for life of the beneficiary in the lands so conveyed in trust to Henson. They now unite in this bill, for the purpose of restraining a sale of the supposed life-estate, and to have the mortgage declared null and void, as having been executed without power in the beneficiary or his trustee. A demurrer was sustained, and the bill dismissed.

The first contention of defendants is "that the conveyance from A. Hamilton to Henson, trustee, was a dry, naked trust, and the beneficiary took a life-estate in the property." This is unsound. The duty to take, hold, and convey the remainder, upon the death of the beneficiary for life, to persons who should then appear entitled under the provisions of the deed, makes the trust an active one. That the founder of the trust could, by way of executory devise, have disposed of the remainder, will not affect the character of the trust, if he chose to resort to a trustee in preference. *Aikin v. Smith*, 1 Sneed, 309; *Hooberry v. Harding*, 10 Lea, 398. If any trust or duty is imposed on the trustee, either expressly or by implication, the trust is an active one; and in such case there is no merger of the legal and equitable estates, and the interest of the beneficiary, not being a legal one, is not subject to levy by execution. *Henderson v. Hill*, 9 Lea, 25; *Jourlmon v. Massengill*, 2 Pickle, 93, 5 S. W. Rep. 719.

The rule that a devise of the rents and profits of land is equivalent to a devise of the land itself only applies where no active trust is interposed. In *Davis v. Williams*, 1 Pickle, 646, 4 S. W. Rep. 8, the devise of the rents and profits to the children of the devisor did not operate to devise them a legal estate for life in the lands, and this for the reason that an active trust was interposed between the legal and equitable estates. The trust in that case was held to be an active one, because it was the duty of the trustee to first apply the rents and profits to payment of taxes, and to keeping the property in repair and tenantable condition. The duty was peculiarly important, in view of the fact that upon the death of the children the rents and profits went to the grandchildren, and this trust not only preserved the remainder devised to the grandchildren, but preserved it in repair and tenantable condition. The duty of applying rents to repairs, or a trust to preserve contingent remainders, makes the trust an active one. *Perry, Trusts*, § 305. In the *Davis* Case the trust ceased upon the death of the children, and the estate of the trustee was therefore cut down to an estate for life of the children, upon the doctrine that the trustee will take no greater estate than the objects of the trust require. The rents being, upon the death of the children, devised to the grandchildren, without any limitation, and the trust being no longer an active one, it was held to be equivalent to a devise of the remainder in fee. 1 Pickle, 647, 4 S. W. Rep. 8. The trust in the case at bar was an active one, and the legal estate did not pass to the beneficial owner. The interest of the beneficiary, Hamilton, was not such an one as could have been reached by a creditor through the instrumentality of a court of chancery. By sections 4282-4285, Code Tenn., the court of chancery is given jurisdiction to subject to the satisfaction of the creditor choses in action, stocks, and property held in trust for the debtor, "except when the trust has been created by, or the property so held has proceeded from, some person other than the defendant himself, and the trust is declared by will duly recorded, or deed duly registered." This legislative provision operated to deprive the chancery court of any jurisdiction which it might have otherwise had to subject the interest of a beneficiary under such a trust as that described. *Jourlmon v. Massengill*, 2 Pickle, 121, 5 S. W. Rep. 719.

But does it follow that, because the interest is such an one as cannot be reached by execution at law, or by bill in equity, that therefore it is inalienable? The trust is distinguished from the one in favor of Massingale in that all power of alienation was expressly withheld from the beneficiary, Massingale, and in that the income was expressly appointed to be used alone in the support of the *cestui que trust*. That trust was distinctly a spendthrift trust, and is so treated throughout the opinion. But learned coun-

sel endeavor to bring this trust within the principles of the *Massengill* Case by the contention that this trust is founded for a special use and purpose, the education and personal support of the beneficiary, and that the power of alienation is therefore repugnant to the purposes of the founder, and, by necessary implication, withheld. The words relied upon as constituting this a trust for the personal support and maintenance of the beneficiary are these, "for the only proper use and benefit of my young friend, Wm. A. Hamilton." And, again, that the trustee "is to hold said lands for the benefit of said Wm. Hamilton only, and to account to him or his guardian for the rents or yearly issues of said land;" and that "he is to hold said two tracts for the only proper use and benefit of him, the said Wm. A. Hamilton, for and during his natural life." These words do not limit the interest of the *cestui que trust* to his support and maintenance, or declare the object of the trust to be to make a provision for his support. They only operate to declare a distinct trust for the sole and only benefit of William Hamilton during his life. A trust may be so created that no interest rests in the beneficiary, as where it is limited to the support and maintenance of the beneficiary, and he is prohibited from alienation or anticipation. So where the increase is to be paid over only in the discretion of the trustee, or when it can only be applied for a special use, such as education or support. In all such cases the purpose of the trust would obviously be defeated if the beneficiary could assign or alienate. But wherever the absolute, equitable interest is in the *cestui que trust*, and there is no prohibition upon his power of alienation, the incidents of ownership attach, and such interest is assignable and alienable. *Perry, Trusts*, § 386a.

It is difficult to see how this trust would be breached by an assignment by the beneficiary, upon sufficient consideration, of the rents accrued or to accrue in the hands of his trustee. These rents would in such case have been applied to "the only use and benefit" of the beneficiary, just as certainly as if paid into his hands. The late cases, to which we have been referred, of *Lampert v. Haydel*, 96 Mo. 439, 9 S. W. Rep. 780, and *Smith v. Towers*, 69 Md. 77, 14 Atl. Rep. 497, and 15 Atl. Rep. 92, are not in point. In the first case, the devise was "for the use and benefit of my three sons, \* \* \* in equal shares, as long as they all may live, with power \* \* \* to use and enjoy equally the rents, issues, and profits thereof during their natural life. \* \* \* My object in making the foregoing disposition of my St. Louis property, and in attaching the limitations aforesaid, is to secure to my children a certain annual income, beyond the accidents of fortune, \* \* \* and, with this end in view, to take away from them the power of disposing of the same, or of creating any liens thereon, or of making the same liable in any way for their

debts." This last clause operated to declare the trust to be one for the personal support of the beneficiaries, and in express terms withheld all power of charging the trust by mortgage or assignment. The deed of one of the beneficiaries, by which he alienated his interest in the trust, was therefore properly held inoperative and void. The Maryland case was still less an authority. The beneficiary had made no assignment. The case was that of a creditor endeavoring by garnishment process to reach the fund in the hands of the trustee, to satisfy a debt due by the beneficiary. The trustee held under a will by which he was empowered to collect the rents and profits, and pay them to his son Robert, "into his own hands, and not into another, whether claiming by his authority or otherwise." The power of anticipation and alienation was thus expressly withheld. The trust was sustained, and the creditor properly repelled.

The legal title to the property conveyed, under the trust under consideration, being in the trustee, Henson, and the equitable interest in the beneficiary, Hamilton, and they having joined in a conveyance, operates to pass the estate for life to the mortgagees. The demurrer was properly sustained, and the decree affirmed.

#### MCQUERRY v. GILLELAND *et al.*

(Court of Appeals of Kentucky. Jan. 16, 1890.)

WILLS—ELECTION BY LEGATEE—JURISDICTION—PARTIES.

1. A testator devised a portion of his estate to defendant, his son, and directed him to convey certain land in Iowa to testator's widow for life, remainder to M. Defendant accepted the devise to him. Held that, assuming the land in Iowa belonged to him, he thereby elected to surrender all right to it, and to make the conveyance directed.

2. An objection that, as M. could not have maintained an action in Iowa to recover the land, the will not being recorded in that state, his heirs could not maintain an action to compel a conveyance, is without merit.

3. Defendant, before the termination of the life-estate, conveyed two-thirds of the land to persons who would have taken one-third as heirs of M., one-third belonging to defendant as an heir of M. Held, that the heirs of M., who were entitled to the remaining one-third, could maintain an action against defendant to compel the conveyance of that one-third, without joining with them those persons who obtained the two-thirds.

Appeal from circuit court, Lincoln county.  
"To be officially reported."

An action by Elizabeth Gilleland and others against William McQuerry to compel a conveyance of land. Judgment for plaintiffs. Defendant appeals.

*Wm. Lindsay and W. H. Pettus*, for appellant. *O. H. Waddle, J. T. May, and T. Z. Morrow*, for appellees.

BENNETT, J. The record, as we think, establishes substantially the following state of case: In 1849 the appellant, William McQuerry, and his father, John McQuerry, bought two land-warrants each, of 160 acres each, which had been issued by the federal

government to the soldiers of the Mexican war. These warrants were for land in the state of Iowa. The appellant, by an arrangement with his father, went to the state of Iowa, in company with his younger brother, Milton Green McQuerry, then about 17 years old, for the purpose of locating said warrants, and of obtaining patents, two of which were to be in his own name and two in the name of his father, John McQuerry. But if, from any cause, patents on the two warrants could not be obtained in the father's name, they were to be obtained in the appellant's name, for the benefit of the father. The appellant, on arriving at the land-office in the state of Iowa, found, owing to the absence of his father from the state, and not having his written power of attorney, that he could not obtain the patents in his father's name, and, pursuant to the alternative agreement, caused them to be issued in his own name, but failed thereafter to convey the land to his father. His father, in 1852, died, leaving a last will, which was recorded in Pulaskee county; and the appellant was named in the will, and qualified, as one of the executors, and entered upon, and continued to discharge, his duties as executor of the will. He was also one of the devisees of the will, and received the portion of the estate devised to him. The testator, among other things, willed to his wife, during her life, this Iowa land, remainder to his son, Milton Green McQuerry, and recited the fact that he bought the two warrants, and that the appellant had to have the patents issued in his own name, and requested him to convey the land to his wife for and during her life, remainder to Milton Green McQuerry. Milton Green McQuerry died soon after the war, without having had issue; and the widow of the testator, John McQuerry, having died in 1884, the appellees brought this action in equity against the appellant, to compel him to convey to the appellee, Mrs. Gilleland, sister of the appellant, and the other appellees, children of his other sister, deceased, their respective portions of said land, they claiming as co-heirs with the appellant of Milton Green McQuerry. The lower court adjudged that appellant should make the conveyance. From that judgment he has appealed.

It is to be observed that appellant is one of the devisees under the will, and is one of the executors of the will. Also, supposing that the testator was mistaken as to owning, or ever having owned, any interest in said land, that the appellant was bound to respect, and that it in fact belonged to the appellant, yet it is a fact that the testator devised a portion of his own estate to the appellant, and directed (the request is in this will a direction) the appellant to convey this land to his widow for life, remainder to Milton Green McQuerry. The testator, in making this direction, assumed to dispose of this land as his own, and, in connection with other estate, certainly his own, devised portions of the whole

to all of his children; and, but for reckoning the whole as his, he doubtless would have made a different disposition of the estate that did in fact belong to him. So the question arises, supposing that said land belonged to the appellant, but the testator having assumed to dispose of it by will, and the appellant having been made a devisee under the will, and having accepted its provisions, has he not thereby elected to surrender all right to said land, and to make the conveyance according to the direction of the will? The principle is well settled, where a testator devises his own estate, or a part of it, to a person, and also devises that person's estate to another, and that person accepts the estate thus devised to him, such person will not be heard to assert his old right, but, by thus accepting the provisions of the will, he relinquishes his old right to the other person. He cannot enjoy the bounty conveyed by the will, and at the same time claim his old right. The intention of the testator, in such case, is that both bounties shall take effect, and the conscience of the devisee is affected by this intention; and, having accepted the bounty, it would be a fraud upon the testator to allow him to thus accept the bounty, and at the same time hold on to the bounty that the testator intended for another; and, but for the belief that such other would receive the bounty, the devise would not have been thus made. It is to prevent this fraud that equity puts this donee to his election, and, having made his election to accept the provision for his benefit, he thereby elects to abide by all of the provisions of the will, and surrender all rights inconsistent with them, and to do whatever the will directs him to do in order to carry out its provisions. The right of the appellees did not accrue until after the death of the widow of the testator, which occurred in 1884.

The appellant contends that, as the will was not recorded in Lucas county, Iowa, where the land was situated, the appellees cannot maintain this action. This contention is based upon the fact that, as Milton Green McQuerry could not have maintained an action in the state of Iowa for the recovery of the land, because the will was not recorded in that state, it follows that his heirs cannot maintain this action to compel a conveyance. We cannot agree to this contention. It is well settled that the performance of an equitable obligation, or an obligation that may be enforced by an action *in personam* and not *in rem*, may be enforced wherever the chancellor may obtain personal jurisdiction of the person, without regard to the fact that the real estate to which such obligation relates is situated in another state. In the case of *Massie v. Watts*, 6 Cranch, 148, (case going to the supreme court from this state,) the court said: "Either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of *mala fides* practiced on the plaintiff, the principles of equity give a court jurisdiction wherever the

person may be found; and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction. \* \* \* This court is of opinion that, in case of fraud or trust or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree." In such case the subject-matter is not that of the recovery of land. In other words, it is not an action *in rem*. The court need not have the land before it in order to be able to render a judgment. But the action is *in personam*, for the purpose of enforcing a personal obligation of contract or of trust. It is true that the title to land is to be affected by the decree, in so far as it compels the party to convey; but, as said, by reason of his trust or contract duty, he is personally obliged to convey, and that duty may be discharged in one state as well as another, although the land may not be situated in such state. It is the breach of trust or contract to convey, that may be complied with without regard to the location of the land, that gives the right of action *in personam*. If Milton Green McQuerry were alive, he, for the foregoing reasons, could maintain this action in this state; and, he being dead, the appellees can maintain it. The judgment is affirmed.

#### ON PETITION FOR REHEARING.

(Feb. 4, 1890.)

BENNETT, J. It is true that the children of Mrs. Gilmore, the appellee's deceased sister, are not made parties to this action. The reason for not making them parties is that they, as is alleged and proven, in 1872, received from the appellant a conveyance to all of said land, except 120 acres thereof, which is not of greater value than one-third of the whole tract, less 20 acres sold by Milton McQuerry in his life-time. It is true that said children, as representatives of Milton McQuerry, were entitled to one-third of the land thus conveyed to them; and, if they or their mother purchased the same from the appellant, the purchase was wrongful, for it belonged to them. It is also true that appellant conveyed to said children the third of said land that belonged to him. It is also true that the appellees only sued for one-third of said land, and the court adjudged that she was entitled to the 120 acres of the land, as one-third of the whole, and ordered the appellant to make a deed to the same. So the intimation of counsel, to the effect that the appellant's right to only one-third of the land was ignored by the judgment, is a mistake. Also, the appellees were entitled to one-third of the whole tract, less what Milton McQuerry sold, notwithstanding the fact that Mrs. Gilmore might have waived or failed to assert her right to one-third by inheritance, and have bought the same from the appellant. The fact that she failed to do so, if she did, can in

no wise prejudice the appellee's right to her third of the whole. The record shows that the appellant conveyed equivalent to two-thirds of this land to the children of Mrs. Gilmore,—one-third that they were entitled to in right of their mother, as heir of Milton McQuerry, and one-third as a purchase from the appellant, his inheritance from said Milton; leaving only one-third in value of the land, the quantity that the appellee is entitled to. We are at a loss to know why the appellee may not recover this, as it is set off from the balance by metes and bounds, without joining said children. Petition overruled.

**KIRK v. CASSADY et al.**

(Court of Appeals of Kentucky. Jan. 18, 1890.)

**HOMESTEAD—RES ADJUDICATA.**

Land in the actual occupancy of plaintiff, as his homestead, was sold under an attachment based upon no property found. It was alleged that plaintiff was permitting a third party to hold the title to the land, to prevent its being subjected to the payment of plaintiff's debts. Held that, the land being plaintiff's homestead, it was his duty to have made that defense, and that, having failed to do so, he could not, after confirmation of the sale, maintain an action to have his homestead set apart to him.

Appeal from circuit court, Martin county.  
"Not to be officially reported."

*Thos. H. Hines*, for appellant. *Stewart & Stewart*, for appellees.

PRYOR, J. The testimony conduces to show that the appellant was a housekeeper, with a family, when his land was sold under the attachment based upon a return of no property found, and that he was in its actual occupancy as a homestead. The record shows that when the sale was made the appellant objected to the confirmation because his homestead was not allotted. His objections were overruled, and the report of sale confirmed. He then brought this action, seeking to have his homestead set apart to him.

The objection made by the appellant to the confirmation of the sale in the attachment case was pleaded in bar as a former adjudication of the same matter. There was no issue directly made in regard to a homestead in that case; and, if there was nothing else in the case but the objection to the sale for a failure to allot a homestead, the appellant might be entitled to relief. It is alleged, however, that Kirk, the appellant, was permitting one Chapman to hold the title for his (Kirk's) benefit, in fraud of the rights of creditors, and for the fraudulent purpose of preventing the plaintiff from making his debt. Upon such a charge of fraud, it was the duty of the appellant to make all the defense he had to prevent the recovery by the plaintiff, as has been settled by this court in two cases, that of *Hill v. Lancaster*, 11 S. W. Rep. 74, and *Snapp v. Snapp*, 9 S. W. Rep. 705. The debtor was before the court upon a distinct charge that he was practicing a

fraud to prevent his land being subjected to the payment of his debts; and, the land being his homestead, it was his duty to make that defense. It would have ended the controversy, and established the fact that no fraud was practiced, and particularly in this case, as the land was not worth exceeding \$1,000. Judgment affirmed.

**TALIAFERRO et al. v. ROACH et al.**

(Court of Appeals of Kentucky. Jan. 18, 1890.)

**HIGHWAYS—ESTABLISHMENT.**

Where the report of road-viewers gives the names of all the owners of the land over which the proposed road runs, the fact that the name of a tenant under the control of an owner, or cropping on shares, does not appear, will not vitiate the proceeding.

Appeal from circuit court, Todd county.

"Not to be officially reported."

*F. H. Briston, J. E. Byars, W. B. Reeves*, and *W. E. King*, for appellants. *Ben. T. Perkins*, for appellees.

PRYOR, J. This is a proceeding to establish a county road, with the usual objections made to the report of viewers and the location of the route. The objections made are purely technical. The report shows the route by courses and distances, its beginning and ending, with unusual distinctness. The viewers were regularly appointed; and the fact that the first report was quashed because one of the viewers was interested, and another substituted in his place, shows of itself that he was to act in conjunction with the one to whom no objection had been made. The names of the owners of the land are all given; and the fact that some tenant on the place, under the control of the owner, or cropping on the shares, is not,—whose name does not appear,—will not vitiate the proceeding. When the writ of *ad quod damnum* goes, the owner can make the proper defense. If there is no owner known, or is not in the occupancy, but has leased it for years to the tenant, there may exist a reason for bringing the tenant before the court; but such a question is not made in this case. The only objection arises from the character of the judgment; but when the *status* of the case is considered, and the judgment properly construed, there is no error. The county judge had declined to issue a writ of *ad quod damnum*, for the reason that in his opinion, from the evidence, no road should be established. The case going to the circuit court, that court held that the road, from the evidence, should be established, and directed the writ of *ad quod damnum* to go. So when the case reaches the county court, that tribunal must issue the writ; and, upon the return of the case from the jury assessing damages, the court may require the applicant to pay the damages, or the county, as he may think best. If the road confers a benefit to the entire community interested, of course the applicant will not be compelled to bear the burden; or,

if the finances of the county are such that no payment can be made, the court may decline to establish the road. All the circuit judge has decided is that the evidence before the court shows that the road is necessary, and in this we concur. Judgment affirmed.

**COCKRILL *et al.* v. MIZE.**

(Court of Appeals of Kentucky. Jan. 18, 1890.)

**GARNISHMENT—VENDOR'S LIEN—ACTION AGAINST WIDOW AND HEIRS.**

1. In an action against the widow and daughter of decedent, to garnishee a debt he owed B., and to enforce a lien on land for the security of the debt, in order to satisfy a judgment recovered by plaintiff against B., the petition alleged that B. sold the decedent certain land therein described, and took his note for the price; that decedent died the owner of the land, and still owing said note, which was a purchase-price note; and that a lien for the payment of the note was upon the land. *Held*, that these allegations were sufficient.

2. Where the petition gives such a description of the land sought to be subjected that the court may, from the description given, determine whether or not the land is susceptible of advantageous division, the allegation in that regard need not be made.

Appeal from circuit court, Morgan county. "Not to be officially reported."

Action by W. O. Mize against B. F. Cockrill, Kate Cockrill, and Mary Cockrill. Plaintiff recovered judgment. Defendants appeal.

*J. T. Hazlerigg*, for appellants. *Wood & Day*, (*W. W. McGuire*, of counsel,) for appellee.

**BENNETT, J.** The object of this action, by the appellee against the appellants, was to garnish a debt that Clifton Cockrill, deceased, husband of the appellant Kate Cockrill, and father of the appellant Mary Cockrill, owed the appellant B. F. Cockrill, and to enforce a lien on a tract of land for the security of said debt, in order to satisfy a debt due the appellee by B. F. Cockrill on a judgment upon which execution had been returned no property found.

It is objected that the allegations in reference to Clifton Cockrill's indebtedness are not sufficient to authorize the court to find that fact. It is alleged that the appellant B. F. Cockrill sold to Clifton Cockrill a tract of land; that said Clifton, on the 8d day of September, 1876, executed to B. F. Cockrill his promissory note for \$800, purchase price of the land, due 12 months after date, together with 6 per cent. interest until paid, and died still owing said note, and the estate of said Clifton Cockrill "is now indebted to B. F. Cockrill in the sum of \$800, with interest," etc. It seems that not only an allegation of indebtedness to B. F. Cockrill by Clifton Cockrill, at the time of the latter's death, is alleged, but so, also, is the consideration for the indebtedness alleged; also, it is alleged that his estate is still indebted said sum. These allegations are certainly sufficient in an action against a garnishee.

No administration was granted upon Clifton Cockrill's estate; and his widow and

daughter were made defendants to the suit to subject said indebtedness to the appellee's claim, and to enforce the lien on said tract of land, to pay said indebtedness. Of course, in such case, no demand was necessary; and the failure to make affidavit that the claim was just, etc., should have been taken advantage of by either motion, rule, or answer, which was not done. The defect was therefore waived. Or the court, before rendering the judgment, might have put the appellee, as to said affidavit, upon terms; but it did not choose to do so.

It is settled by this court that, if the petition gives such a description of the land sought to be subjected that the court may, from the description given, determine whether or not the land is susceptible of advantageous division, the allegation in that regard need not be made.

The allowance of interest on the costs was error, but the error is so small that we will nor reverse on that account; but the lower court, in enforcing the judgment, can deduct it.

It is stated in the petition that B. F. Cockrill sold the land in the petition mentioned to Clifton Cockrill; that the latter died the owner of the land; that his widow and heir at law then owned it by descent from said Clifton. Unless hypertechnicality is to be made the order of the day, these allegations should be deemed sufficient to show that B. F. sold to Clifton Cockrill a fee-simple title in this land. It is not only alleged that the note mentioned is a purchase-price note, but it is specifically described; and it is also stated that a lien for the payment of the note was upon the land. As it is not necessary, as between the respective parties to a deed and their heirs, to allege an express reservation of a lien, these allegations, as between said parties, are sufficient. We see no reversible error whatever in this case. The judgment is affirmed.

**CITY OF NEWPORT v. NEWPORT LIGHT CO.**

(Court of Appeals of Kentucky. Jan. 23, 1890.)

**MUNICIPAL CORPORATIONS—ELECTRIC LIGHT COMPANIES.**

1. An electric light company, chartered by an act of the state legislature, was authorized to "furnish any city \* \* \* with gas or other light for such time, and upon such terms, as may be agreed upon by the parties." The charter of defendant city gave it power to contract, and provided that its board of councilmen should have power "to construct, maintain, and operate gas and water works, and to pass all ordinances necessary to regulate the same." *Held*, that the charters authorized a contract between the company and the city as to lighting the city by gas, electricity, or any other mode.

2. An ordinance of the city gave to the company, for 25 years, the exclusive privilege of "using any or all of the streets \* \* \* of the city for the purpose of laying pipes to convey and supply gas to said city of Newport and others." It also provided that the company might adopt "any other mode equal to gas for supplying light to the city and its inhabitants," etc. The only use of the streets named in the entire ordinance was for gas apparatus and fixtures. *Held* that, in case of a



light other than gas, requiring a different use of the streets, such as the erection of poles upon which to stretch wires for electric illuminating purposes, a consent on the part of the city was necessary.

Appeal from chancery court, Campbell county.

"To be officially reported."

Chas. J. Helm and E. W. Hawkins, for appellant. R. W. Nelson, for appellee.

HOLT, J. This action was brought by the appellee, the Newport Light Company, to enjoin the appellant, the city of Newport, from removing poles erected by the company upon the streets of the city, and upon which it has stretched wires for electric illuminating purposes. It claims the right to so use the streets under a contract with the city for lighting it. It is denied that the terms of the contract embrace such a use; and, if so, then the power of the city to make it is denied. The appellee, the light company, by its charter, enacted March 27, 1880, was authorized to "furnish any city, town, district, corporation, or locality, or any public institution, manufacturing establishment, or private premises, with gas or other light for such time, and upon such terms, as may be agreed upon by the parties." The charter of the appellant, the city of Newport, merely provides, however, that its board of councilmen shall have power "to construct, maintain, and operate gas and water works, and to pass all ordinances necessary to regulate the same, provided that no existing contract shall be affected thereby."

It was held by this court in the case of City of Newport v. Light Co., 84 Ky. 166, that where a municipal corporation has the power by legislative grant to maintain gas-works, in order to fulfill its duty of lighting its streets, and furnishing its inhabitants with the means of obtaining gas at their own expense, it has the implied power to contract with others to do so. This rule is not now questioned; but it is insisted that, as the city charter authorizes the construction and operation of gas-works only, the city had no power to contract for the electrical lighting of its streets. The legislature had, however, by the company's charter, declared that it might "furnish any city \* \* \* with gas or other light for such time, and upon such terms, as may be agreed upon by the parties." This, in view of the fact that the city charter gives to it the power to contract, authorized a contract between these parties as to lighting the city by gas, electricity, or any other mode. The city drew its power to make the contract for this particular purpose from the act incorporating the light company. Phillips v. Bridge Co., 2 Metc. (Ky.) 219.

The city, however, has control of its streets and public thoroughfares; and the inquiry arises, has it consented to or entered into a contract with the appellee which gives the latter the right to use them for the erection of electrical illuminating appliances? The first section of the city ordinance, evidencing

the contract, gives to the company, for 25 years, the exclusive privilege of "using any or all of the streets, lanes, commons, alleys, and public places of the city for the purpose of laying pipes to convey and supply gas to the said city of Newport and others;" and the only use of the streets named in the entire ordinance is for gas apparatus and fixtures. The seventh section, however, reads thus: "Said company or their successors may adopt any other mode equal to gas for supplying light to the city and its inhabitants," etc., "provided the same shall be done at no greater cost or expense to the city or consumers than the gas-light." It is claimed that by virtue of this provision the right is to be implied in favor of the company to use the streets in any manner necessary to the introduction of any other light than gas. It is true that, as a general rule, where the power is given to do a thing, the right to the exercise of the means necessary to the end is implied, without further consent or grant. This case does not, however, in our opinion, fall within the rule. The parties to the contract cannot reasonably be supposed to have so intended. The right to the use of the streets now contended for is not a natural one. It is a franchise, which is a privilege that must emanate from legislative power. It is a special privilege, in derogation of common right, and with which persons generally are not invested. Its exercise may, and likely will, affect the convenience, and even the safety, of the general public. The interests of the city are involved. Its commerce, the health of its people, and its general prosperity are in question. In such a case, therefore, it should not be presumed that the city intended, or that the parties contemplated, that the control of the streets were surrendered *ad libitum* to the light company for lighting purposes, and that the city was to have no further say in the matter, however much the use might be likely to affect the health and business of its people. Franchises of this sweeping character should not be presumed. Grants like the one claimed should be expressed in unambiguous terms; otherwise, the city may be left helpless, and with no power of regulation. The police power essential to its welfare and interests would, in a measure at least, be gone. It would, in an important degree, be a transfer to the light company of its corporate powers and duties, and, *pro tanto*, a destruction of the police power of the city government. It cannot fairly be supposed that the parties intended, in providing that the company might furnish any other light which might be equal to gas, that the city thereby surrendered its streets to any use that might be necessary for the introduction of any light which future invention might produce. Such a use might be highly dangerous to the health and lives of its citizens. It might so far affect the use of its streets as to seriously impede public travel and commerce, and amount, in a less or greater degree, to an abdication of police power in the

city government. It is unreasonable to imply the power upon the part of the company to so use the streets for another reason. The entire contract must, of course, be considered, in construing it. No use of the streets is named in the ordinance, save to supply gas. The first section grants the privilege of using the streets for laying pipes for this purpose. The second section regulates the manner of this use, and places certain conditions upon it. An unrestricted grant of the use of the streets for any other mode of lighting the city should not, therefore, be implied. The entire contract considered forbids it; and, in case of the introduction of a light other than gas, requiring a different use of the streets, a consent upon the part of the city to such new use is necessary. The right is not to be implied from the ordinance in question; and, unless it is made to appear that it has been otherwise given, the demurrer to the petition should be sustained, and the action dismissed. Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

#### TOWN OF BELLEVUE v. PEACOCK *et al.*

(Court of Appeals of Kentucky. Jan. 30, 1890.)

#### STREET ASSESSMENTS—RETROACTIVE LEGISLATION.

Where a street is improved under a contract with the city, by the terms of which the contractor is to look for pay to assessments on the abutting property, and the charter of the city gives no power to improve the street at the cost of the property owners, they cannot be made liable for such improvement by subsequent legislation, validating the contract between the city and the contractor, and giving a lien on the property for the work.

Appeal from chancery court, Campbell county.

"To be officially reported."

John S. Ducker, for appellant. R. W. Nelson, for appellees.

HOLT, J. In 1875 the appellant, the town of Bellevue, entered into a contract with Hahn & Trapp for the improvement of a street, by the terms of which the latter were to look for their pay to assessments upon the abutting property only, save the cost of street intersections, which was to be paid by the town. Both parties to the contract then believed that the charter of the town conferred the power to impose the cost of the improvement upon the abutting property. The assessments were to be collected in the name of the town. The work was properly done, and received by the town. Some of the abutting lot-owners failed to pay their assessments. The town sued to enforce their collection. This court held that the appellant's charter did not give the power to improve a street at the cost of the abutting lot-owners. *Doyle v. Trustees*, 1 Ky. Law Rep. 168. Hahn & Trapp then sued the town, but this court, after express allusion to the fact that they had agreed they would not in any event look to the town, save for the cost of the intersections, which had been paid, decided that no

implied promise arose upon the part of the appellant to pay for the work, because of the non-liability of the lot-owners. *Trustees v. Hohn*, 82 Ky 1. February 14, 1888, the legislature, by what may be termed an attempted healing act, sought to validate the contract between Hahn & Trapp and the town, by giving to the latter a lien for the benefit of the former upon the lots abutting on the improvement, *pro rata* for the assessment, and providing for the enforcement thereof in the event of non-payment by the owners. The appellees, Peacock and Thee, are two of them. Failing to pay, by consent of parties the one action was brought against them. It having been decided below upon demurrer to the petition, its averments, as amended, must be taken as true. From them it appears that Thee was the owner of his lot, and has been ever since the making of the contract between the town and Hahn & Trapp. Peacock purchased his, however, since then, and since the decision of this court holding that the lot-owner was not liable, but with knowledge that Hahn & Trapp made the improvement, and had never been paid for it. The validity of the act is involved. It must be borne in mind that it does not impose upon the town the payment of a just claim for which an equivalent has been received, but which, owing to some irregularity or omission in the proceeding creating it, cannot otherwise be enforced at law. Such a case would be very different from that now presented. Undoubtedly the claim is a just one, as against the town. It has received a full equivalent, and that natural obligation which rests upon all persons, whether acting collectively or individually, to do right and deal fairly should prompt it to see that this debt is paid. This act does not, however, look to payment by the town. It is not an enabling one for that purpose. Our state constitution does not forbid retrospective legislation *eo nomine*, and there is no doubt the legislature has the power to pass a law which reaches back, and changes or modifies the effect of a prior transaction, if there be no other objection to it than its retrospective character. If it merely aid in the enforcement of an existing obligation, and divests no vested right, it is not open to constitutional objection. Cooley, quoting from an approved case, says: "A law, although it be retrospective, if conformable to entire justice, this court has repeatedly decided is to be recognized and enforced." Again: "On the same principle, legislative acts validating invalid contracts have been sustained. When these acts go no further than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law, the question which they suggest is one of policy, and not of constitutional power." Cooley, Const. Lim. 372-374.

Thus a statute imposing a tax for and directing payment of a claim against a city is not invalid or unconstitutional because the claim is not recognized by the law as a legal obligation; and it has been declared that a legislature may compel a municipal corporation to recognize and pay a claim not binding in strict law, and which for technical reasons cannot be enforced in equity, but which is nevertheless just and equitable in character, and supported by moral obligation. *Hasbrouck v. City of Milwaukee*, 80 Amer. Dec. 733. This rule is, however, to be carefully restricted to the original contracting parties, and such others as may have succeeded to their rights, with no greater equities; and Mr. Cooley says, on page 369 of the work just cited: "So he who was never bound, either legally or equitably, cannot have a demand created against him by mere legislative enactment." The statute now in question is not merely remedial in its character. When the contract was made for the improvement of the street no right existed to look to the abutting lot-owners for payment. By the general law he was not liable. The statute alone, in such a case, creates his liability. If A or B, subsequent to the improvement, purchased lots adjoining it, their property would certainly not be liable for its cost, in the absence of a statute so providing; and this is equally true although the purchase was made with knowledge that the party making the improvement had not been paid. Especially would this be so if the highest judicial authority of the jurisdiction had already held that the property was not liable. It is equally true that a person who owned an abutting lot when the contract for the improvement was made, and yet owns it, may defend against the statute in question. When the contract was entered into, the town had no authority, express or implied, to bind his property for the cost of the improvement; and when the statute by virtue of which relief is now asked was enacted there was no pre-existing right as against him, or to look to his property. In short, the legislature by this act has attempted to afford a remedy against a party as to whom no right, legal or equitable, existed. It was said in the case of *Hasbrouck v. City of Milwaukee*, supra: "It [the legislature] would of its own mere motion create an obligation where, by law, none before existed. It would impose a liability against the will and without the consent of the party to be charged. This the legislature cannot do. It can only act retrospectively, for the purpose of furnishing a remedy for, or removing an impediment in the way of, the enforcement of some pre-existing legal or equitable right or duty, and not for the purpose of creating such right or duty." If legal or equitable rights or obligations have arisen between the parties to a transaction,—have grown up out of their previous lawful acts, and exist independently of some want of formality or irregularity which prevents their enforcement,—then the legislature

may provide a remedy; but it cannot provide for the enforcement of a non-pre-existing right. The statute in question was no doubt enacted through a laudable legislative desire that justice should be done, and for this reason, as well as the fact that manifest justice would be done by paying the parties who made the improvement, we would gladly uphold it, if consistent with our sworn duty. Not being so, and the views of the lower court being in accord with those above expressed, the judgment below is affirmed.

ROYAL INS. CO. v. RUFER'S ADM'R.

(Court of Appeals of Kentucky. Feb. 6, 1890.)

SPECIAL JUDGE.

1. Act Ky. Feb. 7, 1884, providing for the election of special judges to preside when the judge of the Jefferson court of common pleas fails to attend, and for transfer of causes from that court to the vice-chancellor of the Louisville chancery court, when the judge thereof cannot properly preside, does not authorize the election of a special judge in the common pleas in a case which the regular judge is disqualified to try, but only when he fails to attend.

2. Nor is such act in contravention of Const. Ky. art. 4, § 23, providing that "the general assembly shall provide by law for holding circuit courts when, for any cause, the judge shall fail to attend, or, if in attendance, cannot properly preside;" the court of common pleas being a statutory court in aid of the circuit courts.

Appeal from court of common pleas, Jefferson county.

"Not to be officially reported."

*Hargis & Eastin*, for appellant. *Brown, Humphrey & Davis*, for appellee.

PRYOR, J. The only question necessary to be decided in this case is, should the clerk or the judge of the court below have transferred this case to the Louisville law and equity court? When the case was called for trial the regular judge declined to preside in the case, and, this court must assume, for reasons that were sufficient to require him to leave the bench. A special judge was then elected, and the case tried; resulting in the verdict and judgment complained of. It is insisted by the appellant that the special judge had no power to try the case, and that, the proceeding under which the election was held having been objected to, the judgment below should be reversed. We find, on an examination of the various acts regulating the proceedings in the courts of Jefferson county and the city of Louisville, that it is only where the judge fails to attend his court that the members of the bar can elect. The act of February 7, 1884, provides "that when the judge of the Jefferson court of common pleas, or the chancellor of the Louisville chancery court, or vice-chancellor of the Louisville chancery court shall fail to attend, it shall be lawful for the members of the bar in attendance on such court to elect a special judge to hold such court for the occasion, in the same manner as special judges for circuit courts are elected." It is evident that the legislature saw the necessity of an election of

a special judge, where the regular judge could not attend, for the reason that it would delay the trial of all the cases ready to be disposed of, and that some one should be substituted other than the chancellor or vice-chancellor, whose courts are in session at the same time. Therefore the election of a special judge was authorized. If, however, the regular judge does attend, and cannot properly preside in a particular case, what action is then required to be taken. The second section of the same act provides: "When the judge of the Jefferson court of common pleas cannot properly preside in an action or special proceeding pending before him, such action or special proceeding shall be transferred by the clerk of said court, or the judge thereof, to the vice-chancellor of the Louisville chancery court, and all further steps and proceedings in such action or special proceeding shall be held before said vice-chancellor; and if, for any cause, the vice-chancellor cannot properly preside in such action or special proceeding, the same shall be transferred to the Jefferson circuit court, and there tried." 1 Laws 1883-84, p. 8. The third section of the act provides that when the chancellor of the Louisville chancery court cannot properly preside in an action before him it shall be transferred to the vice-chancellor, and if he cannot preside a special judge may be chosen, as they are in the circuit courts. Section 4 provides that when the vice-chancellor cannot preside in an ordinary action before him he shall transfer it to the judge of the court of common pleas, and if that judge cannot preside it shall be transferred to the circuit court. Section 5 provides that when the vice-chancellor cannot properly preside in an equitable action before him it shall be transferred to the chancellor, and if he cannot preside a special judge may be chosen. It is therefore apparent, from the legislation in regard to the courts in Louisville and Jefferson county, that the right to elect a special judge in either of the courts mentioned is determined by the statute on the subject, and that special judges cannot be elected unless the judge or the judges of the courts to which the transfers are directed to be made cannot properly preside. It was the duty, therefore, of the regular judge, without leaving the bench, to transfer this case to the law and equity court; or, if he failed to do so, it became the duty of the clerk to make the transfer, and to so enter it upon the order-book. The appellant objected to the holding of the election, and to the election of the special judge. The regular judge had left the bench; and the statute requiring the clerk to make the transfer, and the clerk persisting in holding the election over its objection, and the order so showing that attempt to confer jurisdiction on the special judge, it was not necessary, when that judge took his seat, to make a motion to transfer, or to object to his hearing the case. He had no power, over such objections, to try it. If no objection had

been made to the proceeding, neither party would be allowed to complain of the judgment, because they had the right to consent that a special judge or an attorney should try the case; and this court, in the absence of an objection, would necessarily assume that the trial was had by the consent of parties. The fact that the name of the vice-chancellor's court has been changed to that of the "Louisville law and equity court" can make no difference. The same law or statute applies to that court that applied to the vice-chancellor's court.

It is said by counsel for the appellee that the act in question, authorizing the transfer, is in violation of section 28 of article 4 of the constitution, which provides: "The general assembly shall provide by law for holding circuit courts when, for any cause, the judge shall fail to attend, or, if in attendance, cannot properly preside." We are unable to see the application of the constitutional question to the case before us. The common pleas court is a statutory court, having similar jurisdiction, in many respects, to the circuit court, and was created in aid of that court, to relieve it of a docket that imposed too much labor upon its presiding judge; and it may be termed a "circuit court," for that reason, but at the same time may be abolished, at the will and pleasure of the legislature, without regard to its duration as fixed by the law creating it, or the judge presiding over it. It is the creation of the legislature; and its jurisdiction, connected with the filing, trial, and transfer of cases brought within that court, may be regulated by the law-making power, if not in violation of the constitution. In fact, if this question was confined to the circuit court, we perceive no constitutional objection to the transfer of civil cases from that to another court, if the legislature should deem it expedient. The provision of the constitution requiring the legislature to provide by law for holding circuit courts when the regular judge fails to attend, or cannot properly preside, does not interfere with the right of the legislature to change the venue in a civil case, or to transfer a particular case from one court to another, or even any number of civil cases to that court organized to relieve the circuit court, and invested by the legislature with the jurisdiction. Such is both the legislative and judicial history of the state. The election of a special judge being without authority of law, it was not necessary to move to transfer the case after the special judge had taken his seat; and the fact that he may have given to the appellant a fair trial cannot vest in him the power to try the case. The order of court shows that the defendant objected to the selection of a judge on the ground that the case should be transferred to the law and equity court, and that when the special judge was elected, and took his seat, the defendant objected at the time, and the clerk overruled his objections. The statute is imperative that the judge of the court, or the clerk, shall make the transfer;

and, the judge failing to do so, the clerk should have entered the order. Judgment reversed, and remanded for proceedings consistent with this opinion. The judge of the common pleas court will transfer the case, if he is unwilling to preside, to the law and equity court, and for proceedings consistent with this opinion.

**BAILEY v. WINN et al.**

(Supreme Court of Missouri. Dec. 31, 1889.)

TRUSTS—MORTGAGES—ASSIGNMENT—COURTS—PRESUMPTION OF OFFICIAL DUTY—HEIRS.

1. A purchaser of land, with a full knowledge of an equitable title in another, becomes a trustee of the legal title, for the benefit of the equitable owner.

2. The assignee of a note secured by mortgage cannot recover in ejectment where there is no assignment of the mortgage, or transfer of the legal estate, by the mortgagee.

3. An action to enforce a vendor's lien does not involve the title to real estate, within Acts Mo. 1874, p. 256, § 3, giving the court of common pleas jurisdiction in all civil actions except where the title to real estate is involved.

4. A sale of land under execution issued from the court of common pleas is valid, as the act establishing that court gives it all the powers of a court of record, and the power to issue executions is a necessary incident to such courts.

5. The act makes it the duty of the judge to certify the judgments of the court of common pleas to the circuit court; and, until the contrary appears, it will be presumed that he performed his duty.

6. A deed from a widow to the heirs of her deceased husband will not prevail as against a sheriff's deed to plaintiff, executed during the life of the husband, though not recorded until after the execution of the deed from the widow to the heirs.

7. A judgment in ejectment for defendant is not a bar to the prosecution of another suit between the same parties, for the same land, where it does not appear that an equitable defense was pleaded in the former suit.

Error to circuit court, Macon county: **ANDREW ELLISON, Judge.**

*Sears & Guthrie and Berry & Thompson*, for plaintiff in error. *B. R. Dysart*, for defendants in error.

**BLACK, J.** This is ejectment for 120 acres of land, the same being a part of school section 16, in township 59, range 16, in Macon county. The defendants Winn and Epperson are the tenants of James D. Sparrow, who is the curator of the estates of David B. and Thomas M. Edwards, minor heirs of Edward Edwards, deceased. Sparrow was made a defendant on his own motion, and defends for his wards, though they are not made defendants. The answer of Sparrow sets up, and he made full proof of, the following facts: On the 2d November, 1847, the sheriff of Macon county, pursuant to an order of the county court, sold one of the three 40-acre tracts to Blan, who paid the purchase price; and in October, 1850, the county court ordered the clerk to certify the fact of payment to the register of lands, to the end that a patent should be issued to Blan. He conveyed to Wilson, who purchased the other two 40-acre tracts in 1850, under an order of sale made

by the county court. In 1853, Wilson conveyed the 120 acres to Trewitt, who assumed and paid the purchase price of the 80 acres agreed to be paid by Wilson. In 1858, Trewitt conveyed to Estes, and he conveyed to Agee in 1865; and the latter conveyed to Edward Edwards by a deed dated the 18th June, 1870. Edward Edwards died in possession, in 1877, leaving a widow and the two minor children before named. Edward Edwards, and those under whom he claimed, had been in possession since 1850; but no patent was ever issued by the state to the above-named purchasers or their grantees. By a deed dated and recorded on the 8d April, 1880, the widow of Edward Edwards conveyed her interest to the wards of defendant Sparrow.

1. To defeat this equitable title in the minor heirs of Edward Edwards, the plaintiff relies upon three titles. The first is a patent from the state to Edward A. Edwards, dated the 25th January, 1884, and a deed from him to the plaintiff Bailey, dated in the following February. The patent is based upon a sale of the school lands said to have been made in January, 1884; and Edward A. Edwards became the purchaser, at \$1.85 per acre. The land had been sold many years before to Blan and Wilson, and the purchase price paid into the township school fund; and it is difficult to account for this last sale on any other theory than this: that it was sold through the manipulations of Edward A. Edwards. Be that as it may, Edward A. Edwards had previously sued Sparrow in ejectment for this land, and failed in his suit. He had full knowledge of the equitable title of Edward Edwards and his heirs. Conceding that Edward A. Edwards acquired the legal title by the patent, still he acquired it with actual notice and knowledge of the equitable title in the heirs of Edward Edwards. He is but a trustee of the legal title, and holds it for the benefit of the equitable title; and, unless he has acquired the equitable title, the defendants should prevail in this suit. *Sensenderfer v. Kemp*, 83 Mo. 581; *Swisher v. Sensenderfer*, 84 Mo. 104. As to the plaintiff, Bailey, little need be said. Edward A. Edwards testified that there was no understanding between him and Bailey whereby the latter is to deed back the land in case the plaintiff should succeed in this suit; but he says Bailey paid nothing for the land, and, if he fails in this suit, is to pay nothing. It is clear that Bailey is prosecuting this suit for Edward A. Edwards, and occupies no better position than would Edwards, if he were the plaintiff.

2. The second alleged title of the plaintiff is this: Edward Edwards and his wife, by their mortgage deed, dated the 11th January, 1871, conveyed the 120 acres of land to David W. Williams, to secure a note, of the same date, executed by Edwards and payable to Williams, for \$670, due in two years. David W. Williams acknowledged satisfaction in full on the margin of the record, under date of 13th August, 1879. Plaintiff, however,

produced in evidence the note, with two assignments indorsed thereon,—one from Williams to Edward A. Edwards, and the other from him to plaintiff. Edward A. Edwards testified that he purchased this note from Williams on the 9th August, 1879, and had it assigned to himself on that day, and that the marginal satisfaction was made without his knowledge or consent, and after he had become the owner of the note. He says he had previously contracted for the note, had made several payments, and that the payment of \$206.20 on the 9th August was the last one. Concede that Edward A. Edwards became the owner of the note by assignment, and that he assigned it to plaintiff; still we do not see how the plaintiff can recover in this action of ejectment on the mortgage. There is no doubt but a mortgagee, after condition broken, may recover in ejectment against the mortgagor, and those claiming under him. *Sutton v. Mason*, 38 Mo. 120; *Johnson v. Houston*, 47 Mo. 230. The assignment of the debt carries the security, so that the assignee may foreclose the mortgage; but the mortgagee may recover in ejectment, because, after condition broken, he is in law regarded as the owner of the estate. The legal title vests in him for the protection of the debt, but for no other purpose. Before the assignee of the debt can recover in ejectment, he must show a transfer of this legal estate to himself. We have held that the beneficiary in a deed of trust to secure the payment of a debt cannot maintain ejectment after condition broken. *Siemers v. Schrader*, 88 Mo. 20. So, in case of an ordinary mortgage, the mere assignment of the debt does not vest the title of the mortgagee to the land in the assignee. *Jones, Mortg. (4th Ed.)* § 818. In the present case there was no assignment of the mortgage, or transfer of the estate by the mortgagee; and it follows from what has been said that plaintiff cannot recover on the mortgage, even if he is the owner and holder of the note.

3. For a third title, the plaintiff put in evidence a sheriff's deed to Edward A. Edwards dated the 15th July, 1875. This deed was made by virtue of a sale under a special execution issued upon a judgment of the Macon county court of common pleas in favor of one David W. Edwards, and against Edward Edwards, rendered on the 28th April, 1875. By the second section of the act establishing that court, (Acts 1874, p. 256,) it is provided: "Said court \* \* \* shall have power and jurisdiction within said county as follows: First, concurrent original jurisdiction in all civil actions with the circuit court, except where the title to real estate shall be involved." The point is made that the common pleas court had no jurisdiction of the suit, because it involved the title to real estate, and that the deed, and decree upon which it is based, are void. The pleadings in that case are not in evidence, but from the decree it appears the suit was one of David W. Edwards against Edward Edwards. The find-

ings made by the court disclose the following facts: These two persons purchased the 120 acres of land from Andrew Agee in 1869, at the agreed price, \$1,600. They paid at the time of the purchase \$1,000, of which amount David paid \$400 and Edward \$600. David gave Agee his note for the balance of the purchase price, namely, \$600; and Agee executed to David a bond for deed. David turned this title-bond over to Edward, and the latter paid the debt due to Agee, and received a deed. Edward executed his note to David for \$400, being the amount paid by the latter to Agee. The decree establishes a vendor's lien in favor of David for \$498.50, being the amount due him on the last-named note, subject to a mortgage ("deed of trust," it is called) from Edward Edwards to David W. Williams. From this statement it will be seen the suit was one for the sole purpose of enforcing a vendor's lien. This court has appellate jurisdiction "in cases involving title to real estate." It has been the constant ruling, under this clause of the constitution, that cases having for their sole object the enforcement of tax-bills and mechanics' liens, and the foreclosure of mortgages, do not involve the title to real estate. *Baier v. Berberich*, 77 Mo. 414; *Granite Co. v. Bobb*, 97 Mo. 46, 11 S. W. Rep. 225; *Corrigan v. Morris*, 97 Mo. 174, 10 S. W. Rep. 880. It is not enough that the judgment, when carried into execution, will affect the title to land. The title must be involved in the suit itself, and be a matter about which there is a contest. In the case before us there was no contest, controversy, or dispute as to who had, or was entitled to have, the title to the land. The court was not called upon to make any adjudication concerning the title. Edward Edwards was the admitted owner. We cannot see that this case differs in principle from one to enforce other liens. We conclude the suit did not involve title to real estate, and the case was therefore within the jurisdiction of the common pleas court.

4. Further objections are made to the sheriff's deed because the execution was issued out of the common pleas court, and not the circuit court, and because it does not appear that a transcript of the judgment was filed in the office of the clerk of the circuit court. The act establishing the common pleas court gives to it all the powers of a court of record, and provides that transcripts from justices of the peace, for a designated portion of the county, may be filed therein; and that sales of real estate under its judgments and decrees must be made at same term thereof, and "be conducted in all respects as sales under executions issued from the circuit court." The third section provides: "The judgment of said court shall be a lien upon real estate, and in all other respects have the same force and effect of judgment of the circuit court, after a transcript of such judgment shall be filed in the circuit clerk's office, and issuing of executions thereon; and sales of real and personal estate shall be gov-

erned by the same laws that govern such matters in the circuit court." And it is made "the duty of the judge of said court to file in the office of the clerk of the circuit court a certificate of all judgments rendered and transcripts filed in said court within six days after the rendition or filing thereof, setting forth briefly the names of the plaintiff and defendant, and the amount and date of judgment." The act establishes a court, and in general terms confers upon it the powers and duties of a court of record. The power to issue executions is an incident to such courts, unless denied; and no such denial is found in the act. On the contrary, it contemplates, throughout the various provisions, that the court thereby created shall have the power to carry into effect its own judgments, as well as those of justices of the peace. The execution was sued out of the proper court.

That part of the third section first quoted is involved, and the meaning is not clear. It provides for the filing of a transcript of the judgment in the circuit court. The transcript here mentioned must be the certificate of judgments mentioned in the subsequent part of the section. The certificate which the judge is required to make must state the names of the parties to the suit, and the amount and date of the judgment. It cannot be that the legislature intended that both a full transcript and the certificate should be filed in the office of the clerk of the circuit court. As executions must issue from the common pleas court to carry into effect its judgments, no reason is seen why a full transcript of the judgment should be filed in the circuit court. This special court held its terms at New Cambria, away from the county-seat, where the public records were kept; and the chief object in requiring the judgments to be certified to the circuit court was that there might be evidence in that court of the existence of judgments in the common pleas court. The duty of certifying the judgments to the circuit court is devolved upon the judge, and not the parties litigant; and, until the contrary appears, it will be presumed that he performed the duty thus enjoined upon him. Even if he failed to file the certificate or transcript in the office of the clerk of the circuit court, we do not say or intimate that the sale would be void.

5. The sheriff's deed was executed in 1875, before the death of Edward Edwards, but not recorded until May 4, 1880. The deed from the widow to the minor heirs of Edward Edwards was executed on the 3d April, 1880; and the defendants base a claim on the priority of this record. The sheriff's deed, though not recorded, was valid as against Edward Edwards. The heirs, as against their ancestor's grantee, have no title at all; and the widow has no dower, as against a vendor's lien. It is now the law of this state that a deed from the heirs to one for value, and without notice, will prevail over a prior unrecorded deed made by the ancestor.

Youngblood v. Vastine, 46 Mo. 239. But we do not see how the heirs can build up a title by deeds from one to the other, or by a conveyance from the widow.

6. There is in this record a copy of the judgment and bill of exceptions in the former ejectment suit of Edward A. Edwards against the defendants Epperson and Sparrow. The judgment was for defendants. The pleadings in that case are not before us in this one, and there is nothing to show that any equitable defense was pleaded; so that the rule that one judgment in ejectment is not a bar to the prosecution of another between the same parties, for the same land, must be applied in this case. Emmel v. Hayes, ante, 521, and cases cited, (not yet officially reported.) The judgment is reversed, and the cause remanded. All concur.

STATE *ex rel.* BELL, Public Administrator,  
v. NOLAN *et al.*

(Supreme Court of Missouri. Jan. 27, 1890.)

PUBLIC ADMINISTRATOR—BOND—RELEASE OF  
SURETY.

1. Rev. St. Mo. 1879, § 907, making public administrators "subject to the same duties, penalties, provisions, and proceedings as are enjoined upon or authorized against executors and administrators by this chapter, as far as the same may be applicable," does not exclude public administrators and their sureties from the benefits of chapter 66, section 3906 *et seq.*, providing for the discharge of sureties on official bonds, and limit them to the provisions for sureties on executors' and administrators' bonds.

2. A pleading, alleging an application for discharge as surety, made "after due notice as required by law," and setting out the record of the proceedings, which recites the presence of the principal on the hearing of the application, shows proper notice to the principal.

3. If Rev. St. Mo. 1879, § 1044, requiring an order for a special term of a court to be entered by the court in term-time, applies to probate courts, it will be presumed, in the absence of any showing on the subject, that a special term of that court was held in pursuance of an order so entered.

4. Under Rev. St. Mo. 1879, § 3774, providing that no exceptions shall be considered on appeal except those that have been expressly decided by the lower court, and section 3775, providing that judgments shall not be reversed except for error materially affecting the merits of the action, a judgment overruling a demurrer to the answers of some of the defendants will not be reversed because of the omission to render judgment against a defendant in default; the plaintiff not having indicated any wish to take judgment against that defendant.

Appeal from circuit court, Jackson county.

Plaintiff brought this action to recover for an alleged breach of the official bond of the former public administrator while in charge of the same estate. Defendants are the principal in that bond and his sureties. The defendant principal entered his appearance, but made no defense. The sureties filed answers to the effect that prior to the alleged breach they had been released from subsequent liability as sureties by proceedings under chapter 66, Rev. St. 1879, § 3906 *et seq.* The an-



swers state the particular steps taken in that behalf, and recite the record entries of the probate court of Jackson county, referred to in the opinion, which are as follows:

"Jas. Horrigan vs. George N. Nolan, Pub. Admr., &c. December 7th, 1881. Now at this day comes the petitioner, by his attorney, as well as the defendant, by his attorney, and, it appearing to the satisfaction of the court that the petitioner, James Horrigan, has, since he became one of the sureties of the defendant on his official bond, removed from the county of Jackson, it is ordered that the prayer of the petitioner be granted, and that the said defendant, as public administrator, as aforesaid, be required to file a new bond, as such public administrator, in the sum of twenty thousand dollars, (\$20,000,) on or before the 7th day of February, 1882."

"Special term, Feb. 7, 1882. Now at this day comes O. P. W. Bailey, judge of the probate court of Jackson county, Missouri, and orders that a special term of said court be held on this day, and at which said special term the following proceedings were had and made, to-wit: In the matter of the new bond of George N. Nolan as public administrator of Jackson county. Now at this day the court approves the new bond of said public administrator (heretofore filed) herein, in the sum of twenty thousand dollars, conditioned as the law directs, with John Endres, Joseph H. Green, Patrick Mugan, Henry T. Hereford, and D. S. Self as securities thereon. Ordered that court do now adjourn. O. P. W. BAILEY, Judge."

To these defenses plaintiff demurred, unsuccessfully. He then elected to stand by the demurrers, and appealed.

Rev. St. Mo. 1879, sec. 1044. "Special or adjourned sessions of any court may be held in pursuance of such proclamation, or in continuation of the regular term, when so ordered by the court in term-time; the order being entered in its records." Sec. 8774. "No exceptions shall be taken in an appeal or writ of error to any proceedings in the circuit court, except such as shall have been expressly decided by such court." Sec. 8775. "The supreme court shall not reverse the judgment of any court, unless it shall believe that error was committed by such court against the appellant or plaintiff in error, and materially affecting the merits of the action."

Wash. Adams, for appellant. A. M. Allen, for respondents.

BARCLAY, J., (after stating the facts.) The defense of the sureties on the original bond of the public administrator is, in substance, that one of them, in November, 1881, filed in the probate court of Jackson county his petition, duly verified, for discharge from further liability because of his removal from the county; that after "due notice, as required by law," to the administrator, the application was heard, and resulted in an order of that

court granting the application, and requiring the administrator to file a new bond on or before February 7, 1882. Before that date the new bond was approved and filed in compliance with the former order, if the probate record of February 7, 1882, is to be taken as valid, respecting which more will be said later on. This outline of the defense is sufficient to show the principal issue in the case.

Plaintiff contends that chapter 66, Rev. St. 1879, entitled "Of Sureties, and Their Discharge," has no application to public administrators. The trial court held that it did apply to such officers. Several sections of our statutes bear more or less directly on the question thus presented. In the chapter on "Administration" we find provisions making the public administrator of Jackson and other counties an elective officer, empowering the court to demand of him, from time to time, such additional security as the condition of the estates in his charge may require, (Rev. St. 1879, § 308,) and further declaring that, "in addition to the provisions of this article, he and his securities shall have the same powers as are conferred upon, and be subject to the same duties, penalties, provisions, and proceedings as are enjoined upon, or authorized against, executors and administrators by this chapter, so far as the same may be applicable." Rev. St. 1879, § 307. We read also, in the general law of administration, (Rev. St. 1879,) the following: "Sec. 28. If any person bound as security in the executor's or administrator's bond file in the probate court an affidavit stating that the affiant has sufficient cause to believe, and does believe, his co-security has died, or has, or is likely to, become insolvent, or has removed from the state, or that the principal in such bond has, or is likely to, become insolvent, or is wasting the estate, and shall have given to the principal in such bond at least ten days' notice of such complaint, the court shall examine into the complaint. Sec. 29. If the court shall find the complaint mentioned in either of the preceding sections to be just, it shall order another bond, and sufficient security, to be given. Sec. 30. Such additional bond, when given and approved, shall discharge the former securities from any liability arising from any misconduct of the principal after filing the same; and such former securities shall only be liable for such misconduct as happened prior to the giving of such new bond. Sec. 31. If such person fail to give such additional bond and security within ten days after the making of such order, it shall be the duty of the court to revoke his letters; and his authority from that time shall cease." The sections of law (Rev. St. 1879) upon which the defense relies are these: "Sec. 8906. Any person bound as surety in any bond given by any officer, to secure the faithful performance of the duties of such officer, may, on his petition in writing, addressed to the court authorized by law, for the time being, to take and approve such official bonds, be discharged from all future liability on such

official bond. Sec. 3907. The petition shall set forth the facts upon which the application for a discharge is founded, and shall be verified by the affidavit of the petitioner, thereto annexed." Sections 3908, 3909, provide for notices to the principal. "Sec. 3910. The court to whom the petition is addressed shall hear the application, and may, on examination thereof, in their discretion, make an order requiring the principal in such bond to give a new bond, with sureties, for the performance of his official duties. Sec. 3911. If such bond be given, it shall be taken, approved, and filed in the same manner that the official bond of such officer is required by law, for the time being, to be taken, approved, and filed. Sec. 3912. When such new bond is taken, approved, and filed, it shall immediately operate as a discharge of all the sureties in the former bond from all liability arising from any subsequent misconduct or default of the principal therein; and such sureties shall thenceforth be liable on such bond only for such breaches thereof as shall have happened prior to the taking, approving, and filing of the new bond."

That the language of these latter sections includes public administrators, as well as other officers, is evident at a glance, unless it is affected by the provisions of law relating to the special subject of administration.

Plaintiff claims that the terms of section 307, above quoted, limit sureties of a public administrator to the mode and grounds mentioned in sections 28 to 31 (Rev. St. 1879) in moving for a discharge from future liability on the bond, and thereby excluding resort by them to proceedings under sections 3906-3912. Whether or not sections 28 to 31, Rev. St. 1879, "may be applicable" to public administrators and their sureties, it will not be necessary to decide in this case. It was held by the St. Louis court of appeals, in *State v. Wolff*, 10 Mo. App. 95, that they were not applicable; but, without approving or disapproving that opinion, we are agreed in ruling that, whether they are applicable or not, the sureties on the official bond of such an officer are not precluded from resorting to proceedings under chapter 66, Rev. St. 1879, to terminate their liability. The question whether a general statute is repealed in part by legislation on a special or particular topic is often one of legislative intent, to be solved by a view of the whole subject, in the light of the general rules for the construction of laws. Sections 28-31, if applicable, could be applied to sureties of public administrators only by reason of the general language contained in section 307. We think that language does not evidence any intent of the law-makers to exclude public administrators and their sureties from the benefits of chapter 66, Rev. St. 1879, § 3906 et seq., or to ingraft an exception against them upon a rule apparently designed to apply to all public officers alike. It may be remarked, in passing, that the substitution of a new for an old bond, under the sections last mentioned, has

an effect entirely different, on the liability of former sureties on the old bond, from that which follows the giving of additional security by the public administrator under section 303, Rev. St. 1879. The latter is cumulative merely. Nothing that has been said in this case is intended to imply that the giving of such additional bond would terminate the liability of sureties upon the prior bond of public administrators, then in force.

2. Plaintiff next urges that the formal steps taken for the discharge of the sureties in 1881-82 were fatally defective and insufficient. We have examined the objections to that effect, and find them untenable. It is hence unnecessary to decide whether any of them, if sustained, would have a vital bearing on the result reached herein. It is claimed that the answers do not show proper notice to the administrator of the application of the surety for discharge. The allegation is that the surety, "after due notice, as required by law, applied to the probate court," etc. But further on appears the entry of the court, recording its action on the application. That record recites the presence of the administrator at the hearing of the surety's petition, when the order for new bond was made. Taken together these facts undoubtedly satisfy the requirements of law regarding notice.

It is next asserted that the approval of the new bond, which the statute makes essential to release the old sureties, was void, because made at a special term of the probate court. The defendant's answers do not show whether or not any order for the special term had been previously made by the court in term-time, under section 1044, Rev. St. 1879, assuming that section applicable to probate courts. Without determining whether such prior order for a special term was essential to the validity of the latter, in view of the language of section 1180, Rev. St. 1879, it is sufficient to say that, in the absence of any showing on the subject, it should be assumed that the special term was properly and lawfully held. Such presumption of jurisdiction has been expressly held by this court to be applicable to proceedings in the probate courts of Missouri. *Johnson v. Beazley*, 65 Mo. 250.

It is suggested that plaintiff was at least entitled to judgment against defendant Nolan, who appeared, but did not file an answer in this cause. The point was not made in the trial court by motion for a default against him or otherwise. The case was disposed of there on the issue of the sufficiency of the answers; and plaintiff's action must be taken as amounting, in effect, to a dismissal as to Nolan. If this was not intended, he should have indicated in some manner, in the circuit court, his intention or wish to take judgment against Nolan. Not having done so, he cannot now raise the point for the first time here. It has no bearing on the substantial merits of the case. Rev. St. 1879, §§ 3774, 3775.

The assignments of error are unfounded. The judgment is affirmed; all the judges concurring.

**CITY OF ST. LOUIS v. MARCHEL.**

(Supreme Court of Missouri. Jan. 27, 1890.)

**VIOLATION OF CITY ORDINANCE—APPEAL—CONSTITUTIONAL LAW.**

1. Under Rev. St. Mo. 1879, App. p. 1515, § 26, giving an appeal to the defendant from a judgment of the St. Louis court of criminal correction, and providing for writ of error upon any final judgment of said court, the city of St. Louis cannot appeal from a judgment of acquittal of the defendant, sued for violation of an ordinance, as the charter of the city does not authorize appeals in such cases, and Rev. St. Mo. 1879, § 1986, authorizing appeals by the state when an indictment is quashed, or judgment thereon is arrested, does not apply to such cases.

2. The provisions of section 26, giving appeals to the defendant only, does not infringe the constitutional right of plaintiff to a review by the supreme court of the judgment, as it gives him a convenient and efficient mode of review by writ of error.

Appeal from St. Louis court of criminal correction; E. A. NOONAN, Judge.

The defendant was prosecuted in one of the police courts of St. Louis for violating an ordinance of the city, by refusing to connect certain premises with the adjacent sewer, pursuant to the order of the health commissioner to that effect. The case was tried before a jury. The defendant was acquitted. The plaintiff appealed to the St. Louis court of criminal correction. At the trial anew in the latter court there resulted a finding and judgment for defendant, from which plaintiff has appealed to this court. Rev. St. Mo. 1879, App. p. 1515, § 26, provides that "an appeal shall be allowed the defendant from any final judgment of said court to the supreme court, (St. Louis court of appeals,) if applied for within ten days after the rendition of such judgment, but not otherwise. The manner of taking such appeals shall be the same, as near as may be, as is prescribed by law for [taking] appeals from circuit courts in criminal cases. Writs of error shall be allowed upon any final judgment of said court, and may be prosecuted and issued from the supreme court, [St. Louis court of appeals,] in like manner, and with similar effect, as writs of error to the St. Louis criminal court." Rev. St. Mo. 1879, § 1986, provides: "When any indictment is quashed, or adjudged insufficient upon demurrer, or when judgment thereon is arrested, the court in which the proceedings were had, either from its own knowledge, or from information given by the prosecuting attorney that there is a reasonable ground to believe that the defendant can be convicted of an offense, if properly charged, may cause the defendant to be committed or recognized to answer a new indictment; or, if the prosecuting attorney prays an appeal to the supreme court, the court may, in its discretion, grant an appeal."

*L. Bell*, for appellant. *Wm. E. Hesse*, for respondent.

*BARCLAY, J.*, (after stating the facts.) This is an action brought upon an ordinance of the city of St. Louis, to recover a penalty for a violation thereof. As such, under prior rulings of this court, it must be treated as a civil action, so far as concerns the plaintiff's right to a review of the judgment. *City of Kansas v. Clark*, 68 Mo. 588; *City of Kansas v. Muhlback*, Id. 638. But neither the charter of St. Louis, nor the legislative act governing proceedings in the St. Louis court of criminal correction, expressly authorizes an appeal from judgments in favor of defendants in such cases. The latter provides for an appeal by defendant, but the only means of review given to a plaintiff by that statute is writ of error. Rev. St. 1879, App. p. 1515, § 26. The general law allowing appeals to the state in criminal causes does not apply, because this action is not of that nature; and, even if it could be so regarded, this appeal would not come within its terms. Rev. St. 1879, § 1986.

While the legislature may not properly deprive litigants of their right to have such causes reviewed by this court as fall within its constitutional jurisdiction, (*Blunt v. Sheppard*, 1 Mo. 219,) yet the mode to be pursued in obtaining such review is, speaking generally, a proper subject of legislative regulation. Where, as here, a convenient and efficient one, by a writ of error, is available, no constitutional right of plaintiff is infringed by the omission of the legislature to provide for an appeal. The present appeal must therefore be dismissed, as having been erroneously allowed. It is so ordered. All the judges concur.

**CITY OF ST. LOUIS v. WHITE.**

(Supreme Court of Missouri. Jan. 27, 1890.)

*L. Bell*, for appellant. *T. B. Harvey*, for respondent.

*BARCLAY, J.* In this cause the city has appealed from a judgment of the St. Louis court of criminal correction in favor of the defendant. The same facts are presented as those considered by this court in the case of *City of St. Louis v. Marchel*, ubi supra, (decided at the present term;) and, in accordance with the ruling therein made, the appeal by the plaintiff in this case is dismissed. All concur.

**BURGESS et al. v. ST. LOUIS CO. R. CO. et al.**

(Supreme Court of Missouri. Jan. 27, 1890.)

**CORPORATIONS—STOCKHOLDERS—LACHES.**

Directors of a railroad company executed a deed of trust to secure bonds issued to themselves as creditors. The board next elected brought suit to annul the deed and bonds for want of consideration. Pending the suit, the trustees advertised the property for sale under the power in the deed. At the sale the property was purchased under a compromise between the bondholders and all of the stockholders, except the plaintiffs, by which it was agreed that the suit should be dismissed, and that the purchaser should convey one portion in trust for the stockholders who had received no bonds. The trustee under the compromise, however, transferred the property to a new corporation, composed almost exclusively of persons who

had never been stockholders in the old company. Held, that eleven years having elapsed since the deed of trust, and seven years since the compromise, and the property having, in the mean time, been transferred seven times, including one under foreclosure of a mechanic's lien, plaintiffs have been guilty of such laches as barred their right to recover, and it was immaterial that the acts complained of were *ultra vires*.

Appeal from St. Louis circuit court; AMOS M. THAYER, Judge.

This proceeding is termed "an action in equity." It was instituted by the plaintiffs against the St. Louis County Railroad Company, the Forest Park & Central Railroad Company, the St. Louis, Kansas City & Colorado Railroad Company, Francis Tiernan, E. R. Steward, Dwight Durkee, Robert C. Allen, Amos H. Shultz, William D. Clayton, John F. Hume, — Fox, Melvin L. Gray, Edwin Harrison, James O. Broadhead, Joseph Brown, H. A. Haeussler, Joseph Shippen, and other persons unknown to plaintiffs. Omitting the caption, the amended petition is as follows:

"Plaintiffs, by leave of court, file this, their amended petition, and, suing on behalf of themselves and all stockholders of the St. Louis County Railroad Company who may appear after interlocutory decree, state that the St. Louis County Railroad Company was a corporation duly organized under the laws of the state of Missouri concerning railroad corporations, for the purpose of constructing, maintaining, and operating a railroad commencing at a point in the city of St. Louis and state of Missouri, and thence extending westwardly to a point on Creve Cœur creek, in the county of St. Louis and state of Missouri. That defendants Harrison, Shultz, Shippen, Brown, Broadhead, Haeussler, Clayton, and one Briggs and plaintiff Edward Burgess were the last, and all the last, duly elected and qualified directors of said the St. Louis County Railroad Company. That said Briggs is dead, and no person has been chosen to take his place as such director, and that said Shippen and Clayton are non-residents of the state of Missouri, and they, said Shippen and Clayton, and the other directors above named, (now living,) save and except plaintiff, refuse to institute this suit or seek the relief herein prayed for. That the said St. Louis County Railroad Company, at the time hereinafter mentioned, owned and was in possession of a certain tract of land graded for a railroad bed, extending from Forsyth Junction, on the line of the Wabash, St. Louis & Pacific Railroad, westward to Academy lane, and thence to a point on Creve Cœur creek, which tract of land was known as the 'St. Louis County Railroad,' and was principally located in the county of St. Louis and state of Missouri, although a part thereof was within the said city of St. Louis also. Plaintiffs further state that at the times hereinafter mentioned they were, and now are, the holders and owners of forty shares of the capital stock of said the St. Louis County Railroad Company. That on or about the — day

of —, A. D. 1875, Joseph Brown, William Marsh Kasson, and others were directors of said the St. Louis County Railroad Company, and as such directors issued, in the name of said company and as its act, three hundred bonds, each of the par value of one thousand dollars, payable by said last-named corporation thirty years thereafter, with interest coupons attached thereto payable every six months thereafter, and each for the sum of thirty-five dollars; which bonds and coupons the said directors last mentioned delivered to themselves as alleged creditors of said last-mentioned company, and then and thereupon executed, in the name of said corporation and as its act, a conveyance in trust of all its property, including the property hereinbefore described, to one Lackland and one Allen, as trustees to secure the payment of said bonds, with power in said Lackland and said Allen, or either of them, on default in said payment of any of said coupons, to advertise said property for sale, and to sell the same for cash, to pay said coupons and bonds. That the stockholders of said company, other than said directors who became bondholders as aforesaid, denied the validity of said bonds; and, at the next following election of directors of said last-mentioned corporation, other directors than those last mentioned were elected, none of whom had received or held any of said bonds; and thereupon the new board of directors last mentioned, in the name and on behalf of said last-named corporation, the St. Louis County Railroad Company, and with the assent of plaintiffs, instituted suit in the circuit court of St. Louis county, state of Missouri, to have said bonds and mortgage declared null and void, and of no effect, on the alleged ground that said bonds and said mortgage were fraudulently delivered to the holders thereof, and were null and void, and without consideration. That, while said suit was pending, the trustees aforesaid, in said mortgage or conveyance in trust, advertised for sale, under the provisions of said conveyance last mentioned, all of said railroad, its property and franchises. That on or about the day prior to that on which said sale was advertised to take place the said bondholders and the stockholders of said last-mentioned corporation, save these plaintiffs, entered into an agreement whereby it was stipulated that said suit last mentioned should be dismissed; that said last-mentioned sale of said railroad property and franchises should be made as advertised as aforesaid; that at the sale one Charles Miller should purchase all the railroad and all the property and franchises of said last-named railroad company; and that he, said Miller, should thereupon convey all the railroad and property of said railroad company lying west of Forsyth Junction, with all the franchises appurtenant thereunto, to defendant Melvin L. Gray, in trust for the benefit of the stockholders of said last-named corporation, to whom none of said bonds were delivered before the institution of said suit.

That plaintiffs refused to consent to said last-mentioned agreement, and never received or claimed any benefit thereunder. That, in accordance with said agreement, said railroad and its property were sold by said trustees under said mortgage, and purchased by said Miller, as trustee as aforesaid, for the nominal price of twelve thousand dollars, although they were then well worth two hundred and fifty thousand dollars; and thereupon said Miller, in pursuance of his said agreement and of his said trust, conveyed to defendant Melvin L. Gray, as trustee for the benefit of all of said stockholders not holders of bonds aforesaid, all the railroad and property of said company last mentioned lying west of said Forsyth Junction, as aforesaid. Plaintiffs state that they refused to recognize said conveyances, and declared them null and void, and that in truth and in fact they were utterly void, and that this fact, and all the matters and things aforesaid, were then and there well known to all said bondholders and stockholders.

"Plaintiffs further state that at that time there were twenty-five stockholders of said company who held none of said bonds, and that soon afterwards three of the stockholders of said St. Louis County Railroad, and several other persons, who never held any of said stock or bonds, and who had no right, claims, or interest in or to any of the property or franchises of said St. Louis County Railroad Company, did, as incorporators, organize a corporation known as the 'Forest Park and Central Railroad Company,' to construct, maintain, and operate a railroad from Forsyth Junction westwardly to Academy lane, in said county of St. Louis; and thereupon said Gray, in violation of his trust as aforesaid, and without any right or authority, executed a conveyance of all the railroad and property of said St. Louis County Railroad Company lying west of Forsyth Junction, last mentioned, to said Forest Park and Central Railroad Company. Plaintiffs say that all the defendants to this cause well knew, at all times, that said conveyance of said Gray last mentioned was executed by him in violation of his said trust, and without any authority or right, and was utterly null and void. Plaintiffs further state that, soon after the execution of said conveyance by said Gray as aforesaid, the said Forest Park and Central Railroad Company did, without any right or authority whatever, on, to-wit, the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 1881, take forcible possession of the said right of way, track, and property of said St. Louis County Railroad Company, and did let contracts to divers persons for work to be done on said right of way and property as if they were its owners, and pretending it was its property, and that it was authorized to construct a railroad thereon. Plaintiffs state that the conveyances hereinbefore mentioned are duly recorded in the office of the recorders of the city of St. Louis, and of the county of St. Louis and state of Missouri. That, after said Forest

Park and Central Railroad Company had let contracts for work as aforesaid, the contractors under said contracts performed some work on the part of the track and right of way of said St. Louis County Railroad Company last mentioned, and, not being paid therefor, they, said contractors, instituted suits against said Forest Park and Central Railroad Company as sole and only defendant to recover the amounts they claimed to be due for said work, and to have said claims declared liens on the right of way, track, and property last mentioned, and to procure a sale thereof to satisfy said claims; and judgments were in due course rendered in their favor, on which an execution was issued and levied on the road-bed, station-houses, depots, bridges, rolling stock, real estate, and improvements of the railroad of said Forest Park and Central Company, if any they had, and the same was exposed to sale, and declared to be sold, under and by virtue of the execution last mentioned, to D. P. Dyer and James A. Garland, as trustees for plaintiffs in said last-mentioned suits, and a conveyance of the right, title, and interest claimed and held in said road-bed and property was executed to the persons last named by the officer who made said sale last mentioned; and thereupon said Dyer and Garland executed a conveyance purporting to convey the same to Francis Tiernan and Robert A. Steward,—that is, to convey all said last-mentioned road-bed and property; and thereupon said Tiernan and Steward executed a conveyance assuming to convey said last-mentioned road-bed and property to one Fox, as agent of the St. Louis, Kansas City and Colorado Railroad Company; a railroad corporation organized under the laws of the state of Kansas; and thereupon said Fox executed a conveyance purporting to convey said road-bed and property last described to said last-named corporation, which has entered upon and taken possession of said last-mentioned road-bed and property, and now holds the same.

"Plaintiffs further state that they had no knowledge of the taking, by said Forest Park and Central Railroad Company, of the possession of said right of way and road-bed last mentioned, or said property, or of the execution by it of said conveyance to said Durkee, or of said bonds, or of the letting of said contract, or of the performance of any work on said right of way, track, or property by any of said contractors, or of said lien claims, or of said purchase by Dyer and Garland, or of any of said pretended conveyances to said Tiernan or said Fox, or to said St. Louis, Kansas City and Colorado Railroad Company, or of the entry of said last-mentioned railroad company on said last-mentioned right of way, track, or property, until long after the latter entry was made; and plaintiffs aver that the defendants, and each of them, had, at all the times hereinbefore mentioned, actual and record notice of all the matters, acts, and things hereinbefore stated; but plaintiffs say that if any person in good faith, and after

due diligence to ascertain the facts, had made any valuable improvements on said road-bed, property, etc., available for the lawful purposes of said St. Louis County Railroad Company, they are willing to reimburse him for the same on a surrender by him of all his claims against said road-bed, railroad, or railroad company or property aforesaid.

"Plaintiffs state that said St. Louis, Kansas City and Colorado Railroad Company neither maintains, owns, nor operates any railroad in this state, nor in the state of Kansas, and is wholly controlled by defendants Tiernan and Steward, who at the time they received such conveyance from Dyer and Garland had both actual and constructive notice of the matters hereinbefore set forth, as also had said Dyer and Garland when they purchased as aforesaid, and as also had said Fox when he executed the conveyance hereinbefore mentioned, and as had also said St. Louis, Kansas City and Colorado Railroad Company when it received said conveyance from said Fox as aforesaid. And plaintiffs further state that, because of the matters aforesaid, said sale by Lackland and Allen was null and void as against said St. Louis County Railroad Company and those plaintiffs, and that none of said conveyances of said Miller, Gray, said officer selling under said execution, said Dyer and Garland, said Tiernan and Steward, or of said Fox, conveyed any right, title, or interest of, in, or to said road-bed or property, and that, therefore, the said St. Louis, Kansas City and Colorado Railroad Company did not acquire, has not now, and never had, any right, title, or interest of, in, or to said road-bed, property, or franchises, but the same are rightfully the property of and owned and held by said the St. Louis County Railroad Company. Wherefore plaintiffs pray the court to oust said St. Louis, Kansas City and Colorado Railroad Company from the possession of said St. Louis County Railroad, and of all the rights and franchises in or appurtenant to said road-bed, rights of way, and property of said St. Louis County Railroad Company described in said conveyance to said Gray, and usurped and intruded into by said Forest Park and Central Railroad Company, and that the full control and right and possession thereof be declared in and be restored to said the St. Louis County Railroad Company, and for such other and further relief as may be just, and as ought in equity to be granted to plaintiffs, or on their demand in this bill."

To this amended bill defendant Gray filed his separate demurrer, and the defendants the St. Louis, Kansas City & Colorado Railroad Company, Tiernan, Steward, Durkee, Allen, and Hume filed a joint demurrer. These demurrers are essentially the same, and the grounds alleged in the latter are as follows, viz.: "*First.* That it appears on the face of said bill, and from the allegations therein, that the right of action set up in said bill to set aside the 300 bonds, and the

deed of trust of said St. Louis County Railroad Company securing the same, to said Lackland, and the right to set aside the sale thereunder to said Miller, and the conveyance of said Miller to these defendants, and of these defendants to said Forest Park and Central Railroad Company, did not accrue, if it accrued at all, to said plaintiffs within ten years before the bringing of this suit. *Second.* It also appears on the face of said bill, and the allegations therein, that the issuing of three hundred bonds, and the execution of said deed of trust securing the same, and the sale thereunder by said Lackland and Allen to said Miller, and the conveyance thereof by said Miller to these defendants and of these defendants to said Forest Park and Central Railroad Company, were well known to said plaintiffs at the time they severally took place, and their long delay and laches and want of diligence in seeking redress in the premises deprives them of all right to equitable relief; especially so in view of other facts stated in said bill, that innocent mechanical laborers and others have invested their services and money in the improvement of said road-bed under the ownership of said Forest Park and Central Railroad Company, without any notice from plaintiffs of the matters set out in said bill. *Third.* The allegations in said bill that plaintiffs had no knowledge of the taking possession of said property by the Forest Park and Central Railroad Company, and the execution by said railroad company of said conveyance to said Durkee, and of the letting of contracts, performance of work, creation of liens, suits, judgments, and immediate sales, vesting said property in the St. Louis, Kansas City and Colorado Railroad Company, 'until long after the latter entry was made,' are wholly insufficient in law, and according to the principles and practices of courts of equity, to excuse the laches and long delay of plaintiffs in seeking equitable relief, and, on the facts stated in said bill, it would be inequitable and against good conscience to grant the relief prayed for. *Fourth.* There is no equity in said bill, and it does not state facts sufficient to constitute a cause of action. *Fifth.* There is a defect of parties, in this: that said bill asks the court to set aside conveyances made by one Lackland, and by D. P. Dyer and James A. Garland, and yet said persons are not made parties to this proceeding, as they should be if these conveyances are to be set aside. *Sixth.* That plaintiffs have no legal capacity to sue, which appears on the face of, and by the allegations of, their bill. *Seventh.* That the institution of said suit by the St. Louis County Railroad Company, as alleged in the petition, and the proceedings thereunder, are a bar to this suit by the plaintiffs."

Defendant Gray demurred on the further ground that Durkee and others were improperly made defendants. These demurrers, coming on to be heard, were sustained by the court. The plaintiffs declining to plead

further, final judgment was entered against them on the demurrers. Thereupon they appealed to this court.

*M. Kinealy* and *J. R. Kinealy*, for appellants. *John C. Orrick*, for respondents.

SHERWOOD, J., (*after stating the facts as above.*) Of the various grounds of the demurrer, but one needs examination, and that is the delay of the plaintiffs in instituting the present proceeding. It appears on the face of the petition that there have been, in the eleven years preceding the filing of the petition, no less than eight transfers of the property in dispute; the first one of which transfers was a conveyance, to-wit, a mortgage to secure certain bonds made by the St. Louis County Railroad Company itself, in 1875, and other conveyances also were made under color of authority by the successive grantees, and one of them by the sheriff by virtue of a judgment establishing a contractor's lien on the property, which is the subject of the present litigation. The petition herein was filed October 10, 1885, seven years after the compromise as to the mortgage made to Lackland and Allen was effected, in 1878. It does not appear that plaintiffs took any steps other than those taken in 1876, when, associated with other stockholders, they instituted suit to have the mortgage and bonds canceled and held for naught. In the compromise agreement effected in 1878, which resulted in the dismissal of the petition to set aside the bonds and mortgage to secure the same, they took no part; since which time they have remained in a quiescent state, unmindful of the subsequent transfers of the corporate property, and made no move to arrest such transfers. Considering the circumstances detailed in the petition, which, for the purposes of the demurrers, must be taken as true, the laches of the plaintiffs is fatal to their claim. The fact of the statute of limitations not having run does not help the matter. Laches is as good a bar to the enforcement of a stale claim as ever it was. *Landrum v. Bank*, 68 Mo. 48; *Bliss v. Prichard*, 67 Mo. 181; *Sullivan v. Railroad Co.*, 94 U. S. 807; *Oil Co. v. Marbury*, 91 U. S. 591; *Badger v. Badger*, 2 Wall. 94; *Adams, Eq.* 227; *Kline v. Vogel*, 1 S. W. Rep. 783; *Kitchen v. Railroad Co.*, 69 Mo. 224. And the fact that the acts complained of were *ultra vires* the company does not diminish the force and effect of the laches. If stockholders lie by, sanctioning, or seeming by their silence to sanction, such unwarrantable acts of the company, they will be bound by them. In order to set them aside, they must take timely steps to have them vacated. They cannot wait to see if such acts will prove beneficial or not, and thus take their chances on the result. And this same rule holds, as between a minority of the shareholders and the acts of the majority. Supineness in such cases will be construed as acquiescence of the minority in the acts of the majority. 2 Mor. Priv. Corp. §§ 630, 631, and cases cited. Holding the laches of

the plaintiffs as fatal, to say nothing of other grounds, we affirm the judgment. All concur.

SPENCER *et al.* v. O'NEILL.

(*Supreme Court of Missouri.* Feb. 10, 1890.)

ADVERSE POSSESSION.

Where real estate is conveyed in trust for a married woman, to the sole use of her and her heirs by her present husband, (defendant,) and they have a daughter born to them, after which the wife dies, and defendant remains on the premises with the daughter, who marries, each paying part of the expenses of housekeeping for three years, when the daughter dies, and her husband continues to live on the premises five years without paying board, the possession of defendant, after the daughter's husband leaves, will not bar a recovery of the premises in an action by the husband and heirs of the daughter, there being nothing to show that such possession was adverse.

Appeal from St. Louis circuit court; SHEPARD BARCLAY, Judge.

Ejectment for lots 31 and 32, in city block 466 E., of the city of St. Louis. The property fronts on Autumn street. Action brought June 11, 1884. Answer, a general denial. Under stipulations, admissions were made that the defendant was in the possession of the premises when suit was brought, and that the monthly value thereof was \$50 per month, and that John O'Neill, the husband of Mary Catharine O'Neill, and afterwards of Magdalena C. O'Neill, died in March, 1884. Plaintiffs offered in evidence a deed from Elkanah English and wife to Charles Bayha, as trustee for Mary Catharine O'Neill, dated August 4, 1859, and recorded in the city of St. Louis on August 5, 1859, which said deed was admitted to be duly acknowledged and recorded, and conveyed the lots in controversy in this suit. The *habendum* clause of said deed is as follows: "To have and to hold said lots of ground, together with all and singular the privileges and appurtenances thereto belonging, or in any manner appertaining, unto the said party of the second part, his heirs, assigns, successors in trust, for the sole use, benefit, enjoyment, and behoof of the said Mary Catharine O'Neill and her heirs by her husband, the said John O'Neill, begotten, and to his assigns; and, in the event of the death of the said Mary Catharine O'Neill without heirs as aforesaid, for the use, benefit, enjoyment, and behoof of her husband, John O'Neill; said property to be held by the said party of the second part, for the purposes above set forth, entirely free from all control, restraint, and interference on the part of the said John O'Neill. The said Mary Catharine O'Neill to have, hold, use, enjoy, and occupy the exclusive and undisturbed possession of said lots, and the appurtenances thereunto belonging, with full power, without the intervention in any manner whatsoever of her said husband, to direct the sale, lease, or other disposal of the same, at her own will and pleasure, and to receive for her own use and benefit the proceeds of such sale, and all rents and profits arising from



the lease or other disposal of the same. The said party of the second part holding said real estate subject at all times to the direction, in writing, under her hand and seal, by her acknowledged, of the said Mary Catharine O'Neill, her heirs, as aforesaid, or her assigns, as to the disposal of said lots, whether by lease, conveyance in fee, assignment or transfer of this trust or otherwise, and without the intervention of her husband, the said John O'Neill, in any manner whatsoever; and the said Mary Catharine O'Neill shall have power, at any time hereafter, whenever she may for any cause whatever deem it necessary or expedient, by an instrument in writing, under her hand and seal, by her acknowledged, to nominate and appoint a trustee or trustees in the place and stead of the party of the second part above named; which trustee or trustees, or the survivor of them, or the heirs, assigns, or successors of such survivors, shall hold the said real estate upon the same trust as above recited, and subject to the direction and control of the said Mary Catharine O'Neill, in like manner as above provided, and upon the nomination and appointment of such trustee or trustees, the estate in trust hereby vested in the party of the second part shall thereby be fully transferred to and vested in the trustee or trustees so appointed."

The plaintiffs read in evidence the deposition of James A. Spencer, taken in another suit: "I am James A. Spencer, the plaintiff in this suit. I married Mary G. O'Neill, daughter of John O'Neill and Mary Catharine O'Neill, May 28, 1873. Mary G. O'Neill was then living in St. Louis, on Seventeenth street, between Market and Walnut, with her parents. I had one child by Mary G. O'Neill, born June 9, 1874, and named John O'Neill Spencer. My wife died June 22, 1874, and my son, John O'Neill Spencer, died December 2, 1874. My wife was born May 20, 1849, and was twenty-four years of age when I married her. After we were married I moved to Eleventh street, between Market and Clark avenue, and lived there until December, 1873. John O'Neill was at that time a traveling man, and when in St. Louis he stopped there. In December, 1873, my wife, myself and child (by a former marriage) moved into one of the houses sued for in this case, at the request of Mr. O'Neill. I remained in the house until the first part of 1879. My son by my first marriage left in 1878. The expenses of housekeeping were borne in part by Mr. O'Neill and in part by myself. Part of the time I was out of employment,—off and on,—and Mr. O'Neill paid the expenses then. I paid the largest portion of the expenses. My child, John O'Neill Spencer, during its life, always lived in this house, except a short time it lived on Morgan street. It died in the house on Autumn street. From the time of my wife's death Mr. O'Neill paid the largest portion of the expenses. O'Neill married again in 1876. He lived in the same house after he was married. O'Neill never

asked me for board. In 1877 or 1878 I let him have \$100 to pay the taxes, and a short time after that I gave him \$25. Once he told me he thought the housekeeping expenses were too high, and that we had better go to boarding elsewhere. That was some time in the neighborhood of the death of the child. I never collected any of the rents of the property." "O'Neill has lived in the Autumn-Street house from the time he moved from Eleventh street until the present time. I lived there until 1879, when I left. I only gave him, during the time I lived there, \$20, besides the \$100 and \$25 I have mentioned. I got some money from Mr. O'Neill at different times. It did not exceed \$50 in all. He let me have this before I gave him the \$100. I never collected any of the rents for myself. I made one collection for Mr. O'Neill. As far as I know, all the rents collected were collected by him. I never paid any taxes, except one bill I paid for him, in his name, with money furnished by him for the purpose."

The defendant then introduced in evidence a deed from the sheriff, dated March 3, 1884, conveying to her, she being the second wife of John O'Neill, all the interest of John O'Neill in the litigated premises; also the deposition of John O'Neill, taken in another case, as follows: "John O'Neill, being duly sworn, on his oath says: My name is John O'Neill. I am defendant in the suit of Spencer v. O'Neill, being No. 39,045, in room No. 2, St. Louis circuit court. My first wife's name was Mary Catharine O'Neill. She died October 5, 1871, leaving but one child, Mary G., who was born May 20, 1849. She afterwards married James A. Spencer, May 28, 1873, aged then 24 years and 8 days. A child was born of that marriage, June 9, 1874, and was named John O'Neill Spencer. Mary G. died June 22, 1874. The baby, John O'Neill Spencer, died December 2, 1874. James A. Spencer had by his first wife one son, James H. Spencer, who was living at the time of the death of his half-brother, John O'Neill Spencer, and, so far as I know, is still living. I know of the property in controversy, being Nos. 929 and 931 Autumn street. Spencer moved into 929, October 17, 1873. I fitted up the house myself, and Spencer and his wife moved in at my request, and we all continued to live there together, until her death. After her death I hired a woman to take care of the child. The child died at 929 Autumn street. After the death of Mrs. Spencer, he [Spencer] remained at that house, boarding with me, from her death until January 19, 1880, and paid nothing for his board, which I told him he must pay, as I could not afford to keep him. Occasionally he sent some butter, chickens, etc., to the house. My daughter, Mary, lived with me at all times, till her death. I have always used one of the houses, and collected and appropriated the rent of the other. Spencer owes me for board about \$1,800, at a fair valuation. There was no agreement for price of board. I could not get rid of

him, and so kept him. I have paid all taxes on this property, and all repairs. Spencer never paid any part of the same, and never received any of the rents, and never, to my knowledge, or to me, made any claim to ownership. I paid taxes for every year, up to and including 1879. Taxes for years following 1879 are unpaid. At the time Spencer and his wife were living in the house, I was the keeper thereof, and they lived with me. During the time I have, as stated, occupied said premises, they have been assessed in my name, and I have, at times, made return thereof to the assessor. We were living on the premises at the time my wife (Mary Catharine O'Neill) died." Defendant then read in evidence tax-receipts on the property in controversy, from 1867 to 1883, both years inclusive, and they showed that the property sued for had been assessed to John O'Neill all those years, and the amount of taxes received from him. This was all the evidence. The court thereupon gave the following declaration of law on behalf of the defendant: "The court declares that, under the law and evidence in this cause, the plaintiffs are not entitled to recover;" to the giving of which said declaration the plaintiffs then and there excepted.

*Samuel N. Holliday*, for appellants. *W. C. & J. C. Jones*, for appellee.

SHERWOOD, J., (after stating the facts as above.) In the view we take of this cause, it is wholly immaterial whether the deed of English and wife to Bayha, her trustee, created an estate in fee-tail special, which, under the operation of section 5, p. 355, 1 Rev. St. 1855, turned that into a life-estate in Mary Catharine O'Neill, thus cutting off any tenancy by the curtesy John O'Neill, her husband, otherwise would have had, or whether we hold that the deed to the trustee gave to Mary Catharine O'Neill a title in fee, and her husband acquired by reason thereof a tenancy by the curtesy, since, whichever theory be adopted, the result must be the same, for these reasons: If we hold, as did Judge LUBKE, in a suit brought by these plaintiffs against John O'Neill, regarding the same property, that a fee was created in his wife, then his tenancy by the curtesy would raise an insuperable barrier against the running of the statute of limitations. But grant that it did not; grant that only a life-estate was created in the wife, and still a barrier equally as insuperable is found in the fact that John O'Neill, subsequently to the death of the wife, did no act which even tends to indicate an adverse possession as against his daughter, who continued to live with him after the death of her mother, up to the time of her marriage, and, with a short interval after her marriage, until her death, June 22, 1874. Now, as this suit was brought June 11, 1884, it is clear the bar of the statute had not occurred. But there is nothing to indicate an adverse holding on the part of John O'Neill, even after the death of his daughter, up to the time Spencer left the

premises, in 1879. Judge LUBKE, who tried the other cause, held the same views as to an entire lack of the evidence to show an adverse possession by John O'Neill. Something has been said about the adjudication in that cause being *res adjudicata* in this one; but the case of *Foster v. Evans*, 51 Mo. 40, which upholds that view, has long since been repudiated in this court, and the now prevalent rule asserted that one action of ejectment is no bar to another, though between the same parties, in respect to the same title, and the same tract of land. *Ekey v. Inge*, 87 Mo. 493; *Avery v. Fitzgerald*, 94 Mo. 207, 7 S. W. Rep. 6. It is because of this that it becomes necessary, in order to put a stop to repeated actions of ejectment, to resort to bills of peace. *Primm v. Raboteau*, 56 Mo. 407. For the reasons aforesaid the judgment will be reversed and the cause remanded, with directions to enter judgment for the plaintiff for the premises, and for the sum of \$50 per month rent from the 11th day of June, 1884, down to the time of the delivery of possession to them. All concur, except BARCLAY, J., not sitting.

#### BURDETTE et al. v. MAY et al.

(Supreme Court of Missouri. Feb. 10, 1890.)

##### LIMITATION OF ACTIONS—RESULTING TRUSTS.

1. A resulting trust is not sufficiently established where the evidence consists mainly in verbal admissions made by defendant thirty-five years before suit brought, and before the date of his patent, and where there is evidence of a statement made by the *cestui que trust*, who died 18 years before the institution of the suit, to the effect that the land belonged to defendant, and where no claim has been asserted by plaintiffs, who claim as heirs of the *cestui que trust*, for over 18 years.

2. In Missouri, the statute limiting the time within which actions for the recovery of real estate must be brought applies to actions to establish resulting trusts, the statute beginning to run on the discovery of the facts constituting the trust. Per SHERWOOD and BARCLAY, JJ.

3. Under Rev. St. Mo. § 3222, providing that, if any person entitled to commence an action for the recovery of land shall be under disability, the action may be commenced within three years from the time the disability is removed, provided no action shall be brought after 24 years from the time the cause of action accrued, where the statute once begins to run against a person who dies, it continues to run against his heirs, notwithstanding they may be under disability. Per SHERWOOD and BARCLAY, JJ.

Error to circuit court, Livingston county; J. M. DAVIS, Judge.

Action by Sarah Burdette and others against James May and others to establish a resulting trust. Plaintiffs allege that defendant James May entered the land in his own name, when it should have been entered in the name of his mother, she having furnished the money to buy the land. Rev. St. Mo. § 3219, prescribes that actions for the recovery of real estate must be brought within 10 years from the time the cause of action accrued, and section 3222 prescribes that if the person entitled to sue be under disability the action may be brought within 3 years after the disability is removed, provided no action shall

be brought after 24 years from the time the right of action accrued.

*James L. Davis and John A. Hockaday*, for plaintiffs in error. *W. C. & J. W. Samuel and C. H. Mansur*, for defendants in error.

SHERWOOD, J. 1. This case may be ruled on two points, either of which are decisive: (1) The insufficiency of the testimony to establish a resulting trust; and, (2) the statute of limitations. The rule which prevails in this state, the general rule elsewhere upon the subject of resulting trusts, requires that in order to prove such a trust it must be established by testimony so clear, strong, and unequivocal as to banish every reasonable doubt from the mind of the chancellor respecting the existence of such trust. This is the substance and effect of the language employed by the authorities and by this court in numerous instances. *Johnson v. Quarles*, 46 Mo. 425; *Forrester v. Scoville*, 51 Mo. 268; *Ringo v. Richardson*, 58 Mo. 385; *Kennedy v. Kennedy*, 57 Mo. 73; *Gillespie v. Stone*, 70 Mo. 507; *Philpot v. Penn*, 91 Mo. 88, 3 S. W. Rep. 386; *Berry v. Hartzell*, 91 Mo. 132, 3 S. W. Rep. 582. The testimony in this cause, it will be observed, is made up, for the most part, of the verbal admissions of the party against whom the resulting trust is sought to be established. Touching the subject of such admissions, and the weight to be given them, *Greenleaf* states: "The evidence, consisting, as it does, in the mere repetition of oral statements, is subject to much imperfection and mistake; the party himself either being misinformed or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say." 1 *Greenl. Ev.* §§ 45, 97, 200. And those admissions were made when? Certainly, prior to August 15, 1848, the date of the patent to James May, since which time he has occupied the premises, paid taxes, made improvements, bought and sold, and managed the place as if it were his own. The fact that his father and family lived upon the place for a number of years along with James May argues nothing against his title, especially when considered in connection with the relationship between the parties, and other facts in evidence. William May, a brother, worked for James May on the farm, and for the years 1857 to 1859 was paid by James \$400 for his labor, and went away, and remained away from the place ever since, with the exception of a visit to the place in 1865, when he took away, on a visit to Gallaway county, his mother, whom he found living at James' house. None of the children claimed the place, or set up any opposition to the title of James; and it is truly remarkable that William May should accept wages from his brother, if he knew he was as much enti-

tled to the place as his brother. Indeed, he, as well as Graham and wife, have refused to join in the present suit, and therefore were made parties defendant. It is so natural that parties having a right to property should assert it, should continue to live upon it, after once having lived there, that the fact that they have done neither must weigh heavily against the probability of the justness of their claim, when asserted after so many years of silence, non-claim, and abandonment. None of the present claimants, so far as appears, live on the property in dispute, or did so at the time of the mother's death, which occurred in 1865, her husband having died in 1863. And, from testimony introduced on behalf of the real defendant, James May, it appears that his mother made, in 1861, to one of her neighbors and intimate friends, the statement that the place was given to him as a recompense for staying with his parents, and caring for them in their old age. And the testimony of William May goes to strengthen this view, because he says that on a difficulty springing up between himself and brother James, in 1857, about working, that his mother told James that the place was hers during her life, etc. Now, if these statements by the mother were made, they being statements of the equitable owner then in possession, according to plaintiff's theory, they were competent testimony; and, admitting that defendant James May did make the verbal admissions heretofore ascribed to him, they are not inconsistent with the statements of his mother. Besides, it must be borne in mind that the present proceedings were instituted over 18 years after the death of the mother, who knew all about the transaction. Courts of equity view with disfavor suits that are brought long after the transactions litigated have occurred, and long after death has sealed the lips of those familiar with occurrences so remote in point of time. *State v. West*, 68 Mo. 229; *Lenox v. Harrison*, 88 Mo. 491, and cases cited. For these reasons, it must be held that the claim of plaintiffs has not been established in the manner demanded by the authorities heretofore quoted.

2. In addition thereto, the claim of the plaintiffs is barred by the statute of limitations. That statute, although it will not, as a rule, run against technical or express trusts, yet it will do so from the time when the facts constituting a resulting trust are brought home to the *cestui que trust*. *Buren v. Buren*, 79 Mo. 538, and cases cited. In the case at bar, as the cause of action accrued in 1848, Mrs. May, the mother, only became discover in 1863. Her disability prior to the latter date prevented the statute from running against her, inasmuch as the time specified in the proviso of section 3222 had not expired. That is to say, the 24 years mentioned in that proviso had not elapsed between the time the right or title of Mrs. May first descended or accrued to her and the period when she became discover. *Ang. Lim.* (6th Ed.) § 477, and notes; *Hunt v.*

Wall, 75 Pa. St. 413; Warn v. Brown, 102 Pa. St. 347; Bradley v. Burgess, 10 S. W. Rep. 5; Medlock v. Suter, 80 Ky. 101; Mantle v. Beal, 82 Ky. 122; Valle v. Obenhouse, 62 Mo. 81. Consequently, whatever right or title she had originally remained at her husband's death. But, as the statute began to run in 1863 against her, no subsequent disability or existing disability of those who afterwards became her heirs could stop its course. The saving clause only extends to the person on whom the right of action first descends, or to whom the cause of action first accrues. Ang. Lim. §§ 477, 478, et seq.; Landes v. Perkins, 12 Mo. 238; Cunningham v. Snow, 82 Mo. 587; Williams v. Dongan, 20 Mo. 186; Swearingen v. Robertson, 39 Wis. 462; Bozeman v. Browning, 81 Ark. 864; Wood, Lim. § 251 et seq., and cases. The heirs, then, of Mrs. May must be regarded as barred in the same length of time from the date when she became discovert as she would, had she lived, to-wit, three years. On either of the grounds aforesaid the judgment should be affirmed.

RAY, C. J., and BLACK and BRACE, JJ., concur in the first paragraph of this opinion.

BAROLAY, J., (*concurring*.) Plaintiffs' claim is that money was furnished to defendant James May to enter the land in question for his mother, Elizabeth May; that he made the entry in his own name, obtaining a patent accordingly, in 1848; and that Elizabeth and her husband, Gabriel May, together with the defendant James, resided upon and improved the estate during their joint lives. Gabriel died in 1863, and Elizabeth in 1865, intestate. Plaintiffs insist that a trust exists in their favor, as her heirs, on these facts. Viewing them from the standpoint most favorable to plaintiffs, and giving them the benefit of every inference they suggest, it seems to me, nevertheless, that the statute of limitations is a bar to the relief they ask. Their evidence disclosed that Elizabeth May, at least as early as 1857, perhaps earlier, was fully aware of the original transaction from which the trust is said to spring. The statute of limitations in this state was undoubtedly intended to apply to proceedings for the enforcement of equitable as well as of legal rights; and every court exercising equity powers acts upon it, not merely by analogy, but in obedience to it as positive law. It has been ruled that suits to assert equitable ownership of realty in the form of trusts must be brought within the period limited for other actions to recover estates in land, namely, within 10 years from the time the cause of action accrues, (*Hunter v. Hunter*, 50 Mo. 445,) subject to the qualifications and exceptions contained in the limitation law. As applied to implied trusts, whether resulting or constructive, the rule is that the statute ordinarily begins to run from the discovery by the person entitled to sue of the facts upon which equity will found the trust. If that person is then under disability, the

saving clause is applicable; and the statute begins to run from removal of the disability, in accordance with section 3222, Rev. St. 1879. In this case, as against the right of Elizabeth May to have the trust declared, the limitation began in 1863, upon the termination of her coverture by the death of her husband.

Whether the trust here sought to be established be regarded as a resulting or a constructive one, it would not become impressed upon the legal estate until some competent court so decreed, or until some other sufficient declaration of it. The fact that the owner of the legal title and the person entitled to enforce the equitable right resided together on the land, as in this case, would not defer the beginning of the limitation. Circumstances might exist in such a situation that would modify this rule by justifying the application of other principles of equity, but they have not been shown in this case. The course of dealing between James and Elizabeth May, or his declarations regarding the land, subsequent to the original transaction, did not convert him into a trustee of an express trust. Express trusts in lands are within the statute of frauds, and must at least be evidenced by some writing of the party sought to be charged as trustee. Implied trusts are not within the statute of frauds, but are within the statute of limitations. On the facts here shown, it seems clear to me that Elizabeth May was bound, and those claiming in privity to her were bound, to begin the suit to declare the trust within the period of limitation after she became discovert. The question is not whether the joint occupancy of the land by James and Elizabeth May can be considered an adverse possession on his part. The present is not an action of ejectment. It aims to have a trust declared as growing out of the facts already detailed. If both were yet in the joint occupation of the land, the question still would be, at what date did the present cause of action accrue? When did Elizabeth's right to have a court of equity declare a trust arise? It seems to me the answer must be upon her discovery of the facts on which plaintiffs rely, and that, as against her, the limitation statute began to run from the removal of her disability thereafter. That was in 1863, and this suit was not begun until 1883. If the statute began to run during the life of Elizabeth May, it was not suspended at her death, in 1865, by the disability of any of her heirs. *Landes v. Perkins*, 12 Mo. 238.

It appears to me that the bar of the statute relied upon by defendant is effective, and that the judgment should, for that reason, be affirmed.

PARKS *et al.* v. HARTFORD FIRE INS. CO.  
(*Supreme Court of Missouri*. Feb. 10, 1890.)

INSURANCE—INSURABLE INTEREST—HOMESTEAD.

1. Under Const. Tex. art. 16, §§ 50, 51, providing that no mortgage or other lien on the homestead

shall be valid except for the purchase money or improvements thereon, a lien on a homestead is only voidable at the instance of a person interested in the homestead, and the holder of such voidable lien has an insurable interest in the property.

2. A recital in an insurance policy that it is "subject to the three-fourths value clause," there being nothing in the policy to enlarge or explain it, furnishes no such intelligible agreement as can be construed by a court.

3. The policy contained a clause permitting other insurance, and providing for an apportionment of the loss, "without reference to the solvency or liability of other insurers." Before the destruction of the property an agent of defendant told the insured that his policy was canceled, which was not true; whereupon he took out a policy in another company, representing the property as uninsured, and this company, after the property was destroyed, refused to pay any part of the loss. *Held*, that the policy in the last-named company must be excluded in estimating the amount of insurance for which defendant is liable.

Appeal from St. Louis circuit court; AMOS M. THAYER, Judge.

This is an action upon a policy of fire insurance issued May 12, 1884, by defendant, at Texarkana, Tex., to M. V. Flippin, insuring the latter in the sum of \$3,000, for one year, against loss by fire on a three-story building occupied by him there. The policy permitted \$17,500 total concurrent insurance, "subject to the three-fourths value clause," and made the "loss, if any, payable to Meyer & Aronson, or order, of St. Louis, as their interest may appear." It will not be necessary to state the pleadings at length. The facts disclosed at the trial are mostly undisputed. Those which have a material bearing on the errors assigned on the present appeal will be noted. When the policy sued on was issued, Flippin occupied part of the insured building as a place of business, but his home was elsewhere in the town. He was the head of a family, and a citizen of Texas. Before he took the policy he conveyed the building and lot on which it stood to Meyer & Aronson for \$25,000, due them by him; and on the same day Meyer & Aronson reconveyed the property to Flippin for the same recited consideration, evidenced by promissory notes of the latter, which were made a vendor's lien on the property by recitals in them and in the deed. When Meyer & Aronson received the policy now in suit, they indorsed and delivered it for value, along with Flippin's notes, to the Mechanics' Bank, to whose rights plaintiffs are successors. Some three months before the loss which led to this litigation, Flippin, with his family, moved into the south half of the insured building. He occupied it as his homestead until the fire, February 21, 1885. Shortly before that date defendant's agent at Texarkana took steps towards terminating the risk on its part, (as the policy permitted,) but before that object had been accomplished the fire intervened. It is not claimed by defendant that the policy had then ceased to be operative. After those steps to cancel it had been initiated, defendant's agent told Flippin that the insurances (including this one) had all been canceled. Thereupon the latter applied to the East Texas

Fire Insurance Company for \$5,000 insurance on the property in question, representing it as uninsured, and received from that company a policy for \$2,500 only. This supposed insurance has been denied by the latter company, and payment refused, on the ground of that alleged misrepresentation. The cause was tried by Judge THAYER, who found for plaintiffs in the sum of \$2,522.40, predicated on a valuation of the destroyed property at \$8,000. It will not be essential to set forth the instructions in full, in view of the conclusions reached upon the material points of the controversy. The controlling facts are practically conceded. The finding for less than the face of the policy was based on a clause in it to the effect that "in no case shall the claim be for a greater sum than the actual damage to or cash value of the property at the time of the fire, nor shall the assured be entitled to recover of this company any greater proportion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property, whether such other insurance be by specific or by general or floating policies, and without reference to the solvency or the liability of the other insurers." In estimating the total amount of concurrent insurance, the trial court excluded the policy in the East Texas Fire Insurance Company already mentioned, which left the total contributing insurance \$12,500. The laws of Texas were introduced in evidence at the trial.

One of the main objections to plaintiffs' right of recovery rests on the terms of the constitution of that state relating to homesteads, viz.: Article 16, § 50: "The homestead of a family shall be, and is hereby, protected from forced sale for the payment of all debts, except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of the wife, given in the same manner as is required in making a sale and conveyance of the homestead; nor shall the owner, if a married man, sell the homestead without the consent of the wife, given in such manner as may be prescribed by law. No mortgage, trust-deed, or other lien on the homestead shall ever be valid, except for the purchase money thereof, or improvements made thereon, as hereinbefore provided, whether such mortgage or trust-deed or other lien shall have been created by the husband alone, or together with his wife; and all pretended sales of the homestead, involving any condition of defeasance, shall be void." Section 51: "The homestead, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon. The homestead in a city, town, or village shall consist of lot or lots, not to exceed in value five thousand dollars at the time of their designation as the homestead, without

reference to the value of any improvements thereon: provided, that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the head of a family: provided, also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired." Defendant appealed from the finding and judgment against it, after the usual motions and exceptions. The errors alleged are discussed in the opinion.

*Noble & Orrick*, for appellant. *Cunningham & Elliot* and *E. B. Adams*, for respondents.

BARCLAY, J., (after stating the facts as above.) 1. Defendant asserts that the transaction (in which the notes held by plaintiffs were given) between Flippin and the firm of Meyer & Aronson amounted, in effect, to affixing a mortgage charge to the homestead of the former, and, as such, should be regarded as illegal and void under the constitution and laws of Texas. It is enough on this point to say that, giving full force to the facts alleged by defendant, and assuming, for the moment, that effect may be given here to the Texas homestead laws, the transaction would be, at worst, merely voidable, not void absolutely and at all events. Until set aside, at the instance of some one entitled to question it, no stranger (such as defendant here) to the homestead right can successfully impeach it. So far as concerns the immediate parties to the transaction, and all before the court in this action, the notes will be considered as valid, and the security for their payment as voidable only, but, until avoided, attaching to such interest or estate in the realty in question as Flippin's conveyance transferred. The exact extent of that interest or estate we need not attempt to define. It is involved in some obscurity, despite the able rulings of the courts in Texas on the subject of homesteads. But this, at least, is certain: that Flippin's deed (by way of security for the notes) would be effective, in several contingencies, to pass some sort of substantial interest in the insured property itself, under the decisions in that state. *Jordan v. Godman*, 19 Tex. 278; *Sears v. Sears*, 45 Tex. 557; *Irion v. Mills*, 41 Tex. 310; *Reece v. Renfro*, 68 Tex. 192, 4 S. W. Rep. 545; *McElroy v. McGoffin*, 68 Tex. 208, 4 S. W. Rep. 547. This it would do, even if the transaction in question be treated as creating, in substance, a mortgage, as defendant claims. But the actual form, which the security for the notes took from the written instruments between Flippin and Meyer & Aronson, was that of securing a vendor's lien for the purchase money as represented by the notes. If that be regarded as the real nature of the transaction, plaintiffs' case would be much stronger, under the laws of Texas and rulings there interpreting them. Const. Tex. art. 16, § 50; *Burford v. Rosenfield*, 87 Tex.

42; *Lee v. Welborne*, 71 Tex. 500, 9 S. W. Rep. 471; *Berry v. Boggess*, 62 Tex. 239. Looking at the matter in either aspect, the plaintiffs had such an insurable interest in the property as would support a recovery on the facts here exhibited, and the policy was properly transferred to them according to its terms. A mortgagee has an insurable interest in the property covered by the mortgage lien, at least to the limit of the indebtedness secured, as has likewise a vendor to the extent of his lien for unpaid purchase money. So it becomes unnecessary to the decision of this case to determine whether plaintiffs would have a standing in this action by reason of their interest (as assignees of the policy and notes) in the contract of insurance, as distinguished from an insurable interest in the property itself.

2. The policy before us recites that it is "subject to the three-fourths value clause." That language appears in the written portion of the instrument. No other part of it enlarges that phrase into any sort of intelligible agreement that can be dealt with by a court. It stands alone and unexplained. No attempt is made in this action to reform the agreement, upon principles applicable to mutual mistake, so that it should include a stipulation on the subject alluded to; but defendant seeks to give to the phrase itself, "subject to the three-fourths value clause," the force of an agreement that, in event of total loss, the property should not be valued at a sum greater than three-fourths of the actual value, in ascertaining the amount to be paid for total insurance. This cannot be done. The language used cannot fairly be expanded by construction to embrace that meaning, in the present state of the pleadings and evidence.

3. The action of the trial court excluding the policy in the East Texas Fire Insurance Company from consideration in estimating the total concurrent insurance was abundantly supported by the evidence. The kind of insurance contemplated by the policy in suit, referring to the clause for the apportionment of the loss, is valid insurance, or such as has, at least, original validity. The policy in the East Texas Company was not of that sort. It was obtained under the mistaken impression that the policy sued on here and others had been canceled, and the insured so represented. This was sufficient to avoid that policy from the beginning, and that company's refusal to pay it appears just, on the facts shown. The words in this policy, "without reference to the solvency or liability of other insurers," cannot fairly and reasonably be said to include contracts of supposed insurance which, for any sufficient cause, fall ever to become operative. Those words refer to valid insurances which, though in force at the time of the loss, may not constitute legal liabilities because of some breach of the terms of the policies or otherwise. The judgment is affirmed, with the concurrence of all the members of the court.

**AIKEN v. UNDERWOOD, Commissioner.***(Court of Appeals of Kentucky. Feb. 20, 1890.)***JUDICIAL SALES — LAND IN ADVERSE POSSESSION.**

Where plaintiff, as commissioner, sells a tract of land, giving a bond conditioned, among other things, that the purchaser should be put in full possession of the land, and it appears that a portion of the tract is in the adverse possession of another person, the purchaser is entitled to have the value of that portion deducted from the purchase price of the tract.

Appeal from circuit court, Barren county.

"Not to be officially reported."

Action by Robert Underwood, as commissioner, against G. D. Aiken, on notes given for purchase price of certain lands. Judgment for plaintiff, and defendant appealed.

*Porter & McQuown*, for appellant. *Wright & McElroy*, for appellee.

PRYOR, J. Upon the pleadings and exhibits filed, the appellant was entitled to a deduction from his notes for the 20 acres of land in the possession of Cochran. The bond of the commissioner shows that the appellant was to be placed in full possession of the land; and the pleadings concede that 20 acres was in the adverse possession of another, claiming against the title derived by appellant. The value of the 20 acres should be deducted from the purchase-money notes. The court will ascertain the price per acre for the entire tract, and deduct the purchase price to the extent of the loss. Reversed, and remanded for proceedings consistent with this opinion.

**MCLAUGHLIN v. SCHMIED et al.***(Court of Appeals of Kentucky. Jan. 14, 1890.)***JUDICIAL SALES.**

Where land sold under a judgment could have been sold in parcels, a sale of the whole tract, without an attempt to make less of the land pay the debt, is erroneous, and will be set aside on appeal from the order confirming the commissioners' report of the sale.

Appeal from circuit court, Boone county.

"Not to be officially reported."

*O'Hara & Bryan*, for appellant. *H. P. Stephens*, for appellees.

PRYOR, J. This appeal is from an order confirming the report of the sale of the appellant's land, with evidence conducing to show an inadequacy of price that, of itself, is not sufficient to invalidate the sale. The land sold has upon it a building, with 30 or 40 rooms, that was erected for a hotel, and used as such, but now abandoned. The land is susceptible of division, and could have been sold in parcels. It is composed or made up of two parcels, but, when the commissioner proceeded to sell it, he sold the whole tract, and made no effort to sell a less number of acres for the payment of the debt, and the result was a sale for a sum less than \$1,700 of the entire land. The sale in gross was erroneous, and, as no direction was given by the judgment as to how the land should be

sold, the sale should have been conducted in the usual way, and an attempt made, at least, to make less of the land pay the debt. The sale, under such circumstances, should have been set aside. Judgment reversed, and remanded, with directions to sustain the exception and order a resale.

**YOUNG v. LOFTON et al.***(Court of Appeals of Kentucky. Feb. 20, 1890.)***VENDOR AND VENDEE—MISTAKES OF QUANTITY.**

1. Plaintiff conveyed to defendant, by deed of general warranty, a tract of land containing "about 800 acres," and the deed provided that, if there was more than 800 acres, plaintiff was not to claim the price of the excess, and if less, defendant should not receive a rebate for the deficiency. It appeared, however, that within the boundaries set out in the deed was included a certain tract, which plaintiff did not own, nor claim to own. *Held*, that this was not such a shortage as was contemplated in the deed, and defendant was entitled to an allowance therefor in the purchase price.

2. Where the land included in the boundary is not the vendor's, the vendee may, in an action for the price, claim a deduction without alleging an eviction, or fraud, or insolvency, on the ground of a partial failure of consideration.

Appeal from circuit court, Webster county.

"Not to be officially reported."

*F. M. Baker*, for appellant. *John D. Hill* and *D. H. Towery*, for appellee.

BENNETT, J. The appellant sold to the appellee, by deed of general warranty, a tract of land containing "about three hundred acres." The sale was in gross, and, to make the character of sale doubly sure, it was expressed that, if there was more than 800 acres, the appellant was not to claim the price of the excess, and if less, the appellant was not to pay for the deficiency. The appellee claimed, in a suit for the balance of the purchase money, that there was a considerable shortage in said quantity of land, and that the boundary conveyed to him included about 20½ acres that belonged to Rebecca Orr. The court allowed the appellee the price of the 20½ acres that belonged to Rebecca Orr, and rejected the appellee's claim for the price of the balance of the shortage. We think the court did right. The appellant, while denying that Rebecca Orr was the owner of said land, does not claim that he owned it. He says that he did not. Therefore the question is, was said land included in said boundary? The chancellor found that it was, and we think the finding was correct. Consequently the appellant not owning said land, and having sold it, there was a deficit in the quantity sold. It is true that, if there had been a mere shortage in the boundary sold of 20½ acres, the appellant would not have been liable; but said quantity was in said boundary, and was actually sold as the appellant's property, and it would be manifestly unjust to deny the appellee a corresponding deduction. In such case, where the land included in the boundary is not the vendor's, in a suit for the purchase



price, the vendee can claim a deduction without alleging an eviction or fraud or insolvency, on the ground of a partial failure of consideration. The judgment is affirmed.

### ALLSTOTT v. McCAIN.

(Court of Appeals of Kentucky. Feb. 6, 1890.)

#### RESULTING TRUSTS.

In an action by children of a deceased person to have dower assigned in land held by their ancestor jointly with another, the widow claimed the entire interest of the ancestor under an alleged agreement that the conveyance of his interest was to be made to her, payment for the interest having been made out of the proceeds of land belonging to her. Held, though the evidence was conflicting as to the existence of the agreement, that, it appearing that the wife's money had paid for the land, and the rights of creditors not being involved, her equities were superior to those of the children.

Appeal from circuit court, Casey county.

"Not to be officially reported."

Stone & Stone and A. R. Clarke, for appellant. Harrison & Belden, for appellee.

PRYOR, J. In the year 1860 the husband of the appellee and one Thompson purchased a tract of land jointly, in the county of Casey, under a decretal sale, and obtained a deed from the commissioner. The land was divided between them by a well-defined marked boundary, but no deed of partition ever executed. McCain, the husband, died, leaving his wife and several children surviving him. Allstott (who married a daughter) and his wife instituted this action for a division of the land between the children, and the assignment of dower to the widow. The widow (appellee) filed an answer, in which she claims the land under an agreement with her husband by which he was to have the conveyance made to her, as the consideration paid for the Casey county land was the proceeds of land belonging to her that was sold by the husband, she uniting in the deed under the express agreement that the title was to be vested in her to the Casey land. This is denied by the appellant, and much testimony of a conflicting character taken. Thompson, who made the purchase, and was on intimate terms with the husband of the appellee, never knew of the arrangement; and from other witnesses, as well as acts of ownership by the husband, it would seem to appear that no such agreement was made. On the other hand, the proof shows that the husband had no property, and the land of the appellee in Marion county was sold, and the proceeds applied to the purchase of the Casey land. In fact, the husband, after he purchased this land, became dissipated, and there is no evidence that he accumulated any means with which to make the payments. He recognized the wife as the owner, and said the land was hers, time and again, to those with whom he associated, through a long period of time. He stated to his brother that no deeds had been made between himself and Thompson, and, when made, the deed to his part should be made to his wife. Another

brother states that the husband of the appellee told him of the agreement with his wife; that he was to invest this money of hers in the land, and, besides, that the uncle of the appellee had advanced for her a small balance that was due upon it, and he (the husband) was only delaying the execution of the agreement with his wife until he could make a settlement with Thompson. The agreement is shown to have been made by the statement of the husband to Belden and others, and we think there is but little doubt of its existence. Conceding, however, that the testimony is conflicting, and it certainly is, what is the equity of the case, as between the appellee and her children? It is manifest that her money paid for the land; that this money was obtained from the proceeds of the sale of her land in Marion county; and why, then, should the wife be made to surrender it, unless there is an absence of proof showing, as between herself and husband, there was an agreement that he should invest it for her benefit? It is true that the testimony consists in the statements made by the husband alone. Those statements, however, were repeatedly made, and to parties who have no interest in this controversy, and, when the wife's money paid for the land, it is perfectly rational that such should have been the agreement between the husband and wife. While some of the means was borrowed in cash notes from the uncle of the appellee to pay for this land, it is, we think, established that no payment was made to the uncle on the obligation of the husband, and that the uncle died leaving no claim against him. That it was given to the wife we are satisfied, and, as no creditors are complaining, the wife should, as between herself and children, have this land, and, the chancellor so deciding, his judgment is affirmed.

### HILTON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Feb. 13, 1890.)

#### HOMICIDE—INSTRUCTIONS.

On a trial for murder, the omission of the court to tell the jury that defendant had the right to defend his family against any attack of the deceased is not improper, where there is no evidence to show that the deceased had any such purpose.

Appeal from circuit court, Leslie county.

"Not to be officially reported."

Indictment of C. B. Hilton for murder.

J. G. Forrester, for appellant. P. W. Hardin, Atty. Gen., for the Commonwealth.

BENNETT, J. The appellant was convicted, and sentenced to serve a term in the state penitentiary for two years for the killing of Ben Saylor. The court instructed the jury properly upon the subjects of murder and manslaughter; also upon the subject of self-defense, and the right of the appellant to defend his own house. The omission of the court to tell the jury that appellant had the right to defend his family against any attack of the deceased was not improper in this case,

for the reason that there was no evidence whatever tending to show that deceased had any such purpose. Leaving out of view the commonwealth's evidence, which shows, if believed, that the appellant was guilty of murder, his own evidence shows him guilty of, at least, the crime of which he was convicted. The judgment is affirmed.

**MOYERS v. EVANS et al.**

(Court of Appeals of Kentucky. Feb. 8, 1890.)

**DECEIT—CANCELLATION OF DEED.**

Where one of several heirs to land is induced to give a deed for her share to the husband of a co-heir, pending negotiations for a sale of the land, by misrepresentations as to the amount she will be entitled to receive from the prospective purchaser, and by such misrepresentations her grantee realizes a profit to himself of more than double the consideration paid to her, the deed will be set aside for fraud.

Appeal from court of common pleas, Bell county.

"Not to be officially reported."

Action to cancel a deed, executed and delivered by Maggie Evans to H. P. Moyers. Judgment for plaintiff, and defendant appeals.

*Unthank & Riley*, for appellant. *J. H. Tinsley*, for appellees.

LEWIS, J. Appellee Maggie Evans is one of four sisters and heirs at law of W. A. Lane, who died the owner of a considerable quantity of unimproved mountain land, valuable principally for timber and minerals, and appellant is the husband of another one of the sisters. The evidence shows that a company of capitalists and speculators had offered to purchase the lands at \$5 per acre, and had actually advanced and paid to or for the benefit of each of the sisters \$50, and agreed to pay the balance of the purchase money when deeds had been executed by each of the heirs for the land; and, ostensibly for the purpose of getting from appellee and her husband authority to convey her interest, appellant went to the state of Tennessee, where they then resided. But, upon her refusal to execute a power of attorney, appellant purchased, at the price of \$200, her undivided interest in the estate of her brothers, and procured from her a deed therefor. It clearly appears appellee and her husband were at the time ignorant of the actual condition and value of the estate, and, if informed at all that the land company had offered to purchase the land, was ignorant of the price agreed to be paid, and of the amount to be realized; and, acting upon the information given by appellant that her share was worth not over \$150, they made a deed conveying to him her entire interest in the estate for the consideration of \$200, \$50 of which was a check drawn by the land company to be paid to her. It is further shown that appellant was then well aware that the share of appellee in the proceeds of the land, without considering her interest in the per-

sonalty left by her brother, would amount to between four and seven hundred dollars; that all appellee had to do to entitle her to that amount, which the land company had agreed and was ready to pay, was for her to make the deed of her interest to that company. But instead of giving her full and truthful information on the subject, which it was his duty to do if he undertook to advise her at all, he not only concealed the amount she was entitled to, and the company had agreed and was willing to pay to her upon execution of the conveyance to it, but, in effect, misrepresented and deceived her in respect, not merely to the value of her interest, but as to what she could and would, but for his interference, have actually received from the company. And thus, instead of procuring her deed to the company, and thereby the receipt by her of the full amount she was entitled to receive, he induced her to sell directly to him, using her own money, to the extent of \$50, to pay the consideration, and thus realize a profit to himself of more than double the consideration paid to her. It seems to us it would be hard to make out a clearer case of fraud; for his false representation and deceit was not in relation to the uncertain and contingent value of her interest in the estate of her brother, but as to what it had been actually sold for, and she was enabled to immediately realize by simply conveying to the company. We think the deed was properly canceled by the lower court, and the judgment is affirmed.

**REEDER v. REEDER.**

(Court of Appeals of Kentucky. Feb. 8, 1890.)

**CONTRACTS FOR SUPPORT—BREACH—CANCELLATION OF DEED.**

Where land is deeded under an agreement that the grantee shall support the grantor for life, and the grantee refuses to comply with his part of the contract, a proper measure of relief is the return of the land to the grantor, where this can be done, and, at the election of the grantor, it should be ordered.

Appeal from circuit court, Knox county.

"To be officially reported."

Action for breach of contract to support a grantor in consideration of his deed to land.

*Wilson & Rawlings*, for appellant. *J. H. Tinsley*, for appellee.

BENNETT, J. The written agreement between appellant and appellee is to the effect that the appellant conveyed to the appellee the appellant's tract of land, and, as is alleged and not denied, put the appellee in the possession of it. The conveyance, as is alleged, was made in consideration of \$50 cash, and \$450 to be discharged by appellee doing, or causing to be done, the appellant's and his wife's (the latter being now dead) cooking and washing during the life of each; also, the appellee was to furnish the appellant and his wife "a part of a reasonable support;" also, he was to give them, in case of sickness, care and attention, etc.

It was evidently contemplated by the parties that this support, attention, etc., should continue during the life of each, and that the price of the land would be ample pay for such services. It is alleged that the appellee failed to render any of the services, or to pay any part of said sum of money. On the contrary, it is alleged the appellee refused to render any part of said services, or to pay any part of said money, and drove the appellant away from his house. The services that the appellee was to render were to continue during the respective lives of the appellant and his wife, that is, the undertaking was entire; and upon the failure of the appellee to comply with the contract the appellant could have recovered damages for the non-performance during his entire life. The damages accruing to the time of the trial, by reason of the fact that the appellant's health, condition, and necessities could be accurately surveyed, could be easily ascertained by a jury. Also, the damages thereafter, taking into account the appellant's age, health, and condition, and consequent duration of life, are not too conjectural to be passed on by a jury. We have an instance of the kind in the ascertainment of the money value of a life-estate by means of the life-table, etc. But such damage is always speculative or conjectural. Life may be shorter or longer than anticipated. The party's physical health may become more feeble or more robust than anticipated, or his mind may become impaired, etc. These changes of conditions may render the damages asserted very excessive, or grossly inadequate. For these reasons, the party aggrieved should be forced to resort to such measure of compensation, only in the absence of a more certain measure. If a more certain measure is at hand, the party aggrieved should, at his election, be permitted to resort to it. Here, as the appellee has refused to comply with his part of the contract, and as he can return the consideration, and thus the appellant and he will be placed in *statu quo*, the chancellor, at the election of the appellant, should not hesitate to do it. The judgment is reversed, with directions for further proceedings consistent with this opinion.

**LOUISVILLE & N. R. CO. v. COMMONWEALTH,  
to Use of MARION COUNTY.**

(Court of Appeals of Kentucky. Feb. 8, 1890.)

**TAXATION—INTEREST—VOLUNTARY PAYMENT—  
RAILROAD COMPANIES—MUNICIPAL AID.**

1. Interest is not allowable on taxes, as a penalty for non-payment.
2. Taxes voluntarily paid, under a mistake of law, cannot be recovered.
3. A railroad cannot be taxed by a county to pay the subscription of the county to aid in its construction.
4. And it matters not that the county issued bonds in payment of the subscription, and the tax is to pay the bonds.
5. Where the legislature divides a railroad company into two distinct companies, by consent of all the stockholders, the equity which the old

company had, to exemption from taxation to pay the subscription to it, passes to the new company.

6. Where a tax is ordered for a specific purpose, it must appear that it was levied for that purpose.

Appeal from circuit court, Marion county.  
"To be officially reported."

Action to recover balances of tax for county purposes.

*Rountree & Lisle, H. W. Bruce, and Wm. Lindsay, for appellant. Sam. T. Spalding and Lewis Edelen, for appellee.*

HOLT, J. The Marion county court for the years 1882, '83, '84, levied an *ad valorem* tax for county purposes of 30, 40, and 50 cents, respectively, upon each \$100 in value of taxable property in the county. It also levied for each of said years a like tax of 70 cents upon each \$100 in value of taxable property, to pay the interest on the bonds it had issued in payment of its \$300,000 subscription to the Cumberland & Ohio Railroad, and to create a sinking fund for the payment of the principal of them. About 28 miles of the Knoxville branch of the Louisville & Nashville Railroad lies within the county, as does about 13 miles of what is now the Southern Division of the Cumberland & Ohio Railroad. The latter road was chartered in 1869. The county made its said subscription to it, and in 1871 adjusted it by delivering to the company bonds payable to bearer at the end of 20 years. The road being incomplete, the company being without means or credit to proceed with the work, and the time fixed in the charter for its completion being about to expire, the legislature, in 1878, amended the charter so that the company could, and it did by agreement of the stockholders, Marion county consenting thereto, divide itself into two distinct corporations, called the "Northern" and "Southern" Divisions of the Cumberland & Ohio Railroad Company. Under this arrangement a certain portion of the road, and which included that part in Marion county, became the Southern Division, and the property of the stockholders south of a certain point, Marion county being one of them. Soon after the Southern Division leased its incompleting line to the Louisville & Nashville Railroad Company for 25 years, Marion county voting its \$300,000 of stock subscribed to the Cumberland & Ohio Railroad Company in favor of such lease. By its terms the Louisville & Nashville Railroad Company was to complete and equip the road, it being secured in the necessary expenditure, and any debts of the Southern Division it might pay, by mortgage bonds of the road to the amount of \$300,000, two-thirds of the net earnings to go to the Southern Division, and one-third to the lessee; provided, however, if the mortgage bonds did not repay the Louisville & Nashville road its expenditure above named, then the net earnings were to be applied for that purpose. The lease also provided that all taxes legally assessed upon the leased property should be paid out of the

gross earnings of the road. The road was, under this contract, completed through Marion county, and to a point beyond, and the Louisville & Nashville Railroad Company has since been operating it. The portion in Marion county of the two roads was duly assessed by the board of railroad commissioners, and the assessment certified by the auditor to its county clerk. The appellant paid a portion of the tax levied for county purposes for the years 1882, '84. It also made payments upon the railroad tax for the same years; and if the portion of the Southern Division of the Cumberland & Ohio Railroad lying in Marion county was not liable for this last-named tax, as is claimed, but only so much of the Knoxville branch as is in the county, then the appellant overpaid this tax for the year 1882 by about \$500. This action was brought to recover the balances of the tax for county purposes for 1882, '84, and for that of 1883; also a balance of the railroad tax for 1882, as the county claims both roads are liable to it; a balance for 1884; and for the tax of 1883. Interest was claimed upon all these amounts. The lower court held the county levies to be invalid; that the Southern Division of the Cumberland & Ohio Railroad was not subject to the railroad tax; but rendered a judgment for so much of this tax for the year 1883 as had been assessed against the Knoxville branch of the appellant, with interest from October 1, 1883, and also for the year 1884, with interest from October 1, 1884, less what the appellant had paid on its railroad taxes for the last-named year. It refused to take any account of the overpayment by the appellant on its railroad taxes for 1882. The railroad company now complains of this refusal, and also because of the allowance of interest in the judgment. The county, upon the other hand, by a cross-appeal, seeks to reverse the ruling below as to the taxes for county purposes, and the alleged non-liability of the Southern Division of the Cumberland & Ohio Railroad for the railroad taxes.

Taxes are not "debts," within the legal meaning of the term. They are not based upon contracts, either express or implied. They come upon the tax-payer *in invitum*. Their payment is a duty which the citizen owes to the state, in return for the protection it affords him and his property. Interest is not allowable upon them by the general law. The power to impose it must come from a statute. Although they are payable at a certain time, they do not carry interest, unless the statute says so. It, upon the contrary, provides fixed penalties for their non-payment. It was said by this court in the case of Ormsby v. City of Louisville, 79 Ky. 197, that interest is not allowable upon taxes by way of damages; and this rule has since been followed in Railroad Co. v. Hopkins Co., 87 Ky. 605, 9 S. W. Rep. 497; Railroad Co. v. Pendleton Co., 2 S. W. Rep. 176; and other cases. If credit were given to the appellant upon the railroad taxes for 1883,

for the amount overpaid on those of 1882, it would practically be a recovery of taxes voluntarily paid by the appellant under a mistake of law. These taxes could only be recovered by suit. Resort to judicial proceedings was necessary. The statute provides this mode of collection. If the appellant declined to pay, it necessarily followed that it would have its day in court, where it could raise the question of its liability for them. It is a general rule that a voluntary payment by the tax-payer leaves him remediless. If, however, distraint, or summary mode of collection may be adopted, then the payment will not be regarded as voluntary, and the tax-payer may sue to recover taxes collected without legal authority.

A distinction is to be taken between cases where their collection can be enforced summarily, and those where resort must be had to the courts. In the one case, the tax-payer must submit to a levy upon his property or pay the money; in the other, he has the opportunity to contest the demand in court, and if he does not choose to do so, and voluntarily pays it, he is remediless. Considerations of public policy require this rule, and the tax-payer cannot complain with grace because he has by his own neglect missed the opportunity afforded him by law for his protection. This view is supported by the cases of City of Louisville v. Anderson, 79 Ky. 334, and Railroad Co. v. Hopkins Co., *supra*.

It has been repeatedly held by this court that a railroad cannot be taxed by a county to pay the subscription of the same county to aid in its construction. Court v. Railroad Co., 7 Ky. Law Rep. 761; Railroad Co. v. Hopkins Co., *supra*. If this could be done, it would result that the county would only pay a portion of its debt. It would be *quasi* repudiation. The creditor would be made by its debtor to pay a part of its own demand. The railroad would, in fact, get but a part of the subscription, and the obligation of the contract would *pro tanto* be impaired. It matters not that the county issued bonds in payment of the subscription. It now proposes to tax the road to pay these bonds. This is the same as if it proposed to tax the road to pay the subscription. It is doing it, in effect. The Louisville & Nashville Railroad Company is not the owner of this Southern Division of the Cumberland & Ohio Railroad. If it had purchased it, and then completed it or added to it, a different case would be presented. As this record shows, however, it is merely its creditor, and is operating it under a lease. The road, including all the improvements which have been put upon it, belongs to the Southern Division of the Cumberland & Ohio Railroad Company. It is true the county subscription was to the Cumberland & Ohio Railroad Company. What is now, however, the Southern Division, cannot be regarded, so far as the subscription is concerned, as a new or distinct company. The legislature merely divided the

old company into two distinct companies, by consent of all the stockholders, Marion county included; it becoming, by virtue of the charter of the original company and the subsequent legislation, a stockholder to the extent of its subscription in the Southern Division, and its tax-payers stockholders therein upon the payment of their taxes *pro tanto*, the county stock thereupon decreasing to that extent. The equity which the old company had to the exemption from taxation to pay the subscription to it passed to the new company. The latter is not a purchaser. The old company being merely divided by the legislature, and the new one being invested, by the act of the legislature creating the two divisions, with all the rights and powers of the old company, it was not divested of the exemption from taxation in aid of the subscription to build the road. To so hold would not only be inequitable, but unreasonable. There is no law authorizing an *ad valorem* tax for county purposes generally. The law provides for a head tax only, for these purposes. Nor is there any act of the legislature to this effect as to Marion county. It is only allowable for specific purposes. If a municipal corporation imposes taxes, it must be able to show due authority to make the demand. If a tax be levied for a specific purpose, it must appear that it was levied for that purpose. *Price v. Trustees*, 1 Ky. Law Rep. 276. The tax-payer, when he pays an *ad valorem* county tax, has a right to know the purpose intended, and how it is to be applied. The orders for the county levies, aside from those relating to the railroad tax, failed *in toto* to show the object to which they were to be applied; and they are not aided by any sufficient pleading in this respect, even conceding that this were possible. The judgment upon the main appeal is reversed, so far as it allows interest. It is affirmed upon the cross-appeal, and case remanded for further proceedings consistent with this opinion.

#### COMMONWEALTH v. MOORE.

(Court of Appeals of Kentucky. Feb. 8, 1890.)

##### FALSE PRETENSES.

In order to constitute the offense of obtaining money upon false pretenses, the alleged false statements must relate to some pretended past occurrence or existing fact; and where the false statements by which money is obtained manifestly relate to existing facts, they will support an indictment, though the accused promised to do so and so in the future with the money.

Appeal from circuit court, Simpson county.

"To be officially reported."

M. F. Moore was indicted for obtaining money upon false pretenses. A demurrer to the indictment was sustained, and the commonwealth appeals.

P. W. Hardin, Atty. Gen., for the Commonwealth. W. D. Bush, for appellee.

HOLT, J. The demurrer to this indictment for obtaining money upon false pre-

tenses was doubtless sustained upon the ground that the false representation related to something to take place in the future. An indictment for this offense must not only set forth the pretenses whereby the money was obtained, but they must relate to some pretended past occurrence or existing fact. No representation of anything to be done or to take place *in futuro* is a pretense, within the meaning of the statute, as has been heretofore decided by this court. *Glackan v. Com.*, 3 Metc. (Ky.) 232. Let us, however, test the sufficiency of this indictment by this rule. It avers that the appellee, M. F. Moore, knowingly, willfully, feloniously, and fraudulently, represented to Susan Mason that a mob was then threatening to take her son from the jail, where he was then confined upon a charge of murder, and kill him; that he (the accused) had been employed as his counsel; that, to protect him from mob violence, it was necessary to remove him from the Simpson county jail to that of Warren county; that up to that time the first-named jail had been guarded, in order to protect him against the mob, but it would be no longer; that it would be very dangerous for him to remain in it until 9 o'clock that night, and he must be moved by that time; that the removal would be expensive, and she must furnish him some money for that purpose; that, relying upon these statements, she did pay him \$10, when, in truth and fact, as he well knew, no mob had threatened to mob or injure her son; nor had he been employed as his counsel; nor was he in any danger in the jail; nor was any money needed to remove him to another jail; nor was the Simpson county jail then guarded, nor had it been, to protect her son. These statements, if made, related in part even to past occurrences. Manifestly, they related to existing facts, and an existing state of case. If made, then the money, if obtained, was furnished by reason of a false representation of a present and existing condition of affairs. We are, of course, assuming, as is proper upon a demurrer, that the averments of the indictment are true. The fact that the accused promised to do so and so with the money was a mere incident in the transaction. Aside from it, the indictment was sufficient. The accused has not been put in jeopardy; and the judgment is reversed, with directions to the lower court to overrule the demurrer, and proceed with the case.

#### TRIMBLE v. CITY OF MT. STERLING.

(Court of Appeals of Kentucky. Feb. 8, 1890.)

##### MUNICIPAL CORPORATIONS—TAXATION—CHOSES IN ACTION.

Article 8, § 6, of the charter of the city of Mt. Sterling, providing that "all property not exempt from taxation under the general laws of this state shall be subject to taxation, as herein mentioned, for city purposes," embraces choses in action.

Appeal from circuit court, Montgomery county.

"Not to be officially reported."

Action to set aside taxes alleged to have been improperly imposed.

*Wood & Day* and *W. A. Sudduth*, for appellant. *W. A. Wilson* and *Salger & Orear*, for appellee.

PRYOR, J. The case of *Johnson v. City of Lexington*, 14 B. Mon. 521, cannot control the decision of this case. It was there held that "property and personal estate," according to popular signification, did not mean money or choses in action; but the charter of the city of Mt. Sterling contains a provision as to the character of property to be taxed. The first section of article 8 of the charter authorizes the imposition of a tax at such a sum, "on the real and personal estate directed to be assessed," etc., which shall be paid by the owner or person assessed. Section 6 provides what character of property shall be assessed, and that is: "All property not exempt from taxation under the general laws of this state shall be subject to taxation, as herein mentioned, for city purposes." This embraces all property, whether real or personal, money, choses in action, and every species of property upon which a tax is imposed by the state, and such was the legislative intent. In fact, as the law now exists, a charter containing the provision found in the Lexington charter, when *Johnson v. City of Lexington* was decided, would likely be construed as including money and evidences of debt. The rule of construction found in the Code as to the meaning of the words "personal property" is: "The words 'personal property' means money, goods, chattels, things in action, and evidences of debt." This is a more extended meaning than has heretofore been expressly given by statute, or, rather, than the construction given the statute in the case of *Johnson v. City of Lexington*; and if in a controversy pending in court as to the meaning of the words "personal property," or "personal estate," which has the same meaning, this court would hold that they included choses in action and money, why not apply the same rule, when it is insisted by the owner of choses in action that they are not embraced in the term "personal property," when sought to be taxed? The Code, it seems to us, is but the expression of the popular signification of the words "personal property;" but, whether so or not, the sixth section of the charter defines the meaning of the legislature. The domicile of the owner being the *situs* of this sort of property, the tax was properly imposed. See *City of Newport v. Ringo*, 10 S. W. Rep. 2. Judgment affirmed.

HOLT, J., not sitting.

#### McILVOY v. RUSSELL et al.

(Court of Appeals of Kentucky. Feb. 13, 1890.)  
ATTORNEY AND CLIENT — CONTRACT — CONSTRUCTION.

A contract between an administrator and attorneys, while the settlement of the estate is

progressing, under which the former agrees to pay the latter at the rate of five dollars per day for their services, "and in addition an amount equal to five per cent. of all they might save or make the estate by excepting to the settlements made by the commissioner," does not entitle the attorneys to commission on what is conceded to be owing to the estate, but only on all controverted claims that are allowed against the estate.

Appealed from circuit court, Washington county.

"Not to be officially reported."

Suit in equity brought by Robert McIlvoy, as administrator of Daniel McIlvoy, for the settlement of his intestate's estate.

*W. C. McChord*, *J. W. S. Clements*, and *W. B. Harrison*, for appellant. *W. P. D. Bush*, for appellees.

PRYOR, J. Daniel McIlvoy, who was the administrator on the goods, etc., of his son-in-law, Miller, died, and his administrator brought this action, in equity, to have the estate of his intestate settled, and also a settlement of his accounts with the estate of Miller. After Miller's death, his widow, who was a daughter of McIlvoy, married one Reid; and McIlvoy paid over to Reid a considerable sum of money, a part of which Reid was entitled to in right of his wife, and the balance belonged to Miller's children. This money was invested in land; and Reid, before the estate of McIlvoy was settled, became the guardian of his wife's children by Miller. In the action brought against Reid and wife for the settlement of McIlvoy's accounts with Miller, Reid answered, admitting the payment of the money to him by McIlvoy, and said he could not ascertain how much his (Reid's) wife was entitled to out of her first husband's estate, but when that was fixed he was ready to pay the balance. There was no controversy about what Reid had received, and no difficulty in ascertaining his wife's interest in Miller's estate; and a simple arithmetical calculation was all that was required to be done. The action was brought for McIlvoy's administrator by Hays & Thurman, attorneys, and the case went to the commissioner for a settlement. After the settlement was made and reported, exceptions were filed to the report by attorneys for McIlvoy; the commissioner reporting the amount paid Reid, and stating, in effect, that he was unable to say whether McIlvoy's estate was or not entitled to a credit. While the settlement was progressing, the appellants employed Russell & Avritt to aid Hays & Thurman, agreeing to pay them at the rate of five dollars per day for their services, "and in addition an amount equal to five per cent. of all they might save or make the estate of McIlvoy by excepting to the settlements made by the commissioner." These attorneys also filed exceptions; and the court adjudged that, as Miller's wife was entitled to a part of the estate, and Reid was the statutory guardian of the children, McIlvoy was entitled to a credit of \$25,498, and of this sum Russell & Avritt were entitled to a commission of 5

per cent. Of this large sum, \$23,178 had been paid Reid, and whether the commission on that amount was properly allowed is the question here. The amount received was not denied by Reid, and his readiness to pay over what was left after deducting his wife's interest was stated. There was no controversy as to his wife's right, and none as to the right of the children to the balance. Reid's solvency is established. The money was not secured, saved, or made to the estate of McIlvoy by the exceptions filed; and it therefore follows, looking to the spirit and meaning of this contract, that the attorneys were not entitled to commission on what was conceded to be owing, but were entitled to commission on all the controverted claims that were allowed as credits to McIlvoy's estate, but not to commissions on items about which there was no dispute.

The court below, as appears from the record before us, allowed Russell & Avritt the sum of \$1,464 for their services, embracing \$200 for 40 days' service, at \$5 per day, and giving them commission on the amount paid Reid, \$23,178. This allowance was made on motion of the attorneys, and without notice to the parties they represented. After this the appellants, who had made the contract, came into court, and moved the court to set aside the allowance for want of notice; and this motion was sustained, and the case heard, when the same allowance was made, and from which this appeal is prosecuted. On the 28d of September, 1880, the day after the allowance was originally made, the commissioner paid to the attorneys \$750. This was paid by reason of the allowance that was subsequently set aside; and the court below gave it as a credit, on the assumption that the original allowance was proper. The judgment is therefore reversed, and the cause remanded, with directions to disallow the commission on the sum of \$23,178, and for proceedings consistent with this opinion.

The bill of exceptions is properly in the case. It was tendered at the proper time, and the court took time to consider it.

*WATT et al. v. GOVER et al.*

(Court of Appeals of Kentucky. Feb. 18, 1890.)

**BOUNDARIES—INTERFERING PATENTS—ADVERSE POSSESSION—ESTOPPEL.**

1. Where adjoining land-owners claim a strip of land lying upon the outer boundary of their respective tracts, they cannot both have constructive possession of such strip. It attaches to the one having the elder right; and an actual adverse possession must follow, to divest it.

2. The mere claiming of the land by the inferior title holder, and the occasional use of wood or timber from it, does not constitute such possession.

3. To constitute a good plea of estoppel against the holder of the superior title by virtue of his acts at the survey of the land, it is necessary to aver in the pleadings, in unmistakable terms, that at the time of the survey of the land he knew the exact location of the boundary line, and never set up any claim to the land embraced by the interference, and

that the other side did not know the true state of the case.

Appeal from circuit court, Pulaski county.

"Not to be officially reported."

*Curd & Denton and O. H. Waddle*, for appellants. *J. T. May*, for appellees.

**HOLT, J.** This action, for trespass in the cutting of timber, involves the title to the land. It was heard in equity by consent. A patent issued to L. Brown in 1832 for 100 acres. He conveyed it to W. G. Gover in 1838; and the latter sold it, with other adjoining lands, to the appellees in 1885. A patent issued to William Price in 1838 for 60 acres. His executors sold it, with other adjoining lands, to C. Wait, now deceased. The west end of the 60-acre tract laps over some 25 or 30 acres upon the 100-acre tract. The appellees having cut some timber upon the lap, the appellants, who are the widow and children of C. Wait, brought this action against them. W. G. Gover resided upon the land conveyed by him to the appellees, but not upon the 100-acre part of it, for nearly a half century. Some of his improvements or inclosures were, however, upon the Brown portion. Upon the other hand, Price lived upon the land sold to Wait for a long time; but none of his improvements or inclosures appear to have been upon the 60 acres. No part of the interference has ever been improved or inclosed by any one. It is outlying timber land. Price always claimed, however, to the outer boundary of the 60 acres. Gover may be regarded as having done the same to the outer boundary of the 100 acres. It appears he did not know exactly where this would locate his outer line, but he claimed to the extent of his title paper. Thus we have the one claiming the entire 60 acres as a part of his farm, and the other the entire 100 acres as belonging to his farm, and each residing upon land, belonging to him, adjoining the portion so claimed by him. The timber was upon the lap, but altogether within the lines of the Brown patent. It is the elder title to the interference; but the appellants claim to have had the land in adverse possession for more than our statutory limitation period of 15 years.

It is evident, however, that they, and those through whom they claim, did not, but Gover did, have the actual possession. The mere claiming of land, and the occasional use of wood or timber from it, does not constitute such possession.

In this instance, if neither side had been invested with any possession save such as arises from merely claiming land, or what is constructive possession, then the Gover side would prevail, as it had the elder title. Each of two claimants cannot have the constructive possession of the same land. It attaches to the one having the elder right, and an actual adverse possession must follow to divest it. In the absence of an actual adverse possession, the holder of the elder title has the constructive possession. It avails to him,



unless he has renounced it, or been actually disseised; and the statute of limitation does not run against him, or toll his right of entry, because of a mere claim to, without any actual possession of the land by an inferior title holder. If one enters upon a tract of land, to take possession of all of it, under a deed or patent, an entry by another under a junior grant will not give the latter possession beyond his actual inclosure. It ousts the previous possession to this extent only. In such a case the claim of the holder of the junior grant shrinks down to his actual inclosure. In the case now presented, however, each claimant resided upon land adjoining the tract containing the lap. The 100 acres and the 60 acres constituted a part of the farm of each claimant, respectively; each, respectively, claiming to the outer boundary. Some of the improvements or inclosures of Gover were, however, upon the 100-acre tract; and he had the elder title. None of the improvements of Price were upon the 60-acre tract. Under such circumstances, he cannot be regarded as having any possession, either actual or constructive, of the land embraced by the interference, but it was in the actual possession of Gover; and the possessory claim to it by the appellants is therefore unfounded. *Trimble v. Smith*, 4 Bibb, 257; *Chiles v. Jones*, 7 Dana, 528; *Jones v. McCauley's Heirs*, 2 Duv. 15.

It is also urged by them that the appellees are estopped to claim the interference by reason of the conduct of their vendor, W. G. Gover. He married a daughter of William Price, by whom he had one child. The wife died. The child was entitled to a part of the grandfather's estate, and his father was his guardian. As such, he received from the executor of the estate a portion of the money arising from the sale of the land by him to C. Wait. It further appears that W. G. Gover was one of the chain-carriers in making the survey when the sale was made by Price's executor to Wait, and that it included the land where the timber was cut. The evidence shows, however, that he was not along when that part of the survey was made between his land and the Price land. The question must, however, be determined upon the pleadings, because the facts relied upon as creating the estoppel were pleaded in two amended replies, to which demurrers were sustained, and their averments must therefore be taken as true. They aver that W. G. Gover, as a chain-carrier, assisted in making the survey, and at that time never set up any claim to the land embraced by the interference. It is unnecessary to decide whether, if the facts had been stated in a sufficient pleading, they would have constituted an estoppel. The replies did not aver that Wait, or even his vendor, was then ignorant of the true state of case, or that they did not then know the location of the true line between the Price and the Gover lands; and construing the pleadings, as we must, most strongly against the pleader, the replies cannot be regarded as stating that Gover then

knew the true location of the division line. It is at least doubtful whether this is stated. To constitute a good plea of estoppel, it was necessary to aver in unmistakable terms that Gover then knew, and that the other side did not know, the true state of case. The demurrers were therefore properly sustained, and the judgment is affirmed.

PORTER *et ux.* v. GILTNER *et al.*

(Court of Appeals of Kentucky. Feb. 15, 1890.)

DEEDS—CONSTRUCTION—CONVEYANCE OF INTEREST RESERVED IN FORMER DEED.

G. conveyed to D. all of his estate, with power to sell and convey the same, and distribute the proceeds among his creditors, reserving his homestead right, and all other property exempt from execution. Subsequently G. and wife executed another deed to D. for a money consideration, conveying to him "all the interest, right, title, and benefit which we \* \* \* and each of us have, or may have, in and to all the property and premises of every character whatever, conveyed by G. in a certain deed of assignment to D." The deed further recited that it was "intended to cover, embrace, and convey the husband's right of homestead, and the wife's potential right of dower." *Held*, that this deed must be construed as conveying all of the estate of the grantor to D. absolutely, and vested the whole estate in him.

Appeal from circuit court, Henry county.

"Not to be officially reported."

Wm. Carroll, for appellants. Geo. C. Drane, for appellees.

PRYOR, J. Gorham, by a deed executed on the 26th of March, 1874, conveyed to James H. Drane all of his estate, with the power to sell and convey the same, and distribute the proceeds between his creditors. He reserved his homestead right in the realty, and also the property exempt from execution. The conveyance was, in effect, an assignment for the benefit of creditors. Porter and wife purchased the realty in question of one who had purchased from the assignee, Drane, and have accepted a deed from the assignee, and are now in the possession of the property. It is insisted by these appellants that they were not vested with title, because the maker of the deed of assignment did not join the assignee in the deed, as required by the statute. Waiving the question as to whether these parties can make such a defense, it appears that after the deed was executed Gorham and wife, on the 4th of November, 1874, in consideration of \$1,500 in hand paid, conveyed to Drane all their interest in the trust created by the deed of March 26, 1874. It is insisted by the appellants that the last conveyance of November, 1874, only conveyed the homestead right of Gorham, and the dower right of his wife, and that the proceeds of the trust-estate, after paying the debts, belonged to Gorham. We think the manifest purpose of the last deed was to divest Gorham of all right and title to the trust-estate; that the object was for the consideration received, \$1,500, to remove from the entire trust-estate all claims he had upon it; and that such is the construction to be given

the deed. This last conveyance "sells and conveys unto the party of the second part all the interest, right, title, and benefit which we, the parties of the first part, and each of us, have or may have in and to all the property and premises, of every character whatsoever, conveyed by Gorham in a certain deed of assignment to Jas. H. Drane." It is said, in a latter provision of the deed, that "this deed of conveyance is intended to cover, embrace, and convey the husband's right of homestead, and the wife's potential right of dower." The grantors in the original deed to Drane had specially reserved the homestead right, and the recital in the conveyance was intended to make the deed specific in its nature as to this homestead and dower right, because the claim had been specially reserved, but was not intended to restrict or limit that portion of the conveyance by which the grantors deprived themselves of all title or claim whatsoever. The clause, having special reference to homestead and dower, was designed to show that nothing was reserved, and to strengthen the clause in the deed by which all interest in the trust-estate was granted. Such was the manifest intention of the parties, and, the court below having placed this construction on the deed, the judgment below is affirmed.

#### FERGUSON *et al.* v. McMAHON.

(Supreme Court of Arkansas. Feb. 8, 1890.)

##### ACTIONS—PARTIES—PRINCIPAL AND AGENT.

An agent who makes a contract for his principal, in the principal's name, is not a person with whom the contract is made, within Mansf. Dig. Ark. § 4936, providing that a person with whom, or in whose name, a contract is made, for the benefit of another, may bring an action without joining with him the person for whose benefit it is prosecuted.

Appeal from circuit court, Nevada county; R. B. WILLIAMS, Special Judge.

Replevin by John F. McMahon against J. T. and J. N. Ferguson, to recover some cotton sold or mortgaged to Thomas E. McMahon, in which transaction plaintiff acted as agent for Thomas E. McMahon. Judgment for plaintiff, and defendants appeal. Mansf. Dig. § 4936, provides that a person with whom, or in whose name, a contract is made for the benefit of another, may bring an action without joining with him the person for whose benefit it is prosecuted.

*Atkinson, Tompkins & Gresson*, for appellants. *C. C. Hamby*, for appellee.

COCKRILL, C. J. No reason is disclosed for allowing a recovery for the benefit of Thomas E. McMahon in the name of John McMahon. He is not a trustee for Thomas E.; the mortgage contract was not made in his name; nor is he a person with whom the contract was made, and therefore entitled to sue in his own name, within the meaning of section 4936, Mansf. Dig. It is true that the plaintiff, John McMahon, conducted the ne-

gotiation which led to the mortgage, and also directed its execution; but he is not a party to the instrument, and in all his dealings was only the agent of Thomas E. McMahon, the mortgagee. An agent who makes a contract for his principal, in the principal's name, is not, in any legal sense, a person with whom the contract is made. The contract in such a case is with the principal only, and he alone is authorized to enforce it. Bliss, Code Pl. § 56. The agent, in such a case, has not necessarily even the implied authority to discharge the contract by receiving what is due upon it, much less the right to enforce payment by suit. *Meyer v. Stone*, 46 Ark. 210. The court erred, therefore, in instructing the jury that John McMahon could in any event recover the property in dispute upon the faith of the mortgage executed to Thomas E. McMahon. If John McMahon was the bailee of the property, or had a special interest in it, as he testified, he could maintain an action in his own name against one who wrongfully deprived him of the possession. Bliss, Code Pl. supra. But evidence was conflicting upon that phase of the case, and we cannot disregard the error pointed out. Reverse the judgment, and remand the cause for a new trial, in accordance with this opinion.

#### CROUCH v. EDWARDS.

(Supreme Court of Arkansas. Feb. 8, 1890.)

##### ADMINISTRATORS—SURETIES ON BOND—DOWER.

1. In an action by a widow, against her deceased husband's administrator *de bonis non* for her dower, a finding that the husband's administrator, for whom the widow was surety, had defaulted, is not warranted by a judgment to that effect rendered in an action by the husband's creditors against the administrator *de bonis non* alone, to surcharge the administrator's accounts, as such judgment proved nothing against the sureties.

2. Until the judgment of a probate court settling an administrator's accounts, and showing nothing due from him, is overturned in a court of equity, no liability rests on his bondsmen.

3. Where an administrator applies the personality to the payment of the debts of the estate without paying the widow's claim for dower, she is entitled to be reimbursed out of the real estate.

Appeal from circuit court, Miller county; C. E. MITCHELL, Judge.

Action by W. B. Crouch, administrator of Helen M. Edwards, deceased, widow of Thomas Edwards, against W. B. Edwards, administrator *de bonis non* of said Thomas Edwards, to recover the amount directed by the probate court to be paid to said Helen M. Edwards as her dower. Judgment for defendant, and plaintiff appeals.

*W. H. Arnold*, for appellant. *T. E. Webber and Scott & Jones*, for appellee.

COCKRILL, C. J. The circuit court found as a fact that M. W. Edwards, as administrator of the estate of Thomas J. Edwards, deceased, had in his hands a sum of money realized from personal assets of the estate at the time the probate court directed the payment of the widow's dower; that the widow

neglected for two years thereafter to collect what was due her; and, the administrator having died without accounting for the amount, held that the widow lost her right by her laches, and declared that she was barred for the further reason that she was one of the sureties of the defaulting administrator, and could not claim indemnity out of the real assets of the estate until she had discharged her liability arising by reason of her suretyship. It is not necessary to examine the details of the facts disclosed by the record to ascertain if the conclusion reached by the court is that which the law pronounces upon the facts found, because there is a total want of legal evidence to prove the fact which is the basis of the finding and judgment; that is, that the administrator was indebted to the estate when the judgment for dower was rendered, and at the time the petition herein was filed. The finding is based upon a judgment of the Miller circuit court, in a suit to surcharge the administrator's accounts, wherein the default is found and adjudged as the court in this case declared. But neither the defaulting administrator, nor his administrator, nor any of the sureties upon the bond, were a party to that proceeding. Creditors of the estate of T. J. Edwards, deceased, were plaintiffs; the only defendant being the administrator *de bonis non* of the estate of Thomas J. Edwards. But he was not authorized to represent the bondsmen of the first administrator, nor to make a settlement for them; and the judgment against him was *res inter alios acta*, and not binding upon them. It proved nothing against them. Hecht v. Drake, ante, 706.

The judgment of the probate court settling the accounts of the administrator for whom Mrs. Edwards was surety shows nothing due from him, and until it is overturned in a court of equity no liability rests upon his bondsmen.

If it is true, as recitals in the probate court records indicate, that the administrator (who, before assignment of her dower in personalty, is trustee for the widow) applied the personalty to the payment of the debts of the estate, without paying off her claim for dower, she is equitably entitled to be subrogated to the rights of the creditors whose demands have thus been discharged, and to be reimbursed out of the real estate. Wells v. Fletcher, 17 Ark. 581. Reverse the judgment, and remand the cause for a new trial.

#### COHN v. HOFFMAN.

(Supreme Court of Arkansas. Feb. 8, 1890.)

##### APPEALABLE ORDERS.

In a suit to redeem mortgaged lands, a demurrer was sustained to the answer, except to that part which set up a claim for improvements and taxes paid, and a reference was ordered to state the amounts of the mortgages, the taxes paid, and improvements. *Held*, that it was not a final decree, from which an appeal could be taken. Davie v. Davie, ante, 558, followed.

Appeal from circuit court, Jackson county; J. W. BUTLER, Judge.

Suit in equity by L. M. Hoffman against M. L. Cohn, to redeem certain mortgaged premises, and for an account of rents and profits. The court sustained a demurrer to the answer, except to that part which set up a claim for improvements and the payment of taxes, and referred the cause to a commissioner, to state the amount due on the mortgages, the amount of taxes paid, and the value of the improvements. Defendant appeals.

*Compton & Compton*, for appellant. *W. R. Coody*, for appellee.

PER CURIAM. The decree is not final, within the rule of the decision in *Davie v. Davie*, ante, 558. The appeal is premature. Let it be dismissed.

#### TALBOT v. CARROLL *et al.*

(Supreme Court of Arkansas. Feb. 8, 1890.)

##### PROMISSORY NOTE—CONSIDERATION.

A justice who had fraudulently collected and appropriated the amount of a judgment belonging to plaintiff represented to him and another that it had been converted by a constable, and induced the other to sign with him, as security, a forged note purporting to have been executed by the constable to plaintiff in payment of the pretended defalcation, and induced plaintiff to accept it. At the time the note was executed, and thereafter, neither the constable nor the justice owed plaintiff anything, nor had the latter ratified the collection of the judgment by the justice. *Held*, that the note was without consideration.

Appeal from circuit court, Jefferson county; J. A. WILLIAMS, Judge.

Action by John H. Talbot against V. D. Wilkins and others on a promissory note. Defendant Wilkins alleged in his answer: "That the note sued on was made without any consideration whatever, the same having been given under the circumstances and for the purposes following, to-wit: Defendant Fall was a justice of the peace, and defendant Carroll was constable. Plaintiff, Talbot, had brought suit and obtained judgment before Fall against one Sterling R. Cockrill, Sr. Fall collected from Cockrill the money on the claim, fraudulently assuming and pretending that he was authorized to collect it, he having no authority whatever. Fall appropriated the money to his own use, and then fraudulently represented to Talbot and to Wilkins that Carroll had collected and appropriated it. Under the guise of a mutual friend, Fall induced Wilkins to sign the note in suit with him, as security for Carroll, and induced Talbot to accept the note in settlement of Carroll's pretended defalcation; both Wilkins and Talbot believing that Carroll's signature was genuine, whereas the signature of Carroll was a pure forgery, as Fall well knew. Talbot never ratified or acknowledged the collection of the money by Fall, and never knew of it until long after the note was given. At the time the note was given, neither Fall nor Carroll owed Talbot anything whatever, and neither one of them

since owed him anything; and the note, therefore, was without consideration, and was procured and delivered as a mere device on the part of Fall to conceal from Carroll and the public his misconduct." To this answer a demurrer in short was entered on the record. The demurrer was overruled, and, the plaintiff admitting the truth of the answer, the court below gave judgment for the defendant Wilkins, and Talbot appeals.

*W. P. & A. B. Grace*, for appellant. *W. S. McCain*, for appellees.

**PER CURIAM.** If the answer of appellee Wilkins be true, the note sued on was without consideration. The demurrer was properly overruled. This case is unlike *Cagle v. Lane*, 49 Ark. 465, 5 S. W. Rep. 790, cited by appellant. In the latter case, Lane held a note, indorsed by Cummings, for \$750. In order to take up this note, Cummings procured Cagle to execute his note for \$1,000 direct to Lane, and received from Lane the difference in the principals of the two notes. This court held that Lane stood in the attitude of a *bona fide* purchaser of the \$1,000 note, for value, "before maturity, and under the belief that the maker had executed it upon a valuable consideration," and for that reason was entitled to recover judgment on the note of Cagle. In this case the pretended indebtedness of Carroll for moneys collected by him on a judgment recovered by Talbot, and converted to his own use, was the pretended and only consideration of the note sued on. In the settlement of this indebtedness, which never existed, Talbot accepted the note. Such settlement was the only pretended purpose and object of the note. Talbot never accepted it, or became the owner of it in any other way. He therefore does not stand in the attitude of a purchaser of the note. According to the abstract of appellant, which is not contradicted, the judgment of the circuit court should be affirmed.

COCKRILL, C. J., did not sit in this case.

#### WILLIAMS v. CUNNINGHAM.

(Supreme Court of Arkansas. Feb. 8, 1890.)

##### VENDOR'S LIEN ON CROPS.

The express lien which a vendor of land reserves on the crops for the year when the purchase money shall become due, attaches as soon as the vendee acquires title to the crops, and a subsequent mortgagee thereof with notice, who converts the crops, is liable to the vendor to the extent of his lien.

Appeal from circuit court, Lincoln county; J. A. WILLIAMS, Judge.

Action by James M. Cunningham against Robert Williams to enforce the payment of a promissory note executed by Caswell Bunting, and also a lien on the latter's crops, which defendant is alleged to have converted. Plaintiff alleges that he sold Bunting 80 acres of land, by contract, on the 18th day of December, 1885, and for the purchase money

took Bunting's three notes, for \$166.66 each, due in one, two, and three years from date; that one note was due, except \$50 paid in February, 1887; that under said contract he had a lien on all the crops grown upon the said lands during the year 1886, to secure the payment to himself of said promissory note; that Bunting raised 5,300 pounds seed cotton on the land in 1886, worth \$131, and defendant, Robert Williams, took possession of said cotton, and converted it to his own use, knowing plaintiff's rights in the premises; and prays judgment against said Robert Williams for the proceeds of the said cotton to secure payment of balance due upon said note. To this the defendant, Robert Williams, answered and demurred, and in the answer denies notice of plaintiff's lien; sets up a mortgage from Bunting to himself on all crops to secure payment for supplies; and admits that under the mortgage he received some cotton. He furnished supplies to the amount of \$106, and received cotton to pay it at a loss of \$3, making \$103 received. Denies that plaintiff had a lien upon it. The case was submitted on complaint and exhibit, answer and demurrer, and exhibit and brief. The court overruled the demurrer, and proceeded to decree "that the said contract is hereby agreed to be a mortgage of said cotton," and proceeded to render judgment against Robert Williams for \$128.35, being \$25.35 more than Williams received, and Robert Williams appealed to this court. Pending appeal, defendant died, and Mary Williams, his administratrix, was substituted in his stead.

*M. L. Bell*, for appellant. *James M. Cunningham*, pro se.

**PER CURIAM.** It is the result of all the authorities that wherever the parties by their contract intend to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or contractor or not, or, if personal property, whether it is then *in esse*, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto under him, either voluntarily or with notice, or in bankruptcy. *Jones, Chat. Mortg.* § 173; *Mitchell v. Winslow*, 2 Story, 680; *Bell v. Pelt*, 51 Ark. 483, 11 S. W. Rep. 684.

There was no evidence as to the value of the mortgaged cotton received by appellant, but he alleged in his answer that he had received therefor \$103. It is evident that Cunningham lost the benefit of his lien on the cotton through the appropriation thereof by Williams to his own use. The court should have rendered judgment for the \$103, and interest thereon from the date of the filing of the complaint at the rate of 6 per cent. per annum. The decree, to that extent, will be modified.

COCKRILL, C. J., did not sit in this case.

## SMITH v. GILLEN.

(Supreme Court of Arkansas. Feb. 8, 1890.)

## CORPORATIONS—SUBSCRIPTION TO STOCK—PROMISSORY NOTE.

1. A note, executed as a subscription to a proposed mining corporation to be organized by the promisees, was given partly for the interest that the maker agreed to take in the mining claims which were to constitute the capital stock, and which the promisees claimed to own. *Held*, that the failure to incorporate the mining company would not entirely defeat a recovery on the note, as the equitable right which the maker acquired in whatever interest the promisees might have in the claims constituted a valuable consideration.

2. An instruction that the maker of a note may plead illegality of consideration as to one joint promisee, against the other, is error, where there is no evidence that the consideration was illegal.

Appeal from circuit court, Garland county; J. B. Wood, Judge.

Action by O. F. Smith against John Gillen on a promissory note executed by defendant to Charles Cutter and plaintiff jointly, and indorsed by Cutter without recourse. Gillen answered, stating that the note was without consideration; that the note was obtained by the false pretenses of Charles Cutter and O. F. Smith, to-wit, that it was a subscription to a company to be duly organized for mining purposes, possessed of certain valuable mining claims in Montgomery and Garland counties; that no such company was lawfully organized, and no such claims were held; that the purpose of said scheme was to sell fraudulent stock, and the note, therefore, was void. On motion of defendant, the court gave the following instructions to the jury, to which the plaintiff excepted: "(1) The maker of the note sued on herein promised O. F. Smith and Charles Cutter, as his joint creditors, to pay the sum mentioned; and any illegality of the consideration may be pleaded by the maker against the one paid as against the other, as equally privy to the transactions, with all its incidents. (2) The subscribers to the capital stock of a corporation about to be formed, and in the attempt to unite as corporators, are not liable upon agreements made between them, in view of the formation of such corporation as stockholders, until the formalities which are a condition precedent to the legal incorporation of the company are observed. And, if you believe from the evidence that the note sued on was given, as part of the subscription by a shareholder, to persons proposing to organize a joint-stock company, which has never yet been legally formed, after the lapse of a reasonable time in which to have perfected said organization, you will find for the defendant." From a judgment for defendant, plaintiff appeals.

R. G. Davies and Charles D. Greaves, for appellant. J. M. Harrell and D. H. Cantrell, for appellee.

PER CURIAM. The instructions of the court were erroneous, and did not fairly submit to the jury the question as to the consideration of the note sued on, which they ought

to have decided. It was proven that 10 mining claims, which Smith and Cutter claimed to own, were to constitute the capital stock of the company to be organized, and that the note was given in part, if not wholly, for the interest that Gillen agreed to take, and did take, in this stock as shares. Evidence was adduced tending to prove that the claims were conveyed to a company formed, but not legally organized, as a corporation. If this be true, Gillen acquired an equitable right in whatever interest or property Smith and Cutter had in the mining claims, if any, although the company was never legally organized as a corporation. Such an equitable right may be a valuable consideration. The partial failure of the consideration for which the note was given did not defeat the plaintiff's right to recover something.

There was no evidence tending to show that the consideration of the note was illegal.

Reverse, and remand for a new trial.

BRYAN & BROWN SHOE CO. v. BLOCK *et al.*

(Supreme Court of Arkansas. Feb. 8, 1890.)

## SALES—RESCISSIO—EXECUTION SALE—FRAUDULENT CONVEYANCES.

1. Sellers of goods cannot seize them for the purchase money, under Mansf. Dig. Ark. c. 96, relating to liens, where the goods are in possession of the sheriff under execution before any claim of lien is asserted.

2. Nor can they rescind the contract of sale because of the purchaser's fraudulent representations as to his solvency at the time thereof, where they have pressed their claim to judgment with knowledge of the purchaser's fraud.

3. Attaching creditors cannot contest the payment of judgments against the debtor where they have consented to an order of distribution specifying those judgments as among those to be paid.

4. Attaching creditors cannot complain of a previous sale of a portion of the debtor's property, under executions on judgments by confession, obtained by other creditors, the proceeds of such sale being prorated among the latter, on the ground that one of them held a mortgage to secure her claim on the property sold, unless the sale resulted in injury to the attaching creditors, as it lightened the burden on the attached property.

5. Where several witnesses testify that a sale under execution was not made subject to a certain mortgage, and it appears that the property was sold for as much as it would probably have brought if unincumbered, and the mortgagees immediately thereafter conveyed her title to the purchaser, a finding that the sale was not subject to the mortgage is justified.

6. Testimony of a grantee of an insolvent that he had never been in possession of or seen the land granted, and knew nothing of its condition, and that the grantor continued to collect the rents, in connection with evidence that grantor and grantee were related, and that the conveyance was made shortly before the grantor's failure, justifies a finding that the conveyance was fraudulent, and creditors of the grantor may hold one to whom the grantee has conveyed the land, and who still owes therefor, as garnishee.

7. The court may correct a mistake in the computation of the amount of a receiver's sale, which is apparent on the record and papers.

8. Where a creditor holds collaterals in pledge to secure its claim, it is properly required to account therefor before sharing in the proceeds of a receiver's sale of the debtor's property.

Appeal from circuit court, Yell county; G. S. CUNNINGHAM, Judge.

*Davis & Bullock*, for Bryan & Brown Shoe Co. et al., attaching creditors. *U. M. & G. B. Rose*, for Mack, Stadler & Co., and the judgment creditors and J. D. Goldman. *Cohn & Cohn*, for Emma Block, E. Timer, A. J. and Oscar Kern, and John Lashtofski. *Cohn & Cohn* and *H. S. Carter*, for Kleine, administrator of Block, and the First National Bank.

SMOOTE, Special Judge. C. M. Freed, a merchant at Dardanelle, Yell county, became largely indebted, and failed in business; and on the 25th day of February, 1886, he confessed judgment in favor of a number of his creditors for sums amounting in the aggregate to something over \$40,000. Among the creditors preferred by these confessions of judgment were Emma Block; Mack, Stadler & Co.; Henry Kleine, and Henry Kleine, as administrator of the estate of Dora Block; E. Timer; and the First National Bank of Little Rock, Ark. Executions were immediately issued on these judgments, and levied on the personal and real estate of Freed, including his stock of goods. Others of Freed's creditors, who had not been preferred by confessions of judgments, instituted actions at law on their several claims, and sued out writs of attachment, and had them levied on the same property seized under executions, the attachments being subsequent to the executions. Among the attaching creditors were Bryan & Brown Shoe Company and Adler, Goldman & Co. The Bryan & Brown Shoe Company, in addition to their general attachment, sought to hold the particular goods which they had sold to Freed, for the price thereof, under chapter 96, Mansf. Dig.,<sup>1</sup> and to rescind the contract of sale, upon the ground of fraudulent misrepresentations by Freed, as to his solvency, at the time of the sale. The property was advertised for sale under the execution levies, and then the attaching creditors filed their complaint in equity, attacking the judgments by confession as fraudulent. Among those whose judgments were attacked were Emma Block, Mack, Stadler & Co., Kleine, Timer, and the bank. The attack on Emma Block's judgment is upon the alleged ground that her claim is simulated and fraudulent; and, further, that she held Freed's mortgage on real estate more than sufficient to secure her debt, and that she should be required to seek satisfaction by foreclosure of that mortgage, before being permitted to resort to the personal property. The attack on the judgment of Mack, Stadler & Co. is upon the alleged ground that it was, by fraudulent collusion between that firm and Freed, rendered for the sum of some \$1,600 in excess of what was really due them. The execution sale was enjoined as to the personal property, a receiver appointed, and ordered to sell it, which was done. Goldman, of Adler, Goldman & Co., became the purchaser of the per-

sonal property, and a question arises in the record as to whether or not he has fully paid his bid. The real estate levied on was sold under the executions, and the proceeds pro-rated among the execution creditors. The complaint in equity also sought to vacate the sales and conveyances of certain lands by Freed to parties named, and subject the lands to the payment of Freed's creditors. Upon final hearing the court below found, as matter of facts, that the real estate in controversy, sold by Freed, respectively, to Lettie Miller, W. B. Lemoyne, A. J. and Oscar Kern, Emma Block, and John Lashtofski, were each of them fraudulent and void, set them aside and made an order for their disposition, so as to make the lands available to the creditors. These lands are described in the decree. That the deed to E. Timer by Freed, to certain lands, was also fraudulent and void. That Timer had exchanged them for other lands, and sold those other lands to one Frank Singular, who still owed the purchase money, for which he executed his notes, and ordered Timer to surrender the notes in court, and held Singular as an equitable garnishee. These lands are also described in the decree. The court also found that Goldman became the purchaser of the goods at the receiver's sale at his bid of 70 per cent. on the invoice price of the same, and that the receiver made a mistake, in computing the 70 per cent., of \$2,129, in Goldman's favor, and decreed that said sum be set off against whatever confessed judgments were involved in the suit, which were owned by said Goldman; and the court further found that the First National Bank held collaterals to secure its confessed judgment against Freed, and enjoined it from any further participation in the proceeds of the sale of the personal property, still in the hands of the court, until it disclosed what disposition it had made of said collaterals, how much had been collected on them, and to what extent its judgment had been reduced by such collections; and the court further found that the judgment of Emma Block was not shown, by the proof, to be fraudulent, and that she have her *pro rata* share of the proceeds of the sale of the personal property still in the receiver's hands, and dissolved the injunction against her as to that matter. The court then dismissed the complaint as to the other creditors who held judgments by confession. From the decree setting aside the conveyances of land, Emma Block, Lettie Miller, W. B. Lemoyne, E. Timer, C. M. Freed, A. J. and Oscar Kern, and John Lashtofski appealed. J. D. Goldman also appealed from the decree against him as to the shortage in payment for goods. The Bryan & Brown Shoe Company and other attaching creditors appealed from the decree dissolving the injunction against Emma Block, and allowing her to participate in the fund held by the receiver, and in refusing to either cancel her judgment and mortgage, or remit her to mortgage for payment; and also from so much of the decree

<sup>1</sup> This chapter relates to liens.

as refused to cancel the judgment of Mack, Stadler & Co., and Kleine as administrator of Block, and for refusing to cancel the judgment of the bank. The bank also appealed. So it will be seen that several questions are presented for our consideration, and we have endeavored to make the foregoing statement indicate them.

1. The contention that the Bryan & Brown Shoe Company, and the other attaching creditors, seeking to do so, can seize the particular goods sold by them, respectively, to Freed, for the purchase money, under chapter 96, Mansf. Dig., is untenable, because, before any claim was asserted, the goods were in the possession of the sheriff, which cut off the right of sequestration. *Fox v. Industrial Co.*, MS. opinion. Neither can the right to rescind the contract, on account of Freed's fraudulent representations as to his solvency at the time of the purchase, if any such were made, be invoked, because it is manifestly apparent from the record that these attaching creditors knew as well of that fraud, if in fact it existed, when they sued for the purchase money, as they ever did afterwards, and, notwithstanding this knowledge, they pressed their claim to judgment. The case of *Kraus v. Thompson*, 14 N. W. Rep. 266, relied upon by appellants, as to this does not support their view. Even if it be correct law, as decided in that case, (but as to this we make no decision,) that a creditor, after having obtained judgment for the purchase money for the goods, may still rescind, on account of such fraud, if he proceeds immediately on its discovery, still it does not help the appellants here; for it is held, and we think correctly, in the same case, that "any act of ratification of the contract, after knowledge of the facts authorizing a rescission, amounts to an affirmation, and terminates the right to rescind." Now, there can be no more emphatic act of ratification of the contract than pressing the claim for the purchase money to judgment, after knowledge of the fraud; and from the record in this case it is impossible to resist the inference that such was the case here.

The appealing attaching creditors question the right of Mack, Stadler & Co. to their judgment by confession, on the ground that it is fraudulently excessive, and intentionally made so by them. The only thing offered in support of this is the *ex parte* affidavit of one Kleine, which he repudiates when examined as a witness herein. The manner of his deposition does not lead us to think that anybody's rights ought to be jeopardized by his evidence. His testimony as a witness is directly in conflict with what he deliberately swore in this *ex parte* affidavit. This *ex parte* affidavit is not evidence, as he refused to verify its statement when examined as a witness. If what he swore as a witness is true, it does not impeach the judgment. It is true that the judgment was excessive, but that seems to have been the result of hurry in making up the account, and not for the purpose of fraud; and the error was afterwards corrected

by a remission of the excess. We see no reason for disturbing the decree of the court below as to this.

The appellants are estopped from contesting the payment of the judgments of E. Timer and Henry Kleine, because it appears from the record that they consented to an order of distribution by the receiver, which specified said judgments as among those to be paid *pari passu* with certain others of the confessed judgments. Besides this, we have been referred to no evidence, and have not discovered any in the record ourselves, tending to show that these judgments were fraudulent. The evidence wholly fails to sustain the allegation that Emma Block's confessed judgment was fraudulent, and rendered on a simulated claim. She proves very clearly that Freed owed her the money, and that she was entitled to her judgment. The other points attempted to be made by appellants, as to this, is that she held a mortgage to secure her debt upon valuable real estate, and that she ought to have been required to foreclose that, before sharing with the other creditors in the fund in the receiver's hands. Ordinarily, of course, where a creditor holds securities for his own debt, to which he can resort to the exclusion of other creditors, until his debt is satisfied, the assets may be marshaled, and such creditor required to exhaust these securities before he can resort to another fund or other property, out of which other creditors are seeking satisfaction. But we do not think the facts here bring Emma Block within that rule. She, together with the other creditors who held judgments by confession, sued out executions on these judgments, all of which were levied on the mortgaged property, which was sold under them, and the proceeds prorated among said creditors; thereby lightening the burden on the fund in the hands of the receiver, and resulting, to that extent, to the advantage of the attaching creditors. Whether the mortgagor could have complained at this sale or not we do not stop to decide. Certainly the attaching creditors could not, unless it resulted in some way to their injury. The only attempt they make to show that the sale did so result is the contention that the property was sold subject to her mortgage, thereby reducing the amount which it would otherwise have brought. The court below, in effect, found that it was not sold subject to the mortgage, and we think it was amply justified by the evidence in doing so. M. Davis, the sheriff who made the sale, was among the principal witnesses who testified that the sale was made subject to the mortgage. But, upon reflection, he afterwards testified that he was mistaken as to this, and that he made no such announcement at the sale. Emma Block's attorney and other witnesses testify that no such announcement was made, and that the sale was not subject to the mortgage. Besides this, it is evident that the bidders did not think the property was offered subject to the mortgage, because the property brought \$6,000, and no witness



placed its actual value at more than \$10,000, and some of them as low as \$3,000. The property sold for as much as it could have been expected to bring under the hammer, if offered with a clear and unincumbered title; and, in addition to this, as further evidence that the property was not sold subject to the mortgage, Emma Block, immediately after the sale, conveyed her legal title to the purchaser. By her actions Emma Block has abandoned her rights under the mortgage, and placed herself in a condition which prevents her from ever enforcing it, and the attaching creditors have not been injured thereby. We see no ground for disturbing the decree of the court below as to this matter.

The court below found that the sale and conveyance of certain lands by Freed to E. Timer was fraudulent. Upon considering Timer's own deposition; his statement that he had never been in the actual possession of the land; that he had never seen it; that he did not know how much of it was cleared and how much in the woods; that he did not know how much of bottom and how much hill land there was; and that Freed collected the rents after the sale, and assisted him in disposing of it,—taking these statements of Timer, in connection with his relationship to Freed, and the nearness of the time of the sale to the time of Freed's failure, we think the court below was justified in finding as it did, and that Singular was properly held as an equitable garnishee. *Tappan v. Harbison*, 43 Ark. 84.

The court below also set aside the sales of real estate by Freed to A. J. and Oscar Kern, John Lashtofski, and Emma Block. After a careful examination of the facts as to these sales, we have been unable to find any evidence of fraud in making them, and none has been pointed out to us. So far as we have been able to discover from the evidence, these purchases appear to have been made by the vendees in good faith, and without intention of fraud on their part, or knowledge of fraud on the part of the vendees. We think, under the evidence, the court below erred in finding them fraudulent, and setting them aside. The court below also set aside conveyances of land by Freed to Lettie Miller and W. B. Lemoyne, but neither of them has filed any abstract or brief. We therefore regard their appeals as abandoned, and affirm the decree, as to them, for failure to comply with rule 9.

J. D. Goldman, who is a party to this action, and who was the purchaser of the stock of goods at the receiver's sale, insists that the court below erred in charging him with \$2,129, the amount he is alleged to be short in his payment of his bid for said goods. It appears that the court ordered the sale for not less than 70 per cent. of the invoice price of the goods; that they were advertised to be sold at not less than that; and that Goldman, as appears by the receiver's report at the sale, bid 70 per cent. for them. So the contract between Goldman and the receiver was for

70 per cent. of the invoice price of the goods. The receiver, in computing that 70 per cent., by a mere mistake in extending the value of a lot of coffee, fell short of the actual amount to the extent of said sum of \$2,129, and this is apparent on the face of the record and papers. While, as a general rule, the court can only affirm or set aside sales of this sort, and is without the power to modify them, still it may correct a mere mistake made in the computation, when the record and papers furnish all the elements for the correction. *Trust Co. v. Goodin*, 10 Ohio St. 566. Here there was no new contract made between the receiver and Goldman, nor any modification of the contract actually made between them, but a simple correction of a mistake in computation, apparent on the face of the record and papers, in the correction of which there was no occasion for further testimony. We find no error in the decree of the court below as to this.

The court below found that the First National Bank held notes, mortgages, and commercial paper as security for the payment of its confessed judgment against Freed. Upon examination of the evidence as to this, we are not disposed to interfere with said finding of facts. The witness Kimbal details a conversation with the officers of the bank, in which it was stated that Freed owed the bank only six or seven hundred dollars. P. K. Roots, cashier of the bank, states that in that conversation the secured debts were not referred to; that the conversation was in reference to overdrafts, amounting to some \$502, which were not secured. The evidence further shows that the bank held paper indebtedness belonging to Freed amounting to \$4,500. Nor is this view of the matter explained satisfactorily by the deposition of Logan H. Roots, the president of the bank. Under the evidence, we see nothing to justify us in reversing the finding of the court below as to the facts. Now, as the bank holds these collaterals in pledge, to secure its debts, it has the same right to them, and power over them, that a mortgage would give; and they come within the rule for marshaling assets, as between contesting creditors, if the bank is not thereby unreasonably delayed in the collection of its claim. 3 Pom. Eq. Jur. 462; Coleb. Coll. Sec. 130. Now, all that the court below required the bank to do was to show what disposition it had made of these securities; how much had been collected on them, and to what extent its judgment had been paid by them; and enjoined it from sharing further in the fund in court until it did so. It does not seem to us that there is anything unjust or contrary to law in this. It seems just and equitable. No unreasonable delay can result from it except by the action of the bank itself. It can put the court in possession of the information it requires at once. We therefore decline to disturb the decree on that point.

Let the decree of the lower court in all things be affirmed, except as to so much of it as

sets aside the conveyance by Freed of lands to A. J. and Oscar Kern, John Lashtofski, and Emma Block, as to which the decree is reversed, and the complaint dismissed as to the lands covered by said conveyances; and this cause is remanded to the court below, with instructions to distribute the fund now in the hands of the receiver, and which may arise from sale of lands, the conveyances of which by Freed have been set aside as fraudulent, and not reversed by this court among the creditors of Freed, according to their several rights and priorities.

HEMINGWAY, SANDELS, and BATTLE, JJ., did not sit in this case.

CLARK *et al.* v. HERSHEY.

(Supreme Court of Arkansas. Feb. 8, 1890.)

WILLS—ELECTION—PARTITION—INTEREST—STARE DECISIS.

1. Where all the acts of a devisee tending to show an election to take under the will occur before she knows that she has any other title to the land, no election is implied.

2. Nor will an election be implied from a long delay by the devisee in inquiring as to her rights, even in connection with other acts tending to show such election, where such delay occurred during the progress of the civil war, when courts were largely closed, business suspended, and it appears that the devisee's husband became a refugee.

3. The facts that a suit for trespass on the lands devised was brought by the devisee and her husband, and that the latter paid the taxes on the land, do not show an election where the suit was brought without the devisee's knowledge, and her husband testifies that he paid the taxes as agent for another person, and it is not shown that the devisee ever agreed to take under the will, or entered on the land, or received any rents or profits therefrom.

4. Where a conveyance of land is made, because of the grantor's falling health, for a nominal consideration, and the grantor, and after his death his widow and heir, remain in possession, making improvements, and receiving the rents and profits, the grantee will be held to have taken it in trust.

5. Where the facts on which the rights of the parties on a particular point depend appear on the face of the pleadings, and are undisputed, the question is for the court, and no report of the master is necessary.

6. Where there is long delay in bringing a suit for partition of lands in possession of defendants, and all the parties thought that plaintiff had no rights in the property, and she has made no objection to its use and disposition by defendants, though cognizant thereof, interest on rents and profits will not be allowed before commencement of the suit.

7. Plaintiff has no lien on defendants' shares in the land to secure payment of rents and profits.

8. Where, on appeal, a certain question is not before the supreme court for decision, an expression of opinion concerning it is no bar to a further investigation thereof on a new trial.

Appeal from circuit court, Sebastian county; R. B. RUTHERFORD, Judge.

*Compton & Compton*, for appellants. *U. M. & G. B. Rose*, for appellee.

SMOOTE, Special Judge. This is the second time this case has been before this court. See *Hershey v. Clark*, 35 Ark. 17. Abram and Aaron Clark were brothers. They owned, as tenants in common, and in equal shares, certain real and personal property. Beside

this, neither of them, during their joint lives, seem to have owned any other property. The real estate owned by them was and is situated in the counties of Sebastian, Pope, Johnson, Perry, and Yell. The two brothers, during their lives, and on the 11th day of May, 1850, mutually agreed in writing that the survivor should take and become the sole owner of the whole of the property, real and personal, and hold the same as his own, absolutely. Afterwards, and on the 17th day of May, 1851, Abram Clark died without having made any other testamentary disposition of his property than that contained in the said written agreement between the brothers. He died unmarried, and without issue of his body, leaving him surviving, his mother, Nancy Clark, his brother, Aaron Clark, and his sisters, Sarah Clark, Susan Clark, Elizabeth Miller, and Ann E. Hershey, his only heirs at law and distributees. Upon the death of Abram, Aaron took possession of all the property as his own, and Nancy, the mother, by her deed of the 8th of December, 1851, conveyed her entire interest therein to him; and he held possession of all of the property, claiming it as his own, until his death.

Susan died during the life-time of Aaron, in 1851, unmarried, without issue, and intestate, leaving, her surviving, the said Nancy, her mother, and the said Aaron, Sarah, Elizabeth, and Ann E., her brother and sisters, her only heirs at law and distributees. Aaron died on the 14th day of November, 1855, unmarried, and without issue, after making and publishing his last will, which was duly probated. By this will he bequeathed all his personal property, and devised all of his lands lying in Sebastian and Pope counties, to his mother, Nancy, and his sister Sarah, to hold in common. To his sister Elizabeth he devised all his lands lying in Johnson and Perry counties; and to his sister Ann E. he devised all his lands lying in Yell county, and any other lands undisposed of by the will. Aaron during his life-time acquired lands other than these owned by himself and brother Abram in common. All of the legatees and devisees under the will of Aaron (except, perhaps, Ann E., about whom, as to this, there is a question in the record) seem to have accepted under the will, and entered upon the enjoyment of the property therein bequeathed and devised to them, and remained in undisputed possession thereof until about the time this suit was instituted, except Elizabeth Miller, who so remained in possession until she died, in 1867, leaving, her surviving, Abram C. Miller, her only heir at law and distributee, who has been in possession since her death. The mother, Nancy, died on the 27th of November, 1861, after making, jointly with Sarah, what purported to be her last will, the contents of which it is unnecessary to notice here. She left surviving her, her said daughters, Sarah, Elizabeth, and Ann E., her only heirs and distributees.

Ann E. instituted this suit in October, 1870, the principal defendants being Sarah Clark and Abram C. Miller, the son of said Elizabeth Miller, deceased. The only other defendants are S. F. Clark, as executor of the will of Aaron Clark, and her husband, B. F. Hershey, as administrator of the estate of Nancy Clark, who are little more than nominal defendants. The object of the suit is to have partition, and an account of rents, profits, and the proceeds of the sales of such of the lands as had been sold, and of certain personal property, and the like, as part of the estate and property hereinbefore mentioned, and to have her interest therein ascertained and enforced. Sarah Clark and Abram C. Miller answered, relying principally on the written agreement made by the brothers, in their life-time, the deed of her interest by Nancy, the mother, to Aaron, his will, and the joint will of Nancy and Sarah, in support of their rights to the property. They also interposed the statute of limitations, and made their answer a cross-complaint. At the hearing in the circuit court, the chancellor dismissed the bill for want of equity; and Ann E. Hershey appealed to this court.

Upon consideration here, this court reversed the decree of the chancellor below, and sent the cause back to the circuit court, holding that the written agreement between the brothers, and the joint will of Sarah and Nancy, were void, but sustaining the will of Aaron, so far as it could legally operate upon the property therein bequeathed and devised, and also the sale of her interest by Nancy to Aaron, and saying that Ann E. "is not barred by the statute of limitations. She is entitled, under our statutes of descents and distributions, to a share of the real estate of which her brother Abram died possessed; also, to her proper share of the real and personal property of her sister Susan and her mother. She is entitled to an account, to be taken under the direction of the court, to ascertain these interests. She must elect, however, which her bill virtually does, to disclaim all rights to the property in question acquired directly to herself through the will of her brother Aaron. The will disposes of interests which she claims adversely, and therefore election arises."

When the case under this first appeal went back to the circuit court, Sarah and Miller filed an amendment to their answer, alleging, among other things, that Ann E., the present appellee, had elected to take under the will of Aaron, and that she was barred by laches and acquiescence. This amendment to the answer was rejected by the court below when first presented, but afterwards permitted to be filed. The appellee now insists that the defense above referred to, as contained in the amendment, ought not to be considered, principally upon the ground that it was disposed of and decided by this court on the first appeal.

When a question of law arising in a case has once been decided by this court, it be-

comes a part of the law of that case, unless reconsidered and repudiated by this court at the term during which the decision was made; and this, too, without regard as to whether such decision was right or wrong. *Porter v. Doe*, 10 Ark. 187; *Baxter v. Brooks*, 29 Ark. 185. But this court cannot decide a question which is not before it for decision. *Phelan v. Supervisors*, 9 Cal. 16; *Barney v. Railroad Co.*, 117 U. S. 228, 6 Sup. Ct. Rep. 654. Mr. Justice FIELD, in delivering the opinion of the court in the above-cited case of *Barney v. Railroad Co.*, said: "We recognize the rule that what was decided in a case pending before us on appeal is not open to reconsideration in the same case, on a second appeal upon similar facts. The first decision is the law of the case, and must control its disposition; but the rule does not apply to expressions of opinion on matters the disposition of which was not required for the decision." From an examination of the record upon the first appeal, and the opinion then delivered, we do not think the question of election was before this court; nor do we think that this court, in that opinion, in remarking that the present appellee had by her complaint virtually elected not to take under the will, intended to cut off investigation as to that, or to prevent the present appellants from showing that she had elected to take under the will, if in fact she had done so. Under this state of case, we are of opinion that the court below did not exceed its jurisdiction in allowing the amendment to the answer, and that the question is before us for consideration. This view, it seems to us, is sustained by the authorities above cited, and our own liberal statute of amendment. We hold, however, that the opinion of this court in the first appeal, upon the statute of limitations, does cut off the consideration of the question of laches and acquiescence upon the lapse of time, unconnected with other evidence tending to show that appellee had elected to take under the will; that, if appellee is estopped at all, it is upon the ground that she had so elected in fact. In passing upon that question, lapse of time may be considered, in connection with other facts in evidence upon the point.

Did the court below err in finding that appellee had not elected to take under the will? It is true that some of her acts in evidence tend to show that she had made such election. But we are satisfied from the evidence that neither she nor any of the parties in interest had any knowledge of the fact that she had any right, title, or interest in the property until a short time before the commencement of this suit. She knew of the existence of Aaron's will, and the transactions previous thereto, as hereinbefore stated; but she appears to have been ignorant of the facts that she had any right or title to the property she is suing for herein, whatever. In fact, all the parties seem to have been mutually laboring under this mistake. If this is a mere mistake of law, the appellee cannot, of

course, avail herself of it. Judge Story says: "Indeed, where the party acts upon the misapprehension that he has no title at all in the property, it seems to involve in some measure a mistake of fact; that is, of the fact of ownership arising from a mistake of law. A party can hardly be said to intend to part with a right or title of whose existence he is wholly ignorant; and if he does not so intend a court of equity will, in ordinary cases, relieve him from the legal effect of instruments which surrender such unsuspected right or title." 1 Story, Eq. Jur. § 122. And in discussing the doctrines as to mistake, with reference to a mortgage which had been released by the plaintiff in the case, who was seeking relief upon the ground that he was totally ignorant of his title at the time of the release, and who had been relieved by Lord Chancellor NOTTINGHAM, Judge Story, among other things, says: "If it [the case] proceeded upon the ground that the plaintiff had no knowledge of his title to the mortgage, and therefore did not intend to release any title to it, the release might well be relieved against, as going beyond the intentions of the parties, upon a mutual mistake of the law; \* \* \* and, if both parties acted under a mutual misconception of their actual rights, they could not justly be said to have intended what they did." 1 Story, Eq. Jur. § 123. Again, he says: "There may be a solid ground for a distinction between cases where a party acts or agrees in ignorance of any title in him, or upon the supposition of a clear title in another, and cases where there is a doubt or controversy, or litigation between parties, as to their respective rights." 1 Story, Eq. Jur. § 130. As to the matter under discussion, we refer also to the case of Griffith v. Sebastian Co., 49 Ark. 24, 3 S. W. Rep. 886, and the authorities therein cited. In that case, Judge SMITH, in delivering the opinion of this court, said (49 Ark. 33, 3 S. W. Rep. 889:) "A fact is not less a fact though it be the offspring of the law;" and (49 Ark. 34, 3 S. W. Rep. 889,) "A court of equity will relieve against a mistake of fact superinduced by a mistake of law." See, also, 1 Scrib. Dower, 481-492, where the subject of election by widows as to dower is discussed. We refer also to Snelgrove v. Snelgrove, 4 Desaus. Eq. 274. All the facts tending to show an implied election under the will, by the appellee, occurred before she had come to any knowledge of her title, except one. That one is an attempted sale of the lands devised to appellee, which appears from the weight of evidence to have been originally made by her husband, B. F. Hershey, and her name signed to the papers in connection with it by him, without her knowledge; and the transaction took place after the commencement of this suit. We therefore attach no weight to it as tending to prove that she had elected to take under the will.

We are next to consider whether the lapse of time, in connection with the other facts in

evidence, makes out an election to take under the will. We would be much disposed to hold that the long delay of the appellee in making inquiry about her rights, and in taking steps to enforce them, would of itself, probably, and certainly in connection with the other facts tending to show her election to take under the will, establish that election, if it were not for some other circumstances in evidence. Under the facts as they appear, the appellee was not in a condition to enforce her rights by legal coercion until the death of the mother, Nancy, in 1861. From that time until 1865 the civil war was going on, and for the greater part of the time flagrant in that portion of the state where the property is, and the parties resided. To a great extent the courts were closed, and business to some extent suspended. Considerable numbers of the people residing there had to refugee southward for safety, and among them, as the evidence shows, the husband of appellee. These are facts, except as to the refugeeing of her husband, of which we take judicial notice, as a part of the history of the state. These facts did not, of course, absolutely prevent her directly electing to take or not to take under the will. But when we consider the confused and excited condition of things, we do not think that an election to take under the will can be properly implied from her delay, even in connection with her other acts, as they were done in ignorance of her title to the property herein sued for. There is no sufficient evidence of any direct election of appellee to take under the will. It is not shown that she ever agreed to do so, or that she ever entered upon the lands devised to her, or received any rents and profits from them. It is in evidence that a suit for trespass on the lands devised to appellee was brought in the names of her husband, B. F. Hershey, and herself, and that B. F. Hershey had paid taxes on the land. But the weight of evidence is to the effect that both these things were done without her knowledge or consent, and B. F. Hershey testifies that he paid the taxes as the agent of the appellant Sarah. So, upon the whole case as to that point, we hold that there is not sufficient evidence that appellee elected to take under the will, either directly or by implication.

Upon final hearing, the court below decreed, among other things, that appellee is entitled by inheritance to an interest of 11-48 in all the lands in controversy, (including S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 19, township 5 N., range 16 W., and the N. W.  $\frac{1}{4}$  of section 26, township 5 N., range 17 W., in Perry county, Ark., known as the "Cypress Mills Place.") except the tract in Yell county, in which she was decreed one-third interest, and that she have partition thereof, and also rendered a decree in her favor against appellant Sarah Clark in the sum of \$11,670.67, for rents, issues, and profits, and also a like judgment against appellant Abram Miller, in the sum of \$6,296.45, and decreed

a lien upon the lands remaining unsold at the commencement of this action for the payment of these judgments; from which decree the said Sarah Clark and Abram C. Miller appealed. It is insisted by appellants that the court below erred in decreeing that appellee had an interest in the Cypress Mills place, above described. It appears from the evidence that this place was conveyed by John W. Miller, the father of the appellant Abram C. Miller, in his life-time, to Abram Clark, in his life-time, on account of the failing health of John W., for the sum of one dollar; that John W., who died in 1850, improved it, and had the use and enjoyment of it until his death; that Elizabeth Miller, the widow of John W., and mother of Abram C. Miller, always after that had the use and enjoyment, and received the rents and profits, of it, until her death, in 1867; and that neither of said brothers Abram and Aaron Clark was ever in actual possession of it. Under these facts, we are of opinion that the Cypress Mills place was held by Abram Clark in trust, and that appellee has no interest in it, and that it was error to hold that she had; and we therefore dismiss the complaint as to the said Cypress Mills place.

It is urged by appellants, that the court below erred as to the interest in the lands which the appellee would be entitled to under the statutes of descents, and also as to the allowance of interest. But the appellee submits that these questions were not raised by exceptions to the master's report, and cannot therefore be considered here. In regard to the lands, the facts upon which the several interests of the parties depend appear upon the face of the pleadings, and are undisputed. Being already before the court, no report as to them was necessary; and it was for the court, and not for the master, to determine the law upon these facts, and declare the extent of the several interests in the lands. As to the other point, the master might well report, under the directions of the court, what the amount of interest would be on claims or debts at certain rates; and, if a party should desire to question the correctness of his computation, he might, perhaps, have to do so by exception to his report. But it would be for the court to determine, under all the circumstances of each particular case, whether the amount of interest so reported should be allowed, without the necessity of exception to the report. But, outside of this, we find in the record exceptions as to interest, which were reserved by the court for consideration, and not determined until the hearing, sufficiently broad to raise this question.

We therefore hold that both the foregoing questions are before us for consideration.

There is a controversy in the record as to the shares of the parties in the lands in controversy.

It appears that after the death of Abram, Aaron sold a part of the lands owned by them in common, and also that after the death of Abram, Aaron purchased certain other lands,

a large part of which he sold before his death. We hold that the appellee, Ann E., has no interest or share in said lands, sold as above mentioned, which she can assert in this action, and that the court below erred in holding that she had. As to the shares of the parties in the lands held by Abram and Aaron in common, except so much of them as was sold by Aaron in his life-time, we find as follows: Of said lands in Sebastian and Pope counties, the appellant Sarah Clark is entitled to 37-48 and the appellee, Ann E. Hershey, to 11-48. Of said lands in Johnson and Perry counties, appellant Abram C. Miller is entitled, as heir of his mother, Elizabeth, to seven-eighths, and appellee Ann E. Hershey is entitled to one-eighth. Of the said lands in Yell county, the appellants Sarah Clark and Abram C. Miller, and the appellee, Ann E. Hershey, are entitled each to one-third. As to the lands purchased by Aaron after the death of Abram, all of which appear to be in Sebastian county, we find as follows: Of said lands, except so much of the same as was sold by Aaron in his life-time, the appellant Sarah Clark is entitled to five-sixths, and the appellee, Ann E. Hershey, is entitled to one-sixth. And we are of opinion that the court below erred in its findings as to the interest of the parties in the lands. Interest was allowed, and included in the sums for which the court below decreed personal judgments against appellants, at 6 and 10 per cent. per annum, from various dates, extending back long prior to the commencement of this suit.

Mr. Wait says, in his work on Actions and Defenses: "As a general rule, no interest should be allowed on unliquidated account for goods, wares, and merchandise, without an agreement to allow it, express or implied. \* \* \* It has been held in New York that in an action upon an unliquidated demand interest may properly be allowed from the time of the commencement of the action. \* \* \* In general, interest is not due in law on unliquidated damages or uncertain demands. \* \* \* Interest from the commencement of the suit is recoverable on a money demand, even though it is not claimed in the petition. \* \* \* If there be an unreasonable and vexatious delay in making payment of an account, though it be not liquidated, interest may be recovered. \* \* \* Interest is considered as incident, legally, to every debt certain in amount, and payable at a certain time. It is now allowed in all cases where one person detains the money of another unjustly and against his will." 4 Wait, Act. & Def. 128-136, to which we refer for citation of authorities.

In *Tatum v. Mohr*, 21 Ark. 355, this court said: "We understand the court to have instructed the jury that the plaintiff was entitled to recover interest upon the value of the slave thus ascertained from the date of the exchange. This was an error. On general principles, in a suit like the present, for unliquidated contested damages, the plaintiff is not entitled to recover interest, as such."

In *Brinkley v. Willis*, 22 Ark. 9, 10, which was a suit in equity to recover the value of certain slaves that came to the hands of an administrator, and in which a recovery was had as to a slave named George, this court said: "But under the circumstances of this case we are of opinion that no interest should attend that part of the value of George that shall fall to Brinkley and wife before the beginning of this suit, as there has been delay in its commencement which ought to operate against the plaintiffs."

While we do not, from the foregoing authorities, attempt to formulate any rule applicable to all cases, (see *Watkins v. Wassell*, 20 Ark. 419, 420,) we think them quite sufficient to prevent any allowance of interest to appellee prior to the institution of this suit, taking all the facts into consideration. We cannot agree with the counsel for appellee that there is, under the circumstances of this case, any implied contract for the payment of interest, or any unreasonable and vexatious withholding of it, or any withholding it against the will of the appellee. In addition to the long delay in bringing the action, all the parties were fully under the impression that the appellee had no rights at all in the property. Besides, the appellee consented to, and assisted the appellant Sarah in, the use of nearly \$10,000 of notes, the proceeds of the sale of a part of the land for the benefit of her husband, and tacitly consented to the sale of another valuable part of it by being present and making no objection to the sale, which was brought about by her husband. She and her husband lived in the house for four or five years with appellant Sarah, during the most of which time her husband was the agent of the appellant Sarah; and it is almost impossible, from the evidence, to resist the inference that she knew of all, or nearly all, of the transactions of the appellant Sarah in regard to the property, and made neither complaint nor dissent. These things equally affect the case as to the appellant Abram C. Miller, owing to the impression of all the parties as to appellee's rights, and the undisputed possession by appellants until just before the commencement of this action. To allow interest before the commencement of the action would be to subject appellants to loss and injury superinduced by the conduct and actions of appellee. So we hold, under the circumstances of this case, as this court held in *Brinkley v. Willis*, supra, that interest ought not to have been allowed before the commencement of this suit.

It appears that Nancy and Sarah, before the death of Nancy, and Sarah, after Nancy's death, sold certain parcels of the land in Sebastian and Pope counties, which sales were made after Aaron's death, and before the commencement of this suit, and that Sarah sold one parcel thereof to W. M. Cravens after the commencement of this suit, which last-mentioned sale was for the sum of \$500. And, as it appears that appellee does not seek to

interfere with those sales, we treat them as having been ratified by her, and the lands so sold as having been partitioned and set apart to the appellant Sarah by consent; leaving in said counties of Sebastian and Pope the lands remaining unsold at the time of the commencement of this suit, except the lands sold to Cravens, to be partitioned between appellant Sarah and the appellee, giving appellee 11-48, and appellant Sarah 37-48, of the lands so held in common by Aaron in said counties of Sebastian and Pope; and said appellee one-sixth and said appellants five-sixths of said unsold lands in Sebastian county bought by Aaron after Abram's death. The tract of land in Yell county devised by Aaron's will to appellee is to be partitioned between the appellee and appellants Sarah and Abram C. Miller, giving to each of them one-third, and lands in Johnson and Perry counties are to be partitioned between the appellee and Abram C. Miller, giving appellee one-eighth and Miller seven-eighths. The lands partitioned by sale and consent, as hereinbefore held, to appellant Sarah, are valued at the prices for which they were sold, less 11-48, of \$3,722.60 as to said sales of said land in Sebastian and Pope counties held in common by Abram and Aaron, and one-sixth of \$3,722.60 as to said sale of said lands in Sebastian county bought by Aaron after Abram's death; the said sum of \$3,722.60 being the aggregate amount of taxes (\$622.60) paid by Sarah on said lands, and of moneys, (\$3,100,) part proceeds of sale of said lands, which she had deposited with Brooks & Latham, and which, without fault of her own, she lost by failure of said firm, and for which two sums she was allowed credit by the court below, for the purpose of completing the partition. And the shares which may be allotted to appellant Sarah in the lands in Sebastian, Pope, and Yell counties are to be charged with a sufficient amount of owelty to make appellee's shares therein, exclusive of such of said lands as Aaron held in his life-time, equal to 11-48 of said land held in common by Abram and Aaron in Sebastian and Pope counties, one-sixth of the land bought by Aaron, after Abram's death, in Sebastian county, and one-third of the tract of land in Yell county devised by Aaron's will to appellee, including the value of the lands sold by Nancy and Sarah, or either of them, as hereinbefore stated; which owelty is to be a lien upon the shares of said appellant Sarah in said lands, but no personal judgment for the same is to be entered.

It appears, however, that the appellant Sarah purchased from B. F. Hershey, the husband of appellee, while he was acting as agent for said appellant Sarah, certain real estate in Clarksville, Johnson county, for which she paid him the sum of \$9,937 in notes, representing proceeds of sales of part of said lands held in common, made by appellant Sarah; that this transaction was made with the knowledge, consent, and approbation of appellee; and that she joined

her husband in the deed to appellant Sarah; and that said real estate was not worth more than \$4,000, making the difference between the price paid for, and the value of, said real estate \$5,937. And after the owelty to which the appellee is entitled, as between herself and appellant Sarah, is ascertained, the said sum of \$5,937, less 11-48 of said sum of \$9,937, is to be deducted therefrom, as so much owelty already paid by said appellant Sarah; and, if said sum exceeds said owelty, then no owelty is to be allowed said appellee.

As it does not appear that any of the lands in Johnson, Perry, and Yell counties, in which appellee and appellant Abraham C. Miller are entitled to shares by partition, have been sold, the question of owelty does not arise between them.

We are of opinion, from the facts in evidence, that, as between herself and the appellant Sarah, the appellee ought to have her part of the rents (according to the shares she is entitled to, as hereinbefore held) in the lands in Sebastian and Pope counties as follows: That is to say, she is entitled to her part of the rents of said lands in Sebastian and Pope counties sold after the death of Nancy, from the death of Nancy up to the time they were respectively sold, so far as the evidence shows that such rents were received by the appellant Sarah. She is not entitled to rents from any period anterior to the death of Nancy, because before that time the rents were covered by Nancy's life-estate, with the title into which she had been reinstated by Aaron's will, nor after the sales, because we have held said sales, owing to the circumstances under which they were made, to be a partition by consent. The appellee is also entitled to her said shares of the rents of that part of said lands remaining unsold at the commencement of this action, (except the place afterwards sold to Cravens, and the lots in Ft. Smith, Sebastian county, known as the "Homestead Place,") from the time of the death of Nancy, so far as any such rents are shown by the evidence to have been in fact received by appellant Sarah. As to the homestead place, (lots 4, 5, and 6, and part of lots 9 and 10, in block 26, in Ft. Smith, Sebastian county,) appellee is entitled to her share of the rental value thereof from 1870, the time from which it was allowed by the court below, and of the Cravens place, up to the date of the sale thereof, for which rents appellee is entitled to personal judgment against the appellant Sarah, with 6 per cent. per annum interest thereon from the time of the institution of this suit as to rents then due, and on subsequent rents, from the dates of their accrual, less 11-48 of the sum of \$6,047.97, as to the lands held in common by Abraham and Aaron in Sebastian and Pope counties, and one-sixth of said sum as to the lands bought by Aaron after Abram's death; said sum having been paid out by Sarah for improvement on said land, and allowed her as a credit by the court below, and

not questioned here by appellee on appeal. By this we are not deciding whether or not a tenant in common can recover for improvements, or set them off against rents. We make the allowance because it was made by the court below, and is not questioned here.

Appellee is also entitled to her said share of rents arising from said lands in Johnson and Perry counties, as against the appellant Abram C. Miller, from his mother's death, in 1867, so far as the evidence shows that the same has been received by him, for which she is entitled to personal judgment against him, with 6 per cent. per annum interest thereon from the date of the institution of this action, as to rents then due, and subsequent rents after their accrual.

The court below decreed a lien on appellants' shares of the unsold lands to secure the payment of rents and profits. This character of lien has been sustained by the courts of New York; but we find no discussion of the question in any of the cases in that state coming under our notice. In a Kentucky case, in which it was the only point in issue, the matter was discussed, and the lien held not to exist; and it is denied by other authorities. *Burch v. Burch*, 82 Ky. 622; 2 Jones, Liens, § 1155; *Hancock v. Day*, 36 Amer. Dec. 293. We can see no ground for such a lien on principle, and hold that the court below erred in granting it.

For the errors above indicated, the decree of the court below is reversed, and this cause is remanded to the circuit court, with instructions to make the partition, and settle the accounts between the parties in strict accordance with this opinion, and with the further instructions that in doing so no further evidence shall be taken or considered outside of that which has already been taken, except as to rents accruing subsequent to the decree herein.

SANDELS, J., disqualified, did not sit in this cause.

MAYOR, ETC., OF NASHVILLE v. WILSON.

(Supreme Court of Tennessee. Jan. 23, 1890.)

COSTS—DISMISSAL FOR WANT OF JURISDICTION.

1. Under MILL. & V. Code Tenn. § 8940, providing that, where a suit is dismissed for want of jurisdiction, costs shall be adjudged against the party attempting to institute it, costs may be adjudged against a city attempting to enforce a tax-lien by attachment before a magistrate without jurisdiction to issue the attachment. *Walker v. Snowden*, 1 Swan, 192; *Evans v. Shields*, 3 Head, 70; *Cannon v. McAdams*, 7 Heisk. 373, overruled.

2. As the summons before the magistrate was not in the usual form, but merely to plead, answer, or demur to the attachment, judgment could not have been rendered for the amount of the tax and costs of summons.

Appeal from circuit court, Davidson county; W. K. McALISTER, Jr., Judge.

J. M. Anderson, for plaintiff. Jas. S. Watts, for defendant.



FOLKES, J. This case was disposed of at a former day of the term,<sup>1</sup> and is now before us on a motion to relax the cost, and modify the judgment heretofore entered herein.

The proper understanding of the motion renders necessary a brief statement of the case. The suit was begun by attachment before a magistrate, to enforce a lien upon certain real estate described in the writ, for taxes assessed against the property in favor of the city of Nashville for the year 1886; the amount of the tax so assessed being \$18. The magistrate rendered a judgment sustaining the attachment, and ordered the papers to be "returned to the circuit court for condemnation, and further proceedings." The circuit court, being of opinion that the magistrate had no jurisdiction to issue the attachment, none of the grounds of attachment prescribed by section 4192 et seq. of the Code being alleged, and section 54 of the city charter being ineffectual to confer such jurisdiction, dismissed the cause at the cost of the plaintiff, and awarded execution for the same. The city appealed in error to this court, where the judgment of the circuit court was in all things affirmed, and costs were adjudged against the plaintiff. The plaintiff now moves the court to disallow all costs, both in this court and the circuit court, and, if this is refused, then to relax the costs so as to disallow the magistrate's fees for issuing, and the constable's fee for executing, the attachment; and to modify the judgment heretofore entered herein, to the extent of giving the plaintiff a judgment for the amount of the taxes due, and for such costs as relate to the issuing and service of summons, and the judgment thereon.

Concerning the first branch of the motion, the insistence is that, having adjudged there was no jurisdiction to sustain the proceedings by attachment before the magistrate, the court is without jurisdiction to adjudge costs either for or against the plaintiff. In *Taul's Adm'r v. Collinsworth*, 2 Yerg. 579, (1831,) it was adjudged that, "where a cause is dismissed for want of jurisdiction, any bond taken is extrajudicial, and no judgment can be rendered for debt or costs." To the same effect is *Turner v. Farley*, 3 Yerg. 300. But this was changed as to costs by Act of 1832, c. 5, § 2, which is to be found in Mill. & V. Code, § 3940, in the following language: "Where a suit is dismissed from any court for want of jurisdiction, or because it has not been regularly transferred from an inferior to a superior court, the costs shall be adjudged against the party attempting to institute or bring up the cause." In *Welsh v. Marshall*, 6 Yerg. 458, it was held that, where a cause was dismissed for want of jurisdiction, the judgment must be for costs against the party bringing up the cause, "under the act of the assembly." This was in 1834, and, while not mentioned in terms, manifestly referred to the act just mentioned.

This would seem to be plain enough, the terms of the statute not admitting of any doubt as to the meaning of the legislature. But it is said that since the passage of the act the supreme court of the state has declared the rule to be the same as before the statute. It is true that in *Walker v. Snowden*, 1 Swan, 193, Judge TOTTEN, after holding that an effort to remove a cause from the circuit court of one county to another, under the statute allowing a change of venue, was ineffectual, concluded his opinion with the statement that, "the circuit court of Lewis having no jurisdiction of the cause, it was error to render judgment against the plaintiff for costs. It could only strike the cause from the docket." This was in 1851. It is likewise true that in *Evans v. Shields*, 3 Head, 70-75, (decided in 1859,) Judge McKINNEY, after holding that there was no jurisdiction for the want of proper parties, closed the opinion with the announcement that, "as regards the costs which have accrued since the return of the report of the jury of view, as well in this court as in the circuit and county courts, no judgment can be rendered, for want of the proper parties; and the result is that witnesses and the officers of the court must be left to seek redress from the parties by whom they were respectively summoned, or for whom they may have rendered service, so far as said parties may be liable by law." And this holding is approved and followed by Judge DEADERICK in *Cannon v. McAdams*, 7 Heisk. 378. Neither of these three cases refer to the statute under consideration, nor do they discuss the question; they merely announce the conclusion, placing their action upon the same ground that the cases referred to before the statute rested upon. On the other hand, in *Cartmell v. McClaren*, 12 Heisk. 41-44, it was held that, an injunction bill in the chancery court of Humboldt (a special court, having jurisdiction only of causes arising within certain designated civil districts of Gibson county) being dismissed for want of jurisdiction of the case, it was error for the court thereupon to render a decree upon the injunction bond. In this court the bill was dismissed for want of jurisdiction in the chancery court, and a decree was rendered here against the complainants, and their sureties upon the appeal-bond, for the costs of this and of the court below. This was clearly authorized under the statute, though the statute is not referred to in the opinion. The reporter, however, in a note, cites the statute in question. So, in *Jackson v. Baxter*, 5 Lea, 844, this court quotes this statute, and upon it authorizes judgment for costs where there was no jurisdiction to render judgment, by reason of the failure of the record to show appeal prayed and granted from the magistrate to the circuit court. We hold, therefore, that the statute does authorize the circuit court to render judgment for all costs against the plaintiff instituting the attachment suit, and that the judgment heretofore rendered herein for the costs of this

<sup>1</sup>No opinion filed.

and of the court below is correct. Whatever there is in the cases of Walker v. Snowden, Evans v. Shields, and Cannon v. McAdams, supra, which is contrary to this holding on the question of costs, is hereby overruled.

Plaintiff is not entitled to any relief upon the other branch of his motion. His contention is that, having issued a summons at the time he issued the attachment, he was entitled to a judgment for the amount of the taxes due, notwithstanding his attachment is not sustained, and for costs incident to such summons and judgment. Of course it is not only competent, but proper, for the magistrate, before whom a suit is begun by summons or warrant, to render judgment for the debt, in a case where the attachment issued at the same time is quashed for fatal defects; and in such case the defendant will be taxed with all costs incident to the warrant and the judgment thereon, and the plaintiff with all costs growing out of the wrongful attachment. *Dougherty v. Kellum*, 3 Lea, 642. The plaintiff in the case at bar does not bring itself within this rule, for the reason that the record fails to disclose that any warrant or summons was issued requiring or citing the defendant to answer the debt or demand of the plaintiff. The summons in this case was not for the same "cause of action," and was not "in the usual form" of summons, but was a summons "to plead, answer, or demur to an attachment this day granted and executed upon, [here follows a description of the property attached;] said attachment being prayed to enforce a lien for taxes," etc. Doubtless the summons was intended to be such as is provided for in the Act of 1871, c. 134, §§ 1, 2, to be found in Mill. & V. Code, §§ 4203, 4204, as a means of dispensing with publication and stay of judgment; but it does not follow the statute. Moreover, no judgment for the debt on taxes due was rendered or asked before the magistrate. The sole effort and purpose, as shown by the record, was to obtain the attachment as a means of enforcing the lien for taxes given in the charter, and the cause was carried to the circuit court, not on appeal to obtain judgment for the taxes, but for the purpose of having the land attached, condemned, and sold. It is too late now to ask in this court for the first time for a judgment for the amount of the taxes, so as to carry with it, against the defendant, a part of the costs.

The motion to relax the costs, and to modify the judgment heretofore rendered, is overruled, at the cost of the plaintiff.

#### SHULZE v. STATE.

(Court of Appeals of Texas. Dec. 13, 1889.)

##### HOMICIDE—ACCOMPLICES—CONTINUANCE.

1. In a murder case a witness for the state testified, in regard to a piece of quilt and a sack found together the morning after the murder, on the road between the house of the murdered persons and that of defendant, that he thought the quilt belonged to defendant, but was positive that the sack belonged to the principal witness for the

state, who had testified that defendant confessed to him that he committed the murder. The principal witness had said nothing about this confession until after he knew that he himself was suspected of the crime, and had then lied about his knowledge of the murder before telling of the confession. *Held*, that the evidence called for a charge on the testimony of an accomplice.

2. When the evidence relating to the sack and quilt was introduced, defendant moved to withdraw the case from the jury and to continue, claiming that he could prove by a witness, who had been subpoenaed, but who was unable to attend on account of sickness, that the quilt did not belong at his house. On the preliminary examination there had been no mention of these articles, and defendant and his counsel swore they had never heard of them before. *Held*, that the motion should have been granted.

Appeal from district court, Titus county; F. J. McCORD, Judge.

S. P. Pounders, for appellant. Asst. Atty. Gen. Davidson, for the State.

HURT, J. This is a conviction for murder of the first degree, with the death penalty assessed. The *corpus delicti* was, we think, amply established. The bodies, or portions thereof, were found, and sufficiently identified to establish the fact of the death of the persons charged to have been killed, (Willson, Crim. St. art. 549;) and it is by the circumstances made clear and certain that their deaths were caused by the violence of some person or persons.

The conviction depends mainly upon the testimony of Albert Lunsford. The murder occurred on Monday night, December 10, 1888. Lunsford swears: That on Wednesday night preceding the night on which the murder was committed the appellant, in a conversation with him, said to him "that he and George Shulze [his brother] were going to kill old man King and his family on the following Monday night, and burn down the house." That "on the Wednesday night after the fire the defendant asked me if I had heard of the fire. I told him I had heard of it. He then said: 'I reckon old man King will not prosecute me now. George and I did them up.' Some time after this, the defendant said to me: 'Albert, you are the only person who knows about that thing; and, God damn you! if you tell it, I will kill you.' I said to him: 'How did you get at that thing, anyhow?' He replied: 'I chopped the old man's head open with the edge of the axe, knocked the old woman in the head with the back of the axe, and George did the children up with the hatchet; and we then set fire to the house.'" This was in March, 1889. Lunsford, it is true, is corroborated by the testimony of Thomas Walker, John Davis, Andy Taylor, Isaac Johnson, and Steve Walker. But the state relied upon the fact that a certain tow sack, patched with a piece of striped cloth, and a quilt, or piece of quilt, were found on the road leading from the King place to the house of John Shulze, where defendant lived, as evidence tending to show the defendant's guilt. Mrs. J. E. Johnson says that she lived, with her husband, about three-fourths of a mile from

King's; that, on the morning after the fire, her husband went to the scene of the fire, and she soon followed; that there were only two or three persons there when she got there; that she did not stay long, and that as she returned home she found lying on the edge of the road a piece of bed-quilt and an ordinary tow sack, with a domestic string to it, and a large patch on it; that she picked them up, and carried them home; that they were lying on the edge of the King road; and that this was the road usually traveled in going from the place where the defendant lived to the place where the deceased lived. The witness was shown the sack and quilt, and she identified them as the ones found by her. Andy Taylor, a witness for the state, being on the stand, and the sack and piece of quilt being shown to him, said: "I think I know both the sack and the quilt. About ——— weeks before Mr. King's house and family were burned, I picked cotton for one week for old man John Shulze, and Albert Lunsford picked cotton there the same week. We picked cotton together, and this is Lunsford's sack. Albert Lunsford picked cotton in this sack, or one just like it. The sack he picked in was a tow sack, and had a large patch on the bottom, out of striped cloth, like that one, and had a string on it just like this has. While I was at Mr. John Shulze's, they wanted me to ride a wild mule, and tore a piece of quilt off of an old quilt like this to put under the saddle. This looks like the same piece that I used in riding John Shulze's wild mule." On cross-examination, this witness says: "I picked cotton at John Shulze's with Albert Lunsford, and know that he picked cotton in that sack that week, or at least one just like it. That is Albert Lunsford's sack." Lunsford swears that he never saw the sack before, nor did he remember ever seeing the piece of quilt. He admits picking cotton with Andy Taylor one week at John Schulze's. He states that in September (before the burning) he bought six yards of cloth, just like the patch on the sack from Southerland, in Cookville, to make some shirts, and got Mrs. Shulze, mother of the defendant, to make them. She made him two shirts. The patch on the sack, he says, is of the same kind of cloth that the shirts were made of. Southerland, being shown the sack, says: "I think I sold the cloth [alluding to the patch] to Albert Lunsford. I sold him six yards of it." Mrs. Shulze, mother of the defendant, says: "I have never seen this sack before. It does not belong on our premises. It is not mine, and I never saw it before. I picked cotton with the boys last fall, and know that this sack was not used for a cotton sack on our premises. I never put that patch on this sack. I did make Albert Lunsford two shirts last fall out of striped cloth, but it was not that kind of cloth. He brought me six yards of cloth to make him two shirts, and I made them for him. It took all of the six yards to make the two shirts. I don't think there was a piece left as large as my hand. I

think I have some of the scraps at home. I know this piece of quilt was never used on our premises for any purpose. I never had a quilt, or piece of quilt, like it, and am certain there was none on my place like it. I never saw it before. This may be Albert Lunsford's sack; but it is not my sack, and does not belong to my premises."

We have set out in full all the testimony bearing upon the sack, patch, and quilt, for the purpose of presenting the question we desire to discuss, which is the failure of the court to submit to the jury the instructions relating to the corroboration of an accomplice. Is there evidence in this record tending to show that Lunsford was an accomplice? If so, the court should have informed the jury of the necessity of corroborating his testimony. Counsel at the time objected to the charge of the court because of this omission, reserving a bill. The learned judge refused to submit such instructions, because, he says, "the testimony did not show Lunsford to be an accomplice." Now, as above said, the state relied upon the fact that the sack with the peculiar patch, and the piece of quilt, were found early next morning on the road leading from King's to the house of defendant, as evidence of defendant's guilt, proving by Taylor that the piece of quilt belonged at Shulze's, and by Lunsford that the patch on the sack was of certain cloth out of which Mrs. Shulze had made his (Lunsford's) shirts; thus attempting to show that the sack came from Shulze's, as well as the quilt, and that hence the defendant was the person who dropped these articles in going to or from the place of the murder on the night the murder was committed. But Taylor swears very positively that the sack belonged to Lunsford; that he saw it, the fall before the murder, in the possession of Lunsford, and not only so, but the "sack had a large patch on the bottom, out of striped cloth, just like that one, and had a string on it just like this has." Mrs. Shulze swears she never saw the sack before; that it did not belong on her place. Lunsford swears he never saw the sack before; that it was not his, and had never belonged to him; that he used a white cotton sack at Shulze's when he picked cotton there, and that the patch on the sack in evidence was just like the cloth of which Mrs. Shulze made the shirts for him.

Now, if the sack belonged at the Shulze place, being found under the surrounding circumstances presented in this record, it would be a circumstance against the defendant; and, if it belonged to Lunsford, the circumstances are such as to make it as cogent a fact against him as under the other hypothesis it would be against the defendant. It being evident that the person who dropped the sack dropped the quilt also, and as there is no evidence that Lunsford was connected with the quilt, Taylor swearing it belonged at Shulze's, the state contends that this eliminates the sack from the case, the contest being over the quilt. If it were certain the

quilt came from Shulze's, this would be a strong position. But is it certain? Taylor saw the quilt once, on the occasion when he rode the mule, while at Shulze's, picking cotton. This was in September, as we gather from the record. He saw it next at the trial in April, seven months after. It would be remarkable, indeed, for him to identify a piece of quilt under such circumstances. But in fact he is not at all certain that the quilt is the same used by him on the mule. He says: "This looks like the same piece that I used in riding John Shulze's wild mule." Was there anything peculiar about this piece of quilt to rivet the attention of Taylor? Was it home-made? What was its color? We are left in the dark upon these matters of description. That it looked just like the piece may be true, and still it may not be the same. Numbers of persons living in that vicinity may have had quilts just like it. Stores are filled with quilts of the same pattern. Our women have, to a great extent, ceased to make them. It is unprofitable, in this day and time, to make them. Taylor is nothing like as clear and positive that the quilt was the same used by him as he is that the sack belonged to Lunsford. Mrs. Shulze swears positively that the piece of quilt did not belong to her place; and, though she be the mother of defendant, she may tell the truth. She is certainly entitled to as much credit as Lunsford, upon whose testimony this prosecution mainly depends, and who stands in this record a confessed liar. It being conceded that the sack and quilt were dropped, by the same person, and that the evidence is stronger in support of the hypothesis that the sack belonged to Lunsford than that the quilt belonged at Shulze's, the inference that Lunsford dropped them is stronger than it is that they were dropped by the defendant.

To restate: The sack and quilt are so closely connected that the inference is clear that they were left on the road by the same person. Taylor is certain that the sack belonged to Lunsford. He believes that the quilt belonged at Shulze's. The person who left these articles on the road was probably guilty of the murder. The more certain the fact, the more certain the conclusion. Lunsford owned the sack. Of this, Taylor is certain. Lunsford may have had a piece of quilt like that used by Taylor on the mule. This is not unreasonable, as we have shown above. It is more reasonable than that Shulze had the sack, because Taylor is certain that Lunsford owned the sack, giving very plausible reasons for knowing this fact, viz., the large patch on the bottom, and the string. He is not, and in the very nature of things could not be, certain, under the circumstances, that the quilt belonged at Shulze's. Hence the inference is stronger that Lunsford left these articles on the road than that defendant left them. By a circumstance, Lunsford is criminated. Therefore the necessity of proper instructions to the jury relating to the corroboration of this witness. The

jury should have been permitted to pass upon the fact as to whether Lunsford was an accomplice; and, if so, then they should have been informed of the necessity and the nature of the corroboration required by the statute. The necessity of such a charge is intensified for two reasons: (1) The circumstances surrounding Lunsford when he first divulged the confessions of defendant. There was a committee formed, consisting of about 200 persons. Lunsford was suspected. The country was very greatly excited. He knew that suspicion rested upon him. (2) Helled most egregiously about his knowledge of this murder, and repeated his falsehoods. He lied as to his reason for lying, saying that the reason why he had denied knowing anything of the murder was that he was afraid of defendant. Afraid of defendant, with a *possess* of 200 men at his back! This is monstrous. No sane man could believe such stuff. His version of defendant's confession comes in such a questionable shape as to stagger credulity. The times and places, and the matter itself, are unnatural and unreasonable, but may be true. In view of all these things, we say that the necessity for a charge on the testimony of an accomplice was intensified, and should have been given.

We are not to be understood as holding that if, under proper rulings and instructions, the jury should convict, we would set aside the verdict because of the insufficiency of the evidence. The jury being the judges of the credibility of the witnesses, it is their province to pass upon the weight of the evidence, and not this court. Lunsford and others swear to facts which, if true, are amply sufficient to warrant a conviction of murder of the first degree. In fact, there is no murder of the second degree in this case; and the court did right in not charging upon that degree.

When the state brought forward, and put in evidence, the facts relating to the sack and piece of quilt, the appellant moved to withdraw the case from the jury, and for a continuance, claiming surprise. In his motion, he set forth that he could prove by John Shulze that neither the sack nor piece of quilt belonged on his premises. There had been an examination of this case before a justice, and no witness mentioned the sack or piece of quilt. John Shulze was at home, sick in bed. He had been subpoenaed, and in fact there is no question but that the appellant had used proper diligence to secure his attendance. Appellant and his counsel swear that neither of them ever heard of the sack or quilt until developed on the trial. We are of opinion that the motion should have been granted.

Because of the error in the charge noticed, and because the court erred in not granting the motion to withdraw the case from the jury and continue, the judgment must be reversed, and the case remanded for another trial. Other supposed errors will not arise upon another trial. Reversed and remanded.

## GALLAHER v. STATE.

(Court of Appeals of Texas. June 28, 1889.)

## HOMICIDE—MALICE—CIRCUMSTANTIAL EVIDENCE—ALIBI.

1. A charge, in a murder case, that "malice" is "the intentional doing of a wrongful act to another, without legal justification or excuse," is substantially correct, and sufficient, especially where it is followed by a definition of "express malice," which of itself fully expresses the legal meaning of malice.

2. Where an indictment charges that the murder was committed by the use of a pistol and a knife, it is sufficient to prove that either was used, and it is not error to charge that, if the defendant "killed the deceased by shooting her with a pistol, or by cutting her with a knife," etc.

3. A charge, on the presumption of innocence and reasonable doubt, that "the defendant is presumed by law to be innocent until his guilt is established, by legal evidence, to the satisfaction of the jury, beyond a reasonable doubt; and, unless the evidence so satisfies you of the guilt of the defendant of murder of the first or second degree, you will find him not guilty,"—held to be full and correct.

4. The charge on circumstantial evidence: "In order to warrant a conviction of a crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proven by competent evidence beyond a reasonable doubt. All the facts (that is, the facts necessary to the conclusion) must be consistent with each other, and with the main fact sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the defendant, and no other person, committed the offense charged, and, unless the evidence does so, you will acquit the defendant. But if the evidence does satisfy the understanding, reason, and conscience of the jury, and produces in their minds a reasonable and moral certainty of the guilt of the defendant beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis than that of his guilt, then the jury should convict the defendant,"—held correct, though the last sentence is not usually given.

5. On the subject of *alibi*, the court charged: "Among other defenses interposed in this case by the defendant is what is known, in legal phraseology, as an '*alibi*;' that is, that, if the deceased was killed as alleged, the defendant was, at the time of such killing, at another and different place from that at which said killing was done, and therefore was not, and could not have been, the person who killed the deceased. Now, if the evidence raises in your minds a reasonable doubt as to the presence of the defendant at the place where the defendant was killed, (if killed,) at the time of such killing, then you should acquit the defendant." Held correct; that it properly designated *alibi* as a defense; and that it did not impose the burden of proving an *alibi* on the defendant, or make him prove that it was impossible for him to have been present at the time and place of the killing. HURT, J., dissenting.

6. Code Crim. Proc. Tex. art. 751, provides that, when part of a conversation is given in evidence by one party, the whole, on the same subject, may be inquired into by the other party. B., a state witness, was asked by defendant's counsel, on cross-examination, if he did not say to J., a witness for the state, that her husband's neck was in danger if she did not tell what she knew about the murder, and testified that he did. Held, that it was then competent for the state, within the statute, to show by B. that, in reply to this question, J. had said that she was afraid to tell what she knew about the murder, in the crowd, because the accused was one of the men. HURT, J., dissenting.

7. For the purpose of showing an absence of motive on the part of defendant to commit the murder, he offered to prove, by a witness who had been his counsel in a land suit with the deceased, that witness had advised him that he had a perfect title, and that the judge and deceased's counsel

had advised her to accept a compromise offered her by the accused. Held, that it was incompetent. HURT, J., dissenting.

8. A portion of a charge on express malice, which states that "a sedate and deliberate mind and formed design is evidenced by external circumstances discovering that inward intention, as lying in wait," etc., is not open to the objection that it is on the weight of evidence, and virtually says that express malice is proved when any of the conditions enumerated in the charge are shown to have existed.

9. At the suggestion of the state, and without any objection on his part, defendant stood up before the jury with a handkerchief over his face, and a broad-brimmed hat on his head, and a witness for the state testified that that was exactly the way defendant looked on the night of the murder. Held that, the act being voluntary, he could not complain.

Appeal from criminal district court, Harris county; C. L. CLEVELAND, Judge.

James Gallaher was indicted in Wharton county for the murder of Mary K. Brown. On change of venue to Harris county, he was convicted of murder in the first degree. The evidence was substantially the same as that adduced on the *habeas corpus* proceeding for bail, and set out at length in the report of that proceeding. 8 S. W. Rep. 481. On this trial, however, Judy James, the principal witness for the state, positively identified the defendant as one of the masked men who entered her house and carried the deceased away. Among the portions of the charge objected to are the following: "The defendant is presumed by law to be innocent until his guilt is established by legal evidence, to the satisfaction of the jury, beyond a reasonable doubt; and, unless the evidence so satisfies you of the guilt of the defendant of murder of the first or the second degree, you will find him not guilty." "In order to warrant a conviction of a crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt. All the facts (that is, the facts necessary to the conclusion) must be consistent with each other, and with the main fact sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading, on the whole, to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the defendant and no other person committed the offense charged; and, unless the evidence does so, you will acquit the defendant. But if the evidence does satisfy the understanding, reason, and conscience of the jury, and produces in their minds a reasonable and moral certainty of the guilt of the defendant beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis than that of his guilt, then the jury should convict the defendant." Defendant appeals.

I. H. Dennis, P. E. Pearson, Jones & Garrett, and Goldthwaite & Ewing, for appellant. Asst. Atty. Gen. Davidson and Hutchesson, Carrington & Sears, for the State.

WILLSON, J. Numerous objections are urged by counsel for the defendant to the

charge of the court, each of which we have carefully considered, and will briefly refer to and determine.

1. "Malice" in the charge is defined to be "the intentional doing of a wrongful act to another without legal justification or excuse." This definition of the term is precisely the same as that given in McKinney's Case, 8 Tex. App. 626, and approved by this court. See, also, Harris v. State, Id. 90, as to definition of "malice;" Lander v. State, 12 Tex. 481.

2. It was not error to instruct the jury that if the defendant "killed the deceased by shooting her with a pistol, or by cutting her with a knife," etc. It was charged in the indictment that he used both means in killing her, and it was sufficient to prove that he used either. Nor was it necessary to prove or charge, in view of the other evidence in the case, that the weapon used was a deadly one.

3. Upon the presumption of innocence and reasonable doubt the charge is full and correct, and not subject to the objections made to it.

4. Nor is the charge on circumstantial evidence objectionable, but, on the contrary, it is substantially the form of such a charge which has repeatedly been approved in this and other states. It has not been usual to add to a charge upon circumstantial evidence the last sentence contained in the one before us, but we can perceive no error in such addition, as it certainly announces a correct principle of law applicable to the case.

5. A majority of the court hold that the charge on *alibi* is sufficient. It is almost a literal, and is a substantial, copy of the one approved by this court in Walker v. State, 6 Tex. App. 576. It has been approved by this court in numerous subsequent unreported cases. We are unable to appreciate the objections made to this charge. We cannot see that it is upon the weight of the evidence, or that it sums up the evidence or any portion of it. It does not obtrude upon the jury the opinion of the judge as to the facts upon the issue. It refers to the term "*alibi*" as a defense. It is argued that *alibi* is not a defense. This objection is, to our mind, without merit, and but for the dissent of our brother, Judge HURT, and the earnest insistence of counsel for defendant, we would not regard it as requiring serious consideration. In common parlance, the term "*alibi*" is understood to mean a defense made in a criminal prosecution. It is denominated a "defense" in Webster's Dictionary. It is also denominated and treated as a "defense" by courts of the highest authority, and by standard authors. Mr. Wharton defines it as follows: "It is a defense resorted to in criminal prosecutions where the party accused, in order to prove that he could not have committed the crime with which he is charged, offers evidence that he was in a different place at the time the offense was being committed." Whart. Law Dict. "*Alibi*." Mr. Sackett, in his Instructions to Juries,

(page 499,) gives two approved forms of a charge upon *alibi*, in both of which it is denominated "defense." In the American and English Encyclopædia of Law we find the following: "A prisoner or accused person is said to set up an *alibi* when he alleges that at the time when the offense with which he is charged was committed he was elsewhere; that is, in a different place from that in which it was committed. If proved, it is of course a complete answer to the charge. An *alibi* is as much a traverse of the crime charged as any other defense." Volume 1, pp. 454, 455. Numerous decisions are cited in the notes to the text above quoted, in many of which *alibi* is referred to and denominated a "defense." We think *alibi* is a defense, as much so as insanity, or any other exculpatory matter. But it is further insisted that the charge in question erroneously casts upon the defendant the burden of proving an *alibi*, and that such a charge was condemned by our supreme court in Walker v. State, 42 Tex. 360. An examination of the charge under discussion in the Walker Case will show that it and the charge given in this case are essentially and widely different, and we do not regard the decision in that case as an authority adverse to the views which we here announce. Our understanding of the rule is that when the evidence for the state has established beyond a reasonable doubt that defendant was present and participated in the commission of an offense, and is guilty as charged, he may rebut the case made by the state by proof of an *alibi*; but unless he makes such proof, or proves some other matter which will exculpate him, or raise in the minds of the jury a reasonable doubt of his guilt, his conviction must follow. It is not required, in order to entitle a defendant to an acquittal upon the defense of *alibi*, that such defense should be established beyond a reasonable doubt. The rule is that if the evidence adduced in the case, whether in behalf of the state or of the defendant, engenders in the minds of the jury a reasonable doubt as to defendant's presence at the time and place of the commission of the offense, the defendant is entitled to an acquittal. We do not understand the charge under consideration as shifting the burden of proof from the state to the defendant. It does not instruct that the burden of proving an *alibi* is upon the defendant, or in any way intimate that he must make such proof. It simply and clearly states the rules of the law as to the effect of such proof. This view does not conflict with the decisions of this court in Humphries v. State, 18 Tex. App. 302, and Ayres v. State, 21 Tex. App. 399, as will be seen by a careful analysis of those cases. We cannot conceive that the charge in question could in any way have misled the jury to the prejudice of the defendant. We think it a correct charge, and sanctioned as such by reason, and by numerous authorities.

6. A majority of the court are of the opinion that it was not error to admit the testi-

mony of the witness Barbee relating to the statements made to him by the witness Judy James. Defendant sought to cast discredit upon the witness Judy James by showing on her cross-examination that her testimony against the defendant was the result of fear, and influenced by a desire to shield herself and husband from being accused of the murder. Defendant himself, through his counsel, in his cross-examination of the witness Judy James, with a view to impeaching her testimony, called forth, if not directly, yet legitimately, the statements objected to. The statements objected to were a part of a conversation brought out by the defendant, and the state was entitled to have the whole of said conversation. These statements were admissible under the express provision of our statute, which expands the common-law rule with reference to such evidence. Code Crim. Proc. art. 751; Willson, Crim. St. § 2480. It was doubtless under said provision of the statute that the trial judge admitted said testimony as part of the conversation between the two witnesses Barbee and Judy James drawn out by the defendant's counsel, and it being, in our opinion, clearly admissible under said provision, it is unnecessary that we should determine whether or not it was admissible for the purpose of corroborating the witness Judy James. We are inclined to the opinion, however, that it was admissible for that purpose also.

7. A majority of the court hold that it was not error to reject the testimony of the defendant's witness Pearson as to the litigation between defendant and the deceased. Said witness was permitted to and did testify about such facts relative to such litigation as were relevant to the issue and otherwise competent. But the other matters sought to be elicited from said witness were not admissible under any rule of evidence with which we are familiar. They were declarations made by defendant to his counsel, and advice given to him by his counsel. Such testimony must be regarded as in the nature of self-serving, and incompetent in behalf of the defendant.

8. There are numerous other assignments of error, which we do not discuss, because we deem them unimportant and without substantial merit. We have found no error in the conviction. We think the evidence supports it. It was the province of the jury to weigh the evidence and pass upon the credibility of the witnesses, and, accepting as true the evidence adduced by the state, there can be no question of the defendant's guilt of a most atrocious murder. The judgment is affirmed.

HURT, J., (*dissenting*.) This is a conviction for murder of the first degree, the penalty fixed being confinement in the penitentiary for life. Appellant makes 26 assignments of error. I have carefully examined each in connection with the brief for the state and the record. I desire to notice in this

opinion only such of them as I deem to be of serious character, remarking that the points made and not discussed are held to be, if errors at all, not reversible errors. I will not take up the assignments in the order presented in counsel's brief.

David James and his wife, Judy, were the tenants of appellant, and occupied a house of two rooms. In the absence of David, Judy being at home, Mrs. Brown, the deceased, and her son moved into the house, occupying one room, without the consent of any person. Several days after this, on the 7th day of December, 1887, about 8 o'clock at night, three men, one being Henry Allen, broke open the door to the room occupied by Mrs. Brown and her son, seized and carried them off. Both were tied before they were taken from the house. On the next day, about a mile west of David James' house, on the prairie, Mrs. Brown and her son were found. They were dead, having been killed by gunshot or pistol wounds, or with some sharp instrument, or both. The state relied (1) upon motive; (2) slight physical circumstances attending the homicide; (3) positive evidence to the identity of appellant as one of three who carried the deceased and her son from the house of David James; (4) the opinion of David James as to the similarity in shape and movements in appellant and one of the party which carried off Mrs. Brown and her son; (5) the dog matter. There may be other circumstances relied upon, but the above constitute the main facts for the prosecution.

To show that David and Judy James were mistaken or swore falsely, appellant introduced several witnesses by whom he proved that he was not at James' house when Mrs. Brown and her son were taken away, but that he was at the house of J. C. Cooper, who lived about 12 or 14 miles from James'. Now, under the facts of this case, the only method or means by which appellant could completely meet or cast a doubt upon the state's case was such proof as is commonly known and called proof of an "*alibi*." This being the case, it was of the first importance that there should be no error in the charge of the court upon this subject. Counsel for appellant in their ninth assignment of error complain, and I think justly, of the charge upon this subject. The court instructed the jury as follows: "Among other defenses interpose in this case by the defendant is what is known in legal phraseology as an '*alibi*,' that is, that, if deceased was killed as alleged, the defendant was at the time of such killing at another and different place from that at which such killing was done, and therefore was not, and could not have been, the person who killed deceased, if she was killed. Now, if the evidence raises in your mind a reasonable doubt as to the presence of the defendant at the place where the deceased was killed (if killed) at the time of such killing, then you should acquit the defendant." This charge was excepted to at the time. I have two objections to this charge:



(1) It is wrong to instruct the jury that the defendant interposes an *alibi* as a defense, because an *alibi* is no defense at all, in any other sense than as rebutting evidence, tending to disprove the facts relied on by the state for conviction, or as evidence tending to cast or create a reasonable doubt of the truth of the facts relied on by the state for conviction. Let us illustrate: A. is charged with murder. B. and C. were present at the homicide. They swear to facts which make out a case of murder. D. is also present, and swears to facts which, if true, defeats murder, or which might create a reasonable doubt in the minds of the jury as to the truth of the case as made by the testimony of B. and C. The facts sworn to by D. would be a defense in one sense, and in the same sense would an *alibi* be a defense,—both being an attack upon the case as made by the testimony for the state; and in no other sense are they defenses. The danger to the accused from a charge telling the jury that an *alibi* is a defense is this: It is calculated to impress the jury with the idea that the *alibi* is a separate and distinct issue presented by defendant for solution by the jury, and, this being so, the jury will naturally hold the accused to proof of his plea, whereas the correct principle requires the charge to be so framed as to present but one issue, *i. e.*, did the appellant kill and murder Mrs. Brown?

(2) The charge defines an "*alibi*" thus: "Among other defenses interposed in this case by the defendant is what is known in legal phraseology as an '*alibi*,' that is, that, if the deceased was killed as alleged, the defendant was at the time of such killing at another and different place from that at which said killing was done, and therefore was not, and could not have been, the person who killed deceased," etc. In treating of *alibi*, some of the books state that the accused who pleads or relies upon it must prove it; that the burden is placed upon the accused, and he must prove that it was impossible for him to have committed the offense, because he was at so great a distance therefrom. The rule casting the burden of proof upon the defendant is most emphatically repudiated by our supreme court in *Walker v. State*, 42 Tex. 360. The false theory or principle which places the burden to prove *alibi* upon the accused (which, no doubt, rests upon the idea that *alibi* is a separate and distinct issue in the case) is the natural parent of that rule which requires the accused to prove that it was impossible for him to have been at the place where the offense was committed. Both of these rules rest upon the same reasons, and in each instance the reasons are fallacious. Now, in the charge under discussion, the court defines an "*alibi*" so as to require the proof thereof to show that the appellant was at a different place from that of the killing, and that appellant was not, and could not have been, the person who killed the deceased. This is equivalent to requiring the proof to show that it was

impossible for the accused to have been at the place of the homicide. This is wrong, because here is a question of probabilities. The evidence in support of an *alibi* may not show that it was impossible for the accused to have been at the place of the offense, and yet be such as to create a reasonable doubt as to his presence. The rule would reject all evidence of *alibi* except that tending to show that the accused could not have been present.

But it is urged by counsel representing the state that the charge upon this and all other questions should be construed as a whole, and that as the court instructed the jury that, "if the evidence raised a reasonable doubt in their minds as to the presence of the defendant, they should acquit," the charge was correct. This instruction, while correct, does not extract the vice from the charge, even when tested as a whole. Why? (1) Because, as above stated, the charge is so framed as to impress the jury with the idea that an *alibi* is a separate and distinct issue, with the burden on appellant to prove it. (2) The jury might solve the doubt against the appellant by holding from the evidence bearing upon the *alibi* that it was not impossible for the appellant to have been present, and to have killed deceased.

The state relied upon two matters as motive moving appellant to kill the deceased: (1) That deceased and her son, without authority and by force, entered and took possession of appellant's house. (2) That appellant and Mrs. Brown had been and were then in litigation about the title to land. Evidence supporting both of these matters was introduced by the state to show motive. Appellant, to meet the second ground, introduced as a witness P. E. Pearson, who was and had been for years the attorney for appellant in the land suit. By this witness appellant proposed to prove facts which would tend to show the state of defendant's mind concerning the said litigation,—his knowledge of the same as gained from his attorney, the witness. The facts proposed, if true, tending strongly to eliminate this litigation from the case as a motive for the murder, the court, in my opinion, erred in rejecting them. *Preston v. State*, 8 Tex. App. 30; *Bouldin v. State*, Id. 332; *Washington v. State*, Id. 377; *Noftsinger v. State*, 7 Tex. App. 301; *Cooper v. State*, 19 Tex. 449; *Barnes v. State*, 41 Tex. 351; *Burrill*, Circ. Ev. 466; *Rosc. Crim. Ev.* 18, 19.

In a case depending upon circumstantial evidence, the mind seeks to explore every possible source from which any light, however feeble, may be derived. If this be a sound and just rule for the prosecution, it should be for the accused. Counsel for the state insist, in reply to this matter, "that the witness Pearson had stated all that could be of any consequence regarding the suit, and the questions asked him were wholly incompetent for any purpose." We have compared the bill of exceptions with the testimony of Pearson as found in the statement

of facts, and find that some important matter was rejected by the court at the instance of the state. Among them are these: "*Question.* State to the jury whether or no Mr Gallaher was advised by you as to the condition of his title, and the prospects as to the result of his suit." By the answer the appellant proposed to prove that the attorney had advised him that there was no doubt as to his title to all the land he claimed. Again: "State whether or not after that suit was brought, and before Mrs. Brown was killed, Mr. Gallaher, through you as his attorney, and through Colonel Dennis, did not offer to let Mrs. Brown have all the land she had any title to. *Answer.* He did." "Is it not a fact that when the offer was made to her in court that her lawyers and the judge presiding advised her to accept?" To which question the witness would have answered that, being of counsel for Gallaher, he and his associate advised him that there was no doubt as to his title to all the land which he claimed; that in open court, as counsel for Gallaher, he and his associate counsel offered to permit Mrs. Brown to take judgment for 200 and odd acres of land claimed by her; that that was all the records showed she was entitled to; that her own counsel and the presiding judge advised her to accept the offer; that Gallaher was advised by his counsel that there was no doubt of his holding all the land claimed by her; that there was no cause to doubt the result, and that he was fully satisfied he would hold it, and did not express nor seem to feel any anxiety about the case, and that he did not in any way delay the case. Under the circumstances of this case, I am clearly of the opinion that these facts were admissible, and that it was error to reject them.

A bill of exceptions duly saved by defendant's counsel shows: "J. G. Barbee, a witness for the state, was asked, on cross-examination by the defendant's counsel, if he (witness) did not say to Judy James that her husband's neck was in danger if she did not tell what she knew;" to which Barbee answered: "I do not know that I used language as strong as that, but I told her she was in a critical situation; that the parties had been taken from her house, and that she ought to know something about it. I used words to the effect that if she did not tell what she knew she and her husband were in danger. I cannot recollect my words, but my language was to that effect." Thereafter, on re-examination of the said Barbee by the state, the state's counsel said to the witness: "You were asked by the defendant's counsel if you did not tell this woman, Judy James, that she and her husband were in great danger; that she ought to tell what she knew about it, and that she was bound to know. I will ask you what she said in reply." The defendant objected, upon the ground that the testimony sought to be elicited was hearsay and irrelevant, and upon the further ground that the indictment showed that she (Judy

James) was a witness for the state in the case. The state's counsel, reiterating, said to the witness Barbee: "I asked you, when you made that statement to her, what her reply was, and what information she gave you." The objection made by defendant was overruled, for the reason that the testimony was admissible in connection with the answers of the witness Barbee drawn out by defendant's counsel on the cross-examination of the witness on the same subject, and the witness was thereupon permitted to answer as follows: "Her reply was something to this effect: That she was afraid to state it out there in that crowd; that Mr. Gallaher was one of the men; that she heard the shots over there in the prairie, (pointing the direction to witness); that they (she and her husband) were afraid to go out there to see; and that they had not been out there." The witness further said that "there was no one but her and me present when this conversation occurred; but shortly afterwards Mr. Jones, the sheriff of Wharton county, came, and we had an interview with her." This testimony, in my opinion, was not admissible upon any ground. But it is contended by counsel for the state that it was a part of the conversation between Judy James and Barbee. But the questions propounded by counsel for appellant did not seek to elicit this conversation, nor were they so framed. Barbee, at the instance of the defense, did not state one word that Judy James said to him, Barbee. It is true that defendant sought to show by Barbee that undue influences may have induced her to swear that Gallaher was one of the party which carried off the deceased and her son. Conceding this, the state could show that she had made the same statement before such influences were applied. This could be done to support her, and to refute the inference that she was induced to swear as she did by such influences. But her statements, made after the influences had been applied to her, were not admissible.

Upon this subject Mr. Wharton says: "When a witness is assailed on the ground that he narrated the facts differently on former occasions, it is ordinarily incompetent to sustain him by proof that on other occasions his statements were in harmony with those made on the trial. Thus, the declarations of a complainant in bastardy, whether made before or after her formal accusation upon oath as to the paternity of her child, have been held inadmissible in evidence, when offered by her either to show constancy or strengthen her credit, since they have no tendency to do either. They are no proof, such are the reasons, that entirely different statements may not have been made at other times, and are therefore no evidence of constancy in the accusation; and, if her sworn statements are of doubtful credibility, those made without the sanction of an oath or its equivalent cannot corroborate them. On the other hand, where the opposing case is that the witness testified under corrupt

motives, or where the impeaching evidence goes to charge the witness with a recent fabrication of his testimony, \* \* \* it is but proper that such evidence should be rebutted. It has consequently been ruled that statements made by a witness corroborating his evidence upon the trial, such statements being uttered soon after the transaction in litigation, and at a time when the witness could not have been subjected to any disturbing influences, are competent when proof has been offered to impeach him, by showing that he had recently fabricated the narrative, or that he testified corruptly. The witness called to corroborate the impeached witness in this respect is usually confined to the fact that the statement was made to him, (as stated by the impeached witness,) and is not permitted to give the particulars of the statement." Whart. Ev. § 570. It will be seen from the above that the statement made by the witness corroborating his evidence on the trial must be uttered soon after the transaction occurred, or at least at a time when the witness could not have been subjected to any disturbing influences. I believe no case can be found holding that a corroborating statement made after the disturbing influences were applied, or may have been applied, is competent, admissible evidence. Again, it will be observed that the rule cited from Wharton excludes the particulars of the statement. He says: "The witness called to corroborate the impeached witness in this respect is usually confined to the fact that the statement was made to him, (as stated by the impeached witness,) and is not permitted to give the particulars of the statement." Reg v. Neville, 6 Cox Crim. Cas. 69.

But it is urged by the state that, conceding the incompetency of this evidence, there was no injury to appellant, because Judy James stated at the time deceased was taken from the house that appellant was one of the party, and hence she could not have been wrongfully influenced to thus swear upon the trial. The testimony of this witness is voluminous, especially that given on cross-examination; and, after a very careful examination of all that she says bearing upon the identity of appellant as one of the party who took deceased and her son from the house, I am impressed with the conviction that her testimony is very unsatisfactory. It is true that she said to her husband, when the three men came and passed through the kitchen into the main room in which Mrs. Brown and her son were, that "she believed one of the party was Mr. Gallaher." She did not state to her husband that she knew it was Gallaher. She was not positive, but believed him to be one of the party. Now, when, as told by Barbee, after she and her husband had been indirectly threatened with prosecution for the murder, her husband being under arrest, she is not in doubt, but is positive, that Gallaher was one of the party. This positive proof to a fact which, if true, seals the fate of the appellant, was obtained

through Barbee improperly and illegally, without opportunity to cross-examine the witness Judy James when she was making her statement to Barbee, for when upon the trial she swears in a manner positively to appellant as one of the party; yet no honest, candid man can read and analyze her testimony,—that given in chief and upon cross-examination,—and not be impressed with the conviction that she was not positive then—that is, when she saw the parties at the house when the deceased and her son were taken away—that Gallaher was one of the party. A careful examination of her evidence will impress an investigating mind that she was speculating, or, at the most, simply believed him to be one of the party. Attention is specially called to her cross-examination bearing upon this question. On the fatal night she believed, merely. On the trial she is positive, with conflicting and unsatisfactory reasons for being so. To Barbee, positive. Now, under these circumstances, I hold that this incompetent evidence may have had a serious effect upon the jury. They may, and probably did, aid and strengthen Judy's testimony by that of Barbee. If she had been positive and clear as to the presence of appellant at the house, and positive then, when the party was there, though inadmissible, her statement to Barbee might have been held harmless, though I find no authority for its admission, nor that, being admitted, it would be held without injury.

A number of witnesses swear to facts strongly supporting the theory of defendant, to-wit, that he was not at the place of the homicide. This was very important testimony, and if true, or had the effect to create a reasonable doubt of appellant's presence at the homicide, would or should have produced an acquittal. The state introduced a number of witnesses by whom several witnesses who swore to the *alibi* were impeached; their character for truth and veracity being bad, in the opinion of the impeaching witnesses. Counsel for appellant at the time objected to the charge of the court, because, as alleged in their brief, it failed to instruct the jury that a witness sought to be impeached may still be believed by the jury, and that, notwithstanding such impeaching testimony, they are still the judges of the credibility of all the witnesses sought to be impeached. Examining the bill of exceptions, I find that the objection was as follows: "Because, charging that the jury are the judges of the credibility of the witnesses, the charge fails in that connection to charge that this included the credibility of the witnesses sought to be impeached, and that, after considering all the testimony of all the witnesses, if the jury had a reasonable doubt of the defendant's guilt, he is entitled to be acquitted." The learned judge instructed the jury as follows: "You are the sole judges of the weight of the evidence and the credibility of the witnesses." Evidently this means the weight of all the evidence,—that

given by the witnesses sought to be impeached as well as that given by the other witnesses. So, with reference to the credibility of the witnesses, it means the credibility of all the witnesses. Notwithstanding the impeaching testimony, the jury were still the judges of the credibility of the witnesses; and this they were told in language sufficiently plain to leave no room to doubt. I have examined all the cases and authorities cited by counsel for appellant, but find no case or text which holds that, if the court fails to charge the jury that in case there has been evidence tending to impeach a witness, yet they are still the judges of his credibility, would be error. Cases can be found in which, under peculiar circumstances, it has been held error to omit in the charge "that the jury are the judges of the weight of the evidence and credibility of the witnesses." For the reasons mentioned above, the judgment should be reversed.

#### ON MOTION FOR REHEARING.

(Dec. 7, 1889.)

WILLSON, J. After considering the very able arguments and briefs of counsel for defendant on this motion, and after a careful and thorough re-examination and reconsideration of the record, a majority of the court adhere to their views expressed in their former opinion, and hold that there is no error in the conviction for which it should be set aside. It would be unprofitable, we think, to enter upon an elaborate discussion of the questions determined in our former opinion. We will, however, add some further remarks in support of our views heretofore stated.

1. As to the definition of "malice" given in the charge of the court. It was well said by Judge CLARK in *Harris v. State*, 8 Tex. App. 90, that "a perfectly exact and satisfactory definition of that term, ['malice,'] signifying its legal acceptation in a form at once clear and concise, has been often attempted, but with no very satisfactory permanent result. The differing minds of different courts have employed different terms and language in an attempt to convey substantially the same meaning; and, while a general similarity is apparent in all the definitions, the legal mind has not yet crystalized the substance of the term into a terse sentence, readily comprehensible by the average juror." And it was held that, while the definition of "malice" contained in the charge given in that case was not exact to a critical nicety, it was substantially sufficient, as it enabled the jury to distinguish the legal meaning of the term in contradistinction to its ordinary import. In the subsequent case of *McKinney v. State*, Id. 626, the definition before the court was precisely the one objected to in this case, and the objection urged to it was the same; that is, that it omitted the word "extenuation" after the words "justification or excuse." This court held the definition

sufficient, remarking that it was a fuller definition than the one held sufficient in the *Harris* Case, supra. In *Lander v. State*, 12 Tex. 462, a definition of "malice," given by Russell in his work on Crimes, is cited with approval. It is as follows: "'Malice,' in its legal sense, denotes a wrongful act done intentionally, without just cause or excuse." This definition is substantially the same as was given in this case. We do not claim that the definition of "malice" given in this case is critically correct and absolutely perfect. What we hold is that it is substantially correct and sufficient; that it enabled the jury to distinguish between the legal and common signification of the term; and this was all that the law requires in a definition of "malice" in such case. The definition of "malice" given in *McCoy v. State*, 25 Tex. 33, and approved by this court in *Tooney v. State*, 5 Tex. App. 163, is, we freely admit, a more complete one than was given in this case.

Again, in considering the sufficiency of the definition of "malice," we should look to other portions of the charge explaining malice. Immediately following the definition objected to is an explanation of "express malice," as follows: "Express malice aforethought is where one, with a sedate and deliberate mind and formed design, unlawfully kills another," etc. It required this kind of malice to constitute murder in the first degree, and this explanation of "express malice" in and of itself fully expresses the legal meaning of "malice;" for if the killing was unlawful, and if the slayer committed the act deliberately, and in pursuance of a formed design to kill, the killing would be upon malice. There could be neither justification, excuse, nor extenuation for the act.

2. As to the charge on *alibi*, as stated in our former opinion, it is substantially the same as one approved by this court in *Walker v. State*, 6 Tex. App. 576. We are unable to appreciate the soundness of the objections made to this charge. It is urged that the charge is wrong because it requires the jury to believe, in order to acquit the defendant, that he was not and "could not" have been the person who killed the deceased. The use of the words "could not," it is urged, means, in effect, that it was impossible for the defendant to have committed the murder. We do not think this is a fair criticism upon the charge, or that a jury would give to it such meaning as counsel for defendant suggest might be given to it. The charge upon this matter should be read and considered in its entirety, and when this is done it is not obnoxious to the criticisms made upon it. Following the sentence in which the words "could not" occur, the charge proceeds: "Now, if the evidence raises in your minds a reasonable doubt as to the presence of the defendant at the place where the deceased was killed, (if killed,) at the time of such killing, then you should acquit the defendant." It seems to us that no jury of ordinary intelligence

would understand from this charge that it devolved upon the defendant to prove that it was impossible for him to have been present at the time and place of the killing, or that the burden of proving an *alibi* rested upon the defendant. We think the charge states the law plainly and correctly, and that it could not reasonably have been misunderstood by the jury. The charge is not as unfavorable to the defendant as many authorities would justify. It is held by good authority that while an *alibi* need not be proved to that extent that it absolutely precludes the possibility of the defendant's presence at the time and place of the commission of the offense, yet the range of the evidence must be such as reasonably to exclude the possibility of such presence. 1 Amer. & Eng. Cyclop. Law, 456. But the charge is more liberal to the defendant, as is also the rule declared by the decisions in this state. It is only required by said charge, and by the rule of law of this state, that the jury should, from all the evidence in the case, entertain a reasonable doubt of the presence of the defendant at the time and place of the commission of the offense. If the jury have such reasonable doubt, it entitles the defendant to an acquittal, although the evidence may not exclude reasonably the possibility of such presence. In addition to the authorities heretofore cited relating to *alibi*, we refer to an able and exhaustive article entitled "Cautionary Instructions in Criminal Cases," written by Seymour D. Thompson, and published in 10 Crim. Law Mag. 179, § 19 et seq. That article cites and reviews many decisions relating to *alibi*, and states the rules deducible from them, and those rules are in accord with our views, as expressed in this and our former opinion in this case.

An objection not heretofore made to the charge is presented by counsel for defendant on this motion. It is to that portion of the explanation of express malice which states that a sedate and deliberate mind and formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, etc. The objection made is, in effect, that this portion of the charge is upon the weight of evidence, and virtually tells the jury that express malice is proved when any of the conditions enumerated in the charge are shown to have existed. This precise charge and objection thereto have heretofore been before this court, and determined adversely to the objection, and we think correctly. Sharpe v. State, 17 Tex. App. 486. It is again urged on this motion that there was error in the admission of the testimony of the witness Barbee touching the declarations to him of the witness Judy James. A majority of the court still entertain the opinion that this testimony was, under the circumstances, properly admitted. Barbee was asked by defendant's counsel if he did not say to Judy James that her husband's neck was in danger if she did not tell what she knew about the murder. Barbee answered that he told her

something to that effect. Counsel for the state thereupon asked Barbee to state what Judy James said to him in reply to what he had told her, and, over the objection of defendant that her reply would be hearsay evidence, the court permitted Barbee to testify to the effect that she said in reply that she was afraid to tell what she knew about the murder, in the crowd, because Mr. Gallaher was one of the men; that she heard the shots in the prairie at the time of the murder, etc. This testimony was held admissible by the trial judge upon the ground that it was drawn out by defendant's counsel on cross-examination of the witness Barbee on the same subject. It is a provision of our statute that, when part of a conversation is given in evidence by one party, the whole on the same subject may be inquired into by the other party. Code Crim. Proc. art 751. There was a conversation between the witness Barbee and the witness Judy James upon the subject of the murder, and the knowledge of facts possessed by Judy James relating to the murder. Counsel for defendant, in cross-examining Barbee, put in evidence a part of that conversation; that is, what he said to Judy James. The purpose of this was to affect the credibility of Judy James' testimony. It could subserve no other purpose. A part of the conversation having been put in evidence by the defendant, the state was entitled to have the whole thereof upon the same subject put in evidence. Judy James' reply to what Barbee had said to her was a part of the same conversation, and was upon the same subject,—that is, the murder, and her knowledge of it; and, further, her reply explained her reason for not sooner divulging the facts of the transaction within her knowledge. A majority of the court entertain no doubt of the admissibility of said testimony. In this connection we will say, further, that, this testimony having been drawn out by the defendant with the purpose of impeaching the credibility of the witness Judy James, it was not material error to omit an instruction to the jury as to the purpose of said testimony, directing that it could be considered for that purpose only. The charge was not excepted to because of such omission, nor was an instruction upon this point requested. If the admission of said testimony was prejudicial to the defendant, he cannot complain, because he drew it out, and is alone responsible for its being in the case.

With regard to the proposed testimony of the witness Pearson, a majority of the court still hold that the trial judge did not err in his rulings. Said witness was permitted to testify to the facts connected with the land litigation between defendant and deceased in so far as said facts were pertinent and competent evidence. It was not competent for any purpose, we think, to prove by said witness the advice he gave as an attorney to the defendant in relation to the said litigation, or the defendant's opinion of his legal rights in said litigation, or the advice given by the

judge and others to the deceased to accept a compromise offered her by Gallaher, etc. It seems to us that all the matters sought to be elicited by the questions which the court would not permit to be answered are incompetent as evidence for any purpose. They consist of the defendant's acts and opinions prior to the murder; of the opinion and advice of his counsel; and of the acts, opinions, and advice of others with reference to the land litigation. It is contended by counsel for defendant that this testimony was admissible, as tending to show an absence of motive on the part of the defendant to commit the murder. We do not deny that it was the right of defendant to prove any fact or circumstance which would tend to show absence of motive on his part, but such proof must be made by legal, competent evidence. Acts and declarations of the defendant, not being part of the *res gestæ*, are not competent evidence in his behalf. Nor can we see upon what principle the opinions and advice of his counsel in the land suit could be held admissible evidence in his behalf. Suppose his attorney had advised him that he would certainly be defeated in the suit, and would lose the land, would such testimony be admissible in behalf of the state? Certainly not. Then why should it be admitted in his behalf? We know of no rule or precedent which would admit such testimony. As to the advice given to the deceased to accept the compromise offered her by the defendant, and her refusal to accept such offer, that was matter wholly irrelevant, and, if it could have any effect whatever, that effect would be prejudicial to the defendant, because it would show cause for malice against her on the part of the defendant.

It is insisted by counsel for defendant that the conviction should be set aside upon their twenty-fourth assignment of error, which is as follows: "Because the court erred in permitting, to the prejudice of defendant's rights, the counsel for the state, while re-examining the witness Judy James, to cause the defendant, James Gallaher, to stand up before the jury, and put on his head a broad-brimmed hat, and put over his face a handkerchief, and then, thus exhibiting the defendant before the jury, to ask Judy James if that was the way Gallaher looked at the time she saw him on the night of the murder, and in permitting Judy James to testify 'that was exactly the way he looked;' thus permitting and requiring the defendant to testify against himself, to the material injury and prejudice of his rights." This matter was not discussed in the former opinions delivered in this case, for the reason that we did not consider that it was presented properly; that is, by bill of exceptions. We are still of the opinion that, under the practice in this state, the matter is of that character which should be presented by bill of exceptions. We will, however, in deference to the earnest insistence of counsel for the defendant, give our views upon the question. We do not under-

stand that the defendant was "compelled to give evidence against himself." He was not required by the court to submit to the disguise and exhibition of himself before the jury. There was no compulsion used against him. He made no objection whatever to the disguise and exhibition of which he now complains. For aught that appears, he not only consented to it, but may have been desirous of the test,—willing to take the chances of it. He may have believed that the witness Judy James would fail to identify him when in such disguise, and, so believing, may have been willing and anxious to have the test applied. How can it be said, then, that he was compelled to give evidence against himself? If he had objected to such test, and the court had required him to undergo it, a very different question would have been presented. Suppose counsel for the state had placed the defendant upon the witness stand, and had him sworn to give evidence in the case, and, without objection on the part of the defendant, he proceeded to give evidence against himself, could he be heard to complain that he had been compelled to give evidence against himself? We think not. It was the privilege of the defendant to not give evidence against himself, but it was within his power, and was his right, to waive such privilege, and, having done so, he cannot complain. But it is contended that the mere proposal made by counsel for the state to make the test was error which should reverse the judgment. There would be strength in this proposition if the defendant had interposed any objection to the proposal. He did not object, but acceded to the proposal, and voluntarily underwent the experiment; thus waiving, we think, his privilege, whatever that privilege may have been. We have found no authority, and have been referred to none, which holds that a defendant may not voluntarily give evidence against himself, or may not accede to a proposal to give evidence against himself. If, in this case, the defendant had declined to be disguised and exhibited, the court would doubtless have protected him in his constitutional right to be exempted from giving evidence against himself. As the matter is presented to us, and as we understand it from the record, no error is made apparent of which defendant can complain.

As to the sufficiency of the evidence to sustain the conviction, we have heretofore expressed our conclusion, and a re-examination of the facts has not changed that conclusion. The witness Judy James identified the defendant as one of the three parties who took the deceased from the house on the night of the murder. There can be no question but that the murder was committed by those three parties. Conceding that this conviction rests alone upon the testimony of Judy James, that testimony supports the conviction. It was the exclusive province of the jury to pass upon her credibility, and this court cannot question the truth of testimony when it has been credited by the jury and

judge before whom it was given. There is, it is true, much evidence which tends to show that the defendant was not present at the time and place of the murder. We cannot say that the conviction is unsupported by, contrary to, or against the weight of the evidence. The motion for rehearing is overruled.

HURT, J., (*dissenting*.) I desire to add some observations to what I have written upon two questions, as well as to notice some authorities. And, first, as to the charge upon *alibi*. In support of my views of this charge, I cited no authorities in my original opinion, because I believed none were required. In that opinion I stated that the charge was wrong, because it is a question of probabilities. Is this a correct proposition? If it is, then evidently the charge is incorrect, and was calculated to injure the cause of appellant; because the evidence on *alibi*, if true, does not show that it was impossible for the appellant to have been present, and this was urged by counsel for the state in argument before this court at Galveston. But whether injurious or not, being excepted to at the time, we must reverse; and we have only alluded to the fact that counsel for the state urged that it was possible for appellant to have been present in order to emphasize the error. Let us return to the position above assumed. Must the proof show that the accused was not and could not have been present, or must it, under all the facts and circumstances in evidence, render it improbable; that is, so improbable as to raise a reasonable doubt of the truth of the state's case? This last position must be sound, or *alibi* is a separate and distinct defense, with the burden of its proof resting upon the accused. This is the rule in some states, but not in this. However, I do not desire to extend the discussion of this question, but to support my views by the following authorities: In *Galloway v. State*, 29 Ind. 447, the court say: "True, there is nothing in the averments to exclude the idea that he might have procured a conveyance after he separated from Galloway, but the time which would necessarily be consumed in doing so would be such as to render it *improbable* that he could have been present at the robbery." (*Italics ours*.) In exact accord with this case are the following: *Stuart v. People*, 42 Mich. 255, 8 N. W. Rep. 863; *Adams v. State*, 42 Ind. 374. In *Kaufman v. State*, 49 Ind. 251, there being proof tending to establish *alibi*, the court gave the following charge: "The defendant having introduced evidence for the purpose of establishing an *alibi*, or, in other words, to show that he was not guilty for the reason that he was at a different place, if he failed to cover the whole time necessary when the crime may have been committed, then you would be warranted in paying no attention to such testimony." Now, if the charge in the case before us is correct, then it follows inevitably that the above charge was correct; for, if the

proof of *alibi* must tend to show that it was impossible for the accused to have been present at the place of the crime, the evidence of *alibi*, failing to cover the whole time, is irrelevant, and should have been excluded. But what said the court to the charge in the Kaufman Case? BIDDLE, J., says: "As a rule of law, this instruction is erroneous. An *alibi* is a legitimate defense, and, if the evidence touching it was sufficient to raise a reasonable doubt of the appellant's guilt in the minds of the jury, it should have been considered, although the *alibi* did not cover the whole time during which the crime was committed." Citing *French v. State*, 12 Ind. 670; *Adams v. State*, 42 Ind. 373; and *Binns v. State*, 46 Ind. 311. Additional authorities could be cited, but I deem these sufficient to establish that the proposition is perfectly sound, to wit, that, in view of all the facts and circumstances in evidence, the proof of *alibi* must be such only as to render it so improbable that the accused was present as to raise a reasonable doubt of the truth of the state's case.

But it is replied that the court instructed the jury that "if the evidence raises in your minds a reasonable doubt as to the presence of the defendant at the place where the deceased was killed, at the time of such killing, then you should acquit the defendant." This is true. But by the first part of the instruction (the objectionable part) "*alibi*" is defined so as to render it unavailable to the defendant, unless the proof thereof makes it impossible for him to be present at the homicide; hence, as is so well said by counsel for appellant, a reasonable doubt as to presence, predicated on this definition, is a reasonable doubt as to the character of presence defined; that is, the presence referred to, and none other, — a possible presence, the correlative of an impossibility of presence. Let us look at this subject in a practicable light. The jury are told, in effect, that unless the proof of *alibi* shows that appellant could not have been present, then such proof does not show an *alibi*. Now, then, they are told that if they have a reasonable doubt of presence arising from evidence they should acquit. The jury take both paragraphs under consideration. They inquire, first, what must the proof show in support of this defense? *Answer*. That it was impossible for defendant to have been present. Does it do this? It does not. What shall we do with this defense? Ignore it, because he might have been present. Now, this conclusion and disposition of the appellant's defense, so called, is properly justified by their instructions. But a juror suggests that "we are instructed that if we have a doubt of the defendant's presence, to acquit." "That is true," another juror replies, "but you must agree with us that the proof of *alibi* fails to show that it was impossible for him to be present, and, if this is so, there is no *alibi* in the case, because his honor, the judge, thus defines an *alibi*." To this it is replied: "That is true; but what about the doubt?" It is answered: "We have not reached the



doubt yet, because we have no *alibi*; the proof failing to show that it was impossible for defendant to be present." Another juror enters the discussion, and suggests that "we should construe these conflicting clauses together, and obey the whole instruction upon this point." Now, to do this, I say, would be impossible. Why? Because if *alibi* is an impossible presence, and the proof fails to show this, it is not in the case. If the jury should find from the evidence that it was not impossible for defendant to have been present, the reasonable doubt as to this defense would not be involved, for there is no *alibi* in the case. By this, it is confidently believed, it is demonstrated that the two clauses in the charge on *alibi* are in direct conflict, and, this being so, we cannot tell which governed the jury in their finding upon this so-called defense of *alibi*. Now, then, what is the well-settled rule of this court under such a state of the charge? If objected to at the time, a reversal follows as of course. If not objected to, we look to the whole record, and, injury probably resulting, the case is reversed. I will not stop to cite authority in support of these propositions, for this court has uniformly so held.

My Brother WILLSON in his original opinion says of the charge on *alibi*: "It is almost a literal, and is a substantial, copy of the one approved by this court in *Walker v. State*, 6 Tex. App. 576. It has been approved by this court in numerous subsequent unreported cases." In the *Walker Case* there was no objection reserved to the charge. The objection to the charge was that it was not sufficiently full, failing to explain the full meaning and legal effect of a defense of that kind. Judge WINKLER, speaking for the court, simply says: "The charge objected to comes up to the requirements of a charge on *alibi* as laid down in *Boothe's Case*, [4 Tex. App. 202,] especially when read in connection with what follows the paragraph complained of." My objection to the charge is not that it was too meager, but that it states an incorrect proposition. This objection was not urged, and hence was not considered, by the court, nor was it presented in the *Boothe Case*. But let us concede for argument that, after full discussion, such a charge was held sound. While this might be persuasive, still, if incorrect, we should not be governed by it, and so perpetuate the error. That it is not correct to my mind is evident. That in cases unreported we have affirmed judgments in which the record contained such a charge is true. But this could not be held an approval, unless there has been objections to the charge at the time questioning its correctness upon the grounds now urged. If such be an approval, we have approved in the same way charges which were absurd, foolish, and against every principle of law. In the opinion on this motion my Brother WILLSON says: "The charge (upon *alibi*) is not as unfavorable to the defendant as many authorities would justify," citing authorities. This is an absolute fact,

and a hundred cases, it may be, can be cited in support of its truth. I will give a case which fully supports him,—a case well considered, the opinion being written by a profound judge. In *State v. Ward*, 17 Atl. Rep. 483, TAFT, J., speaking for the court, says: "Exception was taken to the charge on the subject of *alibi*. The jury were told that if the proof of it did not outweigh the proof that he was at the place when the crime was committed it was not sufficient. In this statement there was no error." Here we have a charge not so favorable to the defendant as the one in this case.

Again, we have this proposition: "It is a defense resting on extraneous facts not arising out of the *res gesta*, and the onus of proving it devolves upon the respondent, who alleges it." Is this law in this state? I think not. The judge proceeds: "The burden being upon him, some courts hold that the evidence must exclude the possibility of the prisoner's having been at the scene of the crime so as to prove the *alibi* beyond a reasonable doubt; others, that it must preponderate or outweigh that for the state. The latter was the rule adopted in the court below, and we think correctly." Here we have law very unfavorable for the defendant; but who will assert that such are principles and rules of law in this state? Continuing the opinion, the judge says: "Had the above been all the charge upon *alibi* evidence, there would be just grounds of complaint." What! Complain that the law has been correctly charged? This is strange, unless the correct law needs qualification or modification. Now, here we have the qualification: "For, while the evidence might not have been sufficient to establish an *alibi*, it was not, therefore, to be discarded, laid out of the case, and not considered by the jury, which has been the error in many of the American cases." It is evident, to a logical mind, that this qualification is an absolute retraction and repudiation of the rule which requires the accused to establish his *alibi* by a preponderance of the testimony, which rule is approved by the court and held to be sound.

The opinion proceeds: "After this instruction it was the duty of the court to go further, and to tell the jury that, if the *alibi* was not so established, evidence of it was not to be excluded from the case, but that it should be considered with the other evidence; and if upon the whole, including that in relation to the *alibi*, there was a reasonable doubt of the respondent's guilt, he was entitled to an acquittal." Now, these propositions are diametrically opposed the one to the other. Let us place them side by side. *First*. The accused must prove his *alibi* by a preponderance of evidence. *Second*. Though the evidence does not preponderate in favor of his *alibi*, yet, if it raises a reasonable doubt of his guilt when considered in connection with the other evidence, he should be acquitted. Now, I have this question to propound: If evidence of less probative force

than that required to outweigh the evidence for the state (showing presence) will be sufficient to raise a doubt of guilt, why require the *alibi* to be established by proof outweighing that for the state? In passing, I desire to say that, when the burden is on the accused to prove a fact, the doctrine of reasonable doubt cannot possibly apply in his favor, unless in every case proof of such fact, to create the doubt, preponderates in its favor; for, if proof of less force will be permitted to create the doubt, the burden is not discharged by him and hence is not on him. It would be a rare thing to find an opinion containing (on one question) more inconsistencies than this in the Ward Case. I have referred to it simply for the purpose of supporting Judge WILLSON's observation to the effect that authorities could be found much more unfavorable to the accused than the rule stated in this case. But they are not authority in this state.

I desire now to make some additional observations on the question presented by the fifteenth assignment of error, relating to the testimony of Barbee. In response to questions propounded by counsel for defendant on cross-examination,—the object of which questions being evidently to show the *animus* of the witness Barbee, and also to show an inducement or reason for Judy James' testimony against the defendant,—Barbee, over the objection of defendant, was permitted to state that Judy James stated to him that defendant was one of the men who took the deceased from her house, etc. As I have said in my original opinion, the statement of Judy James was not admissible. Judge WILLSON, in his original opinion, contends that the statement was a part of a conversation between Barbee and Judy, and that it was drawn out by counsel for the defendant. The questions were not calculated nor intended to put in evidence this statement. No conversation was sought or elicited by the questions. What Barbee said and did to Judy was sought and elicited, and nothing more. But it is contended that the statement of Judy was admissible under the statute, (Code Crim. Proc. art. 751,) which reads: "When part of an act, declaration, or conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other, as, when a letter is read, all other letters on the same subject between the same parties may be given; and, when a detailed act, declaration, conversation, or writing is given in evidence, any other act, declaration, or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence." Now, if the defendant had given in evidence a part of the declarations and acts of Barbee, then the state would have been entitled (if it was not complete) to the whole of the act or declaration; or, if part of a conversation between Barbee and Judy James had been given in evidence, the state would have been entitled to all of the conversation; or, if the declarations or acts of Barbee could

not be understood without Judy's replies, then they may have been admissible. If a detailed act, declaration, or conversation is given in evidence, any other act, declaration, or conversation which is necessary to make it fully understood is admissible. Barbee was perfectly understood. There is no contention on this point. Hence this provision does not apply. If Judy's statement was admissible, it was admissible by virtue of the statute, and it was admissible whether she was a witness in the case or not, and whether she was living or dead at the time of the trial. I now propose to give an illustration which will demonstrate the fallacy of the position assumed to sustain the competency of this statement. A. is on trial for theft. B. is introduced as a witness for A. He swears to facts which, if true, and are believed by the jury, will defeat the prosecution. To show his *animus* and corruption, the state asks him if he did not approach Mr. C., and attempt to persuade him to swear to certain facts establishing an *alibi*; if he did not propose to give C. \$500 to swear to these facts. B. answers that he did, whereupon counsel for the defendant asks him what reply C. made. B. answers that C. stated that he knew the time when the property was taken; that A. was not the thief; that A. was not at the place of the theft; that A. was an honest man; and that the witnesses for the prosecution were perjured scoundrels, unworthy of belief, etc. Now, as before stated, if Judy James' statement was competent evidence, it was so by virtue of the statute, and in fact could be used to prove the guilt of defendant because competent evidence. This being the case, the fact that she testified in the case has nothing whatever to do with the question; for if, indeed, the appellant introduced the conversation, declaration, or acts of Judy, he is bound by them. But did he introduce them? Evidently he did not. But take the case illustrated. Will it be contended that the statements of C. could be used against the state as evidence of the facts there stated? By no means. The foregoing is all I desire to add to what I have already said upon this subject. On the other branch of this question I desire to say that no case or authority has been found authorizing the introduction of similar statements, if the statements were made after the disturbing influence was applied. All the authorities, so far as my research extends, hold that, when admissible at all, they must have been made prior to the application of the disturbing influences. 2 Phil. Ev. 973, and note on same page; 1 Greenl. Ev. § 469. I am still of the opinion that the judgment in this case should be reversed, and that the motion should be granted. Motion overruled.

THOMAS *et al.* v. STATE.

(Court of Appeals of Texas. Dec. 7, 1889.)

FORNICATION—LIVING TOGETHER.

On an indictment for fornication, alleging that the parties "lived together" in fornication, ev-

idence that the male defendant was a porter on a train from M. to T.; that he lived in M., where he rented a room, kept his clothes, and had his washing done, boarded at a hotel, and paid a street tax; but that he staid in T. during the time his train laid over there, which was from 9:20 P. M. to 6 A. M. every night; and that defendants had habitual carnal intercourse with each other at T., without living together,—is not sufficient to sustain the charge.

Appeal from Smith county court; B. B. BEARD, Judge.

*Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. Appellants were both convicted in the court below upon a joint indictment charging them with fornication, by living together and having carnal intercourse with each other. As in adultery, so, under our statute, fornication may be committed in one of two modes: (1) By living together and having carnal intercourse with each other; (2) by habitual carnal intercourse with each other without living together,—the only distinction between the two offenses being that the offense of adultery is where either of the parties is married, while in fornication both are unmarried. Pen. Code, arts. 333, 337. In construing the statute with regard to adultery, this court has had occasion to interpret the meaning of the term "living together," and the interpretation given was that "the parties must dwell or reside together; abide together in the same habitation as a common or joint residing place." *Bird v. State*, 27 Tex. App. 635, 11 S. W. Rep. 641; *Mitten v. State*, 24 Tex. App. 346, 6 S. W. Rep. 196. The evidence showed that the defendant Thomas was a porter on the railroad passenger train from Mineola to Troupe; that he lived in Mineola, where he rented a room, kept his clothes, and had his washing done; that he boarded at a hotel in Mineola,—that is, took his meals there,—and paid a street tax at Mineola. He only staid in Troupe during the time his train laid over there, which was from 9:20 P. M. to 6 A. M. each night. It is shown abundantly by the evidence, we think, that the parties had "habitual carnal intercourse with each other, without living together," at Troupe, and, if such had been the charge against them in the indictment, it would have been fully sustained by the evidence. But the evidence is not sufficient to sustain the charge that the parties lived together; that is, resided and abided together in the same habitation at Troupe. The judgment is reversed, and the cause remanded.

#### *In re ANGUS.*

(Court of Appeals of Texas. Nov. 30, 1889.)

**HABEAS CORPUS—HEARING BY JUDGE OF ANOTHER DISTRICT.**

1. Rev. St. Tex. art. 1124, providing that any judge of the district court may hold court for any other district judge, gives a district judge authority to hear a *habeas corpus* case for, and at the request of, the judge of another district, who has absented himself from the district after issuing the writ.

2. Code Crim. Proc. Tex. art. 187, providing that after indictment found a writ of *habeas corpus* must be made returnable in the county where the offense has been committed, does not prevent a writ issued from one district court of a county which is divided into two districts from being returned to the judge of the other district, when the judge of the former has requested the latter to hear the case for him, and has absented himself from the district.

Appeal from district court, Dallas county; C. F. TUCKER, Judge.

*Kearby, McCoy & Hayter and Crawford & Crawford*, for relator. *W. L. Davidson*, *Asst. Atty. Gen.*, for the State.

HURT, J. This record presents the following facts: S. R. Johnson and Thomas Angus were indicted by the grand jury of Dallas county, in separate bills, for the murder of Charles Bradley, in Dallas county, on January 16, 1889. The bills of indictment were returned into, and filed in, the district court of Dallas county on January 19, 1889; and on the same day *capiases* were issued, and Johnson and Angus were arrested, and placed in jail in said county. On the 6th day of July, 1889, Hon. CHARLES FRED. TUCKER, who had been appointed, by the governor, judge of the forty-fourth district, took the oath of office, and caused the same, with his commission, to be entered in the minutes of of the forty-fourth district court. When the act of the legislature creating the forty-fourth judicial district went into effect, the clerk of the district court of Dallas county, in pursuance of said act, made up a docket for each court, to-wit, for the fourteenth district court and for the forty-fourth, or new, district court. The Angus Case was placed on the docket of the fourteenth district, and the Johnson Case on the forty-fourth. The apportionment of the cases was completed prior to the 19th day of July, 1889. On the 20th day of June, 1889, Johnson applied for, and was granted, a writ of *habeas corpus* by the Hon. R. E. BURKE, judge of the fourteenth district, returnable before him on the 12th of July. The hearing of the writ was postponed to July 31, 1889. On the 19th of July, Angus applied to the Hon. R. E. BURKE, for a writ of *habeas corpus*, which was granted, and made returnable before him, July 31, 1889, in chambers. A day or two after this writ was granted, the Hon. R. E. BURKE, by the advice of his physician, left Dallas county, for the health of Mrs. Burke, his wife. Before leaving, he requested Judge TUCKER, in the event he did not return in time to hear the case, to hear it for him. He did not return in time to hear it. On July 31, 1889, in chambers, Judge TUCKER heard both cases together, remanding Angus to custody without bail, and granting bail to Johnson. Judgments to this effect were entered; the record showing that Angus consented that Judge TUCKER should hear the case. Appellant excepted to the judgment of Judge TUCKER, gave notice of appeal, and we have before us what we shall

term the "Tucker Record." Believing that Judge TUCKER had no jurisdiction to hear and determine the case, Angus, on the 3d day of August, 1889, again applied to Judge BURKE for the writ. Its issuance was waived by the sheriff; and the case was heard on the 7th of October, 1889, in chambers. Judge BURKE, with all the evidence before him, refused to pass upon the question of Judge TUCKER's jurisdiction, giving his reasons, but remanded applicant to custody. The applicant appealed, and we have before us the Burke record.

It is not necessary for this court to determine whether Judge TUCKER had jurisdiction of the case, in order to determine whether the applicant is entitled to bail, (Ex parte Foster, 5 Tex. App. 625; Ex parte Rosson, 24 Tex. App. 226, 5 S. W. Rep. 666;) for, if Judge TUCKER had jurisdiction, we can revise his judgment, and if he had none, then Judge BURKE had, and his judgment is subject to revision. But, at the earnest request of counsel for the applicant, we will give our opinion upon the question of Judge TUCKER's jurisdiction in the Angus Case under the facts as set forth above.

The constitution of this state, art. 5, § 8, confers authority upon district judges to issue the writ of *habeas corpus* in felony cases. The authority to issue the writ has in this state been uniformly construed to carry with it the power—jurisdiction—to hear and determine the rights of the parties under the writ; that is, to try the right to bail, or right to be discharged. This being a felony case, a district judge has jurisdiction of the subject-matter anywhere in this state, unless limited by law. He can issue the writ to the officers of any county in this state; and he can, in chambers, try the writ in any county in this state, unless prohibited by law. Having jurisdiction of the subject-matter, had Judge TUCKER jurisdiction of the person of appellant? He had; for the simple, plain, and sufficient reason that appellant consented that the case be tried by him. We have, therefore, a case in which the judge has jurisdiction of the subject-matter and of the person. What further was needed for him to try the case? Article 137 of the Code of Criminal Procedure provides that after indictment found the writ must be made returnable in the county where the offense has been committed on account of which the applicant stands charged. Was this done in this case? It was. But counsel for appellant contends that, as Dallas county is divided into two districts, this will not do; that the writ must not only be returned in the county of the indictment, but it must be returned to the district court in which the indictment is pending. This proposition will not do, because the court may not be in session, and the applicant would frequently have to wait for the session. But counsel replies that then the writ must be returnable before the judge of the district in which the indictment is pending. It will be borne in mind that the

case was tried in chambers; that the district court of the fourteenth judicial district was not in session. The last proposition of counsel leads to this conclusion, *i. e.*, that no district judge or judge of the court of appeals can try the case, except the judge of the district court in which the indictment is pending. It would follow that all that the court of appeals, or a judge thereof, can do, after indictment found, is simply to issue the writ; that they have no power—authority—to hear it. This, we think, is not the law, because, as above observed, the right to issue carries with it the right to hear and determine. But counsel for appellant contend that their position is correct, relying upon article 138 of the Code of Criminal Procedure, which reads: "In all cases where a person is confined on a charge of felony, and indictment has been found against him, he may apply to the judge of the district court for the district in which he is indicted, or, if there be no judge within the district, then to the judge of any district whose residence is nearest to the court-house of the county in which the applicant is held in custody." We are of opinion that this is merely directory. Let us suppose that the judge of the district of the indictment is not absent, but is sick, or is the brother of the accused. Now, if the article is intended to control or limit the jurisdiction over the subject-matter, there would be no relief for the accused, unless he could procure the absence of the judge from the district. And here, again, he could get no relief from the court of appeals.

But a decision of these questions is not necessary, under the facts of this case, for two good reasons: (1) Judge BURKE was out of the district. But counsel may contend that Judge TUCKER could only issue the writ in the absence of Judge BURKE; that he could not hear it. This, to our minds, is absurd. It may be contended that, BURKE being absent, TUCKER, to obtain jurisdiction, must issue the writ himself, and make it returnable before him, (TUCKER.) We answer this by this proposition: BURKE being absent, if TUCKER could issue and hear the writ, he evidently could hear a writ which had been legally issued by BURKE. In support of this proposition, we refer to article 1124 of the Revised Statutes: "Any judge of the district court may hold courts for or with any other district judge, and the judges of the several district courts may exchange districts whenever they may deem it expedient to do so." If a district judge may hold a court for another judge, has he not the authority to hear a *habeas corpus* case for him at his request, the other judge being absent from the district? We will not discuss this proposition, deeming it too plain for discussion. We are of opinion that Judge TUCKER had jurisdiction of the subject-matter of this case; that he had jurisdiction of the person of the applicant; that the writ was returned to the proper county; and that jurisdiction of the subject-matter and the person confers juris-

diction over the procedure, fully and completely.

We are of opinion that there was no error committed upon the merits of the case; it being evident that appellant committed murder upon express malice. The judgment is affirmed.

**BROWN et al. v. STATE.**

(Court of Appeals of Texas. Nov. 30, 1889.)

**CRIMINAL LAW—RECOGNIZANCE.**

1. In *scire facias* issued to the sureties on a judgment *nisi*, rendered by the district court on a forfeited bail-bond, the writ alleged that defendant, "in a prosecution pending in the district court," entered into a bond, etc., conditioned to appear "before the said court \* \* \* to answer \* \* \* upon a charge by information before W. L. H., J. P., precinct No. 1, Ellis county, Texas, duly presented in said court, wherein \* \* \* defendant is charged with the offense of assault to murder, \* \* \* and whereas \* \* \* before said court, then in session for said Ellis county, said prosecution was called for trial, and the said J. L. B. failed to appear, \* \* \* and thereupon said bond was declared forfeited by said court, and it was ordered," etc. Held, that the judgment *nisi* in the district court does not support the allegations of the writ, which read as if the bond was forfeited and judgment *nisi* rendered in the justice's court, on a charge pending in that court.

2. Where the *scire facias* alleges that the bond was executed "in a certain prosecution pending in the district court," and the bond offered in support of the allegation is shown to have been taken in an examining court of a justice of the peace, the variance is fatal.

3. The allegation that the bond was executed "to answer upon a charge by information before W. L. H., J. P. of Ellis county, duly presented in said court," cannot be proved by a bond which was executed to answer before the district court to a charge of assault with intent to murder, as such crime, being a felony, could not be finally tried in a justice's court, and could not be tried in any court on information.

Appeal from district court, Ellis county; ANSON RAINEY, Judge.

Grace & Templeton, for appellants. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. This appeal is from a judgment final on a forfeited bail-bond. Brown, having been brought before a justice of the peace, sitting as an examining court, upon a charge of assault with intent to murder, waived an examination, and was required by said justice to enter into bond in the sum of \$1,000 for his appearance at the next term of the district court, to answer said charge. Brown executed said bond, with sureties, conditioned as the law requires, was discharged from custody, and the bond returned to the district court. This bond was forfeited, and judgment *nisi* rendered upon it. In the *scire facias* issued to the sureties the cause of action, as set forth in this writ of *scire facias* or citation, is, in effect, that defendant Brown, "in a certain prosecution pending in the district court, did enter into a bond with D. Mahoney, G. L. Adkisson, and D. B. Bullard as sureties, in the penal sum of one thousand dollars, conditioned that the said defendant should make his personal appearance before the said court on the 3d day of September,

1888, then and there to answer the state of Texas upon a charge by information before W. L. Harding, J. P., precinct No. 1, Ellis county, Texas, duly presented in said court, wherein J. L. Brown, the said defendant, is charged with the offense of assault to murder, and there remain from day to day, and from term to term, until discharged by law; and whereas, on, to-wit, the 24th day of September, 1888, before said court, then in session for said Ellis county, said prosecution was called for trial, and the said J. L. Brown wholly failed to appear and answer said accusation against him, and thereupon said bond was duly declared forfeited by said court, and it was ordered and adjudged and decreed by said court," etc. From the reading of this *scire facias* it would appear that the bond was forfeited and judgment *nisi* rendered in the justice court, and upon a charge pending by information in that court. If so, then the judgment *nisi* rendered by the district court would not sustain the allegations in the petition, or citation, which sub-serves the purposes of a petition. Again, the *scire facias* alleges that the bond was executed "in a certain prosecution pending in the district court." This allegation could not be proved by an appearance bond taken by, and entered into in an examining court of, a justice of the peace; and hence said bond was erroneously admitted in evidence over the objections of defendants, there being a fatal variance between it and the descriptive allegations in the citation. Again, the allegation that Brown had executed said bond in order "to answer the state of Texas upon a charge by information before W. L. Harding, J. P., precinct No. 1 of Ellis county, duly presented in said court," could not be proved by a bond which was executed to answer before the next term of the district court to a charge of assault with intent to murder. Such a crime could not be finally tried at all in a justice court, and it could not be tried in any court in this state upon "information," it being a felony.

The *scire facias* is fatally defective, and should have been quashed. There was unquestionably a fatal variance between the allegations and the proof introduced in evidence to sustain them. The judgment is reversed, and the cause remanded.

**AKIN v. STATE.**

(Court of Appeals of Texas. Nov. 27, 1889.)

**ASSAULT—INDICTMENT—CONTINUANCE—ABSENCE OF WITNESSES.**

1. An indictment may charge an aggravated and a common assault in the same count, as the former necessarily includes the latter.

2. On trial for an assault, the refusal of defendant's application for a continuance because of the absence of witnesses who would testify that the person assaulted had made threats against defendant's life, which had been communicated by the witnesses to defendant before the alleged assault, is ground for a new trial, in view of testimony adduced at the trial that defendant acted in self-defense.

Appeal from Kaufman county court; JOHN VESSEY, Judge.

James Akin was tried under an indictment charging him in one count with the commission of a simple and an aggravated assault. He was convicted of simple assault, and appeals. The state's proof shows that as Newton, the injured person, and three others, were passing defendant's house, about 13 miles from the town of Kaufman, about dusk, on the day alleged, one Will Daugherty called to them: "Hello, boys! Where are you going?" Newton replied: "None of your damned business! I told you never to speak to me after swearing lies on me." Daugherty replied: "You needn't get your back up about it?" Newton said to him: "If you want anything out of me, come out here." Daugherty replied: "I always come when called." Daugherty then called to the house for defendant. Defendant came towards the gate, and then turned back towards the house. Daugherty said to him: "I have got it." Defendant then said to Daugherty: "Give me that pistol." He got the pistol from Daugherty, walked to the gate with it in his hand, and said to Newton: "Now, you God d—d red-headed son of a bitch! you leave, or I will kill you." Newton and his three companions left. Nothing prevented defendant from shooting. Newton and Daugherty cursed each other boisterously before defendant came out of the house. Defendant testified that Jack Daugherty came to the house, and told him that there was a row at the gate. Just as he started out of the house, witness heard Will Daugherty call him. When he had gone a few steps towards the gate, his wife called him, and he started back; but, the cursing continuing, he turned again, and went to the gate. He got the pistol from Will Daugherty, and said to Newton: "Now, you d—d, red-headed scoundrell you leave here." Newton left. Bad feeling had existed between witness and the Daughertys, on one side, and Newton, on the other, since Newton's indictment for fence-cutting. When witness reached the gate, Newton was off the horse, and was approaching the gate. He told Newton that if he came into the yard he would kill him. The absent testimony, as set out in the application for continuance, was to the effect that, subsequent to his indictment for fence-cutting, Newton had declared his purpose to "make it hot for the defendant and the Daughertys, with his shotgun." This threat was communicated to defendant by the witnesses.

Woods & Cunningham, for appellant.  
Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. On a previous day of the present term, we affirmed the conviction in this case.<sup>1</sup> In then passing upon the case there was no statement of facts in the record which we could consider, because the state-

ment found in the record had been filed after the adjournment of the term at which the conviction was had; and there was nothing in the record to show that time had been granted by the court within which a statement might be filed after adjournment. It is now made to appear, on a motion for rehearing, that an order was made and entered by the court granting 10 days after adjournment of said court in which to prepare and file a statement of facts, and the statement in the record was filed within that time. Having examined and considered said statement of facts, we conclude that a rehearing should be granted, and the cause is reinstated; and we will now proceed to determine the cause upon the whole record.

It is not a good objection to an indictment that it charges two or more offenses in the same count when one of said offenses necessarily implies the other, as, in this case, an aggravated and a common assault; the former necessarily including the latter. *State v. Edmondson*, 43 Tex. 162; *State v. Randle*, 41 Tex. 292.

We have found no error in the charge of the court. It is full, fair, and correct, presenting every phase of the case made by the evidence; and, in so far as the requested instructions are correct, they were embraced substantially in the charge given.

In connection with the issue of self-defense, the testimony of the absent witnesses, Crow and Brooks, as to threats made by Newton, the alleged assaulted party, against the life of defendant, and the communication of such threats to defendant prior to the difficulty, was, we think, material, and probably true. Defendant applied for a continuance because of the absence of said witnesses, showing diligence, etc., which application was refused. In view of the testimony adduced on the trial, we think the court erred in not granting the defendant a new trial, because of the absence of said testimony; and for this error the judgment is reversed, and the cause remanded.

#### HARRIS v. STATE.

(Court of Appeals of Texas. Dec. 14, 1889.)

#### CORPUS DELICTI—CORROBORATION OF CONFESSION.

Defendant confessed that her child was born alive, and that she put it into a certain spring. There was corroborative evidence that it was born alive. There was also evidence that it was not killed by violence; but it was not shown that it was found in the spring, or that it was drowned. *Held*, that the corroborative evidence was not sufficient to prove the *corpus delicti*.

Appeal from district court, Walker county;  
N. G. KITTBRELL, Judge.

Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. Appellant has been convicted of the murder of her infant babe, and her punishment has been assessed at a life term in the penitentiary. We are of opinion that the evidence establishing the *corpus delicti* is not sufficient to sustain the judgment, in so

<sup>1</sup>No opinion.

far as the same is made to appear in the record here before us. To warrant a conviction it was necessary for the state to prove that the child was born alive; that it had an existence independent of the mother; and that afterwards its life was destroyed by the act, agency, or procurement of its mother, this defendant. *Wallace v. State*, 7 Tex. App. 570, 10 Tex. App. 255; *Sheppard v. State*, 17 Tex. App. 74. Defendant confessed that the child was born on Sunday night; that it was born alive; that she put it into Dr. Baldwin's spring; and that it was alive when she put it in the spring. The child was found the following Wednesday. Now, if the defendant's confessions were sufficient by themselves, perhaps we might hold that the *corpus delicti* had been sufficiently proved. These, however, in and of themselves, are not sufficient. The *corpus delicti* consists not merely of an objective crime, but of the defendant's agency of the crime; and it is well settled that, unless the *corpus delicti* in both these respects is proved, a confession is not by itself enough to sustain a conviction. It must be corroborated. This can seldom be done by direct or positive testimony, but it may as well be shown by circumstantial evidence. *Willard v. State*, 27 Tex. App. 386, 11 S. W. Rep. 453. Now, what was the corroboration in this case? The doctor who testified as an expert says: "I cannot say positively whether the child was ever alive, or whether it had ever breathed." He dissected the child's head, and found that the skull had not been fractured. He took out the lung, and applied the hydrostatic test, and found air in it,—the usually accepted test that it had breathed. This was sufficient corroboration as to the fact that the child was born alive. Concede that the child had been born alive. Was it killed, or was it drowned? Evidently the doctor does not think it was killed by violence. As to the chances and probabilities that it had been drowned, he does not say one word. Why did not he make an examination, and give his opinion as to the fact of drowning? What evidence of drowning is there outside the confession? Was the child found in Dr. Baldwin's spring? If so, who found it there, and under what circumstances? Was Dr. Baldwin's spring of sufficient depth to drown the child? Was the spring in a public or secluded place? All these facts might have been testified to, and yet the record contains no such evidence. The first it discloses of the body is that somebody had found it, and it was under a box near the spring. Who found it in and took it out of the spring? Before we are asked to sanction so serious a verdict and judgment, even on the confession of a defendant, there ought to be furnished us some circumstances tending to corroborate that confession, since the law will not permit a conviction to stand alone upon the confession. In this case, because the evidence is insufficient to establish the *corpus delicti*, the judgment is reversed, and the cause is remanded.

## WILLIAMS v. STATE.

(Court of Appeals of Texas. Dec. 12, 1889.)

## PERJURY—WITNESS—CONVICTION.

1. Perjury may be predicated on a false answer of a witness that he had never been convicted of a felony, as such answer affects his credibility, and is therefore material to the issue, within Pen. Code Tex. art. 193.

2. A defendant who has been convicted of a felony is not incompetent to testify as a witness in his own behalf, under Code Crim. Proc. Tex. art. 780, subd. 5, which declares incompetent as witnesses "all persons who have been convicted of a felony, unless the convict has been pardoned," as Laws 1889, p. 87, declares that "any defendant in a criminal action shall be entitled to testify in his own behalf therein."

Appeal from district court, Brazos county; J. N. HENDERSON, Judge.

R. S. Gould, Jr., for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. Appellant, having been sworn as a witness in a certain case on trial in the district court of Brazos county, wherein one Charles King was being prosecuted under an indictment for rape, was asked whether or not he had been tried and convicted in the district court of Burleson county, and sent to the penitentiary for horse-theft. He swore that he had not. In the case before us, he has been indicted for perjury; and the matter upon which the perjury is assigned is his above statement that he had never been convicted and sent to the penitentiary, as aforesaid, for horse-theft. This indictment alleges that his statement was material to the issue on trial in the King Case, but does not set out his testimony in the King Case; nor does it allege the facts and circumstances going to show how the false statement so made by him became material to the issue in the King Case. A motion to quash the indictment for supposed insufficiency in this respect was overruled by the court.

Unquestionably, the matter assigned as perjury must be material to the issue on the trial of which the defendant was sworn. Our statute expressly declares that "the statement of any circumstance wholly immaterial to the matter in respect to which the declaration is made is not perjury." Pen. Code, art. 193. "But it is not necessary that the particular fact sworn to should be immediately material to the issue. \* \* \* The true test is whether the statement could have properly influenced the tribunal. If it tends to do so, \* \* \* it is material. The degree of materiality is of no importance; and if it be material as to a single fact it is sufficient." Willson, Crim. St. § 806. In *Washington v. State*, 22 Tex. App. 26, 3 S. W. Rep. 228, it is said: "It seems to be well settled that perjury may be assigned upon a false statement affecting only a collateral issue, as that of the credit of a witness." Citing 2 Bish. Crim. Law, §§ 1032-1038; 3 Greenl. Ev. § 195; 2 Whart. Crim. Law, § 1278. "A witness' answers on his own cross-examination are material, and may be assigned as perjury, however discursive they may be,



if they go to his credit." *Id.* 1279. The rule of the common law in regard to perjury is thus stated by Archbold: "Every question in cross-examination which goes to the witness' credit is material for this purpose." Archb. Crim. Pl. & Pr. 817, (Eng. Ed.) The same rule was declared by the 12 judges in *Reg. v. Gibbons*, 9 Cox Crim. Cas. 105. In *U. S. v. Landsberg*, 23 Fed. Rep. 585, it was held that where a party accused of crime testified on cross-examination, as a witness in his own behalf, that he had never been in prison, when the fact was that he had been, such false answer was material matter, and indictable for perjury. In that case it is said: "In *Reg. v. Lavey*, 3 Car. & K. 26, the accused, when a witness, had falsely sworn that she had never been tried in the central criminal court, and had never been in custody at the Thames police station. On her trial for perjury these statements were ruled to be material matter, and the conviction was sustained. In *Com. v. Bonner*, 97 Mass. 587, a witness had been asked 'if he had been in the house of correction for any crime.' Objection to the question on the ground that the record was the best evidence was waived, and the case turned upon the materiality of the question. The matter was held to be material. The present case is stronger, for here no objection whatever was interposed to the inquiry respecting the imprisonment of the accused. Having made no objection to the inquiry, and gained all the advantages to be secured by his false statement, it may perhaps be that it does not lie in his mouth now to say that his statement was not material. See *Reg. v. Gibbons*, *supra*; *Reg. v. Mullany*, *Leigh & C.* 593. But, however this may be, it is our opinion that the statement he made was material matter, within the meaning of the statute, because calculated to affect his credit as a witness." In its allegations as to materiality the indictment was sufficient, and defendant's motion to quash was properly overruled.

After the state had closed its testimony on the trial, the defendant proposed to take the stand as a witness, and testify in his own behalf. To this the prosecution objected because the evidence adduced in the case showed that defendant had been duly and legally convicted of a felony in this state, and had not been pardoned. This objection was sustained by the court, and defendant was not permitted to testify in his own behalf. Doubtless this ruling was predicated upon the fifth subdivision of article 730 of the Code of Criminal Procedure, which declares as incompetent to testify as witnesses "all persons who have been, or may be, convicted of felony in this state, or in any other jurisdiction, \* \* \* unless the convict has been legally pardoned for the crime of which he was convicted," etc. Subdivision 4 of said article 730, which declared a defendant incompetent to testify in his own case, has been expressly repealed by the act of April 4, 1889, (Gen. Laws 21st Leg. 37,) and this latter act provides that

"any defendant in a criminal action shall be entitled to testify in his own behalf therein." No distinction is made between convicts and those who have not been convicts. The language is "any defendant." The right and privilege is extended to all, without exception. Mr. Wharton says: "Prior conviction of infamous crime, however, does not incapacitate him, as the statute entitles him to testify as an arbitrary universal right." Citing *Newman v. People*, 63 Barb. 630; *Whart. Crim. Ev.* (9th Ed.) § 429. See, also, *Morgan v. State*, 2 Pickle, 472, 7 S. W. Rep. 456. Because the court erred in denying defendant his privilege and right to testify in his own behalf, the judgment is reversed, and the cause remanded.

#### SMITH v. STATE.

(Court of Appeals of Texas. Dec. 18, 1899.)

HOMICIDE—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE—ACCOMPLICES—NEWLY-DISCOVERED EVIDENCE.

1. It is only when the inculpatory evidence is wholly circumstantial that an instruction as to circumstantial evidence is necessary, and that is not the case where there is proof that defendant confessed to the crime.

2. To require or warrant an instruction on accomplice testimony, there must be some evidence of a witness' complicity in the crime for which defendant is being tried; mere knowledge on the part of a witness that defendant committed the crime does not call for such instruction.

3. There is no error in denying a motion for a new trial, on the ground of newly-discovered evidence, where the state shows that such evidence is not worthy of credit, and it is of such a character that it would not be likely to change the result on a new trial.

Appeal from district court, Lamar county; E. D. McCLELLAN, Judge.

This conviction was in the first degree, for the murder of Andrew Shearon, the death penalty being assessed against the appellant. The proof shows that the deceased was the proprietor of a saloon situated on the east side of South Main street, near the Texas & Pacific Railroad depot, in the city of Paris, the said depot being about three-quarters of a mile distant from the public square. Early on the morning of May 18, 1888, his dead body was found in bed in his room in the rear of and adjoining the saloon. His skull had been crushed with a blunt instrument of some description, but the instrument, after careful search, could not be found. The premises showed no indications of having been opened by force. The front door was closed, with the key on the inside, but the back door was open or slightly ajar. It was shown that one Newt. Harris, now deceased, was discharged from employment in the said saloon a few weeks before the murder, and that his discharge engendered unfriendly feeling between him and the deceased, and that deceased had expressed fears of trouble with said Harris, and requested the city marshal to keep a watch on him. It was also shown that the defendant, who is a negro, was in a manner the body servant of Harris, and that

they were often seen together immediately before and after the murder. Deceased had two partners interested with him in the saloon, one of whom was Dr. Miller, a resident of the Indian Territory.

George W. Wells testified for the state that he was general manager of the cotton compress, which was situated about 500 feet distant from Shearon's saloon, and near the railroad depot. At the time of and for two weeks after the murder of Shearon the defendant worked as one of the hands at the compress. The witness did not know where he went to at the end of the said two weeks, when the compress stopped running and the hands were discharged. Newt. Harris had worked in Shearon's saloon as bar-keeper, but was discharged a short time before the murder.

William Smith testified for the state, in substance, that at the time of the murder he was an officer and lived about one and a quarter miles north-east from Paris. A few days after the murder the defendant was sent into the country with a horse by Mr. Hunt. Mr. Hunt requested witness, who was going in the direction of the place to which the defendant was to take the horse, to point out the place to defendant. *En route* the witness asked the defendant where he lived. He replied that he lived near the Texas & Pacific depot. Witness asked him if "that was not a pretty hard neighborhood." He replied that it was; that a bad killing had recently occurred there; that he and another colored man saw Andrew Shearon 10 or 15 minutes before he was killed, and that a large white man was present. He refused to tell who the large white man was, but "turned it off" by saying that he was a railroad man. Newt. Harris was a very large and powerful white man.

J. R. Fletcher testified for the state that he was bar-keeper at the White Elephant Saloon, in Paris, at the time Shearon was murdered. Newt. Harris and defendant came into that saloon early on the morning after the murder, and took a drink, Harris treating. They then went into the rear apartment of the saloon. The witness saw them often together, before and after the killing.

Alice White was the next witness for the state. She testified that at the time of the murder of Shearon she lived on the place of Mr. A. R. Craig, about a mile and a quarter from the railroad depot, and she did not then know the defendant. About a month or more after the murder she moved to the house of her mother, who lived near the said depot, and became the mistress of the defendant, with whom she lived and slept for three or four months; her mother occupying the same house. One night, about three weeks before his arrest, the defendant awakened the witness by calling the name of Newt. Harris. He was calling Harris in his sleep. The witness awakened him, and asked him what he meant by calling Newt. Harris' name. He replied: "Damn you, shut up! You have

got too much mouth." Witness, however, insisted upon being told, and he finally said to witness: "Newt. Harris and I killed Andrew Shearon for his money." He would tell witness no more. A week or two afterwards a negro named Fred Boren came to the witness near the depot hotel, and asked if she knew "Comanche Jim," the defendant's pseudonym. Witness at first did not reply, but the negro displayed so great an anxiety to see the defendant that she finally told him where to find him. A few minutes later she saw the defendant and Boren engaged in an apparent serious conversation. After Boren left she asked defendant what he and Boren had to talk about so seriously. He replied that witness had too much mouth, and then told her that they had discussed the Shearon murder, and that he would have to leave Paris, as he was afraid somebody would swear a lie on him and break his neck. The witness and defendant came to an amicable separation a short time before the arrest of the former. Witness did not voluntarily appear against the defendant. She was taken by an officer to the court-house, and was then sworn to tell the county officials what she knew. She told them what she has testified on this trial, and was then placed in jail, as a means of extorting more from her, but, after she convinced the officials that she knew no more, she was released.

Lucinda Jones, the mother of the preceding witness, testified for the state, in substance, that she slept in the same room occupied by the defendant and her said daughter, who, though not married, lived together as husband and wife for several months after the murder. The muttering of the defendant in his sleep attracted the attention of the witness one night. He used Shearon's name in his mutterings, and witness asked him what was the matter with him. He replied: "That man Shearon is bothering me." He and Alice were both asleep. Alice did not live at or near the depot at the time of the murder.

Harrison Polk testified for the state that he went with defendant into Shearon's saloon for a glass of beer two or three days before the murder. From the saloon they went to the depot platform, and while standing there talking they observed Shearon standing in his front door. Pointing to Shearon, the defendant said: "Yonder is a damned son of a bitch I am going to do up. He has not treated me right." On the morning after the murder the witness met the defendant on Clarksville street, when the defendant said to him: "I did that damned son of a bitch up last night." Witness replied: "Don't tell me about it, for if I am called upon I will tell it." Several months afterwards defendant asked witness if he had ever divulged his statement on Clarksville street. The witness told him that he had not, and defendant said that he was going to leave Paris, as he was afraid of arrest for the murder of Shearon. The first person to whom witness related

these facts was Officer Polk Burris, who was engaged in working up the case. Burris told the witness to keep his knowledge to himself until he was called upon to testify in regard to it.

Tom Miller testified for the state that some time after the death of Newt. Harris he had a conversation with defendant about the killing of Shearon, in the course of which the defendant said: "The man who killed Andrew Shearon is dead; you are behind the excitement."

Smith Gordon testified for the state that subsequent to the murder of Shearon he met the defendant in the Indian Nation, on which occasion the defendant told him that he was afraid to go back to Paris, as a serious charge was pending there against him. He did not tell witness what the charge was, nor did the witness hear of Shearon's murder until after he got back to Paris.

John Crow testified for the state that he was foreman of the 'Frisco yards at the time of the murder of Shearon. He went to Lapita, Indian Territory, on June 18, 1888, and on his arrival at that point met the defendant. He did not know how long the defendant had then been in Lapita. State closed.

Of the witnesses for the defense who impugned the reputation of the state's witness Alice White for truth and veracity, all save one admitted, on cross-examination, that they had never heard a person say she was unworthy of belief on oath.

Sheriff Gunn testified for the state that he heard Alice White relate what she knew about the murder several different times. She was always reluctant to talk about it, and always told the same story, conforming in every detail to her testimony on this trial. Mr. Minor, one of the grand jurors who found the indictment against the defendant, testified that Alice White's testimony before the grand jury and on the trial was circumstantially the same.

The evidence set up in the motion for new trial as newly discovered was embodied in the affidavits of Anna Logan and J. H. Minton. Anna Logan's affidavit sets forth that at about 10 o'clock on the fatal night she saw Newt. Harris and Alice White standing together on the depot platform, about 50 feet from Shearon's saloon, looking towards the said saloon; that in passing near the said parties she heard Harris say to Alice White, "It is too early, Alice, to go over there yet;" that she (affiant) was at that time sleeping in the same room, near the depot, in which Alice White slept, and that on the following morning she saw the said Alice pull off a bloody dress, which she threw into a corner of the room; that during the day Alice told affiant that she (Alice) had burned the "damned dress," and that a few days later Newt. Harris told her (affiant) that if she ever said anything about the killing of Shearon he (Harris) would kill affiant.

Minton's affidavit sets out as follows: "William Miller hired Newt. Harris to kill

Andy Shearon. Miller gave Newt. Harris the sum of fifty dollars to kill Andy Shearon for sleeping with his (Miller's) wife. Miller carried with him to the Indian Nation the piece of iron with which Newt. Harris killed Shearon. James Smith, the defendant, had nothing to do with the killing of Andy Shearon. Newt. Harris did that killing at the request of William Miller."

The state controverted the motion for new trial, and called J. H. Minton as its first witness. He testified, in substance, that he did not witness the murder of Andrew Shearon, and did not know who killed him. He signed the affidavit in support of the defendant's motion for new trial, affirming that the defendant had nothing to do with the killing, and that the murder was committed by Newt. Harris, because said Harris told him that he (Harris) killed Shearon, and because Dr. William Miller, of the Indian Territory, also told him that he (Miller) hired Harris to kill Shearon, paying Harris \$50 for doing it. Witness went to Antlers, in the Indian Nation, on the morning that Shearon was found dead. He went on the 'Frisco passenger train, leaving Paris between 7 and 8 o'clock A. M. On the depot platform at Antlers he saw Dr. Miller talking to a Choctaw Indian. He (Dr. Miller) then had a piece of iron in his hand. In witness' presence and hearing, Dr. Miller said to the Choctaw Indian: "I hired and gave Newt. Harris \$50 to kill Shearon. Shearon will never f---k another man's wife." Miller then walked off, and hid the piece of iron under a log, about 300 yards distant from the depot. He told witness that the said iron was the instrument Harris killed Shearon with, and that he gave it to Harris for that purpose. Harris afterwards told the witness that Dr. Miller gave him \$50 for killing Shearon. The witness was positive that he went to Antlers on the regular 'Frisco passenger train, leaving Paris early in the morning.

To contradict this witness, the state proved by two witnesses, one of them being the attorney for the 'Frisco Railroad, that no passenger trains going from Paris to Antlers had ever run over that road in the morning, but, on the contrary, had always left Paris for that point after 6 o'clock in the evening.

H. B. Birmingham, the then county attorney of Lamar county, testified that, subsequent to the murder of Shearon, a Mr. Frazier, upon information he received from Minton, swore out an affidavit, charging Dr. Miller with complicity in the murder. Minton was brought before the witness and sworn, but he swore to nothing upon which a charge against Miller could be based. Under oath at that time, Minton said nothing whatever in regard to Miller's complicity in the murder.

The state next called Anna Logan to the stand. She testified that the facts set out in her affidavit in support of the defendant's motion for new trial were true in every particular, except that she was mistaken in

stating in her affidavit that she and Alice White occupied the same room at the time of the murder. As a matter of fact, they occupied the same house, near the depot, but different rooms.

To contradict the witness Anna Logan, the state proved by A. R. Craig, that at the time of the murder of Shearon he lived in Paris, about a mile and a quarter north of the Texas & Pacific depot. The state's witness Alice White was then in his employ, and lived at his house, and was at his house as late as 9 o'clock on the fatal night.

*Asst. Atty. Gen. Davidson*, for the State.

**WILLSON, J.** On the night of May 18, 1888, Andrew Shearon was murdered in his bed, his skull having been crushed and broken in several places by blows inflicted with some blunt instrument. Jim Smith, the defendant, stands convicted of said murder; the conviction being for murder in the first degree, with the death penalty assessed. There has been no presentation of the case in behalf of the defendant in this court, nor is there an assignment of errors in the record. In an original and amended motion for a new trial errors are complained of which we will notice. These are:

1. That the court failed to instruct the jury as to circumstantial evidence. This was not error, as the inculpatory evidence was not wholly circumstantial. There was proof that the defendant confessed to having committed the murder, and a confession is direct and not circumstantial evidence. It is only when the inculpatory evidence is wholly circumstantial that an instruction as to that character of evidence is demanded. *Willard v. State*, 26 Tex. App. 126, 9 S. W. Rep. 358; *Heard v. State*, 24 Tex. App. 103, 5 S. W. Rep. 846; *Carr v. State*, 24 Tex. App. 562, 7 S. W. Rep. 328.

2. That the court failed to instruct the jury in relation to accomplice testimony. This was not error, because there was no evidence demanding or which would have warranted such an instruction. Mere knowledge on the part of a witness that the defendant committed the crime does not render such witness an accomplice, so as to require corroboration of his testimony. To require or warrant an instruction on accomplice testimony, there must be some evidence of a witness' complicity in the crime for which the defendant is being tried. *Pitner v. State*, 23 Tex. App. 366, 5 S. W. Rep. 210; *Kerrigan v. State*, 21 Tex. App. 487, 2 S. W. Rep. 756; *Brown v. State*, 6 Tex. App. 286; *Ham v. State*, 4 Tex. App. 645. There was no such evidence in this case.

3. That a new trial should have been granted the defendant upon the ground of newly-discovered evidence. This ground of the motion was controverted by the state, and we think successfully. It was shown that the pretended newly-discovered evidence was not worthy of credit, and of a character which would not be likely to change the result on

another trial. *Rucker v. State*, 7 Tex. App. 549.

4. That a new trial should have been granted the defendant because the verdict of the jury is contrary to the evidence. We have carefully considered the evidence, and our judgment is that the conviction is in accordance with and fully supported by it. Defendant confessed that he committed the murder, and his confession is strongly corroborated by other facts proved. Finding no error in the conviction, it is affirmed.

## EATMAN v. EATMAN.

(*Supreme Court of Texas*. Dec. 10, 1889.)

### DIVORCE—CRUELTY.

Where the husband of a woman of refined sensibilities, instead of supporting his wife and child, takes to drink, and leaves the burden of supporting the family upon his wife; habitually addresses her unfeelingly, and with oaths; refuses to give medicine prescribed for her when sick; discharges the physician during a critical illness; refuses to milk the cows in bad weather, and leaves his wife to bring on a miscarriage by her exposure while doing the milking, and then refuses to go for a physician when told of her condition,—he is guilty of such "excesses, cruel treatment, and outrages" as will entitle his wife to a divorce, under 1 Sayles, Civil St. Tex. art. 2861, allowing a divorce "where either the husband or wife is guilty of excesses, cruel treatment, or outrages towards the other, if such ill treatment is of such a nature as to render their living together insupportable."

Appeal from district court, Hunt county; **E. W. TERHUNE**, Judge.

This was a suit for divorce by the appellant, **Jeffie Eatman**, against her husband, **T. J. Eatman**.

*Perkins, Gilbert & Perkins*, for appellant.

**GAINES, J.** This was a suit for divorce, brought by the appellant against her husband. The alleged ground of the action was cruel treatment. There is no statement of facts in the record, but the trial judge has filed his conclusions of fact and law, and the assignments of error in effect claim that the court erred in determining that, upon the facts found, the plaintiff was not entitled to a decree of divorce. We are of opinion that the learned judge has applied too rigid a construction of the statute to the facts of the case. It has been sometimes held, and more frequently said, under statutes allowing a divorce on the ground of cruelty, that there usually must be some act of physical violence on part of the defendant in order to justify a decree for the complaining party. But we think the weight of authority is the other way. Cruelty is a ground for a decree of separation from bed and board in the ecclesiastical courts of England, and we understand the rule there to be that, if the conduct of the defendant be such as should reasonably be held to threaten an impairment of the health of the wife, a decree of separation will be granted. Our statutes allow a divorce "where either the husband or wife is guilty of excesses, cruel treatment, or outrages towards the other, if

such ill treatment is of such a nature as to render their living together insupportable." 1 Sayles, Civil St. art. 2861. Whether or not the use of the words "excesses," "outrages," and "ill treatment" was not intended to extend relief in cases of conduct not strictly cruel, as defined by the English courts, we need not pause to inquire. The language of the statute is borrowed from the Civil Code of Louisiana; and, construing the similar provision of that Code, the supreme court of that state say: "A series of studied vexations and provocations on the part of a husband, without ever resorting to personal violence, might constitute that degree of cruel treatment and outrage which would form a just ground for separation from bed and board." *Tourne v. Tourne*, 9 La. 452. In *Sheffield v. Sheffield*, 3 Tex. 79, our own court say: "It cannot be doubted that a series of studied vexations and deliberate insults and provocations would, under our statute, be sufficient cause for divorce, without apprehensions of personal violence or bodily hurt." But, excluding the exceptional case of *Wright v. Wright*, 6 Tex. 8, in which the cruelty alleged consisted in part of the murder of the plaintiff's son by her husband, we believe that no decision of this court can be found in which a judgment for divorce on the ground of cruelty has been permitted to stand, in the absence of some degree of physical violence, except those in which the husband had accused the wife of infidelity. *Jones v. Jones*, 60 Tex. 461; *Bahn v. Bahn*, 62 Tex. 518. This course of decision seems to have led to the conclusions of law announced by the learned judge who tried the case below. But it does not follow that, because no such decision can be found, a case of cruelty sufficient to justify a decree may not exist, in which neither personal violence nor an unsupported charge of adultery is found as an element. In *Wright v. Wright*, supra, the refusal by the husband of medical aid to the wife during a violent attack of sickness was one of the acts of cruelty alleged as grounds for a divorce, and in the opinion was relied upon as one of the averments upon which the sufficiency of the opinion was sustained. An alleged order to the family physician not to attend upon the wife in case of illness, though no sickness actually existed at the time, was treated, in the leading case of *Evans v. Evans*, 4 Eng. Ecc. R. 360, as if it might be deemed an act of cruelty; but it was held that the allegation was not sufficiently proved. A similar doctrine seems to have been recognized in *Dysart v. Dysart*, 1 Rob. Ecc. 106. It has generally been held that when there is no physical violence the cruel conduct, in order to warrant a divorce, must be such as will produce a degree of mental distress which threatens at least to impair the health of the injured party. If it be cruel on the part of one spouse to pursue a course of conduct towards another which is calculated to impair the health of the complaining party, consist-

ency demands that it should also be deemed cruel to willfully refuse to take steps to restore the health when illness already exists. In addition to the immediate physical consequences of such refusal, it is calculated to cause distress to a sensitive mind, and thereby to increase the difficulties of the bodily infirmity. We do not wish to be understood as holding that the mere failure or inability of a husband to furnish medical attendance to the wife is a ground for divorce in any case, any more than a general inefficiency and worthlessness in the performance of other duties; but when the failure is accompanied by such circumstances as to afford a reasonable presumption that it was either intentional, or the result of such carelessness and indifference as to be equivalent to the same thing, and the wrong has been repeated, we see no sufficient reason for denying relief.

In the case before us the court found that the plaintiff had been tenderly reared, and that she was a woman of refined sensibilities; that the defendant was capable of earning a support for his family, but that he took to drink, and left the burden upon her to maintain, not only herself and child, but him also. It was also found that he was generally unkind to her, and habitually addressed her in an unfeeling and insulting manner, and with oaths; that on one occasion, when she was sick, and under medical treatment, he failed to administer medicines which had been prescribed by her physician, and that such failure resulted in a serious injury to her health. Upon another, he discharged her physician during a critical illness, and she immediately grew worse. Upon a third, when pregnant, a severe illness was induced by exposure in bad weather from milking cows, a work which, upon her request, he had refused to do; and when told of her condition, and asked to go for a physician, he refused with an oath, saying she was only "mad." Her attack resulted in a miscarriage. Under all the circumstances, his conduct in this last instance seems to us to have been actuated by malice, or to have been the result of such brutal indifference to her sufferings as should be considered equivalent to an intentional wrong. Every case of this character must be determined by its own peculiar facts. It is impossible to lay down any precise rule by which to decide, under a given state of facts, whether legal cruelty does or does not exist; but we think the findings of the court show in the present instances such "excesses, cruel treatment, and outrages" as to demand that a divorce should be granted. The record shows that the custody of a child of the parties was involved in the determination of the case. The judgment will therefore be reversed, and with instructions to enter a decree for divorce in favor of appellant upon the facts already found, and to make such orders in regard to the custody of the child as the testimony upon that issue may warrant. The judgment is reversed, and the cause remanded.

*BOUNDS et al. v. LITTLE et al.*

(Supreme Court of Texas. Dec. 3, 1889.)

## DEPOSITIONS—BONA FIDE PURCHASERS—PROOF OF DEED—TRESPASS TO TRY TITLE—PURCHASERS.

1. Sayles' Civil St. Tex. art. 2243, which provides that, upon the refusal of a party whose deposition is taken to answer the interrogatories propounded, they shall be taken as confessed, upon the certificate of the officer taking the deposition, is intended to apply only to the case of a deliberate refusal to answer, and if it be shown that the party declined under a mistake as to his rights, and not contumaciously, the interrogatories should not be taken as confessed, provided that at the trial he shows that he is willing to answer them.

2. One who is about to purchase land is under no obligation to make inquiries of persons living near it as to the title thereto.

3. Where a proper predicate has been laid by proof that a deed is lost, its execution may be established by circumstantial evidence.

4. One tenant in common may recover in trespass to try title against a wrong-doer without joining his co-tenants as plaintiffs in the suit.

Appeal from district court, Navarro county; RUFUS HARDY, Judge.

*J. F. Stout and W. W. Ballou*, for appellants. *Frost & Etheredge*, for appellees.

GAINES, J. This was an action of trespass to try title, brought by appellees against appellants, to recover a tract of 200 acres of land, a part of the James Little survey. The land was patented to James Little, who died in 1874, having made a will by which he devised all his property to his nephew Robert J. Little. His wife, Mary A. Little, survived him. On February 16, 1874, Robert J. Little conveyed to Mary A. Little all of the property devised to him by the will of James Little. Afterwards, Mary A. Little died, having made a will by which she devised all her estate to F. B. Smith. The date of her death is not shown by the record. In July, 1874, F. B. Smith, who was a defendant in the court below, conveyed to his co-defendant, Bounds, the land in controversy by a warranty deed. Such was the documentary evidence in the case; and from it the title to the premises in controversy appears to be in appellant Bounds. But in the deed from Robert J. Little to Mary A. Little the consideration is recited to be as follows: "Five hundred dollars lawful currency of the United States, and the further consideration of two hundred acres of land described in a deed from Mary A. Little to myself, of same date herewith, receipt of which is hereby acknowledged." This recital gives the key-note to the controversy in this case. The plaintiffs claim as heirs of Robert J. Little, and seek to show by circumstantial evidence that the deed referred to in the conveyance from him to Mary A. Little conveyed to him the 200 acres of land in controversy. The defendant controverted this claim, and also sought to show that defendant Bounds was a purchaser for a valuable consideration, without notice of the deed, if any such ever existed.

In the view we take of the case, it will be neither necessary nor proper to discuss the evidence. Nor would it subserve any useful

purpose to consider in detail the numerous assignments of error. The plaintiffs propounded interrogatories under the statute to defendant Bounds, with the view of showing that he had notice of their claim at the time he purchased from his co-defendant, Smith. The notary returned the commission and interrogatories unanswered, with a certificate that the defendant had refused to answer them. Upon the trial the plaintiffs offered to read the interrogatories to the jury, for the purpose of having them considered as confessed. The defendant objected, and, in order to maintain his objection, was sworn, and testified, in effect, that he did not willfully refuse to answer the questions; that some of them did not admit of the answer yes or no, and that the notary told him that he must answer each of them in that manner; that he told the notary that he could not do this, and that he would be present at the trial next day, ready to testify; and that the notary told him that under the circumstances he would not answer them himself. The witness was subjected to a rigid cross-examination for the purpose of showing that he could have answered the questions, and admitted that he could have answered most of them. No evidence was offered to contradict his testimony as to what occurred between him and the notary. The court permitted the interrogatories to be read to the jury, and instructed them that if the defendant refused to answer the questions they should be taken as confessed. We think the court should have passed upon the question of the admissibility of the interrogatories, and should not have submitted it to the jury; but no point has been made upon this by appellants. They did, however, except to the reading of the interrogatories, and, having assigned the ruling of the court in that particular as error, we are of opinion that the court erred in its ruling. The object of the statute, when first enacted, was to enable a party to a suit to obtain the testimony of his adversary, which he could not do at common law. Since the passage of the act permitting parties to testify, the Revised Statutes have been adopted; and the substance of the old statute has been retained, for the reason, it is presumed, that it allows leading questions to be asked, and also permits the party who propounds the interrogatories to controvert the answers by other competent testimony. Under its provisions, a party may obtain the testimony of his adversary without vouching for his credibility as a witness. Sayles' Civil St. arts. 2240, 2242. To give effect to the law, it was provided that, upon the refusal of the party interrogated to answer, the interrogatories should be taken as confessed, upon the certificate of the officer to the fact. *Id.* art. 2243. But we apprehend that it is only in case of a deliberate refusal that the provision was intended to apply. It was certainly not intended that the certificate of the officer should be deemed conclusive in every case. We think, therefore, that if it be shown that he did not

refuse, or that he declined under a mistake as to his rights, and not contumaciously, or that the notary induced him to believe that he need not answer, the interrogatories should not be taken as confessed: provided that at the trial he shows that he is willing to answer them. Even after the trial has begun, all the purposes of the law can be subserved by permitting him then to answer. The only reason that can be urged against such practice is the slight delay that may be thereby caused in proceeding with the case. If the party has ever willfully refused, he should be concluded; but we think, where there is a reasonable doubt about the question of his refusal, the better rule is to give him the benefit of it, and that the interrogatories should not be taken as confessed: provided, always, he be willing then to answer. This, in every case, he should be required to do, should the other party demand it. The statute was intended to promote the administration of justice, and we think that in some cases a different rule is calculated to work a manifest wrong. It does not appear at what time the interrogatories, with the officer's certificate of refusal, were filed in court. If filed a reasonable time before the trial, so that the defendant could have had notice of the fact before his announcement, a proper practice would have been to move to suppress or vacate the certificate before entering upon the trial of the case. To refuse to permit them to be read, when no motion has been made to vacate the certificate, after the party who has propounded the interrogatories has announced ready, relying upon the implied confession to make out his case, would place him at a serious disadvantage upon the trial. It has been repeatedly held that where the deposition of a party has been taken under the act of May 18, 1846, exceptions to the answers must be filed and acted upon before the commencement of the trial. *Dikes v. De Cordova*, 17 Tex. 618; *Allen v. Atohison*, 26 Tex. 616; *Handley v. Leigh*, 8 Tex. 129. In this case, however, the record does not show that any objection was made to entering upon the inquiry as to the truth of the certificate during the progress of the trial. We think, therefore, that the court, after hearing the evidence, should have refused to permit the interrogatories to be read to the jury, and should then have allowed the defendant the opportunity of answering them.

Upon the question of notice, the court, among other instructions, gave the following: "If, before defendant Bounds purchased from his co-defendant, Smith, the land in controversy, if he ever did, he had heard of the claim of Robert J. Little or his heirs to the land in question, and, by the making of such inquiries as a prudent man would have made, such as by inquiries made among the persons living near the land, could have learned from them, or from such sources as they might have directed him to, of the existence of a deed from Mary A. Little to Robert J. Little, if any such deed was ever made to the land

in question, and if he failed to make such inquiries, then he is deemed to have notice." This charge is assigned as error, and we are of opinion that the assignment is well taken. We know of no rule of law which requires one who is about to purchase land to make inquiries of persons living near it. It is the duty of the purchaser to inquire of the party in possession by what right he holds, and hence the law affects him with notice of the claim of such possessor. But, in the absence of some information that some particular person knows of an adverse claim to the premises in dispute, there is no duty resting upon the purchaser to make inquiries of such person, although he may live in the neighborhood in which the land lies. If Bounds had heard that the heirs of Robert Little claimed the land, he should have made inquiry of them; and if he failed to do so the law would have affected him with notice of such facts in reference to the title as were within his knowledge.

The court did not err in first admitting and then excluding the testimony of the witness Nusbaum. His deposition was taken and read. He testified to facts very material to plaintiffs, but after that part of his testimony was read to the jury his subsequent answers disclosed that he had testified from hearsay. As soon as the source of his information was shown, the court excluded the evidence. The defendants should have objected in the first instance, and should have pointed out to the court that part of the deposition which disclosed that the witness had testified from hearsay.

In view of another trial, we will submit some general remarks upon the merits of the case. As has been stated, the effort of plaintiffs was to establish by circumstances the execution and contents of a deed, that is to say, the execution of a deed from Mary A. Little to Robert J. Little to the land in controversy, claimed to have been lost. We are of the opinion that a deed may be established by circumstantial evidence. Mr. Starkie, in his philosophical treatise on Evidence, uses this language: "It has been doubted whether the doctrine of presumption as to the execution of deeds of conveyance has not been carried to too great a length. The reasons, however, which have been urged on the subject are properly applicable to legal and artificial presumptions only; that is, to such as are made by the courts, either directly or indirectly by means of a jury, and not to such conclusions of fact as are made by a jury upon a full conviction of the truth of the fact, by the natural force of the evidence. To the weight and importance of circumstantial evidence to prove the actual execution of a conveyance whose existence cannot be directly proved, there is no limit short of that which necessarily produces actual conviction; and there seems to be no rule of law which excludes such evidence from the consideration of a jury. If there were, it would be a singular and anomalous one which shut out ev-



idence of a nature and description which is admissible in every other case, however important the consequences, even upon trials for murder and treason. Juries are bound to decide according to the actual truth of the fact. \* \* \* It would therefore be absurd and inconsistent to say that a jury was not to be allowed to find according to the real fact, where they were satisfied that an actual conveyance had been executed." 2 Starkie, Ev. 924. We think, however, in a case like the present, as preliminary to the introduction of circumstantial evidence, it ought first to be proved that search had been made for the supposed deed in the place where such instrument would most likely be found. If such a deed was ever executed and delivered to Robert J. Little, the presumption would be that it would be found in the possession of his heirs, or other legal representatives. The record discloses no evidence as to the loss of the deed, except the testimony of a witness who swore that defendant Smith said the deed had been lost, or that, if ever there was such a deed, it had been lost. No one of the plaintiffs, or other heirs of Robert J. Little, testified that he did not have the deed, or that he had ever made search or inquiry for it. We have therefore the anomaly of an attempt to prove an instrument by circumstantial evidence when the paper, if it ever existed, may be in the possession of one of the plaintiffs, or of some other person equally entitled to claim under it. We think that if the proper predicate had been laid, by proving that the deed was not in possession of Little's heirs, and could not be found, then the evidence, the introduction of which is complained of in the first assignment, should have been admitted.

The court did not err in instructing the jury that the plaintiffs, if heirs of Robert J. Little, might recover although he left other heirs who were not parties to the suit. One tenant in common may recover against a wrong-doer without joining their co-tenants as plaintiffs in the suit. For the errors pointed out, the judgment is reversed, and the cause remanded.

#### HERNDON *et al.* v. DAVENPORT *et al.*

(Supreme Court of Texas. Dec. 6, 1889.)

##### LAND CERTIFICATES—OWNERSHIP.

1. The facts that a person causes a certificate to be located on land, and a survey to be made in the name of the original grantee, and that this is returned to the general land-office, are not sufficient proof that the original grantee sold the land certificate to such person.

2. Assertion of ownership, unaccompanied by possession long continued, is not admissible in support of a presumption that a conveyance once existed in favor of the party making the assertion.

3. Proceedings in bankruptcy are admissible in evidence upon the question as to whether the bankrupt owned certain land at the time of filing his petition and inventory, but the subsequent issue of a patent to the heirs of the bankrupt, on the location of a land certificate not referred to in his schedule, cuts off all inquiry by persons who cannot show a transfer of the certificate to them.

Appeal from district court, Ellis county; ANSON RAINEY, Judge.

*F. P. Powell*, for appellants. *Grace & Templeton*, for appellees.

STAYTON, C. J. Appellants brought this action to recover 171 acres of land patented to them as the heirs of John H. Herndon, by patent issued December 6, 1887. The defendants claim by regular chain of transfer from A. C. McCartney, to whom it is claimed that John H. Herndon sold the land certificate by virtue of which the land was patented. Plaintiffs introduced the patent; proved that John H. Herndon died in July, 1879, and that they were his heirs. On behalf of defendants it was proved that the land in controversy was located by virtue of William Nabors' certificate No. 8116, issued May 1, 1838, and transferred from Nabors to S. M. Frost August 25, 1838, and from Frost to John H. Herndon, October 8, 1859. Certified land-office copies of these transfers were introduced in evidence. It was proved that John H. Herndon, in 1859, dealt extensively in land and land certificates, and his pecuniary condition was good, and continued so until 1865, from which time until his death he was pecuniarily embarrassed. He died in July, 1879. On June 6, 1861, A. C. McCartney made application to the county surveyor of Ellis county for a survey by virtue of this Nabors certificate 8116, and in April, 1862, a survey of the land in controversy was made by virtue of this application; and the application, certificate, and field-notes were filed in the land-office September 13, 1863. On March 1, 1876, A. C. McCartney conveyed the land embraced in this survey, and in controversy, to D. B. Bullard, by warranty deed, and subsequently Bullard and J. D. Templeton sold the land in different parcels to appellees, and those under whom they claim. In the same transfer, by which Frost conveyed to John H. Herndon the Nabors certificate 8116, he also conveyed two other certificates, to-wit, No. 8037, to Frost, as assignee of Matthew R. Williams, and the William Nabors, No. 541. It was shown that John H. Herndon transferred these two certificates in his life-time, and never claimed the land located by virtue of them. The transfer by William Nabors to S. M. Frost included his two certificates, 3116 and 541, and was filed in the land-office with "file 541." On December 31st, John H. Herndon filed his voluntary petition to be adjudicated a bankrupt in the United States court, at Galveston, accompanied by the affidavits and schedules of debts and liabilities required by law, which schedule did not contain the Nabors certificate 8116, nor any land located by virtue of it, upon which application an assignee of the estate of applicant was appointed; and the applicant was duly adjudicated a bankrupt, and in November, 1869, received his discharge. In 1876, John H. Herndon made a memorandum in his diary to the effect that this William Nabors certificate No.

3116 had been located on 171 acres of land on Onion creek, in Ellis county, and this memorandum, coming to the attention of his son, A. C. Herndon, in August, 1887, caused him to investigate the matter; and he, finding, from the records of the land-office, the transfer of the certificate to his father, and no transfer from his father, applied for and obtained a patent to the heirs of his father for the land so located. The death of A. C. McCartney was proved, and that search among his papers had failed to disclose any transfer of the Nabors certificate; and it was further shown that McCartney, while D. B. Bullard had a mortgage on the land in controversy, and after J. D. Templeton had an execution levy on it, claimed ownership of this land, and of the certificate by virtue of which it was located. The certificate by virtue of which the land was patented was for 320 acres, and the part not placed on the land in controversy was never located. There has been some adverse possession by persons claiming under McCartney since 1881. The survey returned to the general land-office purported to have been made by William Nabors, though the application for the survey was made by McCartney. The verdict for appellees was general. Appellants show title to the land, and are entitled to recover, unless the evidence justifies a finding that the certificate by virtue of which it was granted became the property of McCartney, or unless defendants show title by limitation.

The testimony of a witness to the effect that at some recent period McCartney claimed to own the land, and the certificate by virtue of which it was granted, was objected to, and under the circumstances of this case we are of opinion the objection should have been sustained. Assertion of ownership, accompanied with possession long continued, may no doubt be shown in support of a presumption that a conveyance once existed; but there are no facts shown in this case which would make the declaration of McCartney admissible. The proceedings in bankruptcy, we think, were properly admitted in evidence, and tended to show that John H. Herndon did not own either the land or certificate by virtue of which it was granted, at the time of filing his petition and inventory; but the patent to appellants cuts off all inquiry upon that question by any person other than some one who can show that Herndon conveyed the certificate or land to him, or to some one under whom he claims. If the land belonged to John H. Herndon, it passed to his assignee in bankruptcy, for the purposes of that proceeding, whether scheduled or not; but, if not disposed of by the assignee at the termination of the bankrupt proceedings, title remained in John H. Herndon. *Jones v. Pyron*, 57 Tex. 47. Title of the assignee in bankruptcy could not be set up by appellees as outstanding superior title to that presented by appellants.

The important inquiry in the case is, was the evidence sufficient to show that John H.

Herndon sold the land certificate to McCartney? and to us it is too clear that the evidence is insufficient to establish that fact. The only legitimate evidence tending to establish that fact was that McCartney caused the certificate to be located on the land, and a survey to be made in the name of the original grantee, and that this was returned to the general land-office. It is shown that Herndon was an extensive dealer in land and land certificates at the time this was done, and the inference from what is shown is just as strong that McCartney was acting for Herndon as for himself. A discussion of the evidence, with a view to determine probabilities, would be an unprofitable as well as unnecessary undertaking; and it is sufficient to say that the evidence was insufficient to sustain a finding that the land certificate or land belonged equitably or legally to McCartney.

It may be that some of the defendants showed title to tracts claimed by them under the statutes of limitation; but, as the case was tried by a jury, we do not feel authorized to pass on that question. Nor is it necessary for us to pass on the sufficiency of appellees' pleadings to entitle them to recover for improvements made on the land, for they will have opportunity to amend. For the errors noticed, the judgment will be reversed, and the cause remanded.

#### KING *et al.* v. HALEY.

(*Supreme Court of Texas*. Nov. 19, 1889.)

BONA FIDE PURCHASER—TRESPASS TO TRY TITLE—COSTS.

1. In trespass to try title, where plaintiff showed title from the original grantee, and defendants claimed title as innocent purchasers for value without notice, it appeared that defendants had received a deed made by the daughter of the original grantee as his heir, dated January 13, 1873, which proved invalid for want of a proper acknowledgment; that on May 13, 1887, they obtained a deed of confirmation from the same party, reciting that a valuable consideration had been paid when the invalid deed was given, but that on March 9, 1883, a deed from the original grantee, conveying the land in controversy to plaintiff's predecessor in title, was recorded. *Held*, that defendants were affected with notice that their grantor had no title when they took the deed of confirmation from her.

2. In trespass to try title, the tenant of a trespasser on lands who is a defendant is properly chargeable with costs.

Appeal from district court, Hunt county; H. O. HEAD, Judge.

Action to recover possession of land. Plaintiff had judgment, and defendants appealed. The deed from the original grantee, from whom plaintiff showed a clear chain of title, was dated September 4, 1845, but was not recorded until March 9, 1882. After the death of the original grantee his daughter, as his heir, by deed dated January 12, 1872, conveyed the land in controversy to the defendants. This deed proved invalid for want of a proper acknowledgment. Subsequent to the record of the deed from the original gran-

tee to plaintiff's predecessor in title, and on May 13, 1887, the defendants obtained a deed of confirmation from the daughter of the original grantee, reciting that a valuable consideration had been paid when the invalid deed was given by her.

*R. L. Porter*, for appellants. *Matthews & Heyland*, for appellee.

STAYTON, C. J. The estate represented by appellee shows title to the land in controversy, which, in its regular deraignment from the original grantee, is not questioned, except in one particular, by appellants. *Davis & Co.*, who are the real defendants, seek to show that they are purchasers in good faith, without notice of the outstanding chain of title, through which appellee claims. It is urged that the proceedings had in the district court for Fannin county in the partition of the estate of T. D. Jones, and the deed made in pursuance thereof, are insufficient to show title from the estate of Jones to Haley. The proceedings had in the district court are not set out in full, but the statement of facts shows that a suit was pending in the district court for Fannin county to partition the estate of T. D. Jones, who held title to the land in controversy by regular chain of title from the original grantee; that on March 15, 1880, that court made an order directing a person named to sell the land at public auction to the highest bidder; that on August 17, 1880, the same court confirmed a sale made by the person named, and directed him to make a deed to plaintiff's intestate, which was done. The district court had jurisdiction to render such decrees as are shown to have been rendered, and, in the absence of evidence to the contrary, it must be presumed that it acquired jurisdiction of all persons necessary to empower it to make decrees that would bind all persons interested in the estate of T. D. Jones, and that every step was taken required by law to authorize the court to cause the land to be sold for purpose of partition. Appellee then shows title to the land in the estate represented by her, and was entitled to recover, unless appellants should show that they were innocent purchasers. The case of *Davis v. Agnew*, 67 Tex. 206, 2 S. W. Rep. 43, 376, involved the title to the south half of 820 acres of land, part of the same tract of which that now in controversy is the north half. Appellants' title to the land in controversy in this action is the same in all respects, except one, as it was in the case above referred to, and the title of appellee is the same as that shown by *Agnew*, except in the proceedings had in the district court for Fannin county, before referred to. In so far as the questions are the same in this case as were they in the case referred to, it is unnecessary again to discuss them. In the case of *Davis v. Agnew* it was held that appellants showed no title, holding, as they did, through a deed from a married woman, a daughter of the original grantee, not acknowledged as deeds are required to

be to pass title to land, the separate estate of a married woman. Appellants, in the case of *Davis v. Agnew*, claimed title through a deed made by a daughter of the original grantee, dated January 12, 1872, to Joseph W. Farrier, and through a purchase made by them under a judgment in their favor against Farrier. The daughter of the original grantee was a married woman at the time she and her husband attempted to convey her interest in the land to Farrier, and, for want of sufficient acknowledgment, it was inoperative. The original grantee, by warranty deed of date September 4, 1845, conveyed the entire tract to one under whom appellee holds by regular chain of title. That deed, and the subsequent deeds through which appellee holds, were not recorded in the county in which the land is situated until March 9, 1882, except the deed to her intestate, which was recorded February 15, 1881. On May 13, 1887, appellants obtained a deed from the daughter of the original grantee, who before had attempted to convey to Farrier, intended to be a confirmation of the deed inoperative because not properly acknowledged. That deed is sufficient to pass to appellants whatever title its makers had at the time it was executed, and it contained recitals that Farrier paid valuable consideration for the land at the time the inoperative deed was executed to him. The deed last referred to was admitted in evidence, and there was evidence showing that *Davis & Co.*, when they bought under execution against Farrier, paid the costs which had accrued in their action against him. On these facts appellants claim that they are innocent purchasers for value, and that their right relates to the date of the attempted conveyance to Farrier. There was no proof that Farrier paid any sum, or gave anything of value, when the daughter of the original grantee and her husband attempted to convey to him. As against appellee, whatever right appellants have grows out of the deed made to them by the daughter of the original grantee, of date May 13, 1887. Before that date the deed from the original grantee, the father of appellants' vendor, had been placed on record, and they were thus affected with notice that their vendor had no title when they received a deed from her. This is conclusive of the rights of the parties; but, were it not so, we do not see that appellants could acquire any right or equity by reason of the fact that Farrier may have paid a valuable consideration when he received the deed not properly acknowledged. At the sale made under the execution against Farrier, and in favor of appellants, they only acquired such right to the land as Farrier had, and not any equities which may have existed between the latter and the daughter of the original grantee, growing out of transactions between them; but, were this not so, proof that Farrier paid a valuable consideration, as against appellee, could not be proved by recitals in the deed to appellants of date May 13, 1887.

Appellant King was in possession of the land at the time the action was brought as the tenant of his co-defendants, and the court did not err in rendering judgment against him for the land and costs, notwithstanding his disclaimer. There is no error in the judgment, and it will be affirmed.

**FIRST NAT. BANK v. PENNINGTON et al.**  
(*Supreme Court of Texas. Nov. 20, 1889.*)

**AUTHORITY OF AGENT.**

1. A person employed to purchase cattle with money furnished in advance is not authorized to pledge his employer's credit, where it appears that he received half the profits, and conducted the business entirely in his own name, with the knowledge of his employer, and it does not appear that he was ever authorized to make any purchase on credit, or borrow money, or incur any debt, or that his employer knew of his ever having done so.
2. An objection to the admission of evidence cannot be raised for the first time on appeal.

Appeal from district court, Hunt county;  
H. O. HEAD, Judge.

Action by the First National Bank of Greenville against J. R. Pennington and others for the amount of two notes. Plaintiff appeals from the judgment.

*Matthews & Neyland* and *A. H. Hafner*, for appellant. *Perkins, Gilbert & Perkins* and *B. S. Johnson*, for appellees.

HENRY, J. By this suit, as finally amended, appellant seeks to recover against J. R. Pennington and B. F. Buzard a judgment for the amount of two promissory notes. One of said notes was signed by Pennington alone, and the other was signed by Pennington and J. B. Mahaffey. The petition contains two counts,—one charging Buzard as Pennington's partner; and the other charging that, if Buzard is not liable as such partner, he is liable because Pennington, in executing the notes in suit, acted as his agent and for his benefit. But two errors are assigned,—one relating to the issue of partnership, and the other to that of agency. The first is that "the court erred in allowing the defendant B. F. Buzard to testify, over the plaintiff's objection, that he (Buzard) did not intend to form a copartnership at the time he and his co-defendant, J. R. Pennington, entered into the contract in Denison, in June, 1888, because the question at issue was one at law, to be drawn only from the acts of the parties, and the terms of the said contract, and does not depend on the secret intention of the parties." This objection cannot be considered by us, because the record fails to show that any objection was made at the trial to the admission of the evidence. When this cause was before us on a former appeal, (67 Tex. 83, 2 S. W. Rep. 54,) upon substantially the same facts upon the issue of partnership that are now presented, that question was fully considered, and a conclusion reached adverse to the existence of the partnership contended for. We are entirely satisfied with the conclusions then announced.

The other objection is stated as follows: "Because if, in fact, the said defendants were not partners in fact or in law, then the court erred in holding that the defendant Buzard was not bound for the debt sued for, because said Pennington was the duly-authorized agent of said Buzard, and said Buzard held him out to the world as such, or permitted Pennington to hold himself out as such. And said Buzard knew, or might have known by the use of reasonable diligence, that said Pennington was so holding himself out to the world; and, further, that after a full knowledge of the fact that Pennington had so held himself out as his agent, and had borrowed the money sued for by plaintiff, and had given a mortgage on the cattle bought with the borrowed money sued for, said Buzard interposed his claim to the cattle so bought, thereby declaring Pennington to be his agent, and fully ratifying his action in borrowing and investing the money." With regard to this issue, we find from the record that Pennington was first employed on a salary to purchase cattle for Buzard with money furnished by him, and afterwards his employment was continued to do the same thing, with the difference that, instead of receiving wages, he was to be compensated by receiving half of the profit. He seems, with the knowledge of Buzard, to have conducted the business in every respect in his own name. He recorded Buzard's cattle-mark in his own name. He deposited all money in the bank in his own name, and drew it out and disbursed it in the same way. The cattle were bought and sold and mortgaged to plaintiff in his own name, and as his own property. There is nothing in the record to indicate that Buzard ever authorized him to make any purchase on credit, to borrow money, or incur any debt, or that he had knowledge of his having done so in any instance. He seems only to have authorized Pennington to purchase cattle with an amount of money furnished in advance for that purpose. The cattle, when purchased, were to become the individual property of Buzard. If it be conceded that this method of dealing made the cattle, when purchased, the apparent property of Pennington, so that his individual creditors could acquire through him a title to them, it still will not follow that he had acquired any authority to pledge the credit of Buzard. The judgment is affirmed.

**JENKINS v. CAIN et al.**

(*Supreme Court of Texas. Nov. 20, 1889.*)

**ADMINISTRATORS—CLAIMS AGAINST ESTATE—JURISDICTION.**

1. In an action to establish a claim against an intestate's estate, the joinder of the heirs with the administratrix as defendants is harmless error, where the judgment is against the estate alone.
2. Where the claim presented against an intestate's estate, and rejected by the administratrix, consists of a judgment against decedent and a vendor's lien on real estate, the district court has jurisdiction of the action to establish the claim by

reason of the lien claimed, though the amount of the claim is less than \$500.

8. The judgment of the district court that decedent's estate is indebted to plaintiff in a certain amount, and that a lien exists on certain land to secure its payment on account of a judgment and lien obtained against decedent in his life-time, is not an interference with the right of the probate court to classify the claim.

Appeal from district court, Smith county; FELIX J. McCORD, Judge.

*White & Edwards*, for appellant. *I. J. Rice*, for appellees.

STAYTON, C. J. On March 4, 1881, a judgment was rendered by the district court for Smith county against Andrew Jenkins, for \$379.26, with foreclosure of vendor's lien on 100 acres of land to enforce its judgment. Of that judgment, Mrs. S. A. Cain, the wife of W. G. Cain, became the owner. No process was issued for the enforcement of the judgment until December 20, 1886, when an order of sale was issued under which the land was advertised for sale; but before sale-day Andrew Jenkins died, and the process was returned unexecuted. Subsequently, Mary Jenkins, the widow of Andrew, was appointed and qualified as the administratrix of the estate. A certified copy of the judgment, duly authenticated, was presented to her for allowance, but she rejected it. This action was then brought on the rejected claim against the administratrix and the heirs of Andrew Jenkins, and the petition prayed for "judgment for said claim, so presented, that same be established, together with the vendor's lien, upon the land therein described, and that said judgment be in all things revived," and for general relief. A judgment was rendered, which, in so far as necessary to be stated, was as follows: "It is therefore ordered, adjudged, and decreed by the court that said judgment, fully set out, with its vendor's lien upon the land therein described, be in all things revived and established as a valid claim against the estate of A. Jenkins, dec'd, for purchase money of said land, and for amount of principal, interest, and costs, as therein specified; \* \* \* and that this judgment, together with the bill of costs herein incurred, be certified to the probate court of Smith county for observance in accordance with the law governing estates of deceased persons." From that judgment the administratrix prosecutes this appeal.

It is urged that the court erred in overruling an exception to the petition, which set up a misjoinder of parties. The heirs were neither necessary nor proper parties, and the exception ought to have been sustained; but the failure of the court to do this furnishes no sufficient ground for reversal. No judgment was rendered against the heirs; they have not appealed; and the only way in which their joinder could operate prejudicially to the right of the estate would be in the way of cost unnecessarily incurred by their being joined; but no complaint is made on that ground.

It is claimed that a plea to the jurisdiction, urged by the administratrix, should have been sustained, on the ground that the sum sued for was less than \$500. The claim presented and rejected was for money secured by lien on land, both of which appellees sought to establish against the estate; but, when presented, the moneyed demand, as well as the lien established by the judgment, were both rejected, and we are of opinion that the district court had jurisdiction, by reason of the lien claimed, although the sum secured by it, exclusive of interest and costs, was less than \$500.

It is further claimed that it was error for the court to establish the lien, and that this operated as a classification of the claim; a matter which pertains to the jurisdiction of the probate court. When the claim, which was for money and lien, was rejected, it was proper for the district court to adjudicate the right of the parties in both respects. The lien existed before the judgment was rendered, and the judgment simply established that fact, and did not create the lien, or in any manner attempt to interfere with the right of the probate court to place it in the class of claims to which the law assigns it, and to provide for its payment, just as would have been done had it been allowed by the administratrix and approved by the probate court. Had the district court attempted to give it a classification to which the law did not assign it, there would have been ground for complaint. The judgment established the entire claim in the only way it could possibly be done after it was rejected, and it matters not whether it be termed a revivor of the former judgment, or simply a judgment. Its effect is to declare that the estate is indebted to appellees in the sum claimed; that a lien exists on a tract of land described, to secure its payment; and the enforcement of this determination of the rights of the parties is left to the tribunal created by law for this purpose. There is no error in the judgment in respect to any matter complained of, and it will be affirmed.

#### NORWOOD v. SANGER *et al.*

(Supreme Court of Texas. Nov. 20, 1889.)

##### PRINCIPAL AND AGENT.

1. Defendant, being indebted to plaintiffs, empowered a third person to carry on his business, and, in case of necessity, to sell his stock, notes, and accounts, and from the proceeds pay plaintiffs whatever might be owing them. *Held*, that plaintiffs, in the absence of fraud on their part, could be charged only with the amount paid them from the proceeds, without regard to the value of the stock, as the manager was not their agent.

2. The agreement further provided that, if the manager should fail to fully execute the agency, then plaintiffs might execute the same, or appoint any other person to execute it. *Held*, that the taking of the notes and accounts, and suing on them in their own name, made plaintiffs liable only for a faithful execution of the power, and not for their full face value.

Appeal from district court, Kaufman county; ANSON RAINEY, Judge.

*J. D. Cunningham and W. H. Allen, for appellant. Robertson & Coke, for appellees.*

STAYTON, C. J. This action was brought by appellees to recover from appellant a sum claimed to be due on promissory notes executed by the latter to them. To secure the payment of these notes and other indebtedness of appellant to appellees, the former, who was a merchant, empowered T. P. Barry to conduct his business, and when, in his judgment, it became necessary to do so, to sell out his stock, and collect all notes and accounts due him, and from the proceeds to pay whatever might be due to appellees. The business was carried on for some time, appellees furnishing goods from time to time, but it seems to have been unprofitable, and Barry, in pursuance of the power conferred on him, sold the stock of goods, which invoiced \$2,750, for \$2,000, which was appropriated to the payment of a part of the sum due appellees. At the same time Barry took possession of the notes and accounts, and they were placed in the hands of attorneys for collection. Sums thus raised were paid to appellees, and this action is for the balance due thereon. The notes and accounts, on their faces, called for \$5,278.25. Appellant does not deny that he has had credit for the sum the goods sold for, and for all sums collected on notes and accounts, but he claims that appellees should be charged with the sum shown by the invoice of the goods, and with the sums shown to be due by the face of the notes and accounts, and asks a judgment over against appellees. That he made Barry his agent and empowered him to sell the goods and collect the notes and accounts, and apply the sums thus received to the payment of the debt due appellees, is evidenced by a written instrument executed by himself; and the fact that appellees were interested in the execution of the power thus conferred cannot make Barry their agent. If Barry sold the goods for less than they were worth, or in any manner was unfaithful in the trust confided to him, he would be responsible to appellant for such injury as he may have suffered; but appellees could not be held responsible unless they, in some way, participated in the agent's act, and the mere receipt of the sum for which the goods were sold would not be such participation. The writing conferring the power on Barry left the management of the business, sale of goods, and collection of outstanding claims to his discretion as to time, terms, and manner; and we do not wish to be understood to intimate that he in any way abused this when he sold a stock of goods, which invoiced \$2,750, for \$2,000. Appellees are sought to be held responsible for the sum which the notes and accounts showed to be due to appellant on a claim that appellees placed them in the hands of attorneys for collection, and controlled their collection, and, in order to show that fact, offered to prove that one Bryan claimed that he was the agent of ap-

pellees, and placed the claims in the hands of attorneys to be collected for them. This evidence was objected to, on the ground that Bryan's agency could not be proved by his declarations,—hearsay,—and because the evidence was immaterial. The court sustained the objection, and in this there was no error. A witness was asked if he did not have letters from appellees in which they claimed to be the owners of the notes and accounts, expecting to prove that the witness had received such letters, but, on objection, this evidence was excluded; and in this there was no error, for the letters would have been better evidence than the statement of a witness of their contents. The bill of exceptions shows that the letters were objected to, but does not show that appellant produced them, and offered to introduce them in evidence. If, however, it had been shown that appellees did place the notes and accounts in the hands of attorneys for collection, and assumed the right to control them, in view of the fact that they had an interest in their collection, and by the express terms of the instrument, under which Barry was authorized to act,—“if said Barry should fail from any cause to fully execute this agency, then the said Sanger Bros., or any one of them, \* \* \* may execute the same, or appoint any other person they may select to execute the same, and to change the agent appointed for another at their wish,”—were empowered to assume control, we do not see that this could make them liable for anything more than a faithful execution of the power. Barry had determined that the business should be closed, and money realized on the assets; and, if he failed to have the notes and accounts collected, it was not only the right, but the duty, of appellees to do this, and if they did this in their own names, no injury would result to appellant. There was some evidence tending to show that appellees did assume to collect the notes and accounts in their own names, but there is no pretense that proper diligence has not been used in this respect, nor claim that any dollar collected has not been appropriated strictly in accordance with the contract. If collections shall be made of notes and accounts after the rendition of the judgment, appellant will be entitled to have them applied on the judgment, less necessary charges for collection, and, should he satisfy the judgment, will be entitled to have them delivered to him. Appellees' cause of action was admitted, and there was no evidence on which the court would have been justified in submitting any issue of fact which appellant sought to raise by his pleadings. As the case stood, the court correctly instructed the jury to find for appellees, and refused to permit an argument made to them, for it would have been a useless consumption of time to have permitted a discussion of the case before the jury, when there was no evidence that raised any issue of fact that had a bearing on the merits of the case. There is no error in the judgment, and it will be affirmed.

## MISSOURI PAC. RY. CO. v. BROWN.

(Supreme Court of Texas. Nov. 29, 1889.)

## RAILROAD COMPANIES—INJURIES TO PERSONS ON TRACK—INSTRUCTIONS.

In an action against a railroad company for the killing of plaintiff's son, where, under the law, recovery could be had only in case of gross negligence, a charge which authorizes the jury to believe that the injury was caused by the gross negligence of the company's employee, if they could have avoided it by the use of "ordinary care and caution," is fatally defective.

Appeal from district court, Rains county; E. W. TERHUNE, Judge.

*Whitaker & Bonner*, for appellant. *E. B. Perkins, C. H. Yoakum, and H. W. Martin*, for appellee.

STAYTON, C. J. Appellee's son was killed on March 28, 1887, while on appellant's track; and this action was brought to recover damages for the injury resulting to the father. The accident occurred about sundown, when appellant's train, just before the son was seen on the track, was running at a speed of about 22 miles an hour. The son was lying on the track when first seen by the employee of appellant, when the train was within about 100 feet of him; and after he was seen every effort was made to stop the train before it reached him, but this could not be done. How he came to be on the track is left in some uncertainty. He had been in a town, a few miles distant from where the accident occurred, during the day; and it was contended by appellant that while there, or on his way from the town to the place where he was found, he became intoxicated, and from this cause had fallen on the track. There is evidence showing that he was drinking while in town, and a bottle of whisky, partly emptied, was found on his person after he was injured. There was some other evidence tending to show that he may have been intoxicated when he fell on the track, where evidence was found of facts which might be attributed to intoxication or other sickness. Appellee contended, and offered some evidence to show, that his son was threatened with measles, or some kindred disease, and went to town for medicine; and his theory was that by reason of fever resulting his son became unconscious, and fell on the track. The accident occurred at a place where there was no reason to expect anyone to be on the track, and at a time when the law imposed on railway companies a liability for an injury resulting in death from the negligence of an employee only when that was gross. In applying the law to the facts, the court charged the jury as follows: "If the jury believe from the evidence that A. J. Brown was killed by the passenger train of defendant, and if you further believe from the evidence that the proximate cause of the injury was the gross negligence of the defendant's employee who were operating its train, that is, if you believe that A. J. Brown was on the track of defendant, and the employees operating the train saw him, or could, taken in connection

with such other duties as they were called on to perform, by the exercise of proper care and attention, have seen him, and could, by the use of ordinary care and caution, have avoided injuring him, and that such employee failed to exercise reasonable care and caution, and operated the train in a manner showing an entire want of care, such as would raise a presumption of conscious indifference to the consequences, and ran the train over A. J. Brown, and killed him; and if you further believe that plaintiff had a reasonable expectation of receiving pecuniary assistance from his said son,—you will find for plaintiff. But if you believe from the evidence that as soon as the employee operating the train discovered A. J. Brown on the track, and that as soon as they could, by the use of proper care, in connection with the performance of their other duties, have seen him, and that they then did all they could to warn him of the approach of the train, and endeavored, with such means as they could, to stop the train, and prevent said injury, and that they were unable to stop the train, but the same ran over and killed A. J. Brown, you should find for defendant."

The jury were authorized from this charge to believe that the proximate cause of the injury was the gross negligence of the appellant's employee, if they could, in connection with their other duties, "by the exercise of proper care and attention, have seen him, and could, by the use of ordinary care and caution," have avoided injuring him, and that a failure to use this "reasonable care and caution" might evidence an entire want of care. The charge contains inconsistent propositions. By "proper care and attention," the jury most likely understood to be meant such care and attention as would have avoided the accident, or at least such care as is in another place termed "ordinary care and caution." If such proper care and attention, or ordinary care and caution, was used, there could not have been an entire want of care, or such slight degree of care as could raise a presumption of indifference to the safety of the deceased. It may be that by the exercise of ordinary care and caution the employee could have seen the deceased in time to have stopped the train before it reached him, but the failure to use that degree of care could not fix liability on appellant; for it would only be responsible if its employee failed to use a less degree of care. That part of the charge which informed the jury under what state of facts appellant would be entitled to a verdict was subject to the same objections; for it informed the jury that appellant would be entitled to a verdict if its employee, "as soon as they could, by the use of proper care," have seen him, did see him, and then used such means as they could to stop the train. It seems to us that the charge was misleading, and that under it the jury could have had no proper conception of the law applicable to the case. It is probably true that juries often fail to apply correctly to the facts



a correct charge, in which it becomes necessary to explain to them the different degrees of negligence; but it is the right of a defendant who is liable only when its employees have been grossly negligent, to have a charge correct in this respect.

It is urged that the evidence was insufficient to sustain the verdict; but in view of the fact that the charge given will require a reversal of the judgment, it is neither proper nor necessary that we should express any opinion on that question. For the error noticed, the judgment will be reversed, and the cause remanded.

#### **GROUND 2. INGRAM.**

(Supreme Court of Texas. Dec. 20, 1889.)

#### **CONTINUANCE—CHATTEL MORTGAGES—RECORDING.**

1. An application for a continuance on the ground of the absence of the applicant as a witness, which does not show that by reasonable diligence he could not have been present, or that his deposition could not have been taken, is insufficient.

2. In a suit to foreclose a chattel mortgage a certified copy thereof is admissible in evidence, as against the single objection that it is "a copy," where it appears that the original is filed in another county, and cannot be withdrawn, though Sayles' St. Tex. art. 3190b, § 3, regulating the registration of chattel mortgages, provides that a copy of such instrument, certified by the clerk, shall be received in evidence of the fact that it was received and filed according to the clerk's indorsement, "but of no other fact."

3. A certificate showing that the mortgage was recorded in full, instead of being deposited with the clerk as provided by law, would not render the registration invalid, if the law was otherwise complied with.

4. Where a chattel mortgage contains a power of sale, and provides that costs incurred in selling shall be paid out of the proceeds of the sale, costs incurred by the mortgagee in an attempt to sell which is prevented by the wrongful act of the mortgagor, are recoverable from him in a suit to foreclose.

Appeal from district court, Tarrant county; B. E. BECKHAM, Judge.

Action by J. C. Ingram against W. A. Grounds. Judgment for plaintiff, and defendant appeals.

*Wray & Stanley and Bentley & Bowyer*, for appellant. *B. P. Ayres*, for appellee.

STATTON, C. J. Appellee brought this action to recover the amount due on a promissory note executed to him by appellant, and to foreclose a chattel mortgage given to secure it. The mortgage covered 500 head of horses, and the same number of cattle, described by a designated brand, all of which in the instrument were declared to be on appellant's ranch, in Taylor county; and there is nothing in the mortgage, nor in the record, which shows that the mortgaged property was not described with sufficient certainty to pass title to specific property, had the transaction been a sale, instead of a mortgage. The mortgage contained a power to sell in case the debt was not paid at maturity, and the trustee attempted to collect the mortgaged property for the purpose of selling it to satisfy the debt after its maturity,

but he was threatened with violence in case he proceeded, and desisted; and this action was brought. The mortgage contained a provision that the costs incurred in selling under it should be paid out of the proceeds of the property when sold, and appellee sought to recover a sum thus expended prior to the time the trustee was deterred from exercising the power conferred on him. The mortgage, having been acknowledged, was filed in the office of county clerk for Taylor county, as chattel mortgages are required to be. A copy of that mortgage, duly certified by the proper officer, was made an exhibit to the petition. Appellant pleaded a general denial, alleged that the note covered usurious interest, and that the property mortgaged was but parts of stocks of cattle and horses. There seems to have been a verbal agreement, looking to convenience of counsel, as to time when the cause should be taken up, but nothing tending to show that counsel for appellee intended to waive the right to trial when the cause was reached in its order. When the cause was reached, counsel for appellee suggested that counsel for appellant resided in another town, and that he was willing to pass the case until another day, if thereby his right to a trial at a future day of the term should not be prejudiced. The court declined to give that assurance, and the trial began, when other counsel appeared for appellant, who was permitted time to make an informal application for continuance, which was overruled.

We do not see that there was anything in the agreement of counsel which entitled appellant to a continuance, and in so far as it was asked on account of his absence as a witness the application was insufficient, in that he did not show that by the exercise of reasonable attention to his own business his deposition could not have been taken, or he have been present in person to testify.

The certified copy of the mortgage attached to the petition was offered in evidence, and objected to on three grounds: (1) Because the description of property was not such as to identify any particular property; (2) because it was claimed that the certificates showed that the mortgage had been recorded in full, instead of being deposited with the clerk, as is provided by law for the registration of chattel mortgages; (3) "because the instrument offered is only a copy, and not the best, or primary, evidence." The mortgage described the property covered by it with as much particularity and precision as is usual or necessary in the description of such property; and, if uncertainty exists, this arises from facts extrinsic the instrument, which are not shown by the record before us. What the effect of such uncertainty of description, if shown, would be, it is not now necessary to consider.

The certificates to the copy of the mortgage offered do not show that it was registered or recorded otherwise than is required by the law regulating the registration of chattel

mortgages; but, if it was shown that it was recorded in full, this would not render the registration invalid, if the law regulating the registration of such instruments was otherwise complied with. The inference from the certificates is that the law regulating the registration of chattel mortgages was complied with. The law regulating the registration of chattel mortgages, among other things, provides that "a copy of any such original instrument, or of any copy thereof, so filed as aforesaid, certified to by the clerk in whose office the same shall have been filed, shall be received in evidence of the fact that such instrument or copy was received and filed according to the indorsement of the clerk thereon, but of no other fact." Sayles' St. Tex. art. 3190b, § 3. The law provides that an original chattel mortgage may be filed as was done in this case; and we see no good reason, when this mortgage has been acknowledged or proved for registration in the ordinary mode, and the original filed in the proper office, why a certified copy of that should not be received in evidence under the same rules which admit certified copies of other instruments properly registered. There may be reasons why certified copies should not be received when only a copy is filed with the clerk, which the law permits to be done. The legislature, however, has declared that certified copies "shall be received in evidence of the fact that such instrument or copy was received and filed according to the indorsement of the clerk thereon, but of no other fact." This law has application only to chattel mortgages, and the emphatic language used shows that it was not intended that the statutes applicable to the use of certified copies of instruments recorded under the general registration laws should apply. If the statute in question deprived the holder of a chattel mortgage of all opportunity or means to prove its existence or contents, it ought not to be given effect; but such is not its effect. A mortgagee is under no obligation to file the original mortgage; but if it has been acknowledged, as was the mortgage in this case, he may file a copy, which will protect his right to a lien as fully as though the original was filed. The original may be proved up in such a case, and used in evidence, under the rules applicable to the proof and admission of instruments; and, if the original be filed, its execution and contents may be proved in the same way. The method of making proof may not be so convenient as it is in other cases under the laws regulating the admission of instruments, or certified copies thereof, when recorded under the general registration laws; but this furnishes no reason why effect should not be given to the clearly-expressed intention of the legislature. In *Boydston v. Morris*, 71 Tex. 699, 10 S. W. Rep. 331, it was held that a certified copy of a chattel mortgage should not have been received for a purpose other than that contemplated by the statute, and that, "in order to establish the mortgage, its execution should

be proved, and the original produced, or its absence accounted for." A very similar statute was in force in New York when the case of *Bissell v. Pearce*, 28 N. Y. 256, was decided, and a certified copy had been introduced, for the purpose of showing an executed mortgage and its contents; but the court, after saying that it was admissible for some purpose, said: "But evidence of what? The statute answers, of the fact, only, that such instrument or copy, and statement, were received and filed according to the indorsement of the clerk thereon, and of no other fact. And so also as to the original indorsement by the clerk. It is to be received in evidence only of the facts stated in such indorsement. Such evidence is no proof of the existence of the mortgage." If the attention of the legislature be called to the statute in question, it would no doubt place it in harmony with other statutes permitting original instruments properly recorded to be used in evidence without further proof of their execution, and permitting certified copies of duly-recorded instruments to be used under given circumstances; but so long as the statute stands this court must give effect to the clearly-expressed intention.

It does not follow from this, however, that the court below erred in admitting the copy over the objections urged to it. The very objections made are those to be here considered. The objection was that the paper offered was a copy, and not that it was not a true copy of the original, nor that the paper of which it purported to be a copy was not shown to have been executed by appellant. It is shown that the paper of which that offered in evidence purports to be a copy was filed in the office of the county clerk of Taylor county, and that cannot be withdrawn. Thus is the non-production of the original sufficiently accounted for on the trial of this cause in Tarrant county. The objection that it was "a copy" is not equivalent to one that it was not shown to be a true copy, but carries with it the implication that such was conceded to be its true character. Appellee, not being able to produce the original, because a filed paper in another county, was entitled to introduce such secondary evidence as was available. That a proved copy would have been admissible, the execution of the original being shown, under the circumstances of this case, cannot be questioned; and, had the objection been that the execution of the original had not been proved, or that the paper offered was not shown to be a true copy, then the objection should have been sustained, unless the proof was made. If either of these objections had been made, the record leaves no doubt that they would have been obviated by proper evidence, if this was not actually done. The attorney who wrote the mortgage testified on the trial to that fact, and that it was signed by appellant; and, had there been an objection based on the want of proof of execution of the original, or of the correctness of the copy offered, appellee would

have had an opportunity to make these matters clear, and beyond controversy. The objection raised neither of these questions, but did raise the single question whether the copy could be used in absence of the original. On that question the court below ruled correctly.

The court below correctly ruled that appellee was entitled to recover such sum as he had in good faith expended, in accordance with the terms of the mortgage, in an effort to sell the property as therein provided, which, however, was prevented by the wrong of appellant, who forced the more expensive foreclosure through the courts. There is no error in the judgment, and it will be affirmed.

JOHNSON v. FLINT *et al.*

(Supreme Court of Texas. Dec. 10, 1889.)

STATUTE OF FRAUDS—PLEADING—ASSIGNMENT OF ERRORS—NEWLY-DISCOVERED EVIDENCE.

1. The statute of frauds is available as a defense in trespass to try title though not pleaded, under Rev. St. Tex. art. 4793, providing that under the plea of not guilty the defendant may give in evidence any lawful defense, except that of limitation.

2. An assignment of error, presenting the propositions that "the execution of an instrument offered was sufficiently proved;" "that the terms of the instrument make it a sufficient memorandum of sale of the land," etc.; and that "the recitals of the instrument show that the vendor and vendee were tenants in common of the land itself,"—does not sufficiently point out any particular ruling of which appellant complains, his brief not in any way showing by whom or for what purpose the instrument was offered, the objection to it, nor the ruling, if any, thereon.

3. From an instrument offered on plaintiff's motion for a new trial on the ground of newly-discovered evidence, it appeared that plaintiff, a minor, had inherited the land in question; that it had been sold by order of court on a credit, and the purchase money secured by lien on the land, the instrument being the release given by the guardian on the payment of the purchase money. *Held* that, though this would have proved that plaintiff once owned the land, it would also have shown that it had been transferred, and the proceeds paid to her estate, and was therefore not sufficiently material.

4. The release had been recorded in the court several years before the suit was brought, but the motion stated that its existence was unknown to plaintiff at the time of the trial, and that he had examined the records for instruments affecting the land in question without discovering it, but states no reason for his failure to discover it. *Held*, that proper diligence to discover it was not shown.

Commissioners' decision. Appeal from district court, Tarrant county; R. E. BECKHAM, Judge.

Trespass to try title by Robert G. Johnson, as guardian of Minnie R. Williams, a minor, against Joseph L. Flint and others. Plaintiff appeals from a judgment for defendants. Rev. St. Tex. art. 4793, provides that "under such plea of 'not guilty' [trespass to title] the defendant may give in evidence any lawful defense to the action, except the defense of limitations, which shall be specially pleaded."

Robert G. Johnson, for appellant. Pen-dleton, Chapman & Powell, for appellees.

ACKER, P. J. Appellant brought this suit as guardian of the estate of Minnie R. Will-

iams, a minor, against appellees, to recover an undivided one-half interest in 18½ acres of land, and for partition. Defendants pleaded not guilty. The trial was without a jury, and resulted in judgment for defendants. The assignments of error are not contained in the brief, which was filed before the amendment to rule 29 took effect. 68 Tex. X, 6 S. W. Rep. III. The brief of appellant presents the following propositions, "under the first assignment of error:" "(1) The execution of the instrument offered in evidence as a memorandum of sale was properly proved. (2) The terms of said instrument make it a sufficient memorandum of the sale of the land in controversy by David Boaz to J. N. B. Williams to bring it within the requirements of the statute of frauds. (3) The recitals of said instrument show that Williams was a tenant in common with Boaz of the land itself."

Under the first of these propositions, the following statement is made: "C. C. Cummings testified that he drew and signed said instrument by authority of David Boaz, and at his request, and that the facts set forth in said instrument were furnished him by said Boaz." No statement is made under either of the other propositions. It does not appear, even inferentially, from the brief, by whom this instrument was offered, or for what purpose, or what objection was made to it, if any, or whether the court ever made any ruling in regard to it. It devolves upon appellant to call the attention of this court to the rulings of the court below of which he complains, and the rules plainly point out the manner in which he shall do this. We think it obvious that these propositions do not point out any particular ruling of the court below. Rules 29, 31; *Mynders v. Ralston*, 68 Tex. 499, 4 S. W. Rep. 854.

The brief contains the following "proposition under second assignment:" "The judgment should have been in favor of plaintiff. The statute of frauds must be invoked, to be available as a defense." Under the plea of not guilty, the defendants had the right to interpose any defense, except limitation. Rev. St. art. 4793.

By a proposition, "under the third assignment," it is contended that plaintiff's motion for new trial should have been granted, because "the deed of release attached to plaintiff's motion recites a sale of the land in controversy by Boaz to Williams for a valuable consideration, and said recitals are valid evidence, as against defendants, of plaintiff's title." There is no statement under this proposition, but we find, from an examination of the record, that the release referred to was duly recorded in Tarrant county, several years before this suit was brought, and the motion does not show any reasonable excuse for the failure to use it in evidence on the trial, if it was thought important to do so. The motion states that the existence of the instrument was not known to plaintiff at the time of the trial, and that plaintiff had

examined the records for instruments of writing affecting the land in controversy, but failed to discover it. No reason is stated for the failure to discover the record of the instrument. It appears to have been regularly recorded, and, if so, the exercise of ordinary diligence would have discovered its existence. To authorize granting a new trial on the ground of newly-discovered evidence, it must appear that the party seeking it has exercised proper diligence, and that the failure to produce the evidence on the trial was not due to any neglect on his part. The newly-discovered evidence must also be material. It appears from the recitations of the release referred to that plaintiff's minor ward inherited from her father a half interest in the land which he held under parol contract of purchase, and that her interest was sold by authority of an order of the probate court, on a credit of one year, the purchase-money note being secured by lien against the land, and that the purchase-money note was paid to her guardian, and the instrument referred to was his release of the lien against the land. If the instrument would have proved that the minor ward of plaintiff had once owned a half interest in the land, it would also have proved that that interest had been disposed of, and that her estate received the proceeds. We think the motion for new trial was insufficient, both upon the ground of diligence and materiality of the newly-discovered evidence, and that there was no error in overruling it. We find no error in the record, and are of opinion that the judgment of the court below should be affirmed.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment affirmed.

#### GULF, C. & S. F. RY. CO. v. BREITLING.

(Supreme Court of Texas. Jan. 10, 1890.)

##### RAILWAY COMPANIES—ACCIDENTS AT CROSSINGS.

1. As plaintiff was about to drive across the defendant's tracks, after having exercised due care to ascertain the approach of trains, the sudden approach of a train, which she had not noticed, frightened her horse, in consequence of which she was thrown from her buggy. Rev. St. Tex. 1879, art. 4232, imposes a penalty on a railroad company for the failure to ring the bell or blow the whistle at road and street crossings, and provides that the company shall be liable for all damages sustained by reason of such neglect. *Held*, that a charge to the effect that the failure to comply with these requirements at the crossing at which plaintiff was injured was *prima facie* evidence of negligence, making the company liable for the injury if it occurred without any fault of plaintiff, is correct.

2. An instruction that, "if the train was running at a rate of speed greater than that limited by an ordinance of the city, and in excess of what an ordinarily skillful and prudent man engaged in the business would employ, in view of the probable danger at the crossing, and if, in consequence of this speed, the train came so close to plaintiff's horse that plaintiff was thrown from the buggy in consequence of the horse becoming frightened, and plaintiff did not contribute directly to her injury, then defendant is liable," is correct.

v. 12s. w. no. 29—71

Appeal from district court, Harris county; MASTERSON, Judge.

Action by Mary Breitling against the Gulf, Colorado & Santa Fe Railway Company for personal injuries. The company appeals from a judgment for the plaintiff. Rev. St. Tex. 1879, art. 4232, provides that "a bell of at least 30 pounds weight or a steam-whistle shall be placed on each locomotive engine, and the bell shall be rung or the whistle blown at the distance of at least 80 rods from the place where the railroad shall cross any road or street, and to be kept ringing or blowing until it shall have crossed such road or street, or stopped, under a penalty of fifty dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer, and the other half to the state, and also be liable for all damage which shall be sustained by any person by reason of such neglect."

Jones & Garnett, for appellant. Goldthwaite & Ewing, for appellee.

STAYTON, C. J. The evidence shows that appellee was injured while attempting to cross a street in the city of Houston over which appellant's railway runs; that there were several tracks in the street, all of which, perhaps, but one, on which the moving train was, were occupied by standing freight-cars, which cut off the view of one approaching the street crossing to the right or left until within a few feet of the track on which the moving train was. The evidence is conflicting as to the extent of street crossing not occupied by freight-cars, as is it whether a bell was ringing or whistle blowing as the moving train approached the street crossing. The evidence is also conflicting as to the rate of speed at which the train was moving at the time of the accident; some witnesses estimating the speed as high as 12 or 15 miles per hour, while an ordinance of the city forbade the running of trains at a speed greater than 6 miles per hour. The evidence for appellee shows that, after having exercised due care to ascertain whether a train was approaching the street crossing, she drove upon it, ignorant of the approach of a train, but that when within a few feet of the track on which the train was moving it came rapidly from behind the standing freight-cars, when, to avoid contact with it, she checked the horse she was driving, which, however, was so near to the moving train that it became frightened, and backed the vehicle in which she and her children were into a ditch, by which it was overturned, and she seriously injured. The court instructed the jury that, if the statutory requirement as to ringing of bell or blowing of whistle on approaching the crossing was not complied with, this was *prima facie* evidence of negligence, from which, if the injury resulted without negligence on the part of appellee, liability of appellant would exist. There was no error in this charge. It clearly informed the jury what the duty of appellant was, and that a

failure to perform this rendered appellant liable to appellee for all damages sustained by reason of such neglect. Rev. St. art. 4282.

After stating the ordinance of the city, the court instructed the jury as follows: "Now, in this case, if the jury believe from the evidence, taking into consideration the ordinance referred to, and all the attendant circumstances, that the defendant's agents and servants in charge of the train in question ran the train, on the occasion in question, up to and across Capitol street at a rate of speed exceeding six miles an hour, and in excess of what an ordinarily prudent and skillful person engaged in defendant's business would, in view of the probable danger at the crossing, have done; and if the jury further believe from the evidence that the train came in close proximity to plaintiff, as charged in her petition, and that the near approach of the train was occasioned by the train running at an excessive rate of speed, as above supposed, and the plaintiff was thrown from her buggy into the ditch at the railroad crossing in question, and injured, as charged in her petition, in direct consequence of her horse taking fright at the near approach of the train, and that plaintiff did not contribute directly, by her own negligence, to the injuries of which she complains,—then the defendant is liable to the plaintiff for the loss and damage if any, sustained by her by reason of such injuries, and the jury should so find." We see nothing in this charge erroneous, as matter of law, applicable to the facts which the evidence tended to show existed, nor was it in any respect misleading, when considered in connection with the other parts of the charge.

The charge complained of in the third and fourth assignments of error were correct as matter of law, and applicable to the state of facts shown by the evidence offered by appellee to have existed. Brief of counsel for appellant does not even suggest wherein these charges are subject to criticism. The same is true of the charges referred to in the fifth assignment of error. There was evidence which the jury must have believed sufficient to fix liability on appellant, and it was for the jury to determine the truth in reference to all matters as to which the evidence was conflicting.

The verdict seems to us large, but, in view of the nature of the injury shown to have been received, and its effect upon the future ability of appellee to earn a living, we are not authorized to hold it so clearly excessive as to justify a reversal of the judgment. The cause was fairly tried, and the judgment will be affirmed.

LEHMAN v. GAJEWSKY.

(*Supreme Court of Texas. Jan. 14, 1890.*)

APPEALABLE ORDERS.

Under Rev. St. Tex. art. 2707, providing that any person aggrieved by any decision, order, or

judgment of the county court, or by any order of the judge thereof, may appeal to the district court, an order setting aside a previous order, made at the same term, discharging a guardian, is not appealable, as it is not in its nature decisive of any issue between the parties, to which class of orders only the statute applies.

Appeal from district court, Washington county; C. C. GARRETT, Judge.

Application to the county court, by F. Gajewsky, to set aside an order, made earlier in the same term, discharging Julius Lehman as his guardian. The guardian appealed to the district court from the order granting this application, and now appeals from the dismissal of the appeal in the district court.

C. R. Breedlove, for appellant. Searcy & Garrett and Bassett & Muse, for appellee.

STAYTON, C. J. Appellant was guardian of the estate of appellee, and with the latter, on the day he reached majority, made a settlement, taking from him a written acknowledgment that he had delivered to his ward all property theretofore in the guardian's hands. This paper, together with an application for discharge, was filed in the county court having jurisdiction of the matter; and on November 24, 1888, that court entered an order discharging the guardian on condition that costs of the guardianship should be paid. On December 4th, appellee made an application to have the order of November 24th set aside on the ground that the settlement on which it was made had been obtained by false representations made to him by appellant in reference to the estate for which he was liable. The application set out with some particularity wherein appellant had failed to turn over or account for property of appellee which he had received as guardian. While this motion was pending, appellant offered to pay to the clerk all costs of the guardianship; but, under direction of the county judge, the clerk declined to receive this. On December 6th the order of November 24th was set aside, and from the order doing this an appeal was presented to the district court. When, on motion, the above facts appearing, the appeal was dismissed; and from that ruling this appeal is prosecuted. All the proceedings referred to occurred during the same term of the county court.

The statute provides that "any person who may consider himself aggrieved by any decision, order, or judgment of the court, or by any order of the judge thereof, may appeal to the district court, as a matter of right, without bond." Rev. St. art. 2707. This statute doubtless has application only to such decisions, orders, or judgments as at the end of a term would be held conclusive, as adjudicative of some controverted question or right, unless set aside by some proceeding appellate or revisory in its nature. The question between the parties in this case is, has appellant delivered to appellee all property and funds which he ought as guardian to deliver? Has he complied with his obligation as guardian? He reported to the court that he had,

and offered as evidence of that fact the written acknowledgment of appellee; and on this the court directed his discharge. The county court, however, had power, as have all other courts, during the term at which that order was made, to set it aside, if such course was shown to be proper; and of this that court was the sole judge. In the exercise of that power, the order directing the discharge of the guardian was set aside; and the matter now stands in that court as though the order had not been entered. There is no order, final in its nature, decisive of any issue between the parties; and until such an order exists there is nothing which can be appealed from. There would be as much reason for sustaining an appeal from an order granting a new trial as for sustaining the appeal to the district court in this case. The order of December 6th is in effect one granting a new trial, and on it no appeal will lie. If, in the final settlement to be made of the guardian's account, an order be made with which he is dissatisfied, he will then have an opportunity to appeal. There is no error in the judgment, and it will be affirmed.

**MANN v. WALLIS et al.**

(Supreme Court of Texas. Jan. 14, 1890.)

**EXECUTION—SALE—INJUNCTION.**

A sale on execution, under a judgment against a firm, of the homestead of one of its members, which had been conveyed before the judgment creditors had done anything to fix a lien on the land, and of which conveyance they had notice when they levied their execution, will not be enjoined, as the possession of the grantee will not be disturbed by the sale, and he has an ample remedy in trespass to try title.

Appeal from district court, Washington county; C. C. GARRETT, Judge.

Action by M. W. Mann against Wallis, Landes & Co., as execution creditors; Hunt & Co., composed of P. W. Hunt and M. V. Hunt, execution debtors; and Dever, sheriff, —to restrain the sale under execution of certain real estate purchased by plaintiff from P. W. Hunt, and to clear the title thereto. Plaintiff appeals from a judgment dissolving the injunction and dismissing the action.

*Bassett, Muse & Muse*, for appellant. *Davidson & Minor*, for appellees.

STAYTON, C. J. The nature and result of this suit, as well as the substance of appellant's petition, are thus correctly stated in brief of counsel: The appellant, M. W. Mann, who was plaintiff in the court below, brought this suit to enjoin the sale, under an execution in favor of Wallis, Landes & Co., against Hunt & Co., of 86 1-5 acres of land claimed by the plaintiff, and to clear his title thereto. Wallis, Landes & Co., plaintiffs in the execution; Hunt & Co., composed of P. W. Hunt and M. V. Hunt, defendants therein; and Dever, the sheriff, who was in possession of the writ, and had levied on the premises under it, and was about to sell them,—were joined as defendants. By an

order of the judge, made in chambers, the sale was temporarily enjoined; but afterwards, on motion of the defendants Wallis, Landes & Co., the court dissolved the injunction and dismissed the bill.

The grounds of the motion were (1) that the allegations of the petition were insufficient; (2) that it did not appear from the petition that the plaintiff had not a complete remedy at law; (3) that it did not appear that plaintiff was not a volunteer and interloper; (4) that it did not appear that the plaintiff was entitled to any relief in equity; and (5) that it did not appear that the plaintiff had purchased the land before the lien of the defendants Wallis, Landes & Co. became fixed thereon.

The petition alleged that on and prior to the 11th day of November, 1888, and down to and including the 11th of March, 1889, the defendant P. W. Hunt owned and occupied the premises in the controversy, consisting of 86 1-5 acres of land, which were part of the rural homestead of said Hunt and his family,—he (the said Hunt) being a citizen of Texas, and a married man, and the head of a family; that said Hunt and his family were residing on the premises, and occupying, using, and enjoying the same as part of their homestead; that afterwards, on said 11th of March, 1889, said Hunt, joined by his wife, by their deed of that date, conveyed said premises in fee to the plaintiff, whereby the plaintiff became and was the owner thereof, of all which the defendants had due notice; that afterwards, on the 10th of April, 1889, the defendant Dever, sheriff, etc., having in his possession a writ of *fi. fa.* issued out of the county court of Galveston county on a judgment of that court rendered on the — day of February, 1889, in favor of Wallis, Landes & Co., and against Hunt & Co., for the sum of \$267.06, with interest and costs, by virtue of said writ levied on the premises, and advertised them for sale on the first Tuesday in May, 1889, and had threatened to sell, and would so sell, unless restrained, etc.; that the premises, being the homestead of the family of said Hunt prior to his said sale to plaintiff, and being thereafter the property of plaintiff, were not subject to sale under said writ, but that the sale, if made, would cast a cloud upon the plaintiff's title, which would interfere with the sale thereof, and depreciate its market value, and the rental value thereof, to the plaintiff's great and irreparable injury; that, should it appear upon the trial of the case that the premises were not protected from forced sale as part of the homestead of the family of said Hunt, the plaintiff is still the owner thereof, subject to such rights as the defendants Wallis, Landes & Co. may have under their said judgment and execution; that the premises were reasonably worth the sum of \$1,500, being about \$1,200 in excess of said defendants' claim, and it is to the interest of all the parties, both plaintiff and defendants, that their respective rights and interests in the

property, and especially its *status* in respect of said claim of homestead, should be determined in advance of the proposed sale thereof under said execution, in order that, should the same be held subject to said judgment and execution, the plaintiff may have an opportunity to redeem the same by payment of the debt, and that in the event of a sale the title of the premises may be cleared, and bidders apprised of the *status* thereof, so as to be enabled to bid thereon intelligently, and that the same may bring its fair value.

While there is some conflict of decision, the great weight of authority sustains the proposition that a sale of land under execution will not be enjoined at the instance of one not a party to the execution, on the sole ground that such third person claims to own the property. To entitle such a person to injunction, he must show that his right will be injuriously affected, or that some irreparable injury will follow if the sale be made. This is the settled rule of this court. *Carlin v. Hudson*, 12 Tex. 203; *Henderson v. Morrill*, Id. 1; *Whitman v. Willis*, 51 Tex. 432; *Purniton v. Davis*, 66 Tex. 456, 1 S. W. Rep. 343; *Spencer v. Rosenthal*, 58 Tex. 4. It was incumbent on appellant to allege such facts as would show, if the sale proceeded, that he had not a clear and adequate remedy in law for the enforcement of any right he may have. The case which his petition makes is simply that the property in question was a part of the rural homestead of P. W. Hunt and family on March 11, 1889, when he acquired title thereto by a conveyance made by Hunt and wife. If this was true, title to the land vested in him whether the land was part of the homestead of Hunt or not. The petition shows the right of appellees to depend on the fact that some time in February, 1889, they recovered a judgment against a firm of which Hunt was a member, under which an execution issued that on April 10, 1889, was levied on the land. It is not shown that appellees had in any manner attempted to fix a lien on the land prior to his purchase, nor that they claim to have acquired any right superior to his by reason of the fact that the levy was made without notice of his purchase; but, on the contrary, it is alleged that they had full notice of his right. If these facts be true, appellant need not resort to a court of equity for the protection of his right, for, his title having accrued prior to the time appellees are shown to have acquired any right, an action of trespass to try title would secure to him every right which he asserts. On sale under execution, his possession would not be disturbed. Whether in or out of possession, appellant could maintain an action of trespass to try title successfully against any one claiming under the sale sought to be enjoined, if the facts are as stated in his petition. *Thomson v. Locke*, 66 Tex. 383, 1 S. W. Rep. 112. An adjudication of title is as effective in the protection of right as is a decree in equity removing cloud from title. If appellant intended to base his right to re-

lief sought on the proposition that the deed to himself was not recorded, and that appellees derived notice of the conveyance to him at the time their levy was made, or on the ground that appellees denied that the property was homestead at the time he bought, or that he was a *bona fide* purchaser for value, he should have alleged such facts, and the question would then have arisen whether resort to a court of equity was necessary to prevent cloud upon his title. That such issues were involved cannot be presumed, when not made by the pleadings. In *Gardner v. Douglass*, 64 Tex. 76, sale under execution was enjoined at the prayer of husband and wife, on the ground that the property sought to be sold was the homestead of the family whose head was defendant in execution, and on the further ground that the property was in part the separate property of the wife by reason of the fact that in part it was paid for with her separate funds. The property had not been actually used for homestead prior to the time an abstract of the judgment, under which the execution issued, was recorded. The decision in that case is in line with all the decisions which hold that injunction will issue to prevent cloud upon title, when the evidence on which the right depends is not of record, or shown in the papers through which the right depends. In *Van Ratcliff v. Call*, 72 Tex. 492, 10 S. W. Rep. 578, the facts were similar to those alleged in this case, except in that case an abstract of the judgment under which the execution issued had been properly rendered in the county in which the land was situated before the debt or sold to the persons seeking injunction. The question was whether a homestead existed when the abstract of judgment was filed, and so continued until sale to persons seeking injunction. It was also alleged that the property was bought for purpose of sale. Injunction in that case was perpetuated under the rules which apply to the granting of such relief to prevent cloud upon title. It may be desirable to appellant to know before the sale is made whether his title will prevail over one to be acquired under the sale sought to be enjoined, in order that he may act in accordance with his own best interest, but this furnishes no sufficient reason for entertaining proceedings for injunction not authorized by the facts stated. There was no proposition to amend when exceptions to the petition were sustained, and it would have been folly to permit the cause to stand for a hearing on the facts, when, if every fact alleged had been proved, they would have furnished no ground for relief. There is no error in the judgment, and it will be affirmed.

#### ANDREWS v. ANDREWS.

(Supreme Court of Texas. Jan. 17, 1890.)

DIVORCE—PLEADING—MARRIAGE—NEGROES.

A petition for divorce alleging that plaintiff and defendant are negroes, are husband and wife, and lived together as such from August, 1867, to



August, 1885, and were so living together on August 15, 1870, is bad on general demurrer, as showing no marriage previous to the filing of the petition, even if Act Tex. Aug. 15, 1870, legalizing marriages between slaves when they had continuously lived together as husband and wife, applies to marriages between freed persons.

Appeal from district court, Washington county; J. B. McFARLAND, Judge.

*Beauregard Bryan and W. B. Garrett*, for appellant. *Lafayette Kirk*, for appellee.

**GAINES, J.** The appellant, as plaintiff in the court below, brought this suit against appellee for a divorce, and for a division of property alleged to belong to them in common. A general demurrer was sustained to the petition, and the suit was dismissed. In this there was no error. The petition is insufficient, even upon general demurrer. The allegations in reference to the marriage of the parties are as follows: "That the plaintiff and defendant are negroes, are husband and wife, and lived together as husband and wife from the — day of August, 1867, until about the — day of August, 1885, continuously; having been both precluded by the laws of bondage from the rights of matrimony, and having been living together in such relations August 15, 1870." If the petition had alleged that the parties were husband and wife at the time the defendant committed the acts which are complained of as grounds for a divorce, it would have been sufficient. But the allegations only show that they were husband and wife at the time the petition was filed, and failed to show at what time that relation was established. We infer from the briefs that it was the object of the allegations which have been quoted to aver that the parties mutually agreed presently to become husband and wife in 1867, without the rites of matrimony being solemnized by any one authorized by law to perform that ceremony, and that they had continued ever since to live together as husband and wife, until August, 1885. But the averment merely is that they have continuously lived together as husband and wife from 1867 to 1885. The fact that they have been together as husband and wife would in some cases be evidence of the fact that that relation existed between them. But in pleading it cannot be taken as the equivalent of an allegation of marriage. The pleading does not contain any statement that such cohabitation was in pursuance of any contract of marriage. They may have lived together as husband and wife without being married. The act of August 15, 1870, in reference to persons who had been held in bondage, was intended to legalize the marriage between slaves when they had made a present contract of marriage, and had continuously lived together as married persons in pursuance of such contract. Even if we should hold that the statute applied to marriages between freedmen and freedwomen contracted in 1867, (which we do not hold,) the allegations, we think, would still be insufficient to show a marriage. If it had

been averred, however, that the plaintiff and defendant mutually agreed presently to be husband and wife, we would have had the question whether such contract, even in the absence of any ceremony by a person authorized to solemnize the rights of matrimony, would not have been a valid marriage at common law. But the petition lacks such averment, and we need not consider that question. The demurrer to the petition was properly sustained, and the judgment is affirmed.

#### O'CONNOR v. LUNA.

(*Supreme Court of Texas. Jan. 17, 1890.*)

##### TRESPASS TO TRY TITLE—USE AND OCCUPATION.

Rev. St. Tex. art. 4794 et seq., provides that in trespass to try title the petition shall allege that plaintiff was in possession or entitled to such possession, and that the plea of not guilty shall be an admission that defendant was in possession or claimed title at the commencement of the action, and that, when it is alleged and proved that one party is in possession, on a finding for the adverse party damages shall be assessed for use and occupation. *Held*, that a plea of not guilty is not sufficient to charge defendant with use and occupation from the institution of suit, without proof of his occupancy.

Appeal from district court, Victoria county; H. CLAY PLEASANTS, Judge.

*Glass, Callender & Proctor*, for appellant. *Stayton, Kleberg & Dabney and Herbert Wilson*, for appellee.

**HENRY, J.** This was an action of trespass to try title. The defendant pleaded not guilty. Judgment was rendered in favor of plaintiff for the recovery of the land, and for the value of its use and occupation from the date of the filing of the original petition. The only question raised by the assignment of errors relates to the judgment for the value of the use and occupation of the land.

It appears from a bill of exceptions that no evidence was introduced to show that defendant had ever been in the actual occupancy of the land, but the court held that their plea of "not guilty" was sufficient to charge them with possession, for the purposes of the judgment, from the time of the institution of the suit. We are unable to concur in this conclusion. The Revised Statutes direct that in the action of "trespass to try title," among other things, the petition shall state that the plaintiff "was in possession of the premises, or entitled to such possession." Other articles read as follows: "Art. 4794. Such plea [not guilty] or any other answer to the merits shall be an admission by the defendant, for the purpose of that action, that he was in possession of the premises sued for, or that he claimed title thereto at the time of commencing the action, unless he states distinctly in his answer the extent of his possession or claim, in which case it shall be an admission to such extent only." "Art. 4808. Upon the finding of the jury, or of the court when the case is tried by the court, in favor of the plaintiff for the whole or any part of

the premises in controversy, the judgment shall be that the plaintiff recover of the defendant the title or possession, or both, as the case may be, of such premises, describing them, and, where he recovers the possession, that he have his writ of possession. Art. 4809. Where it is alleged and proved that one of the parties is in possession of the premises, the court or jury, if they find for the adverse party, shall assess the damages for the use and occupation of the premises; and, if special injury to the property be alleged and proved, the damages for such injury shall be also assessed." We think the necessary construction of these provisions of the law is that, the admission of possession, by the answer, authorizes only a recovery of the title and possession of the land, but that damages for the use and occupation of the premises can be recovered only when the facts authorizing such recovery are alleged and proved as other issues are required to be. The judgment is reversed, and the cause remanded.

STAYTON, C. J., not sitting.

**SABINE & E. T. RY. CO. v. BROUSSARD.**

(*Supreme Court of Texas. Jan. 17, 1890.*)

**TRIAL—REMARKS OF COURT—RAILROAD COMPANIES—CONSTRUCTION—OVERFLOWING LANDS.**

1. A remark of the court, during the examination of a witness, that he thought the last half-hour had been unnecessarily consumed, and was not calculated to enlighten court or jury, not excepted to at the time, will not be considered on appeal, when the jury are charged that they were the judges of the weight of the testimony, and that it was not the province of the court to pass on that question, or to express an opinion as to its value.

2. In an action for damages from an overflow alleged to have been caused by improper construction of defendants' railroad, an instruction to consider whether the water on the land, including what fell as rain and what was there as overflow, would have run off in its natural course, is not erroneous as not confining the jury to the sources and character of overflow alleged in the petition.

3. An instruction to consider whether, in such case, the damage would have occurred if the road-bed had been so constructed as properly to drain the country, is not erroneous on the ground that it is the duty of defendant only to construct its road so as not to impede the natural drainage.

Appeal from district court, Hardin county; EDWIN HOBBS, Judge.

Action by Moise Broussard, against the Sabine & East Texas Railway Company, to recover damages for an overflow alleged to have been caused by the improper construction of defendant's road. Among the assignments of error were: That the court erred in instructing the jury that, "in determining the question of defendant's liability to plaintiff for damages, if any, you will consider the question whether or not the amount of water on the land south of Taylor's bayou, inclusive of what may have fallen as rain-water and what was there as overflow water, would have run off the land in its natural course of drainage, without the injury complained of, if the defendant's road-bed embankment had not been, as alleged, construct-

ed in the form and manner as alleged by plaintiff; and you may consider whether, if plaintiff has shown that he has sustained the losses and damages alleged, it would have occurred if the embankment or road-bed of defendant had been so constructed as to properly drain the country south of Taylor's bayou into Sabine lake and pass. In that the jury was not thereby confined to the sources and character of overflow alleged in plaintiff's petition, and the charge imposes upon the defendant, as a duty, the construction of its road-bed and embankment so as properly to "drain the country" south of Taylor's bayou "into Sabine lake and pass," whereas the duty of defendant was to so construct its road-bed and embankment as not to impede the natural drainage of said section of country. And that the charge assumed that the natural drainage was into Sabine lake and pass. The other assignments relied on were as to refusal to give requested instructions, and as to the sufficiency of the evidence.

*O'Brien & John, for appellant. Tom J. Russell, for appellee.*

HENRY, J. This suit was brought by appellee to recover of appellant damages. Plaintiff claims that defendant so negligently constructed its railroad bed, all the way from Taylor's bayou to the town of Sabine Pass, that when, in January, 1885, there came heavy rains, such as are usual to that region, the water overflowed the south bank of the bayou, and was obstructed in its natural flow toward Sabine lake by said railroad bed, and dammed up, and caused to accumulate and stand at a great depth upon plaintiff's land for several months, destroying the grass, and causing the death of plaintiff's horses and cattle then being pastured upon said land. There was a verdict for plaintiff.

Appellant's first assignment of error is that the court erred in making comments upon the testimony of defendant's first witness during said trial, in the presence and hearing of the jury, to the effect following, to-wit: "The last half-hour, he thought, had been unnecessarily consumed, and was not calculated to enlighten court or jury." It appears that these remarks were not excepted to at the time they were made, nor until after the court had adjourned for the day. When the remarks are considered in connection with the evidence of the witness, and the subsequent charge of the court, by which the jury were told that they were the judges of the weight to be attached to the testimony, and that it was not the province of the court to pass on that question, or to express an opinion as to the value of the testimony admitted, but they were to be controlled by their own views, we do not think the jury could have been improperly influenced by the remarks. The proper time to have taken the exception was when the remarks were made, and in the presence of the jury. If the objection had been then made, an opportunity would have been furnished the court to have

removed any improper effect that they were likely to produce by proper explanations to the jury. Not having been then taken, the objection ought not to be considered now.

The remaining assignments of error relate to charges given and refused by the court, and to the sufficiency of the evidence to support the verdict. The charge of the court furnished the jury with a full, clear, and correct exposition of the law applicable to the issues made by the pleadings and evidence; and the findings of the jury are sufficiently supported by the evidence. The case was once before this court, and was reversed and remanded. 7 S. W. Rep. 374. The trial from which this appeal is taken appears to have been conducted in accordance with the opinion then expressed. The judgment is affirmed.

### VELA v. GUENA *et al.*

(Supreme Court of Texas. Jan. 17, 1890.)

#### SEQUESTRATION—ADMINISTRATOR DE SON TORT.

1. Where, to obtain a writ of sequestration, plaintiff makes affidavit that he feared defendant would injure, waste, or destroy the property, or remove it out of the county, but testifies on the trial that he did not fear such things, the court, not having instructed the jury as to what would constitute a wrongful issuance of the writ, should give a requested instruction that the mere existence of the debt did not authorize a sequestration.

2. That the widow has taken possession of the community property is not sufficient to authorize suit against her on a note of her deceased husband.

Appeal from district court, Duval county;  
J. C. RUSSELL, Judge.

*Louis P. Bryant*, for appellant.

GAINES, J. One Ynes Vela executed to Torribio Guena & Bro., a firm composed of appellee and one Antonio Guerra, his written promise to pay them the sum of \$351.53, and, to secure the obligation, in the same instrument gave them a lien upon his ranch, and all personal property thereon. Vela died very soon after the instrument was executed, leaving his wife, the appellant, surviving him. The debt having matured, and not being paid, Guena & Bro. brought suit to recover it against the surviving widow, and sued out a writ of sequestration against certain sheep, goats, horses, and cattle alleged to be subject to the mortgage. By virtue of the writ the sheriff took into his possession 1,000 sheep, 140 goats, and 8 cows. Before the trial an amended petition was filed, in which it was averred that the property was sold by order of the court for the sum of \$453.60, and that the net proceeds, amounting to the sum of \$265.38, were deposited in court to await the determination of the suit. It was also alleged that Antonio Guerra had died; and the suit proceeded in the name of appellee, as surviving partner of the firm. After other answers, the defendant pleaded that the writ of sequestration was wrongfully and maliciously sued out, and prayed for damages actual and exemplary. The assignments of error relate

only to the issues made by the plea in reconvention.

The ground for the writ of sequestration was that the plaintiff feared that the defendant would injure, waste, or destroy the property, or remove it out of the county. Appellee, upon the trial, among other things, testified as follows: "I do not know of any attempt of the defendant to sell the property. \* \* \* I did not want to wait until letters of administration would issue, because she might waste or destroy the property. After this suit in sequestration, defendant sold some horses. I had no reason to fear that defendant would dispose of, destroy, waste, injure the property levied upon, nor any reason to believe that she would remove it out of the county." The defendant testified that the sheep sequestered were worth at the time of the seizure \$1 per head; the goats, \$1 per head; and the cows, \$15 each,—and that she never attempted to sell, remove, injure, or waste the property levied upon. The court charged the jury, in substance, that if the writ of sequestration was wrongfully issued, and defendant was thereby damaged, they should give her a verdict for her actual damages; and that, if they further found that the writ was also "sued out maliciously, without probable cause, and with intent to injure defendant," they might also give exemplary damages. They were not told under what state of facts they should find that the writ had wrongfully issued. The defendant, however, requested the court to give the following instruction: "The jury are instructed that they are not to consider whether or not the note in this case was due and unpaid, to determine whether or not there was probable cause to issue the writ of sequestration in this case. The indebtedness itself was no ground to sequester the property of Ynes Vela, deceased." The charge given by the court was defective, and the court should have given any proper instruction which supplied its defects. The defendant pleaded *non est factum* to the writing sued upon, and in her plea in reconvention denied all the facts alleged in the affidavit made in order to procure the writ. The defendant, however, had the right, if she saw fit, to waive the issue as to the justness of the debt so far as it affected the question of the wrongful issue of the writ. We presume the object of the instruction requested by her was to inform the jury that, although they might find for plaintiff upon the question of the existence of the debt, yet they should find that the sequestration was wrongfully issued, if they should believe from the evidence that the plaintiff, when he procured the writ, did not fear that the defendant would injure, waste, destroy, or remove the property from the county. This is correct as a legal proposition, and we think the instruction should have been given. It would have virtually told the jury that the mere existence of the debt did not authorize a sequestration, and would have aided the jury in arriving at a proper verdict. It would have been better

than no charge at all as to what facts were necessary to be proved in order to show that the writ was wrongfully issued. It is difficult to resist the conclusion that if the jury had been properly charged the verdict would have been different. The plaintiff testified that he did not fear that defendant would injure, waste, destroy, or remove the property, as he swore in his affidavit, in order to procure the writ; and it is clear that the defendant was damaged by the seizure. There has been realized from the property only \$265.38. The defendant testified that its value was \$1,260. It sold at the sheriff's sale for \$453.60. If the sequestration was wrongfully issued, defendant has suffered actual damage to the amount at least of the value of the property less the net proceeds of the sheriff's sale. The verdict of the jury was contrary to the evidence. The judgment must be reversed, and the cause remanded.

There has been no question made in this court as to the propriety of bringing this suit directly against the surviving widow of the deceased to enforce the payment of the debt. If Ynes Vela left no children, the suit was properly brought against the defendant, (Rev. St. art. 2165;) but otherwise not. The plaintiff could have caused letters of administration to issue upon the defendant's failure to qualify as surviving widow. If she had qualified as surviving widow, so as to administer the community estate, then this suit may have been properly brought, (Id. arts. 2172, 2181;) but the petition alleges that such is not the fact, and we need not pass upon that question. It is alleged that she had taken possession of the community property, and was controlling and managing it. But this did not give jurisdiction. One who has taken charge of the property of a decedent cannot be sued as an executor *de son tort*, under our law. The judgment is reversed, and the cause remanded.

#### PRESOOTT *et al.* v. LINNEY.

(*Supreme Court of Texas. Jan. 17, 1890.*)

##### APPEAL.—WEIGHT OF EVIDENCE.—TERMS OF COURT.

1. Where the evidence will sustain the finding of the trial court, that finding will not be reversed, though a contrary conclusion would be more satisfactory.

2. Act Tex. April 2, 1889, changing the terms of holding district court in Goliad county, and providing that the act shall take effect from passage, is constitutional, and, though containing an emergency clause, does not take effect until two terms can be held thereunder in the county each year, as provided by Const. art. 5, § 7. Following *Ex parte Murphy*, 11 S. W. Rep. 487.

Appeal from district court, Goliad county; H. CLAY PLEASANTS, Judge.

A. B. Petcolas, for appellants. *Fly & Davidson*, for appellee.

HENRY, J. This was an action of trespass to try title, instituted by appellants to recover 640 acres of land, part of the Caleb Bennett league, lying in Goliad county. Plaintiffs alleged that their title was acquired

through the five and ten years' statutes of limitations. Defendant pleaded not guilty. The case was tried without a jury, and no conclusions of law or fact were filed. The defendants introduced evidence for the purpose of showing a regular chain of title in themselves from the sovereignty of the soil. Objections are urged to the evidence introduced to show such title, which we do not deem it necessary to consider, because the existence of such title is immaterial, if plaintiffs have shown title by limitation, and if they have not they cannot recover. It is contended that plaintiffs were entitled to judgment under the proof of their possession, under their pleadings of both the five and ten years' periods of limitation. We are not prepared to say that the finding of the judge who tried the cause is without sufficient evidence to sustain it. The fact that, as the evidence appears to us, we would have been better satisfied with the result if the issue of ten years' limitation had been found in favor of plaintiffs, does not authorize a reversal of the cause under the precedents established in such cases. Many witnesses were examined orally, and the judge who tried the cause had opportunities that we do not possess of estimating the credibility and weight of the testimony. Whatever impressions may be suggested by the evidence as presented by the record, it is quite suggestive of conclusions sustaining the judgment.

The case of *Ex parte Murphy*, 27 Tex. App. 492, 11 S. W. Rep. 487, (decided by the court of appeals of this state,) construed the act of April 2, 1889, fixing the times of holding the district courts in the county of Goliad. We concur in the views expressed in the opinion in that case, and are of the opinion that the court rendering the judgment in this case was a legal court. The judgment is affirmed.

#### CAHILL v. TEXAS MEX. RY. CO.

(*Supreme Court of Texas. Jan. 28, 1890.*)

##### JUSTICE OF THE PEACE.—JURISDICTION.—WAIVER.

After a trial on the merits in a justice's court, the defendant is precluded, on appeal, from raising the question of jurisdiction on the ground that the complaint did not affirmatively show that the premises in question were situated in the justice's precinct.

Commissioners' decision. Appeal from district court, Nueces county.

Forcible entry and detainer by Johanna Cahill against the Texas Mexican Railway Company, brought before a justice of the peace, who, after a trial by jury, gave judgment for the plaintiff, from which the defendant appealed to the district court. The plaintiff now appeals from a judgment of the latter court dismissing the complaint.

Pat. O'Docharty, for appellant. John C. Russell, for appellee.

COLLARD, J. The record does not show that defendant made any answer in the justice's court; but the judgment recites that

the parties "came by their attorneys, and announced themselves ready for trial;" that a jury was duly impaneled, who, "after hearing the evidence and the argument of counsel, retired to consider of their verdict," etc. We think this was such an appearance and submission of the case upon the merits as would preclude defendant from afterwards, on appeal, filing a plea to the jurisdiction, or raising the question by special exceptions. The judgment recites enough to show that there was a trial on the merits; and, though there is no entry on the justice's docket showing what pleas were filed or made, we are informed that there was a trial upon submission of the evidence and the law. From aught that appears, defendant waited until the case was appealed to the district court, and there filed a motion to dismiss the complaint because it did not affirmatively show that the property was situated in the precinct of the justice trying the case. We think he had waived his right to demur to the jurisdiction. *Rice v. Peteet*, 66 Tex. 568, 1 S. W. Rep. 657. It will not be presumed that the justice failed to perform his duty in entering on his docket the pleadings insisted on by the parties. *Rev. St. art. 1578; Maas v. Solinsky*, 67 Tex. 290, 3 S. W. Rep. 289. It was too late, after the appeal, to present the demurrer for the first time. *Clay v. Clay*, 7 Tex. 254. Had the demurrer or motion to dismiss been presented in the justice's court in due order, it should have been sustained, as the statute requires the complaint to show the fact that the property is situated in the precinct where the suit is brought. *Rev. St. arts. 2443, 2445*. The complaint is merely informal, in not alleging a jurisdictional fact. It does not appear as a fact that the property is not situated in the precinct where the suit was brought. If such fact did affirmatively appear, there might be a distinction made, upon the ground that the justice had no power to try the cause; but we express no opinion upon that subject. We conclude the judgment of the court below should be reversed, and the cause remanded for a new trial.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment reversed, and cause remanded.

#### RIO GRANDE & E. P. RY. CO. v. ORTIZ.

(Supreme Court of Texas. Jan. 17, 1890.)

#### EMINENT DOMAIN—RIGHTS OF OWNER—ELECTION OF REMEDY.

1. As the Texas statutes require a railroad company to first pay the compensation before appropriating land, one upon whose land a railroad company has entered without condemnation does not lose his lien or title by recovering judgment in a suit for damages, and may recover compensation from the purchaser of the rights of the first.

2. That in a suit to foreclose the first mortgage bonds of the company the judgment was rejected by the court as not being a claim to be paid out of the proceeds of the sale, does not preclude the owner from recovering compensation from the

purchaser at the sale, who continues to occupy the land.

3. The amount of a judgment recovered for entering upon land by a railroad company is the proper measure of damages, as against its successor.

4. The purchaser of a railroad at foreclosure sale, under a decree that the purchaser hold free from all liens and incumbrances, is not an innocent purchaser as against one whose land has been appropriated without condemnation or compensation.

Appeal from district court, Webb county; J. C. RUSSELL, Judge.

*Atlee & Earnest* and *A. L. McLane*, for appellant. *W. Showalter*, for appellee.

GAINES, J. This suit was brought by appellee to recover of appellant the sum of \$800. The cause was submitted to the court under a statement of facts agreed upon by the parties, and resulted in a judgment for plaintiff for the whole amount claimed. The statement agreed upon as the evidence in the case is as follows: *First*. Juan Ortiz, as plaintiff, recovered in the district court of Webb county, on March 27, 1884, against the Rio Grande & Pecos Railway Company, defendant, in cause No. 297 on the docket of said court, a judgment, by agreement of parties, for \$800, and interest from date thereof at 8 per cent., besides costs of suit, for all which execution was awarded, and on which judgment said plaintiff paid all costs, to-wit, \$35. *Second*. In June, 1884, execution was issued and returned not satisfied. *Third*. The said judgment was the measure of damages to the plaintiff, Ortiz, for right of way over his land which the said Rio Grande & Pecos Railway Company entered and used for its right of way until succeeded in such use of the land by the Rio Grande & Eagle Pass Railway Company, which has continued its use of the land to the present time. *Fourth*. That said judgment, and no part of it, has been paid, and plaintiff, Ortiz, is still the owner of the judgment. *Fifth*. That at the suit of the first mortgage bondholders a receiver was appointed by the United States court having jurisdiction on April 9, 1884, the suit being to foreclose their lien on the Rio Grande & Pecos Railway; and the receiver took possession of all the property of said road. *Sixth*. That on June 11, 1884, a special master in chancery was appointed by the court, who was directed to ascertain and report upon all claims which might be presented to him against said railway company, and of all persons having or asserting any liens or claims, by judgment or otherwise, prior to the first mortgage bonds, and upon all claims entitled to preference of payment out of the proceeds of said railway, which was to be sold to satisfy the demands of the creditors of said railroad, and the mortgage lien thereon foreclosed. *Seventh*. That due notice was given to the plaintiff and all creditors to present their claims before said master; that plaintiff presented said judgment to the master as a claim to be paid out of the proceeds of said railroad, which claim was not allowed by the court. *Eighth*. That about June 20,

1885, the Rio Grande & Pecos Railway was sold by order of the court, to be held and possessed by the purchaser free from all liens and incumbrances whatsoever; and the proceeds thereof were ordered to be applied to the payment of the mortgage bonds, after payment of all claims allowed by the court as having preference over said bonds. *Ninth.* That defendant, the Rio Grande & Eagle Pass Railway Company, is the owner of all the property of the Rio Grande & Pecos Railway Company, having acquired the same by purchase at the trustee's sale made by order of the United States circuit court, which order decreed that the purchaser should acquire free from all liens and incumbrances whatsoever.

It is insisted that the judgment is erroneous—*First*, upon the ground that the plaintiff, having elected to sue the Rio Grande & Pecos Railway Company for damages for appropriating his land without asserting his lien in that action, had waived the lien, if any ever existed; *second*, for the reason that his right of asserting a lien, and of claiming any recovery, against appellant, was concluded by the action of the United States court upon his claim; and, *third*, because the plaintiff, even if entitled to recover anything, was not entitled to recover the damages as assessed in the former suit between him and the former company.

In regard to the first ground, we are of the opinion that the plaintiff was not bound to show that he had a lien upon the property in order to maintain this action. As we construe the statement, the Rio Grande & Pecos Railway Company entered upon his land, and made use of so much of it as was needed for its right of way, for railroad purposes, without having resorted to the method provided by law for its condemnation to that use. The company, by virtue of its franchises, had the right to appropriate the land, provided it first paid a just compensation to the owner, to be assessed in the manner prescribed by the statute. This the plaintiff could not prevent. But, the company having already occupied the land without either the payment or assessment of any compensation, he had two methods of enforcing his rights. The first was by an action for the recovery of the land, which would have forced the company to take the statutory measures for its condemnation; and the second was to bring a direct action to recover his damages for the appropriation of the land. *Railway Co. v. Benitos*, 59 Tex. 326. An injured party may sometimes waive a tort, and sue as upon an implied contract; but that is probably not the principle upon which the right of action should be sustained when the owner sues for his damages. At all events, the case is somewhat different from that of an ordinary trespass. The ultimate rights of the parties are that the railroad company is entitled to the easement in the land, and the owner is entitled to his damages. The payment of the damages is, however, a condition precedent

to the right of the company. No reason is seen why, should the company appropriate the land, and should he concede its right to use it, he should not be permitted to sue for the compensation. Admitting, then, that he does sue for his damages, the question presents itself, what does he concede? Does he concede that the railway company has acquired the easement, or merely that it is entitled to the right of way upon condition that it pay him such compensatory damages as may be assessed by the court? The latter, we think, is the extent of his concession. If it were necessary to apply the principle of waiver of tort, and an implied *assumpsit*, in order to maintain the action, it would probably be necessary to hold that the payment of the damages was not a condition precedent to the acquisition of the right to use the land; that the owner, having elected to treat the transaction as a contract for the sale of the easement, and having sued for the damages as the consideration, would be held to have affirmed the company's right, and would be confined to usual remedies for enforcing such contract. But we think the transaction should not be treated as a contract. The law gives the company, by reason of its franchise, the right to an easement over the land. It gives the owner the right to his compensation in the event the company appropriate land, and it makes the company's right to depend upon the precedent condition that it first pays the compensation. There is no statutory proceeding in which the owner may take the initiative in order to have his damages assessed. Should the railroad company disregard the statute, and occupy and use the land without taking the proper steps for its condemnation, and should the owner sue to compel an assessment and payment of the damages, we see no reason why such suit should be held a waiver of his right to hold the land, with all the incidents of ownership, until the compensation be actually paid. A judgment in his favor in such a suit should be considered merely an assessment and demand of the compensation, until it be in fact paid. We are of opinion, therefore, that the appellee's title to his land was not affected by his suit against the Rio Grande & Pecos Railway Company, and the judgment therein rendered in his favor, except in so far as the company acquired the right to pay the judgment, and thereby to perfect its title to the use of the property. This ruling is supported by the well-considered case of *Railroad Co. v. Johnston*, 59 Pa. St. 290, and is in accordance with the principles announced in the following cases: *Gilman v. Railroad Co.*, 40 Wis. 653; *Pfeifer v. Railroad Co.*, 18 Wis. 155; *Hibbs v. Railway Co.*, 39 Iowa, 340; *White v. Railroad Co.*, 7 Heisk. 518; *Gillison v. Railroad Co.*, 7 S. C. 173; *Provolt v. Railroad Co.*, 57 Mo. 256. These principles are that where the constitution or statutes of a state require the payment, and not merely the securing of the payment, of the compen-

sation before taking land for a public use, the paramount title remains with the owner until the money is actually paid, unless the payment be waived; and an effort to enforce the payment is not a waiver. As the court in *Railroad Co. v. Johnston*, above cited, say, in speaking of the land-owner's right to compensation: "This is a sacred, constitutional right, not to be spirited away by refinement." We think, therefore, that the plaintiff, by obtaining his judgment against the Rio Grande & Pecos Railway Company, which was never satisfied, parted neither with his title to the land nor with his right to demand compensation therefor from another company which succeeded to the rights of the former, and continued to use the property.

We come, then, to the question whether the plaintiff should be held concluded by the order of the United States court which rejected his claim. The statement does not snow with clearness what that decree was. The court could hardly have rejected it as a claim against the railroad. It may, however, have determined that the plaintiff did not have a lien which took precedence over the first mortgage bonds. The court may have determined that, since the land had never been paid for, the title still remained in the owner; and, because a sale under an order of the court could not pass the easement in this land, the plaintiff was not entitled to have his judgment paid from the proceeds. It probably was considered that, still holding the title to the land, the plaintiff had a sufficient security for his claim. We do not understand the agreed statement of facts to show anything more than that the court decreed that the plaintiff did not have a lien. His rights did not depend upon a lien. See *Railroad Co. v. Johnston*, supra.

We have not had so much difficulty in determining that the defendant company is liable to make compensation for the land as in holding that the former judgment should be taken as the measure of that compensation. However, the defendant company has succeeded to the rights of the defendant in the former suit by purchase of its property, and whatever claim it has to that portion of its road which lies across plaintiff's land it holds in subordination to his claim for compensation. In a suit between him and the old company, that compensation has been assessed at and adjudged to be \$800. The present defendant, claiming under the former, and still occupying and using the land for the purposes of its railroad, should be held to possess it *cum onere*; that is to say, subject to payment of the damages assessed by the former judgment. As the court say in *Railroad Co. v. Johnston*, from which we have previously quoted: "If, therefore, the original occupant has so managed its card as to escape payment until it has divested itself of its interest by any form of alienation, its alienee, mediate or immediate, if it would enjoy the uncompensated right, must pay the

price of it, unless it can show an equity growing out of the conduct of the owner of the soil which would estop him." The case quoted from is an authority in point. See, also, *White v. Railroad Co.*, *Gillison v. Railroad Co.*, *Pfeifer v. Railroad Co.*, previously cited.

It is insisted, however, that at all events the defendant should be here protected as a *bona fide* purchaser, having no notice of plaintiff's claim. But we fail to see how one can claim to be an innocent purchaser who accepts a conveyance from a vendor who is not able to exhibit a title. A prudent person, proposing to purchase the Rio Grande & Pecos Railroad, would have looked to see that the company had acquired its right of way either by purchase or condemnation. We find no error in the judgment, and it is affirmed.

#### ROST v. MISSOURI PAC. RY. CO.

(Supreme Court of Texas. Jan. 21, 1890.)

##### RAILROAD COMPANIES—FIRES—INSTRUCTIONS.

1. In an action for setting out a fire by a railroad company, a charge as to diligence in keeping the right of way "free from combustible grass and weeds" is not erroneous, as omitting other material shown to be near the track, where another part of the charge instructs that it is the duty of railroad companies to "prevent the accumulation of combustible material along the right of way."

2. A charge that railroad companies are to use such diligence in keeping the right of way free from combustible material as prudent and cautious "persons" would under like circumstances, is not erroneous where negligence in a railroad company is defined to be the absence of such care as prudent, cautious, and skillful "railroad men" would use under similar circumstances.

3. A charge that railroad companies are not insurers against loss by sparks, and that all that is required in attempts to prevent burning by sparks is that they use the best-known spark-arresters, is not erroneous, as omitting their duty to prevent burning from cinders, coals, and other kinds of fire, where the jury are also told that they are to use the best appliances "for lessening the damage from sparks, cinders, and coals."

4. Omission to charge as to negligence of sectionmen in going to dinner without attempting to put out the fire, though seeing it soon after the train passed, is not error, where no such charge is requested, and the only negligence charged in the petition is failure to provide proper appliances, permitting accumulation of dry material, and inefficiency of the servants operating the engine.

Commissioners' decision. Appeal from district court, Galveston county; WILLIAM H. STEWART, Judge.

A. B. Bustell and F. Charles Hume, for appellant. Willie, Mott & Ballinger, for appellee.

HOBBS, J. Mollie Rost, joined by her husband, John Rost, sued the Missouri Pacific Railway Company to recover damages for the destruction of certain personal property belonging to her, consisting of houses, fences, and other improvements, near Clear Creek station, on the line of said company's railway, between Houston and Galveston. The destruction of this property occurred about



the 13th of February, 1886; and it was alleged to have been caused by fire communicated by the engine of the company to dry grass and other combustible material along defendant's track, thence spreading, extending to, and involving plaintiff's property, valued at about \$9,612. The petition charged the appellee with negligently permitting the accumulation, on and near said track and right of way, of dry grass, weeds, and decayed ties, along the entire line, and specially at the point of communication by it of fire. Gross negligence was alleged to consist of the failure by appellee to provide proper appliances, etc., for the prevention of the escape of sparks and cinders from the smoke-stack and furnace of the engine. Defendant's servants were charged with inefficiency and gross negligence in operating the engine, whereby sparks, etc., were permitted to escape and fall on said dry grass and other combustibles. Upon suggestion of a divorce of plaintiff, pending the suit, and disclaimer of any interest therein by John G. Rost, the plaintiff, Mollie C., was permitted to prosecute the suit for her own use as a *feme sole*, and in her maiden name of Hasselmeyer, restored to her by the divorce decree. On trial, verdict and judgment were rendered for defendant, and plaintiff's motion for new trial being overruled, the case is here, upon her appeal, for revision.

There was proof of the destruction by fire of plaintiff's property on about February 13, 1886, the value of which was shown to be between eight and nine thousand dollars. The evidence most favorable to the plaintiff in the court below is that of the witness King, who stated that he was on the 13th of February, 1886, a section hand at work for the company, with McMullen, the foreman, piling ties near the track. Saw the train pass at about 11:30 A. M., and about a quarter of an hour later he and the section boss, McMullen, saw the fire about 400 yards from the point at which they were at work, between the right of way fence and the track. As soon as they saw the fire, they went to dinner, and a little after 1 o'clock, when they returned, the fire was burning Butler's south fence. Witness and McMullen were the only persons there. "They tore down the fence, and tried to put the fire out." "Along towards 2 o'clock the fire spread rapidly on the prairie, going right down on the property at Clear Lake." This witness further stated that "the engine, at the moment of passing him, was heaving sparks out of her right lively. The ash-pan of the engine was all afire,—a solid mass of red cinders." There was evidence to the effect that "there were a few old rotten ties along the right of way." There was testimony that "the right of way was clear of dry grass at the time of the fire; it had been burned off the preceding November." The appellee proved that the engine referred to was inspected by defendant's inspector of engines at Palestine, about 50 hours prior to the fire. The appliances used

on it for arresting sparks and cinders were said to be of the best. The smoke-stack, spark-arrester, and ash-pan were in good order. The diamond smoke-stack, cast-iron wire, and steel wire netting, to arrest sparks, were considered the best in use, known to railroad men, for the prevention of the emission of sparks and cinders. There was evidence to the effect that no appliance would entirely prevent the escape of sparks, and allow the engine to make steam enough to pull an ordinary train. The fireman on the engine testified that he had been on an engine for eight or nine years, and had never been able to see sparks fly from an engine in the day-time, and that no one, standing by the side of the track, could see the ash-pan of an engine passing at the rate of 30 miles an hour. This engine had an extended ash-pan, with wire netting bolted down over it, to avoid the dropping of fire. Such is a synopsis of the testimony in the case.

The errors assigned relate to the charge, and seem to consist principally of criticisms upon the supposed omission to submit in full to the jury all of the issues made by the evidence. The first error assigned is that the court charged the jury as follows: "Railroad companies are required to use such diligence and care and prudence to keep their right of way as free from combustible grass and weeds as prudent and cautious persons would under similar circumstances; and if you believe from the evidence that the defendant was guilty of negligence in this respect, and that such negligence was the cause of the destruction of plaintiff's property, then the defendant company would be liable to the plaintiff for such damages as she sustained thereby." The first objection to this instruction is that, as there was evidence tending to show that there were combustible substances along the right of way other than grass and weeds, to and by which fire might be communicated, the charge should have included such "substances" in defining the extent of the company's duty in respect to keeping its right of way clear, etc. The other combustible substances referred to were the decayed ties mentioned by some of the witnesses as lying near the track in some places. In paragraph 3 of the instructions requested by the appellee, and given by the court, the jury are told that "it is the duty of railroad companies to prevent accumulation of combustible material along their right of way," etc. So, too, in the preceding paragraph, the language of the charge is that "the company would not be liable unless it negligently permitted the accumulation of combustible material along its right of way," etc. Among other duties devolved on railroads enumerated in the fourth paragraph of the charge is that they "are to prevent the accumulation of combustible material on their right of way." There can be no doubt, from the foregoing quotations from the charges given by the court to the jury, that the assignment of error is not tenable, because the charge was

given in almost the language appellant contends it should have been given.

It is also objected to the charge quoted that "the measure of diligence imposed by law on the company, with respect to the cleanliness of the right of way, was such as cautious railroad operators would use under like circumstances, and not such as would be required of prudent and cautious persons under similar circumstances." It is a rule as familiar as it is fair that all parts of a charge, having reference to the same subject, should be read and considered together. An omission complained of in one paragraph, abstractly considered, may be cured in some other part of the charge. Looking to the definition of negligence in a railroad, in this case, we find it to be: "The absence of such care and prudence as prudent, cautious, and skillful railroad men would use under similar circumstances." If there could be any doubt that by the term "prudent and cautious persons" used in the charge quoted was meant "railroad operators," we think it is entirely removed when the paragraph defining "negligence" is read in connection with it. The charge objected to was certainly good as far as it went, and, if there was an omission, under the well-known rule in this state, an instruction supplying the omission should have been requested.

The court instructed the jury: "Railroad companies, however, are not insurers against loss by the destruction of property by sparks emitted from the smoke-stack; but all that is required by them in attempts to prevent burning from sparks is that they shall use the best known spark-arresters, and keep them in good order, and operate their engines and appliances without negligence." This, it is claimed, "limited defendant's obligation to the prevention of burning from sparks, when it was not less its duty to prevent burning from cinders, coals, or other kinds of fire." This assignment is not well taken, because the jury had been instructed, in a preceding paragraph, that "railroad companies are required to use the best appliances known to skillful railroad men for the lessening of the danger from sparks, cinders, and coals," and, if they believe they did not have such appliances, then the company would be guilty of negligence, and if such negligence caused the burning, etc., defendant would be liable. If the proof had shown that the fire was occasioned by coals or cinders, under such circumstances as constituted negligence in the company, the jury could not, we think, have failed to understand from this charge that it would have been liable.

Appellant also contends that, as there was "evidence showing, or tending to show, negligent omission of defendant's sectionmen to arrest or extinguish the fire, or to make any effort to do so, the court prejudiced the rights of plaintiff by instructing the jury, in effect, in the charge objected to, last mentioned, that defendant's duty was fully performed if it used good spark arresters." The state-

ment in support of this proposition is that "Tom King, defendant's section hand, saw the train pass at 11:30 A. M., and about a quarter of an hour later he and McMullen, the section boss, saw the fire, about 400 yards from the point at which they were working, between the right of way fence and the railroad track. They were at work 500 or 600 feet south of Butler's south fence. As soon as they saw the fire they went to dinner, and upon their return from dinner, a little after 1 o'clock, the fire was burning Butler's south fence, which they knocked down. "Along towards 2 o'clock the fire spread rapidly on the prairie, going right down on top of the property at Clear Lake. The fire burned towards Butler's house, and to the bay and lake." It is contended that, under these facts, the court should have instructed the jury, in effect, that, if appellee's employees negligently failed to extinguish the fire, the company would be liable. The question of the liability of a railroad company for the negligent failure of its employees and servants to extinguish a fire, caused along the line of its road by the escape of sparks, etc., from its engine, was elaborately discussed in *Railway Co. v. Platzer*, 73 Tex. 118,<sup>1</sup> and *Railway Co. v. Donaldson*, 78 Tex. 126,<sup>2</sup> and the authorities cited in the briefs in the present case reviewed at length. In the case before us we are of opinion that the court did not err in failing to charge upon the question of the negligent failure of the appellee's servants to extinguish the fire, because to have so charged would have recognized appellant's right to recover upon a distinct ground of negligence not alleged in the petition. The charge, it is well settled, should be limited to the case made by the petition. The acts of negligence charged by appellant as having caused the fire were the failure to provide proper appliances, etc., for the prevention of the escape of sparks, etc., from the smoke-stack and funnel; and the inefficiency of the company's servants in operating the engine; and the company's negligence in permitting the accumulation of dry grass, weeds, and decayed ties along the track. The jury found by their verdict that the appellee was not guilty of the negligence complained of, and necessarily that the fire was not occasioned thereby. If, however, these averments can be considered as sufficient to authorize a recovery upon the ground of the negligence of said servants in failing to extinguish the fire as claimed by appellant, the charge complained of was, at all events, correct as far as it went, and, if it omitted to fully present the issue, an instruction should have been asked. No charge was requested by appellant for the purpose of supplying the supposed omission, and she is not, therefore, we think, in a position to complain. Again, the testimony shows that the appellee's employees King and McMullen "tried to extinguish the fire about 1 o'clock;" that "the wind was fresh;" and when it was first dis-

<sup>1</sup>11 S. W. Rep. 160.<sup>2</sup>11 S. W. Rep. 168.

covered, at about 11:30 o'clock, it was about 400 yards from them. It was not shown that, by the exercise of ordinary care, the two employes referred to could have put out the fire. We think the judgment should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment affirmed.

**BUSH v. JOHNSON et al.**

(*Court of Appeals of Kentucky.* Jan. 23, 1890.)

On petition for rehearing. For former report, see ante, 758.

"Not to be officially reported."

J. W. Perry and T. R. Gordon, for appellant. J. W. Greene and Montgomery, Lindsay & Botts, for appellees.

PRYOR, J. Upon a review of the case, and with the suggestions of counsel before us in their petition, we are not inclined to disturb the judgment rendered below. The opinion has been modified in the statement that a part of the original tract had been sold to satisfy the debts of a son-in-law of the grantor, when it should have read, sold for the debts of one Bush, who was related in some way to the family, or some of its members, by marriage. Petition overruled.

**BRYANT et al v. MAXWELL.**

(*Court of Appeals of Kentucky.* June 15, 1889.)

Appeal from circuit court, Kenton county; W. E. ARTHUR, Judge.

"Not to be officially reported."

E. H. Maxwell propounded for probate in the county court of Kenton county the alleged will of his deceased wife, Louisa Maxwell; he being appointed executor therein. Helen Bryant and others contested said will. Probate thereof was granted in the county court, but refused in the circuit court, to which an appeal from the county court was taken. The circuit court also refused the motion of the executor to be allowed the costs incurred by him in attempting to establish the will. Maxwell took an appeal to this court, and, pending said appeal herein the contestants purchased Maxwell's interest in his wife's estate, agreeing to pay his costs, including his attorneys' fees. The case in this court was reversed; and, all parties agreeing thereto, the mandate directed the court below to refer the case to its commissioner, to ascertain the value of the services rendered by Maxwell's attorneys. From the allowance for services made by the commissioner and the court below, Bryant and others appeal.

Hallam & Myers, for appellants. O'Hara & Bryan, for appellee.

PRYOR, J. We find nothing in this case of which the appellants can complain. The

case was sent back with directions to refer the case to the commissioner to fix the amount of fees to which the attorneys were entitled. O'Hara & Bryan and Cleary & Hamilton had been employed to sustain the will of Mrs. Maxwell, that had been assailed by her heirs at law; Maxwell, the executor and husband, being the principal devisee. The case was tried in the county court, the circuit court, and finally brought to this court.

The value of the property involved was estimated at from sixty to one hundred and fifty thousand dollars. During the progress of the litigation the case was compromised, or the interest of the husband purchased in by the heirs, or some one for them, with the agreement on their part or their agent to pay the attorneys of Maxwell their fees. The appellees have shown by the testimony of various members of the profession, and the majority of them conversant with the case and its history, that the two firms are entitled jointly to \$5,000. The claim is supported by the decided weight of the evidence; and, there being no legal question involved, the judgment below is affirmed.

**LEWIS v. LEWIS.**

(*Court of Appeals of Kentucky.* Oct. 19, 1889.)

Appeal from circuit court, Morgan county.

"Not to be officially reported."

John T. Hazelrigg, for appellant. John E. Cooper, for appellee.

PRYOR, J. This case is brought here by a second appeal. The court below followed the mandate of this court in the opinion then delivered; and the matters set up in the amended pleading offered to be filed were all considered on the former hearing. Judgment affirmed.

**THOMPSON'S ADM'X v. ELAM'S EX'X.**

(*Court of Appeals of Kentucky.* Nov. 2, 1889.)

Appeal from circuit court, Henderson county.

"Not to be officially reported."

R. H. Cunningham, R. H. Thompson, and Aaron Kohn, for appellant. Brown & Merritt and R. D. Vance, for appellee.

PRYOR, J. It is apparent from the record that the personal representative of the intestate, in his settlement in the year 1866, accounted for all the moneys and assets with which he was properly chargeable; and from the testimony, that he has paid out to the distributees their distributable share of the estate. The husband of Mrs. Williams had the right to receive the money to which she was entitled; and, as to Sallie Thompson, Williams was evidently managing her business, and, but for his embarrassed condition, no complaint would now be made of the pay-

<sup>1</sup>Not reported.

ment to him by the appellee of the moneys to which she was entitled. The course of business connected with these payments, transacted as far back as 15 or 20 years, leaves but little room to doubt that it is not so much the default of the personal representative of the intestate as that of the trusted agent and husband, whose unfortunate failure in business caused the appellants to realize the loss of their patrimony. It is now claimed that the sum of \$3,428, credited to the administrator, in his settlement of 1866, as paid by him of the debts of W. P. Smith, or set apart for that purpose, was in fact never paid, and that the estate of John Smith, his brother, was in no event liable for these debts. This part of the settlement made in 1866 was attempted to be surcharged more than 15 years after the settlement; and it may be difficult to explain satisfactorily, at this late day, why, or the manner in which, this credit was given. Some of the parties who were distributees or representing distributees were present when some of the settlements were made; and it is scarcely to be presumed that the county judge, the personal representative, and the distributees would have permitted such a large credit when there was no foundation for it. Besides, the appellee Elam says that the list of debts he was to pay for William Smith was handed him by the sheriff or other officer. He recollects some of the creditors, viz., the Farmers' Bank and A. L. Leslie. The list was like a subscription paper, and as he paid each creditor he took his receipt on this list, and that it has been lost or misplaced. He lived near the town, and was on intimate terms with all the parties, and able to meet his pecuniary engagements; and, while the evidence of its payment might be more satisfactory, there is enough in the record to induce the belief that the personal representative was faithful to his trust. The appellant, Sallie Thompson, may have been wronged by Williams, but that he was acting for both Miss Thompson and his own wife, and was present, representing them, at some of the settlements, is apparent; and, after the lapse of so many years, the plea that Williams signed the receipts without authority will not avail. They all lived together. Williams was a prosperous business merchant, with unbounded credit, and, as to his wife, had the full power, as a matter of law, to receive the money. On the facts of this record, the judgment was proper; and it is not therefore necessary to pass on the other questions raised.

Judgment affirmed.

#### McDAVID v. STATE.

(*Supreme Court of Arkansas.* Jan. 25, 1890.)

Appeal from circuit court, Monroe county; M. T. SANDERS, Judge.

James C. Tappan, for appellant. W. E. Atkinson, Atty. Gen., for the State.

PER CURIAM. This cause is presented to us upon the contention that the verdict of

the jury is not sustained by the evidence. A conviction of murder in the second degree would have been more satisfactory, but there was evidence upon which the jury could find a verdict for the higher degree. In such cases, we cannot interfere. The judgment is affirmed.

#### RAGAN v. TATE.

(*Supreme Court of Arkansas.* Nov. 2, 1889.)

Appeal from circuit court, Jefferson county; JOHN A. WILLIAMS, Judge.

Action by Virginia M. Tate against Daniel F. Ragan to set aside as fraudulent a sale of land. The chancellor decreed the sale to be a fraud, set it aside, and appointed a master to take account of rents, etc. Defendant filed exceptions to the report, which were overruled, and he appeals.

Met L. Jones, for appellant. Harrison & Harrison and M. S. Bell, for appellee.

PER CURIAM. The chancellor's finding of facts is amply sustained by the evidence, and the decree will be affirmed.

#### IVENS et al. v. LONDON et al.

(*Supreme Court of Arkansas.* Nov. 9, 1889.)

Appeal from circuit court, Crawford county; JOHN S. LITTLE, Judge.

John M. Rose, for appellants.

PER CURIAM. The verdict of the jury is not sustained by evidence, and is in the face of the court's charge. Reverse and remand.

#### BELL v. WILSON.

(*Supreme Court of Arkansas.* Nov. 23, 1889.)

On motion to reconsider. For former opinion, see ante, 328.

W. G. Weatherford, for appellant. Geo. Sibley, for appellee.

PER CURIAM. It is not ruled in this case, as counsel seems to suppose, that a subsequent creditor or purchaser may not attack the deed of Moore as a fraud upon his rights. See *Adams v. Edgerton*, 48 Ark. 419, 8 S. W. Rep. 628; *Bank v. Norwood*, 50 Ark. 42, 6 S. W. Rep. 323. It is only determined that the Allen decree was not evidence of that fact in this suit. Motion denied.

#### CONNER v. STATE.

(*Court of Appeals of Texas.* Nov. 27, 1889.)

Appeal from Panola county court.

Indictment of Andy Conner for theft. The proof failed to establish the *corpus delicti*, and showed affirmatively that the property was not taken by defendant, or anybody else. Verdict of guilty, and from the judgment thereon defendant appeals.

Hull & Hull, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. Appellant has been convicted of the theft of two hogs, the property of one Davis. The evidence upon which the conviction rests, as shown in the statement of facts before us, is wholly insufficient to establish theft, or any other wrongful act or conduct, upon the part of appellant. The judgment is reversed, and the cause remanded.

*In re* ROBERTSON.

(Court of Appeals of Texas. Dec. 20, 1889.)

Appeal from district court, Bosque county; J. M. HALL, Judge.

Indictment of James Robertson as an accomplice to murder. The proof against him, however, was not "evident." He applied to be released on bail. His application was denied, and he appeals.

F. S. Morris, for relator. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. The judgment of the lower court refusing bail to the appellant is reversed, and appellant is admitted to bail in the sum of \$3,000; and the sheriff of Bosque county will release him from imprisonment upon his executing a good and sufficient bond in said sum of \$3,000, conditioned as the law requires. Ordered accordingly.

McDOUGALD v. STATE.

(Court of Appeals of Texas. Nov. 9, 1889.)

Appeal from Kaufman county court; JOHN VESLEY, Judge.

Peter McDougald was convicted on an information for playing cards in a public place, and appeals.

J. D. Cunningham, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. The evidence does not sustain this conviction. It was not clearly proved that defendant played at cards; nor was it shown that the place where the playing is alleged to have occurred was a public place,

as charged in the information. The judgment is reversed, and the cause remanded.

FRIEBERG v. SANGER et al.

(Supreme Court of Texas. Dec. 8, 1889.)

Appeal from district court, Ellis county; ANSON RAINEY, Judge.

W. H. Fears and Crawford & Crawford, for appellant. D. F. Singleton and M. B. Templeton, for appellees.

STAYTON, C. J. This cause was submitted to the court below on the same statement of facts, and involves the same questions in findings of fact and law, as did the case of Moss v. Sanger, ante, 616, (this day decided,) and for the reasons given in that case the judgment in this will be affirmed.

GOLDEN v. SANGER et al.

(Supreme Court of Texas. Dec. 8, 1889.)

Appeal from district court, Ellis county; ANSON RAINEY, Judge.

W. H. Fears and Crawford & Crawford, for appellant. D. F. Singleton and M. B. Templeton, for appellees.

STAYTON, C. J. This cause is submitted on the same statement of facts, and involves the same questions on findings of fact and law, as did the case of Moss v. Sanger, ante, 616, (this day decided.) The evidence, however, tending to show that appellant was a creditor of A. Moss to the extent and in manner contended, is not so strong as was the evidence tending to show indebtedness in the case before referred to. On the other issue, appellant expressly denies that he bought any merchandise from A. Moss, but claims to have bought from Fears, who does not pretend that he made any purchase from Moss; but, were the evidence in favor of appellant as strong as was the evidence in favor of Mary Moss, for the reasons given in that case we would be compelled to affirm the judgment in this. Judgment affirmed.

# INDEX.

NOTE. A star (\*) indicates that the case referred to is annotated.

## ABATEMENT AND REVIVAL.

Pleas in abatement, see *Pleading*, 5.

### Death of party.

1. Where defendant appeals from a judgment, and pending the appeal dies, and the judgment is affirmed without the court's having notice of his death, the supreme court will not revive the action, on *scire facias*, after it is barred by the statute of limitations (Mill. & V. Code Tenn. § 381) against the deceased's administrator, the judgment not being void on its face, and the case having ceased to be pending since the rendering of the judgment.—*Outlaw v. Cheny*, (Tenn.) 12 S. W. 725.

### Another action pending.

2. A plea in abatement of the pendency of another action cannot be sustained where the prior suit is dismissed before the hearing of such plea.—*Trawick v. Martin Brown Co.*, (Tex.) 12 S. W. 216.

### Objections to jurisdiction.

3. An objection to the jurisdiction of a district court on the ground that at the time of the trial a special judge was engaged in the trial of another cause, in the district court of the same county, is too late, if not made till after judgment.—*City of Corsicana v. Carr*, (Tex.) 12 S. W. 982.

## Acceptance.

Of dedicated land, see *Dedication*, 4.

## Acknowledgment.

Of deed, see *Deed*, 1-3.

## ACCOUNT STATED.

### Restatement—Fraud and mistake.

Where there has been a settlement of accounts between parties, a restatement will be allowed by a court only upon the ground of fraud or mistake; and where it is not claimed that any fraud has been practiced, and the proof of mistake is not clear or convincing, the settlement must stand.—*Moscowitz v. Lemp*, (Ark.) 12 S. W. 781.

## ACTION.

See, also, *Limitation of Actions; Parties; Pleading; Practice in Civil Cases.*

By assignee, see *Assignment*.

and against city, see *Municipal Corporations*, 28.

—executors, etc., see *Executors and Administrators*, 13-16.

—firm, see *Partnership*, 3.

—husband and wife, see *Husband and Wife*, 10-12.

For removing fence, see *Fences*.

On contracts, see *Contracts*, 12, 13.

judgment, see *Judgment*, 34.

notes, see *Negotiable Instruments*, 11-22.

policies, see *Insurance*, 23, 24.

Particular forms, see *Assumpsit; Creditors' Bill; Ejectment; Partition; Replevin; Trespass; Trespass to Try Title; Trover and Conversion.*

To set aside conveyances, see *Fraudulent Conveyances*, 16-19.

v.12s.w.—72

### Joinder of causes.

The right of plaintiff to have set aside a deed procured from him by his co-tenant by fraud, and his right to demand an accounting for personality, the assets of a former partnership between them, of which the latter is in possession, are separate causes of action, and are not made one by the fact that defendant, by the same fraud by which he deprived plaintiff of his real estate, attempted to deprive him of his interest in the partnership assets.—*Holloway v. Holloway*, (Mo.) 12 S. W. 460.

## Administration.

See *Executors and Administrators*.

## Admissions.

See *Evidence*, 7-12.

## Advancements.

See *Gifts*.

## ADVERSE POSSESSION.

See, also, *Boundaries*, 8-11.

### What constitutes.

1. The mere claiming of land, and the occasional use of wood or timber upon it, does not constitute actual adverse possession.—*Wait v. Gover*, (Ky.) 12 S. W. 1068.

2. A trustee cannot acquire title by limitation as against his *cestui que trust* where there has been no disclaimer of the trust.—*Wren v. Followell*, (Ark.) 12 S. W. 155.

3. Where land is conveyed by a father to a son as an advancement, the father cannot afterwards claim title to the land by adverse possession.—*White v. White*, (Ark.) 12 S. W. 201.

4. Where the widow of a decedent holds lands belonging to his estate in trust for his heirs, and occupies the lands solely by virtue of her marital rights, her possession is not adverse to the heirs so as to give title by limitation; especially where she has disavowed any other than a dower right.—*Clayton v. Clayton's Ex'r*, (Ky.) 12 S. W. 812.

5. A trustee under a deed purchased by parol the interest of his daughter, one of the beneficiaries, for two slaves, of whom she at once took control, he beginning to claim her interest in the land. He sold the entire tract by parol to one who held and improved it for two years, using it as his own, and then surrendered it to the father, the daughter having knowledge of the transaction. The father then held it, claiming it as his own, until he sold it. Held, an open renunciation of the trust, and a notorious adverse claim which set the statute of limitations running.—*Hall v. Ditto*, (Ky.) 12 S. W. 941.

6. Where the line between adjoining owners is in doubt, but they only claim ownership to the true line, wherever that may be, no title by adverse possession can arise in either, as against the other.—*Krider v. Milner*, (Mo.) 12 S. W. 461.

7. One who has enjoyed uninterrupted possession of land for 23 years, without any question as to title, and without knowledge of any rightful claimant, though unknown heirs have been warned for many years, acquires such a title that it, to-

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gether with an indemnity bond executed by a complainant in foreclosure, will protect her interest on sale of the land.—*Woodhead v. Foulds*, (Ky.) 12 S. W. 120.

8. Where one has a patent to all unappropriated lands within a certain boundary, possession of certain detached parcels of unappropriated land, separated from the land in dispute by land already appropriated, is not such possession as would extend over all lands unappropriated when the patent issued.—*Moses v. Gatliff*, (Ky.) 12 S. W. 189.

9. In trespass to try title to land beyond the limits of the boundaries in defendant's deed, in the absence of actual and notorious claim, the plea of 10 years' limitation is not good, unless the land has been actually inclosed for that period.—*Carley v. Parton*, (Tex.) 12 S. W. 950.

10. In trespass to try title it appeared that in 1838 a conditional land certificate was issued to B.; that in 1848 an unconditional certificate was issued to plaintiffs, who were his heirs, and to his personal representatives; and that the land was patented to them in 1853. There was nothing to show that the certificate or the land was sold either by B. or his representatives, or by plaintiffs. In 1855 a third person conveyed the certificate to one S., who located it on the land in 1857, and asserted title thereto, plaintiffs having knowledge of such claim as early as 1860. In 1882 one whose right does not appear conveyed the land without consideration, and his grantee took possession, and paid the taxes, though his possession was not hostile to plaintiffs' claim. In 1884 the grantee conveyed to defendant, who took possession, paid the taxes, made improvements, and held adversely until 1887, when plaintiffs sued. Defendant had also taken a deed from the heirs of S. *Held*, that the evidence does not sufficiently show adverse possession to establish title by limitation as against plaintiffs.—*Boothe v. Best*, (Tex.) 12 S. W. 1000.

11. Real estate was conveyed in trust to the sole use of a married woman and her heirs by her husband, the defendant. The wife died, leaving a daughter. Defendant remained on the premises with the daughter, who married, each paying part of the expenses of housekeeping for three years, when the daughter died, and her husband continued to live on the premises five years without paying board. *Held*, that the possession of defendant, with the daughter and afterwards with her husband, did not bar a recovery of the premises in an action by the husband and heirs of the daughter, there being nothing to show that such possession was adverse.—*Spencer v. O'Neill*, (Mo.) 12 S. W. 1064.

#### What constitutes—Constructive possession.

12. Where adjoining land-owners claim a strip of land lying upon the outer boundary of their respective tracts, the constructive possession of such strip attaches to the one having the elder right.—*Wait v. Gover*, (Ky.) 12 S. W. 1063.

#### Tacking.

13. Adverse possession of inclosed land by a donee before deed may be coupled with possession after deed, to make out the seven-years adverse possession necessary under Act Tenn. 1819, § 2, to constitute a possessory defense.—*Sanders v. Logue*, (Tenn.) 12 S. W. 722.

#### Evidence.

14. Where husband and wife claim title to land by adverse possession, whatever right the wife may acquire therein is in common with her husband; and his acts and declarations in regard to such possession are admissible in evidence, though not authorized nor acquiesced in by the wife.—*Hurley v. Lockett*, (Tex.) 12 S. W. 212.

15. In an action to recover land, where plaintiffs claim title by adverse possession under the Texas statute of 10 years' limitation, the declarations of occupants of the land during that period are admissible against plaintiffs where there is no evidence that such occupants held the land as plaintiffs' tenants, except the general statement that plaintiffs were in possession by agents and tenants.—*Hurley v. Lockett*, (Tex.) 12 S. W. 212.

16. An order of the probate court setting apart a homestead to the widow and children of a decedent is not a judgment or decree whereby the title to land is recovered, nor a partition of land, within the meaning of Rev. St. Tex. art. 4339, requiring all judgments and decrees deciding questions of title to land, or directing partition thereof, to be recorded, before they are admissible in evidence; and in an action against the widow and children for the land, where defendants show a deed to their decedent therefor, and that they have been in possession thereof for more than the period of limitation, the order setting apart the homestead is admissible, though not recorded, to show the extent of their claim.—*Fossett v. McMahan*, (Tex.) 12 S. W. 324.

#### Quantity of land held.

17. Defendants' grantor occupied land near the line of sections 1 and 3 for more than 10 years, supposing it to be unsettled, but there was a conflict as to which section his improvements were on. He testified that he always claimed section 1, but it was shown that previous to the conveyance of that section to defendants he had, by several deeds, conveyed all of section 3. *Held*, that defendants took no title to the portion of section 1 not occupied by his improvements, as Pasch. Dig. Tex. art. 4624, provides that 10 years' peaceable possession, without any evidence of title, shall give to the possessor full property in 640 acres, including his improvements.—*Snow v. Starr*, (Tex.) 12 S. W. 672.

#### Affidavit.

For attachment, see *Attachment*, 1.  
continuance, see *Criminal Law*, 12-20.

#### AGISTMENT.

##### Construction of contract.

1. Under a contract to pasture cattle at a given rate per month, for a term not longer than eight months, and give all possible protection for their safety and benefit, the owners reserving the right to remove them whenever liable to loss for lack of grass or water, paying for the time that has expired, the owner of the pasture does not bind himself to furnish pasture for the full eight months, and may recover for the time it is used whenever the cattle are withdrawn.—*Meuly v. Corkill*, (Tex.) 12 S. W. 1005.

2. The pasture, in such case, being of sufficient area, and known to both parties, the owner of the cattle cannot recoup damages sustained by the insufficiency of the grass and water.—*Meuly v. Corkill*, (Tex.) 12 S. W. 1005.

#### Alimony.

See *Divorce*, 8, 9.

#### Amendment.

See *Pleading*, 7, 8.

Of judgment, see *Judgment*, 22.

statutes, see *Constitutional Law*, 3-5; *Statutes*, 1.

#### Ancient Instruments.

See *Evidence*, 23.

#### ANIMALS.

See, also, *Agistment*.

##### Illegal branding.

A conviction for illegally branding a colt cannot be sustained where the evidence fails to show that the colt was the property of the complaining witness, and that the branding was done with intent to defraud.—*Foster v. State*, (Tex.) 12 S. W. 596.

#### Answer.

See *Pleading*, 8.



## APPEAL.

- I. APPELLATE JURISDICTION.
- II. APPEAL-BOND.
- III. PRACTICE.
- IV. REVIEW.
- V. DECISION.

See, also, *Certiorari*; *Error*, *Writ of*; *Exceptions*, *Bill of*; *New Trial*.

Costs on appeal, see *Costs*, 12, 13.

From judgment on agreed case, see *Report and Case Made*.

In criminal cases, see *Criminal Law*, 108-121; *Homicide*, 111.

*habeas corpus* proceedings, see *Habeas Corpus*, 1.

### I. APPELLATE JURISDICTION.

#### When appeal lies.

1. As, by the provisions of Code Tenn. 1853, § 8760, the proceedings in a *habeas corpus* case, including all the papers and the final order, are required to be returned to the nearest court of the trial judge, there to become a record, a case in which the judgment was rendered at chambers is appealable.—In re Vanvaver, (Tenn.) 12 S. W. 786.

2. A suit for an injunction against a sale under a trust-deed, brought by one who alleges title by adverse possession which would defeat the deed, is one involving title to real estate, of which the Missouri supreme court has jurisdiction on appeal.—Gardner v. Terry, (Mo.) 12 S. W. 838.

#### Who may appeal.

3. Where in *quo warranto* the chancellor decrees against defendants, and rules the election under which they claim title to their offices void upon all the grounds alleged in the bill, except the voting of non-residents, and defendants do not appeal, complainants cannot appeal, and have the right of said voters adjudged, because the question may arise at some future election.—State v. Wagener, (Tenn.) 12 S. W. 721.

4. When, on the petition of citizens of a county, an order has been granted by the county court prohibiting the sale of liquor within a certain district, a person who files an affidavit for an appeal nearly four months thereafter, and after the term of the court is over, does not thereby make himself a party to the proceeding, and cannot appeal.—Holmes v. Morgan, (Ark.) 12 S. W. 201.

5. Under Const. Ark. art. 7, § 51, providing that in all cases of allowances made for or against a county an appeal may be granted at the intervention of any citizen, resident, or tax-payer, an order prohibiting the sale of liquor is not an allowance for or against the county.—Holmes v. Morgan, (Ark.) 12 S. W. 201.

#### Appealable judgments and orders.

6. A order filing a case away for want of prosecution is not a final order.—Nickell v. Fallen, (Ky.) 12 S. W. 767.

7. Where suit is brought against two partners, and the judgment entry only names one of them, and, so far as the record discloses, there is no disposition of the case as to the other partner, there is no final judgment from which an appeal can be taken.—Lilliensterne v. Lewis, (Tex.) 12 S. W. 750.

8. Mansf. Dig. Ark. § 1265, granting an appeal from a final order, and giving the appellate court authority "upon such appeal to review any intermediate order," does not give a direct appeal from an interlocutory order.—Davie v. Davie, (Ark.) 12 S. W. 553.

9. A decree adjudicating the parties' proportionate interests in land, and directing a reference to a master, who shall report at a subsequent term, when the court will determine what amount shall be charged as a lien on the several interests, and whether there shall be a sale to satisfy the liens, is not a final decree from which an appeal can be taken.—Davie v. Davie, (Ark.) 12 S. W. 553.\*

10. In a suit to redeem mortgaged lands, a demurrer was sustained to the answer, except to that part which set up a claim for improvements

and taxes paid, and a reference was ordered to state the amounts of the mortgages, the taxes paid, and improvements. *Held*, that it was not a final decree, from which an appeal could be taken. Davie v. Davie, 12 S. W. 553, followed.—Cohn v. Hoffman, (Ark.) 12 S. W. 1071.

11. An order transferring an action from one court of the state to another is not a final order, and hence not within the appellate jurisdiction of the court of appeals, under the Kentucky statute, which confines the appellate jurisdiction of that court to final orders and judgments.—Mercer v. Glass' Ex'r, (Ky.) 12 S. W. 194.

12. Under Rev. St. Tex. art. 2707, providing that any person aggrieved by any decision, order, or judgment of the county court, or by any order of the judge thereof, may appeal to the district court, an order setting aside a previous order, made at the same term, discharging a guardian, is not appealable, as it is not in its nature decisive of any issue between the parties, to which class of orders only the statute applies.—Lehman v. Gajewsky, (Tex.) 12 S. W. 1122.

13. A judgment dismissing a petition and adjudging costs against plaintiff, leaving defendant's plea in reconvention to stand for hearing, is not a final judgment from which an appeal will lie.—Texas & P. Ry. Co. v. Ft. Worth St. Ry. Co., (Tex.) 12 S. W. 977.

#### Jurisdictional amount.

14. Act Ky. April 22, 1882, giving the superior court exclusive appellate jurisdiction in place of the court of appeals, except, among other exceptions, over "judgments for money or personal property, if the value in controversy be greater than \$3,000," gives the superior court jurisdiction of an appeal by defendant from a judgment against him for \$1,600, though plaintiff sued for \$5,000.—Louisville & N. R. Co. v. Wade, (Ky.) 12 S. W. 379.

### II. APPEAL-BOND.

#### Validity.

15. Under Rev. St. Tex. art. 2201, requiring an appellant to file a bond payable to the judge, and "conditioned to prosecute his appeal," etc., but not requiring it to be given in any sum, a bond is not void because given for a stated amount, and the appeal on which it is given should not for that reason be dismissed. Hicks v. Oliver, 10 S. W. 97, followed.—Howard v. Russell, (Tex.) 12 S. W. 525.

16. Rev. St. Tex. art. 2201, provides that an administrator appealing from an order of removal shall give a bond with sureties, "payable to the county judge," conditioned that the appellant shall prosecute said appeal to effect, and perform the order or judgment which the court shall make, in case the cause shall be decided against him. *Held*, that the statute contemplates an obligation to pay money, and that a bond which merely recites that the principal and sureties "acknowledge" themselves to be held and firmly bound unto the county judge, "conditioned that said A. B., appellant, shall prosecute his said appeal," etc., is not such an obligation.—Munzesheimer v. Wickham, (Tex.) 12 S. W. 751; Black v. Same, *Id.* 752; Marx v. Same, *Id.*

#### Liabilities on.

Two creditors of T. were attempting, in the same action, to collect their claims out of an indebtedness of a third party to T. Judgment was rendered that the claim of one of the creditors should be paid out of the indebtedness; and the other creditor appeared, and executed a *superseas* bond, conditioned to pay all costs, and satisfy the judgment, if affirmed. Pending the appeal, the debtor of T. became insolvent. The judgment was affirmed. *Held*, that the sureties on the *superseas* bond were liable for the amount of the judgment, and not for the costs of appeal only.—Mahlman v. Williams, (Ky.) 12 S. W. 835.

18. No judgment having been rendered against the appellants for the recovery of money in the lower court or in the supreme court, the sureties on the *superseas* bond are not liable to pay the penalty prescribed by Mansf. Dig. Ark. § 1311, which provides that, upon the affirmation of a judgment order or decree for the payment of mon-

ey, the collection of which in whole or in part has been superseded, 10 per cent. damages shall be awarded.—*Block v. Valley Mut. Ins. Ass'n*, (Ark.) 12 S. W. 702.

### III. PRACTICE.

#### Assignments of error.

19. Assignments of error that "the court erred in rendering judgment for appellee \* \* \* under the law and evidence in this case," and that "the judgment is contrary to the evidence, the burden of proof being upon appellee, she having failed to establish her claim in law and in fact," are too general to entitle appellant to a review by the supreme court of Texas.—*Macey v. Wilson*, (Tex.) 12 S. W. 282.

20. An assignment of error, presenting the propositions that "the execution of an instrument offered was sufficiently proved;" "that the terms of the instrument make it a sufficient memorandum of sale of the land," etc.; and that "the recitals of the instrument show that the vendor and vendee were tenants in common of the land itself,"—does not sufficiently point out any particular ruling of which appellant complains, his brief not in any way showing by whom or for what purpose the instrument was offered, the objection to it, nor the ruling, if any, thereon.—*Johnson v. Flint*, (Tex.) 12 S. W. 1120.

21. Assignments of error not copied in appellant's brief as required by rule 29 of the supreme court of Texas, as amended February 10, 1883, will not be considered.—*Chappell v. Missouri Pac. Ry. Co.*, (Tex.) 12 S. W. 977; *Tabb v. Smart*, Id.

22. Assignments of error which are not accompanied by appropriate statements showing how the question arose, as required by the rules of court, will not be considered.—*Gallagher v. Goldfrank*, (Tex.) 12 S. W. 964.

#### Record.

23. Under rule 9, Sup. Ct. Ark., when plaintiff, who obtained judgment below, does not appear in the supreme court, the abstract filed by the appellant will be taken as true.—*Hendricks v. Smith*, (Ark.) 12 S. W. 731.

24. Where a paper is filed in the record, on appeal, by the clerk, styled "Petition," but he certifies that it was not filed, or indorsed as filed, in the lower court, and he does not certify that it was considered or used in the lower court as a petition, it must be regarded as out of the case.—*Nickell v. Fallon*, (Ky.) 12 S. W. 767.

25. A deposition purporting to be one read at the trial, and copied into the transcript by the clerk, cannot be considered on appeal, as the evidence must be made a part of the bill of exceptions, or made a part of the record by an order of court.—*Wathen v. Byrne*, (Ky.) 12 S. W. 197.

26. Under Rev. St. Tex. art. 1845, providing that, where defendants are cited by a publication, a statement of the evidence, approved and signed by the judge, shall be filed with the papers of the cause, as part of the record, a judgment for plaintiff in an action of trespass to try title will not be reversed, at the instance of plaintiff himself, for a failure to file the evidence as required.—*Taliaferro v. Carter*, (Tex.) 12 S. W. 750.

#### — Bill of exceptions.

27. Laws Mo. 1885, p. 219, does not embrace within its terms the application for a continuance, nor the evidence, and they cannot, therefore, be considered by the appellate court, unless set forth in the bill of exceptions.—*State v. Griffin*, (Mo.) 12 S. W. 358.

28. The bill of exceptions agreed to by the parties, and approved by the court, under Rev. St. Tex. art. 1364, must prevail over a statement of facts made by the court, on failure of the parties to agree thereto.—*McClelland v. Fallon*, (Tex.) 12 S. W. 60.

29. Under Code Ky. § 835, subsec. 2, which declares that if a party wish to appeal upon the ground that the verdict is not sustained by the evidence it shall be stated in full in the bill of exceptions, a judgment will not be reversed for insufficiency of the evidence to sustain the verdict

unless the evidence is stated in full.—*Wathen v. Byrne*, (Ky.) 12 S. W. 197.

30. The bill of exceptions controls the assignment of errors; and only the grounds of objection stated in the bill will be considered, though the assignment may be upon other grounds.—*Kimmarle v. Houston & T. C. Ry. Co.*, (Tex.) 12 S. W. 693.

31. Where documents offered in evidence at the trial, and objected to on the ground that the impression thereto attached had no words or letters to show that it was the seal that it purported to be, are found in the record, indorsed with an agreement of counsel that they are the papers referred to in the bill of exceptions, and that they should be made part of the record, but there is no order of the trial court to that effect, such papers will not be considered by the supreme court in determining the correctness of the ruling on the evidence; and the statements of the judge in the bill of exceptions that the impression, though dim, was evidently made with the proper seal, will be conclusive of the question.—*Cunningham v. State*, (Tex.) 12 S. W. 217, 27 Tex. App. 479; *Caswell v. State*, 12 S. W. 219.

32. Where six months after a motion for new trial was denied, and after many extensions of time, against the objection of the appellee, a bill tendered was signed by by-standers, it will not be considered, except by consent of parties, when it is apparent that, if prepared in time, the judge would have signed it.—*Schneider v. Hesse*, (Ky.) 12 S. W. 271.

33. Under Laws Mo. 1885, p. 219, amending Rev. St. Mo. § 3776, and providing that it shall not be necessary for the review of the action of any lower court, on appeal or writ of error, that the motion for new trial, in arrest of judgment, or instructions filed in lower court, be copied in the bill of exceptions, provided there be in the bill of exceptions a direction to the clerk to copy the same, and the same be copied, into the record, they will not be considered on appeal, unless they are either themselves embodied in the bill of exceptions, or unless there is contained therein a direction to the clerk to copy them into the record, and they are so copied.—*State v. Griffin*, (Mo.) 12 S. W. 358.

34. A paper in the transcript purporting to be a bill of exceptions, but not signed by the judge, cannot be considered.—*Davis v. State*, (Tex.) 12 S. W. 957.

#### Rehearing.

35. Where, on appeal, judgment has been affirmed for appellee on the whole case, a rehearing will not be granted him on the ground that his exceptions on a cross-appeal had not been considered.—*Dudley v. Goddard*, (Ky.) 12 S. W. 382.

36. Where a case is submitted 14 months after the appeal was granted, and 8 months have elapsed since the delivery of the opinion, a rehearing will not be granted on the ground that the appeal has been prosecuted in the name of one of the alleged appellants without his consent.—*Day v. Burnham*, (Ky.) 12 S. W. 148.

#### Appeals from inferior courts.

37. In a proceeding for the allotment of dower in the probate court, an order confirming the report of the commissioners appointed to allot the same is final, and an appeal therefrom to the circuit court carries with it the whole case for trial *de novo*.—*Hilliard v. Hilliard*, (Ark.) 12 S. W. 573.

38. The charter of Kansas City, (Sess. Acts Mo. 1875,) art. 7, § 6, provides that when any person is aggrieved by the verdict of a jury in the mayor's court he may appeal to the circuit court for Jackson county. The appeal shall be taken by filing an affidavit with the city clerk, and he shall within a certain time file a complete transcript with the clerk of the circuit court, which "court shall thereupon become possessed of the cause." Held, that the circuit court has no jurisdiction to render judgment in a case commenced in the mayor's court, where its records fall to show that any verdict was rendered in the mayor's court, or that any appeal was taken from such verdict.—*City of Kansas v. Ford*, (Mo.) 12 S. W. 346.

## IV. REVIEW.

**In general.**

39. A reference to a jury in equity cases being merely to aid the chancellor in determining issues of fact, its finding is not so conclusive as would be the verdict of a properly instructed jury, and the correctness of the judgment rendered thereon will be determined on appeal without regard thereto.—*McElwain v. Russell*, (Ky.) 12 S. W. 777.

40. Where, on appeal, a certain question is not before the supreme court for decision, an expression of opinion concerning it is no bar to a further investigation thereof on a new trial.—*Clark v. Hershey*, (Ark.) 12 S. W. 1077.

**Objections not raised below.**

41. An objection to the admission of evidence cannot be raised for the first time on appeal.—*First Nat. Bank v. Pennington*, (Tex.) 12 S. W. 1114.

42. Where defendant, on an appeal by plaintiff from a judgment of a justice of the peace, fails to move the circuit court to dismiss the appeal for want of an affidavit for appeal, he cannot raise the objection in the supreme court.—*Crenshaw v. Bradley*, (Ark.) 12 S. W. 573.

43. Defendant, in an action for personal injuries caused by a cable-car, cannot object for the first time on appeal that there is no evidence that it was operating the road, where its answer alleges that plaintiff was allowed "to get in front of defendant's car" by the negligence of its mother.—*Winters v. Kansas City Cable Ry. Co.*, (Mo.) 12 S. W. 652.

44. Where several pleadings are heard out of due order by consent of parties and without objection, an objection to such hearing cannot be raised on appeal.—*Traweck v. Martin Brown Co.*, (Tex.) 12 S. W. 216.

45. Under Code Ky. § 333, subsec. 3, which declares that a party cannot "except to a decision made at the instance of the adverse party unless objection shall have been made to the motion, offer, or request of the adverse party," exceptions to instructions will not be considered where the record fails to show that the instructions were objected to, though it recites that "to the giving of which instructions, and each of them, defendant excepted."—*Wathen v. Byrne*, (Ky.) 12 S. W. 197.

**Presumptions.**

46. The appellate court will presume that such a state of facts was presented as authorized the entry of an order of warning against defendants, where it is conceded that they were non-residents, though no affidavit to that effect appears in the record.—*Herd v. Clat*, (Ky.) 12 S. W. 466.

47. Where, on writ of error to a court having jurisdiction of a cause, the record is returned signed by one as special judge, and reciting that the cause was tried before him in that capacity, it will be presumed, in the absence of evidence to the contrary, that he had proper authority.—*Green v. Walker*, (Mo.) 12 S. W. 353.

**Weight of evidence.**

48. Where the evidence will sustain the finding of the trial court, that finding will not be reversed, though a contrary conclusion would be more satisfactory.—*Prescott v. Linney*, (Tex.) 12 S. W. 1123.

49. Where there is a direct conflict of evidence, a judgment will not be disturbed on appeal on the ground that the evidence does not support the judgment.—*De Cordova v. Bahn*, (Tex.) 12 S. W. 845.

50. A general verdict will not be disturbed on appeal, though the evidence on one of the two issues tried preponderates in favor of appellant; the other being within the province of the jury.—*Moss v. Sanger*, (Tex.) 12 S. W. 619.

51. Where it appears from the record that a garnishee has sold the goods in controversy since the writ of garnishment was served on him, a judgment entered in the supreme court on the theory that the goods were still in his possession will be modified.—*Willis v. Yates*, (Tex.) 12 S. W. 432.

**Matters not apparent on record.**

52. Where the record on appeal contains only part of the evidence adduced in the court below,

the judgment will not be disturbed unless unwarranted by the pleadings.—*Whitefield v. Hipple*, (Ky.) 12 S. W. 150.

53. Under supreme court rule Mo. No. 15, requiring appellants to make an abstract of the record in the cause, setting forth as much thereof as is necessary to a full understanding of all the questions presented to the court for its decision, the court cannot pass upon instructions, where they are not copied in such abstract, and their substance is not given therein.—*Craig v. Scudder*, (Mo.) 12 S. W. 841.

54. An assignment of error complaining of the refusal of the court to count votes for relator, and its ruling in counting votes for respondent, cannot be considered where there are no findings of fact by the court showing which votes were received and counted, and which were rejected.—*Davis v. State*, (Tex.) 12 S. W. 937.

**Harmless error.**

55. To permit a plaintiff to recover \$40 or \$50 more than he claims is not such a trifling error as can or should be overlooked by the appellate court.—*Wathen v. Byrne*, (Ky.) 12 S. W. 197.

56. Where no statement of facts is furnished by appellant, a judgment will not be reversed for rulings on evidence unless it appear, not only that the lower court erred, but that such error must, with reasonable certainty, have produced a substantial injury to appellant.—*Missouri Pac. Ry. Co. v. Edwards*, (Tex.) 12 S. W. 553.

57. Error in admission of evidence purely cumulative, on trial by the court, is not ground for reversal, where the findings are sustained by other unchallenged evidence.—*Young v. Hudson*, (Mo.) 12 S. W. 632.

58. A plaintiff cannot complain of an instruction which requires the finding of facts unnecessary for a defense.—*Harrington v. City of Sedalia*, (Mo.) 12 S. W. 342.

59. Where the jury find for defendant, a refusal to instruct that they might return a verdict for punitive damages is not prejudicial error.—*Brown v. St. Louis, I. M. & S. Ry. Co.* (Ark.) 12 S. W. 203.

**Objections waived.**

60. Where the record shows that appellant voluntarily submitted the cause in the court below for final hearing upon the proof taken, he cannot complain that he was misled, and failed to take proof which he might have adduced under the issue before the court, under the belief that the account involved in the cause would be referred to a master for settlement.—*Moscowitz v. Lemp*, (Ark.) 12 S. W. 781.

61. Where it was admitted that a prior suit for the same cause of action was dismissed before a plea in abatement of the pendency of such suit was acted on, that fact cannot be controverted on appeal by a certificate of the clerk.—*Traweck v. Martin Brown Co.*, (Tex.) 12 S. W. 216.

62. A party cannot, on appeal, complain of instructions embodying principles advanced by himself, or which contain inconsistencies arising from those given at his request.—*Harrington v. City of Sedalia*, (Mo.) 12 S. W. 342.

## V. DECISION.

**Dismissal.**

63. A motion to dismiss an appeal will be granted when the record fails to show that the special judge who presided at the trial of the cause was duly elected.—*Wall v. Looney*, (Ark.) 12 S. W. 202.

64. The dismissal of an appeal for want of prosecution does not bar a second appeal.—*Sanders v. Moore*, (Ark.) 12 S. W. 783.

65. Where plaintiff sues to enjoin the collection of taxes on the ground that the property taxed is exempt, and his claim is decided adversely in the appellate court, and his suit dismissed, and at the same time he appeals from the judgment on the tax information, the latter appeal, involving the same substantial question, will be dismissed without inquiring into the action of the court below in some particulars.—*Masonic Temple Co. v. Commonwealth*, (Ky.) 12 S. W. 143.

**Mandate and proceedings below.**

66. In proceedings to condemn land for railroad purposes, an appeal taken by the plaintiff from the judgment rendered in the circuit court was accompanied by a *supersedeas* issued at the instance of both parties. *Held*, that an order of the circuit court for payment of the amount of the judgment into the hands of the clerk of the court, and for a writ of possession, made, at the instance of plaintiff, after the delivery by the court of appeals of an opinion affirming the judgment, but before the mandate of that court was or could be legally issued, was void; and no costs could be imposed on either party by reason of any order of the court made in reference to the money.—*Piel v. Covington S. R. T. Ry. Co.*, (Ky.) 12 S. W. 759.

**Reversal.**

67. Under Rev. St. Mo. 1879, § 3774, providing that no exceptions shall be considered on appeal except those that have been expressly decided by the lower court, and section 3775, providing that judgments shall not be reversed except for error materially affecting the merits of the action, a judgment overruling a demurrer to the answers of some of the defendants will not be reversed because of the omission to render judgment against a defendant in default; the plaintiff not having indicated any wish to take judgment against that defendant.—*State v. Nolan*, (Mo.) 12 S. W. 1047.

**APPEARANCE.****Stipulations.**

1. Plaintiffs filed 10 suits in ejectment against persons in possession of different lots of land; and summonses were duly issued. The attorneys employed to defend them stipulated with plaintiffs that in two cases to be tried as test cases, and in "suits now brought and about to be brought," defendants who have not been served with summons "enter their appearance, and waive service of summons." *Held*, that another case against defendants, in which the petition was simply lodged with the clerk of the court, with directions not to issue a writ of summons on it, and which had never been docketed as a pending cause, was not a "suit brought," within the meaning of the stipulation.—*Bradley v. Welch*, (Mo.) 12 S. W. 911.

**Authority of attorney.**

2. After the service of summons in the 10 cases, a public meeting was held, and a committee appointed to employ attorneys to defend the cases. The members of the committee did not know that any other petition had been left with the clerk; nor, in employing the attorneys, did they contract for any person that might thereafter be sued. *Held*, that the fact that defendants attended the meeting at which the committee was appointed, and contributed to the fund to defend the suits, and that there was a general understanding that the attorneys would, for a reasonable fee, defend any other suits that might be brought, was not sufficient to constitute them defendants' attorneys.—*Bradley v. Welch*, (Mo.) 12 S. W. 911.

**Application.**

For insurance, see *Insurance*, 6-9.

**Argument of Counsel.**

See *Trial*, 7, 8.

**ARREST.****Without warrant.**

Under Pen. Code Tex. art. 322, which provides that a person violating the law by unlawfully carrying arms may be arrested by a peace-officer, without warrant, upon his own knowledge, or upon information of some credible person, a peace-officer may arrest the offender, without warrant, upon information of a credible person, though the offender may be in a distant part of the county at the time of the information, and though the arrest may not be immediately made.—*Jacobs v. State*, (Tex.) 12 S. W. 408.

**ARSON.****Indictment.**

1. Under the Kentucky statute making it a felony to "willfully and unlawfully burn a \* \* \* stable, barn, or any house or place where wheat, corn, or other grain, grass, \* \* \* is usually kept," an indictment for burning "a barn, the property of," etc., is sufficient, without an averment that wheat, corn, or other articles named in the statute, were usually kept in it.—*Evans v. Commonwealth*, (Ky.) 12 S. W. 769.

**Evidence.**

2. On trial for arson, evidence that defendant and his co-indictes were at the store which was burned, after business hours, and some time before the burning; that defendant was seen prowling about the place, taking note of localities and objects; that, in conversation with different persons, he made covert threats, "verbal intimations," and "declarations of intention," so called,—is admissible, as tending to connect defendant with the burning.—*State v. Crawford*, (Mo.) 12 S. W. 354.

3. Evidence tending to show that a stranger to the trial had made threats against the person and property of the owner of the burned house is irrelevant.—*State v. Crawford*, (Mo.) 12 S. W. 354.

**ASSAULT AND BATTERY.**

Assault with intent to kill, see *Homicide*, 29-31.

**Aggravated assault.**

1. An axe is not necessarily a deadly weapon; and on trial of an information for an aggravated assault alleged to have been committed "with an axe, the same being a deadly weapon," the state must prove that the axe was such a weapon as would be likely to produce death or serious bodily injury when used in the manner it was attempted to be used.—*Gladney v. State*, (Tex.) 12 S. W. 868.

**Indictment.**

2. An indictment may charge an aggravated and a common assault in the same count, as the former necessarily includes the latter.—*Akin v. State*, (Tex.) 12 S. W. 1101.

**Assessment.**

Of taxes, see *Taxation*, 6.

For improvements, see *Municipal Corporations*, 19-23.

**Assets.**

See *Insolvency*, 1.

**ASSIGNMENT.**

See, also, *Assignment for Benefit of Creditors*.

Of errors on appeal, see *Appeal*, 19-22; mortgage, see *Mortgages*, 4.

**Action by assignee.**

It is no objection to suit by an assignee of an account in his name that no consideration for the assignment is shown.—*Young v. Hudson*, (Mo.) 12 S. W. 632.

**ASSIGNMENT FOR BENEFIT OF CREDITORS.**

See, also, *Bankruptcy*.

Who may execute, see *Powers*.

**What constitutes.**

1. Under Gen. St. Ky. c. 44, art. 2, § 1, providing that certain acts of a debtor in contemplation of insolvency, or with intent to prefer creditors, shall operate as an assignment for benefit of creditors, in an action to declare certain acts of a debtor an assignment, where the pleadings did not aver that the debtor knew of his insolvency, or that he contemplated it, or that there was any design on his part to prefer, and where no facts were stated from which these essential conditions

were necessarily inferable, the action was properly dismissed.—*Heidrich v. Silva*, (Ky.) 12 S. W. 770.

#### By attorney.

2. In Texas an assignment for benefit of creditors may be made by an agent or attorney in fact authorized thereto.—*Gouldy v. Metcalf*, (Tex.) 12 S. W. 880.

#### Presentation of claims.

3. The assignee of an insolvent mailed to plaintiff a printed notice of the time and place for the presentation of claims. Plaintiff failed to receive the notice, and did not know of the time fixed for the allowance of claims, but, knowing of the assignment, had previously sent his claim to his attorney. From a conversation between the attorney and the assignee about the claim, before the time was fixed for the allowance of claims, it appeared that the attorney was led to believe that the assignee would notify him of the time when fixed, and that notice was not given. *Held*, that good cause was shown for the failure to present the claim on the day designated, within Rev. St. Mo. 1879, § 373, which provides that a creditor who fails to present his claim at the time designated for any good cause, may do so any time before the declaration of the final dividend.—*Maverick v. Heard*, (Mo.) 12 S. W. 892.

#### Rights of creditors.

4. The assignment law of Texas (act July 24, 1879, § 8) provides that any creditor not consenting to the assignment may garnish the assignee for any excess of the estate remaining in his hands after payment of the debts of consenting creditors and the costs of the assignment. *Held* that, upon such garnishment proceedings, the creditor is entitled to a discovery of the condition of the estate, and thereby establishes his right to such excess.—*Craddock v. Orand*, (Tex.) 12 S. W. 208.

5. Where the creditors of an insolvent sign a release of their liens on the property of the insolvent acquired by attachment, and the property is conveyed to trustees for their benefit, and the trustees accept the trust, one of the creditors cannot afterwards divest the trustees of title by erasing his name from the instrument without the consent of all the other parties interested.—*Martin v. Taylor*, (Ark.) 12 S. W. 1011.

6. Parol evidence is not admissible to show that plaintiffs signed an agreement by which attachments against the property of an insolvent firm were discharged, and the property conveyed to trustees for the benefit of creditors, on condition that one of the trustees should be removed, and another person put in his place, where the instrument and property were delivered to the trustees, and accepted by them, and where there is nothing in the instrument to show that it was to take effect only on the happening of a future contingency.—*Martin v. Taylor*, (Ark.) 12 S. W. 1011.

7. Where a creditor signs an agreement made between creditors and their insolvent debtor, which is also a conveyance of the property of the debtor to trustees for the benefit of the creditors, he is concluded from afterwards attacking the instrument on the ground that it was executed to defraud creditors.—*Martin v. Taylor*, (Ark.) 12 S. W. 1011.

#### Action on assignee's bond.

8. The seizure of the assigned property by judicial proceedings, whereby the assignee is prevented from realizing anything, is a bar to an action, by a creditor not consenting to the assignment, on the bond of the assignee; and a judgment against him in garnishment proceedings under the statute does not estop the sureties from making such defense.—*Craddock v. Orand*, (Tex.) 12 S. W. 208.

9. The assignment law of Texas, (act July 24, 1879, § 6,) provides that the assignee shall give bond that he will faithfully discharge his duties as assignee, and will make proportional distribution of the net proceeds of the estate among the creditors entitled thereto, which bond shall inure to the benefit of the assignor and of creditors, who may maintain an action thereon against such as-

signee and his sureties for any breach of violation of this law, by which such as creditor shall sustain damages. *Held*, suit on such bond by a non-consenting creditor should show that there are or were in the assignee's hands funds subject to which are withheld.—*Craddock v. Orand* 12 S. W. 208.

#### ASSUMPSIT.

##### Evidence.

1. In an action on a contract to pay a sum for work, evidence for defendant of value of the work is inadmissible.—*G Turner*, (Ark.) 12 S. W. 201.

2. In an action for money loaned, the showed that the money was given, if at defendant in an envelope, and no opportunity given him to count it. Plaintiff testified envelope originally contained \$2,688.28, and had previously paid out of it \$150 to defendant. He had also paid to others \$55, but also that there was exactly \$2,500 in the envelope admitted that defendant could not have how much there was. *Held*, that a verdict for plaintiff for \$2,500 could not be sustained if it did not sufficiently appear that he loaned defendant that sum.—*Dimmitt v. Robbins*, S. W. 94.

#### ATTACHMENT.

See, also, *Garnishment*.

##### Grounds—Fraud.

1. Attachment on the ground that defendant have disposed of their property with intent to defraud creditors is justified where defendant in failing circumstances, have mortgaged substantially all their assets, in part to pay existing debt, and in part to secure a large payment of money, especially where the mortgage provides that the mortgagees may enter possession, and sell the goods in due course of sale.—*Gallagher v. Goldfrank*, (Tex.) 12 S. W. 94.

##### Affidavit.

2. Under the Texas statute requiring suing out an attachment to make oath that for the purpose of injuring or harassing the defendants named therein, an affidavit "this attachment is not sued out for the purpose of injuring or harassing the defendant, there are two defendants, is insufficient."—*v. Kauffman*, 12 S. W. 125, 72 Tex. 214; *Gunnham*, (Tex.) 12 S. W. 233.

##### Levy.

3. The privilege granted to vendors of real property by *Manaf. Dig. Ark. § 4398*, to sue for specific attachment without imposing the conditions, does not take precedence of the right of a prior attaching creditor of the vendor.—*v. Arkansas Industrial Co.*, (Ark.) 12 S. W. 208.

##### Lien.

4. Where property is held under the levy of attachment sued out by plaintiff, and also under a mortgage in proceedings to foreclose a mortgage thereon, plaintiff has no interest in the proceeds of the sale of whatever interest other persons may have acquired by the levy of a subsequent mortgage, it appearing that the sheriff did not comply with the property after such sale, but hold it under such prior levies.—*Taylor v. Thacker*, (Tex.) 12 S. W. 614.

5. The withdrawal, after return of writ duly served, of a plea in abatement entered in an action commenced by a writ of attachment, does not vitiate the lien of the attachment, as the attachment will still be for the enforcement of the debt acquired by the levy of the attachment.—*Clay v. Sylvester*, (Mo.) 12 S. W. 508.

6. In proceedings to set aside a prior attachment lien, so that a junior attachment may be a first lien on the attached property, the court does not consider the question whether the original attachment was a part of a general assignment of the debtors, which would inure to the benefit of the creditors.

all the creditors.—*Claffin v. Sylvester*, (Mo.) 12 S. W. 508.

7. The lien of an attachment will not be set aside or postponed in favor of junior attachments, where it appears that the debts sued for were *bona fide*; that the attachments were not sued out for the benefit of the debtors, or to aid them in hindering or defrauding other creditors; and that the only object of the attaching creditor was to get preference for himself.—*Claffin v. Sylvester*, (Mo.) 12 S. W. 508.

#### Evidence.

8. As tending to show that plaintiff had no reasonable cause for attachment, on the ground that defendants were about to dispose of their property with intent to defraud creditors, testimony is admissible that before the attachment defendants consulted plaintiff, and asked for his approval in the matter of a contemplated change in the partnership, this being the only intended disposition on which plaintiff relied for his attachment.—*McClelland v. Fallon*, (Tex.) 12 S. W. 60.

#### Sale.

9. Where a judgment foreclosing an attachment lien and an order of sale issued thereunder describe the land to be sold simply as part of designated lots, without identifying the part, a sale thereunder is void.—*McDonald v. Red River County Bank*, (Tex.) 12 S. W. 235.

#### Redemption.

10. A chancery sale under attachment is within the purview of Manuf. Dig. Ark. § 8067, which provides that when real estate, or any interest therein, is sold under execution, the same may be redeemed by the debtor within 12 months thereafter.—*Beard v. Wilson*, (Ark.) 12 S. W. 567.

#### Procedure.

11. Where a city attempts to enforce a tax-lien by attachment before a magistrate without jurisdiction to issue the attachment, and the summons before the magistrate is not in the usual form, but merely to plead, answer, or demur to the attachment, judgment cannot be rendered for the amount of the tax and costs of summons.—*City of Nashville v. Wilson*, (Tenn.) 12 S. W. 1082.

12. A supplemental petition, in an attachment suit, showing that since suit was brought plaintiff recovered a judgment against defendant, and that the defendant has no effects other than the proceeds of the property attached, and praying that the surplus be applied to the payment of that judgment, is unauthorized.—*Parks v. Young*, (Tex.) 12 S. W. 936.

#### Intervention.

13. On trial of title to goods alleged to have been purchased by the intervening claimants in satisfaction of debts due them from the insolvent, refusal to allow claimants, after the case has been closed, to introduce evidence that the valuation of the sheriff is excessive is not error, especially where no issue was made as to value.—*Moss v. Sanger*, (Tex.) 12 S. W. 616; *Freiberg v. Same*, Id. 1136; *Golden v. Same*, Id.

#### New trial.

14. In a suit to foreclose an attachment, the record failed to disclose the grounds for the attachment, but strongly indicated that no statutory ground existed, and that the issuance of the writ was the result of a collusion to defraud creditors. Plaintiff, who was the debtor's father, and worked for him, and with whom the debtor lived, testified that the debtor did not convert any of his property into money; that he paid his debts as fast as he could, with the money for which he sold his goods; that he did not fear that the debtor would defraud him if let alone, but that plaintiff sued for attachment because the debtor paid off other debts, and not his claims, which he could not otherwise collect. Held that, judgment having been rendered foreclosing plaintiff's attachment, a new trial would be granted in favor of junior attaching creditors who intervened to show that plaintiff's attachment was fraudulent.—*Bateman v. Ramsey*, (Tex.) 12 S. W. 255.

#### Wrongful attachment.

15. Defendants wrongfully caused a writ of attachment to issue in G. county, directed to the sheriff of M. county, which they placed in the hands of their agent, who superintended the seizure and took possession of the goods. Held, that these acts constituted a trespass by defendants in M. county.—*Willis v. McNatt*, (Tex.) 12 S. W. 478.

16. The defendant had more than sufficient property to pay all his debts, and was disposing of his goods only in the usual course of trade. When plaintiff came to him for a settlement, he offered to give a mortgage on all his property except one parcel, already mortgaged. Plaintiff, by pretending to accede to this, procured a list of defendant's property, and then threatened to attach him, unless he at once paid all he owed plaintiff. Held sufficient to warrant a finding of malice.—*Parks v. Young*, (Tex.) 12 S. W. 936.

17. There being a dispute as to whether property wrongfully attached by defendants was sold under defendants' writ, or under an order of court issued on the application of subsequent attaching creditors, a verdict in plaintiffs' favor is supported by the officer's return, showing that, after applying part of the proceeds on an execution in favor of defendants, he credited the balance on their attachment; other evidence also showing that a return of sale under the order was to be made at a certain date, but that the sale in question occurred thereafter.—*Willis v. McNatt*, (Tex.) 12 S. W. 478.

18. An attachment is wrongful where it appears that the affidavit on which it issued, which alleged that these plaintiffs were about to convert their property into money to defraud their creditors, was made by a person having no knowledge as to how plaintiffs conducted their business, and who took no steps to ascertain whether there was any ground for the writ; that plaintiffs' business was prosperous, and their mercantile standing was considered first class; that in conversation with defendants' agent, a few days before the writ issued, plaintiffs expressed their willingness to pay the debt, and suggested several arrangements as to how it could be done; and that, on the trial, this agent testified that the reason for issuing the writ was his apprehension that some other creditors might give defendants trouble, and that he intended to buy the goods at the sale, if he could get them cheap enough, the profits on such to go to defendants.—*Willis v. McNatt*, (Tex.) 12 S. W. 478.

#### Damages.

19. Both defendants in attachment having testified that their stock of goods, all of which was attached by plaintiff, was worth \$4,400 or \$4,500, a verdict for \$4,400, less the amount of plaintiff's claim, is warranted, though the sheriff's return valued the goods attached at only \$2,225, and it appeared that two other attachments, one for \$149 and the other for an amount not shown, were subsequently levied upon the same goods.—*McClelland v. Fallon*, (Tex.) 12 S. W. 60.

20. Where the only evidence of probable cause for issuing the attachment is the testimony of a witness that one of defendants had stated that his co-defendant was disposing of the proceeds of the sale of their goods for his own benefit, which statement the defendant denied having made, it is error to withdraw from the jury the question of exemplary damages raised by defendants' plea in reconviction of wrongful attachment.—*Conly v. Wood*, (Tex.) 12 S. W. 615.

21. Since plaintiffs are entitled to interest on the value of the goods taken under the writ, the allowance of such interest by the jury does not render the damages excessive.—*Willis v. McNatt*, (Tex.) 12 S. W. 478.

22. A verdict for actual damages for wrongful attachment, which is only about the value testified by the debtor, and \$300 less than that placed on it by the sheriff in his return, there being no other evidence as to the value, is not excessive.—*Parks v. Young*, (Tex.) 12 S. W. 936.

23. Where the attachment is entirely unnecessary to secure plaintiff's debt, and has been sued out without probable cause, and defendant's busi-

ness has been broken up, and his immediate actual loss amounts to nearly \$700, a verdict for \$500 exemplary damages is not excessive. — *Parks v. Young*, (Tex.) 12 S. W. 986.

24. Malice appears where the ground stated in the affidavit to procure the writ is known, or ought to be known, to be untrue by the attaching creditors, and plaintiffs may recover exemplary damages. — *Willis v. McNatt*, (Tex.) 12 S. W. 478.

— Evidence.

25. Where defendants in attachment recover only actual damages for its wrongful issue, plaintiff is not prejudiced by their testimony as to what they had been doing since the attachment. — *McClelland v. Fallon*, (Tex.) 12 S. W. 60.

26. On the trial of an issue of wrongful attachment, where the verdict is against the attachment plaintiff for actual damages only, he is not prejudiced by defendant's testimony that the goods, for the price of which the action was brought, were unsalable, and not such as the buyer ordered. — *McClelland v. Fallon*, (Tex.) 12 S. W. 60.

## ATTORNEY AND CLIENT.

Authority to appear, see *Appearance*, 2.

### Compensation.

1. A contract between an administrator and attorneys, while the settlement of the estate is progressing, under which the former agrees to pay the latter at the rate of five dollars per day for their services, and an amount equal to five per cent. of all they may save the estate "by excepting to the settlements made by the commissioner," does not entitle the attorneys to commission on what is conceded to be owing to the estate, but only on all controverted claims that are allowed against the estate. — *Mellvoy v. Russell*, (Ky.) 12 S. W. 1067.

### Lien.

2. After an attorney had procured a judgment against a railroad company, all its property and franchises were sold to satisfy various liens. The client and others became purchasers, the company was reorganized, and stock was issued to the purchasers, by mutual agreement among them, in payment of their claims against the old company. Liens prior to the judgment procured by the attorney absorbed all the purchase price. *Held*, that the attorney had no lien, by virtue of the judgment, on the stock which was issued to his client. — *Morton v. Hallam*, (Ky.) 12 S. W. 187.

3. An attorney's lien on a judgment exists notwithstanding the judgment is compromised pending appeal, as, under the Tennessee practice, an appeal does not vacate the judgment. — *Covington v. Bass*, (Tenn.) 12 S. W. 1033.

4. Where a judgment is compromised, pending appeal, without notice to the attorneys of the successful plaintiff, they may enforce their lien against defendant in equity. — *Covington v. Bass*, (Tenn.) 12 S. W. 1033.

5. A defendant who compromises a judgment against him is conclusively presumed to have known all it contained, and is not entitled to actual notice of an attorney's lien. — *Covington v. Bass*, (Tenn.) 12 S. W. 1033.

### Contracts between.

6. Where an attorney exchanges land with his client, he must show that the trade was fair, and that he gave an adequate consideration for his client's land. — *Cooper v. Lee*, (Tex.) 12 S. W. 453.

7. Defendant employed plaintiffs to collect a claim against a railroad company, and agreed to pay them a per cent. of the amount realized or secured, "whether by suit, compromise, or otherwise; and, if nothing of said claim is realized or secured, said attorneys (plaintiffs) are to receive no compensation." The evidence showed that after much litigation, in which a judgment was procured, plaintiffs had advised defendant that the claim was hopeless. Afterwards defendant purchased an interest in the road, and abandoned the litigation. He afterwards realized the amount of his claim. *Held*, that plaintiffs were not entitled

to recover under the contract. — *Simrall v. Morton*, (Ky.) 12 S. W. 185.

## BAIL.

### Right to bail.

1. In Texas a person arrested for murder is entitled to bail where it appears that deceased, a constable, was killed while trying to arrest accused, and that accused was not aware of his official character, and was not apprised of his purpose, in making the arrest. — *In re Johnson*, (Tex.) 12 S. W. 504.

2. The children of defendant and deceased had quarreled, and deceased threatened to shoot defendant's children. Later, defendant drove deceased's children from his spring, when deceased took a pail and pistol, and started, in a rage. Defendant, seeing him coming, took his gun, and went to meet him; but there was evidence that he did not shoot until deceased, a savage man, drew his pistol, and threatened to kill him. Defendant at once gave himself up, and was discharged by a justice, but after two terms, was indicted for murder, and tried, the jury disagreeing. His conduct was good, and he had refused to escape when other prisoners broke jail. Const. Mo. art. 2, § 24, declares that all persons shall be bailable, "except for capital offenses, when the proof is evident, or the presumption great." *Held*, that it was proper to admit him to bail. — *In re Goans*, (Mo.) 12 S. W. 635.

### Bail-bond.

3. Under Code Crim. Proc. Tex. art. 288, requiring the offense to be distinctly named in a bail-bond, a recital that defendant was charged with "unlawfully selling liquor on Sunday" is insufficient, but the indictment having charged that he was a merchant, grocer, or dealer in wares, and merchandise, or trader in business, and that as such he did unlawfully sell liquor on Sunday, the bond must allege the same facts. — *Bowen v. State*, (Tex.) 12 S. W. 418.

### — Scire facias.

4. In *scire facias* issued to the sureties on a judgment nisi, rendered by the district court on a forfeited bail-bond, the writ alleged that defendant, "in a prosecution pending in the district court," entered into a bond, etc., conditioned to appear "before the said court \* \* \* to answer \* \* \* upon a charge by information before W. L. H., J. P., precinct No. 1, Ellis county, Texas, duly presented in said court, wherein \* \* \* defendant is charged with the offense of assault to murder, \* \* \* and whereas \* \* \* before said court, then in session for said Ellis county, said prosecution was called for trial, and the said J. L. B. failed to appear, \* \* \* and thereupon said bond was declared forfeited by said court, and it was ordered," etc. *Held*, that the judgment nisi in the district court does not support the allegations of the writ, which read as if the bond was forfeited and judgment nisi rendered in the justice's court, on a charge pending in that court. — *Brown v. State*, (Tex.) 12 S. W. 1101.

5. Where the *scire facias* alleges that the bond was executed "in a certain prosecution pending in the district court," and the bond offered in support of the allegation is shown to have been taken in an examining court of a justice of the peace, the variance is fatal. — *Brown v. State*, (Tex.) 12 S. W. 1101.

6. The allegation that the bond was executed "to answer upon a charge by information before W. L. H., J. P. of Ellis county, duly presented in said court," cannot be proved by a bond which was executed to answer before the district court to a charge of assault with intent to murder, as such crime, being a felony, could not be finally tried in a justice's court, and could not be tried in any court on information. — *Brown v. State*, (Tex.) 12 S. W. 1101.

### Release of sureties.

7. When one released on a bail-bond goes into another state, and is there confined in the penitentiary for another crime, whereby his bond is forfeited, his bail are not exonerated. — *Yarbrough v. Commonwealth*, (Ky.) 12 S. W. 143.



8. Under Crim. Code Ky. § 98, providing that "if, before judgment is entered against the bail, the defendant is surrendered or arrested, the court may, at its discretion, remit the whole or part of the sum specified in the bail-bond," the discretion of the court is not abused when judgment is entered against the bail of one who went into another state and was there confined in the penitentiary for another crime, for two-thirds of the amount specified, though the accused was surrendered by his bail when he was released from the penitentiary.—*Yarbrough v. Commonwealth*, (Ky.) 12 S. W. 148.

### Bailment.

See *Agreement; Carriers; Innkeepers; Pledge.*

## BANKRUPTCY.

### Effect of discharge.

A debtor's discharge in bankruptcy cannot affect the right of a creditor to enforce a vendor's lien on lands of the debtor which were not listed as part of his assets, and in relation to which no proceedings in bankruptcy were had.—*Barnett v. Salyers*, (Ky.) 12 S. W. 808.

## BANKS AND BANKING.

### Checks.

1. The holder of a check cannot sue the bank on which it is drawn, unless it has been accepted by the bank.—*Pickle v. People's Nat. Bank*, (Tenn.) 12 S. W. 919.

2. Where a bank has paid a check drawn on it to one not the payee or his indorsee, and charged and deducted the amount on settlement with the drawer, its conduct amounts to such acceptance as will enable the payee to sue upon it.—*Pickle v. People's Nat. Bank*, (Tenn.) 12 S. W. 919.

3. It is immaterial that it does not appear that the check was delivered to complainant, or how it came into possession of the bank, as by suing upon it the payee ratifies the receipt of the check on his account, though not its subsequent collection.—*Pickle v. People's Nat. Bank*, (Tenn.) 12 S. W. 919.

4. When a bank pays a forged check without requiring identification or preserving any evidence of the identity of the person to whom it is paid, and indorses it, and sends it for payment to the bank upon which it is drawn, the latter bank, upon discovering the forgery after having paid the check, can recover the amount thereof from the former.—*People's Bank v. Franklin Bank*, (Tenn.) 12 S. W. 716.

### Officers.

5. A bank cashier may indorse to himself, and sue on, a note payable to the bank.—*Young v. Hudson*, (Mo.) 12 S. W. 632.

### Taxation.

6. Statutes of Texas permitting private banks to deduct their deposits from their taxable assets do not discriminate against national banks, which are, by act of March 31, 1885, required to render a sworn statement of the number of their shares, each share for its actual cash value, less its proportion of real estate, which is taxed separately, since, to determine such value, it is necessary to deduct deposits, as debts against the bank.—*Engelke v. Schlender*, (Tex.) 12 S. W. 999.

## BIGAMY.

### Venue—Constitutional law.

Rev. St. Mo. § 1536, providing that an indictment for bigamy may be found and trial had in the county where the offender is apprehended, is in violation of the constitution of 1875, providing that the indictment must be found by a grand jury of the county where the offense was committed, and, where a second marriage was performed in J. county, an indictment and conviction in M. county is error.—*State v. Smiley*, (Mo.) 12 S. W. 247.

## Bona Fide Purchasers.

See *Negotiable Instruments*, 7-9; *Sale*, 6; *Vendor and Vendee*, 31-33.

## BONDS.

See, also, *Principal and Surety.*

Action on assignee's bond, see *Assignment for Benefit of Creditors*, 8, 9.

Injunction bond, see *Injunction*, 7.

Of executors, etc., see *Executors and Administrators*, 2-5.

Replevin bond, see *Replevin*, 12-14.

Venue of action on, see *Venue in Civil Cases*, 1.

### Qualifications of sureties.

The non-residence of a surety on the bond of a commissioner appointed to sell land under decree of the court is no ground of objection, where it is shown that the surety has sufficient property within the state.—*Herd v. Cist*, (Ky.) 12 S. W. 466.

## BOUNDARIES.

### By acquiescence.

1. Where the location of a road constituting the dividing line between plaintiffs' and defendants' lands is in dispute, the purchase and holding of adjacent land by one of the defendants does not constitute such a recognition of the *locus* of the road as would operate as an estoppel, where plaintiffs were not induced thereby to change their position for the worse.—*Griffith v. Rife*, (Tex.) 12 S. W. 168.

### Courses and distances.

2. Where the beginning corner of a survey is the south-west, but the south-east corner is equally well identified, a charge limiting the jury to finding the unidentified north-east corner by the first and second lines from the south-west corner is erroneous, as the south-east corner is of equal importance, unless the line from the former corner was actually run and measured, and that from the latter not.—*Scott v. Pettigrew*, 12 S. W. 161, 72 Tex. 321; *Lancaster v. Ayers*, (Tex.) 12 S. W. 163.

3. An instruction making the importance of an established north-east corner, in locating the north and west lines of a survey, dependent upon the jury's belief that such western line was not run, is erroneous, as such corner has the same weight for the purpose in question, whether the western line was run or not.—*Scott v. Pettigrew*, (Tex.) 12 S. W. 161.

4. Where a grant of a tract of land declares its area to be 11 leagues, and there is nothing to indicate an intent to grant a greater area, and no older surveys are called for, and the "footsteps" of the surveyor are found on a part only of the boundaries of the grant, upon an issue as to the location of one of the lines of such tract, an instruction that any excess over the area granted is immaterial if the jury can fix its boundaries in harmony with the calls of the original survey is erroneous; the effect of such excess in determining the unidentified boundaries, in connection with the other evidence, being a question for the jury.—*Scott v. Pettigrew*, (Tex.) 12 S. W. 161.

5. Plaintiff alleged a vacancy of 1,590 *varas* between two surveys having a common east line and three others lying to the east of them. Four of them were made by one surveyor, at about the same time, and all, by mutual use of the same lines and corners, were evidently intended to have a common line, and to include the whole territory. No marked lines were found on the ground, and, to locate their exterior lines by measurement from identified corners of adjacent surveys, several thousand *varas* distant to the east and west, and measuring the required distances towards the interior, the vacancy would exist as asserted. But, measuring from other nearer identified corners of like surveys, the discrepancy on one side of the line would be trifling. There was evidence from which the court might well find, as it did, that a pile of stones claimed by defendants as a corner in the common line was such corner. No vacancy

was shown on the county map. *Held*, that the identified corner of the surveys in question must prevail over measurements from contiguous surveys, and, while there was an apparent excess of land in some of the surveys, there was no vacancy.—*Booker v. Hart*, (Tex.) 12 S. W. 16.

6. Where neither the corners of plaintiffs' nor defendants' land are satisfactorily established, and there is a well-established and identified corner of another survey, from which, by following course and distance, defendants' survey can be constructed, such course should be followed, though the boundaries thus established include land within the boundaries of plaintiffs' junior survey.—*Griffith v. Rife*, (Tex.) 12 S. W. 168.

### Recognition.

7. Where a dividing line is established between tracts of land owned by a county, before purchases are made of land on each side of it, and the deeds under which parties claim have been made, and are known by the parties to have been made with reference to that line, they, and all the persons claiming through them, are bound by it.—*Briscoe v. Puckett*, (Tex.) 12 S. W. 978.

### Adverse possession.

8. Where parties have respectively claimed adversely up to a division fence for 30 years, such fence fixes the line between them, and determines their respective rights.—*Scheible v. Hart*, (Ky.) 12 S. W. 623.

9. But, if there is a marked line between the two pieces of land for which the deed of one of the parties calls, then he does not acquire possession beyond it by the adjoining owner's permitting him to join to his fencing, if he does not claim to the division fence.—*Scheible v. Hart*, (Ky.) 12 S. W. 623.

10. Continuous and uninterrupted possession, under claim of ownership, to the line of a division fence, will not bar title, where it appears that such occupation was under a belief that the fence was on the true line, and without intention of claiming beyond the true line, as described in the deeds.—*Skinker v. Haagsma*, (Mo.) 12 S. W. 659.

11. A. and B., being tenants in common of a section of land, agreed that A. should have the south half, and B. the north half. A. deeded the south-west quarter, and by mistake located the upper boundary too far north. Her grantees deeded it to defendants without any reference to the northern boundary. B. deeded the north half to plaintiff, calling for the proper southern boundary. *Held*, that plaintiff was not estopped from claiming the boundary line described in his deed.—*Carley v. Parton*, (Tex.) 12 S. W. 960.

### Evidence.

12. Findings of the court, in ejectment, as to the location of the boundary line will not be reviewed, when there is evidence to support them.—*Skinker v. Haagsma*, (Mo.) 12 S. W. 659.

13. In trespass to try title, an expert surveyor, who was present at the survey of the lands in controversy, may use a map in explaining his testimony, which would not be clearly intelligible without it, though the map is not shown to be correct or official.—*Griffith v. Rife*, (Tex.) 12 S. W. 168.

14. In an action to try title to land, where the title depends upon the location of a line, an instruction that the burden of fixing such line was upon defendant, and that it must be fixed with reasonable certainty, is erroneous, as the burden of proof is upon the plaintiff; and also because the words "reasonable certainty" require proof beyond a reasonable doubt, which is not necessary.—*Scott v. Pettigrew*, (Tex.) 12 S. W. 161.

15. Where the evidence as to the locality of a road constituting the dividing line between plaintiffs' and defendants' lands is conflicting, a judgment for defendants will not be disturbed, even if their patent did not prevail over plaintiffs'.—*Griffith v. Rife*, (Tex.) 12 S. W. 168.

16. It appeared that a certain road, constituting the dividing line between plaintiffs' and defendants' lands, could not be precisely located by physical evidences on the ground; that the meanders of such

road were given by calls for courses and distances in the field-notes of the original, unauthorized survey of defendants' land only, and not in those of the survey of plaintiffs' land, which was made first, but was not shown to have been authorized; that neither of these sets of field-notes called for the other; that a resurvey of plaintiffs' land, upon which their patent was issued, was made subsequent to another survey of defendants' land, and the issue of their patent thereon; and that the meanders of the road, as called for in the respective patents, were irreconcilable. *Held*, that the original survey of defendants' land was superseded by that upon which their patent was issued, and that the latter will prevail over that of plaintiffs' junior patent.—*Griffith v. Rife*, (Tex.) 12 S. W. 168.

## BRIDGES.

### Defective bridges.

1. Where it appears that plaintiff, while riding on horseback, was injured by her horse's falling backward into an open space between a wagon-way and a foot-bridge, evidence that another person had been injured at the same place by falling from the foot-bridge is not admissible on the question of notice, as it has no tendency to show that the wagon-way was unsafe for travel on horseback.—*Shelley v. City of Austin*, (Tex.) 12 S. W. 758.

### Evidence.

2. In an action against a city for personal injuries caused by the alleged defective construction of two bridges,—one a wagon way, and the other a foot bridge,—whereby an open space over a gutter was left between them, about ten feet long, four feet wide, and two feet deep, expert evidence is not admissible on the question as to whether the opening was dangerous.—*Shelley v. City of Austin*, (Tex.) 12 S. W. 758.

3. Neither are the opinions of non-expert witnesses who have examined the place, and who are able to state the facts on which their opinions are based, admissible.—*Shelley v. City of Austin*, (Tex.) 12 S. W. 758.

4. In an action against a city for damages alleged to have resulted from the city's negligence in constructing a bridge, testimony of the mayor, of the city engineer, who superintended the construction of the bridge, and of a member of the city council, that the bridge was built by the city, sufficiently supports a finding to that effect, though there was no evidence that the city council passed an ordinance authorizing the bridge to be built.—*City of Austin v. Emanuel*, (Tex.) 12 S. W. 318.

### Instructions.

5. An instruction that if the jury, looking to all the circumstances, find that the city used ordinary care and prudence in keeping a bridge of the dimensions shown,—that is, if the bridge was reasonably safe for the public,—then to find for the city; but if the city failed to exercise such care, etc., then to find for plaintiff,—sufficiently submits to the jury the question whether the bridge was of sufficient dimensions to relieve the city of negligence in its construction and keeping.—*Shelley v. City of Austin*, (Tex.) 12 S. W. 758.

## BUILDING AND LOAN ASSOCIATIONS.

Charters, see *Usury*.

### Default in dues.

The laws of a building association divided its stock into four series of 500 shares each, to be paid for in weekly payments of \$1. When the funds amounted to \$500, that sum was assigned to some share, which was then termed a "redeemed share," and the holder was thereafter required to pay interest on the amount monthly, besides the \$1 a week, until all the shares in that series were "redeemed." A shareholder had \$500 assigned to him, and gave his note for payment, secured by a deed of trust authorizing a sale of the property in case of default in the monthly or weekly payments.

*Held*, that default in the payment of the dues was the default in the weekly payments referred to in the trust-deed, and authorized a sale of the property.—*Wilson v. Schoenlaub*, (Mo.) 12 S. W. 861.

## BURGLARY.

### With intent to rape.

1. Where the evidence shows that defendant broke into a cabin where certain females slept, and followed them thence to the main dwelling, which he also forcibly entered, the verdict of the jury, convicting him of burglary with intent to commit rape, will not be disturbed on the ground that the facts did not justify the finding of the intent as charged.—*McComb v. Commonwealth*, (Ky.) 12 S. W. 882.

### Evidence—Possession of stolen property.

2. To warrant an inference of guilt from the fact that some of the stolen property was found in defendant's possession recently after a burglary, his possession must be personal and exclusive, must be unexplained, and must involve a distinct and conscious assertion of property by defendant; and, where the evidence shows that some of the stolen property was soon thereafter found in defendant's possession, the court should so instruct.—*Jackson v. State*, (Tex.) 12 S. W. 701.

3. On a trial for burglary, proof that some of the stolen property was found in the house of a third person cannot be considered against defendant, unless it is proved that the two acted together in the commission of the burglary, and that the third person had personal and exclusive possession, unexplained, and under a claim of ownership.—*Jackson v. State*, (Tex.) 12 S. W. 701.

4. Where there is no evidence that defendant made any explanation of his possession of the stolen property, it is improper to instruct as to the rule relating to such explanations.—*Jackson v. State*, (Tex.) 12 S. W. 701.

### Instructions.

5. On a trial for burglary, P. and T., on behalf of the state, testified that defendant confessed to them that he committed the burglary. There was evidence that said witnesses were accomplices in the crime, and the only material corroboration of their testimony was the fact that shortly after the burglary a gun taken at the time was found in defendant's possession; but defendant testified that he purchased it from T., and that the latter had it in his possession soon after the burglary, and before defendant had it. *Held*, that the court should have charged that, unless the jury were satisfied, beyond a reasonable doubt, that defendant did not purchase the gun from T., or that T. did not have possession of said gun before it was found in defendant's possession, they should not consider the circumstance of defendant's possession as corroborative of the testimony of said witnesses.—*Beach v. State*, (Tex.) 12 S. W. 868.

## Cancellation of Contracts.

See *Equity*, 4-11.

## CARRIERS.

See, also, *Horse and Street Railroads; Railroad Companies*.

### Contracts between—Public policy.

1. An agreement, between owners of two rival steam-boats on the Kentucky river, that, in order to prevent rivalry and consequent reduction of charges, the net profits of each should be shared in a certain proportion, each bearing its own expenses, and that, if the owners of either boat should sell with a view of going out of the trade, notice should be given to the owners of the other boat, and the owners so selling should not enter the trade again within one year, is void, as against public policy, and the owners so selling may start a new boat within the year.—*Anderson v. Jett*, (Ky.) 12 S. W. 670.

### Contract of carriage.

2. Where trains habitually stop at a certain station, and an agent of the company sells a return ticket to that station to a person who has been informed of the custom, and relies on it, and the agent knows that the purchaser intends to use the ticket to return on a train which does not stop at that station, but does not inform him of the fact, the company is liable.—*St. Louis, I. M. & S. Ry. Co. v. Adcox*, (Ark.) 12 S. W. 874.

3. Where defendant sells plaintiff a first-class railroad ticket over its own and other lines, containing a provision that in selling the ticket defendant acted only as agent, and was not responsible, beyond its own lines, plaintiff cannot recover against defendant for being ejected from a first-class car, and being compelled to travel in a smoking-car, on one of the other lines.—*Harris v. Howe*, (Tex.) 12 S. W. 224.

### Limiting liability.

4. A railroad company that has made no reduction in its freight rates in consideration of a stipulation in a bill of lading exempting it from loss by fire; that has furnished its agent with no form for a bill of lading not containing the "fire clause;" and that has given him no authority to submit to the shipper the alternative of paying a higher rate for a shipment with the common-law responsibility attaching to the company,—is liable for goods destroyed by fire, though the company's officers testify that the company had a higher freight rate, where the "limited liability" clause was omitted from the bill of lading, and that, if the shipper had so requested, permission would have been given to ship under a contract without the "fire clause" in it. The stipulation, being unreasonable and unjust, is not a valid limitation of the company's common-law liability as a common carrier.—*Louisville & N. R. Co. v. Gilbert*, (Tenn.) 12 S. W. 1018.

5. Where a railroad company has not given its customers the choice of shipping under a bill of lading without the clause exempting it from liability for loss by fire, the acquiescence of the shipping public in the form of the bill of lading containing the "fire clause" does not establish the reasonableness of the exemption.—*Louisville & N. R. Co. v. Gilbert*, (Tenn.) 12 S. W. 1018.

### Injuries to passengers.

6. Where the petition, in an action for injuries sustained by plaintiff while traveling in charge of cattle, alleges that, when the train stopped to take water, plaintiff, as was customary, left the caboose to look after his cattle; that the train started without giving him time to re-enter the caboose, and he was compelled to climb up on the train, or be left behind; that on the invitation of the conductor he started towards the caboose; and that, as he was in the act of entering it from the top of the car, he was struck by a water-pipe attached to a tank, and injured,—exceptions to so much of it as alleges why plaintiff went on the top of the train rather than the caboose, and that he entered the caboose from the top of the car at the request of the conductor, are properly overruled.—*Missouri Pac. Ry. Co. v. Callahan*, (Tex.) 12 S. W. 883.

7. The evidence showed that plaintiff was attempting to enter the caboose at the place fixed for employees when he was struck by the pipe of a water-tank, and there was nothing to show that it was obviously dangerous so to enter, or that plaintiff was negligent in the manner of his attempt to enter. *Held*, that a verdict in his favor would not be disturbed.—*Missouri Pac. Ry. Co. v. Callahan*, (Tex.) 12 S. W. 883.

8. A passenger aged 67, and in good health, was directed to get off defendant's train, a freight carrying passengers, before reaching his station. His duties requiring haste, he started on beside the train, the road-bed being closely fenced with barbed wire, but soon came to a bridge, to get over which he had to mount a flat-car. Reaching the front of the car, and being anxious lest the train might start, he, having first examined the ground, jumped from the coupling outward, with one hand on the car in front, and in landing broke his leg. *Held*,

that the facts did not constitute a cause of action.—*Adams v. Missouri Pac. Ry. Co.*, (Mo.) 12 S. W. 637.

#### — Pleading.

9. Allegations in a petition against a railroad company for personal injuries, that plaintiff was put to great inconvenience and delay; that he was expected at a certain city on a certain day, but was unable to reach it; that the weather was bitterly cold, and the place of the accident not near any house, and he was forced to walk back to nearest town for shelter, and suffered greatly thereby; and that, by reason of said inconvenience and delay, he was damaged in the further sum of \$500,—are too vague to warrant an allowance for inconvenience.—*Missouri Pac. Ry. Co. v. Mitchell*, (Tex.) 12 S. W. 810.

10. An allegation in a complaint that plaintiff was expelled from defendant's train, that he experienced great fatigue and distress in finding his way back, and that by reason thereof and the ejection from the train he suffered great pain of mind and body, will not admit proof of the sickness of plaintiff's child, to which he was going, and plaintiff's consequent mental suffering, but such fact must be distinctly pleaded.—*Gulf, C. & S. F. R. Co. v. Hurley*, (Tex.) 12 S. W. 226.

#### — Evidence.

11. In an action against a railroad company for injuries received in a wreck, the evidence as to the condition of the road should be confined to the time and place of the accident, and all evidence as to other wrecks excluded, though presented on the question of exemplary damages.—*Missouri Pac. Ry. Co. v. Mitchell*, (Tex.) 12 S. W. 810.

12. In an action for injuries received in getting off a moving cable car, by a car passing on another track, evidence that the cars were running at a higher rate of speed than was authorized by city ordinances, coupled with some evidence that the bell on the passing car was not rung, is sufficient to show negligence of defendant.—*Weber v. Kansas City Cable Ry. Co.*, (Mo.) 12 S. W. 804.

13. Evidence that, after plaintiff, who was traveling with cattle, reached the car top, and was sitting down, the conductor sent for him to come to the caboose to sign a statement that the cattle were in good order at the end of defendant's line, which they were then nearing, is admissible, where plaintiff is injured in so doing, as having some bearing on the question of contributory negligence.—*Missouri Pac. Ry. Co. v. Callahan*, (Tex.) 12 S. W. 833.

14. So, also, is evidence that no notice of the movement of the train was given plaintiff, to enable him to reach the caboose before the train started.—*Missouri Pac. Ry. Co. v. Callahan*, (Tex.) 12 S. W. 833.

15. Nor is it error to permit plaintiff to state the position of the water-pipe when it struck him, and that it would not have struck him had it been placed in its usual position when not used to conduct water.—*Missouri Pac. Ry. Co. v. Callahan*, (Tex.) 12 S. W. 833.

#### — Contributory negligence.

16. A passenger on a grip-car pulled the rope for a stop at a crossing, but the signal, being out of order, gave no sound; and, while the car was in full motion, without signaling the conductor or gripman, who was near him, he stepped out of a side door, which was open and unguarded, and was struck immediately by a car passing on another track. Held, that he was guilty of contributory negligence.—*Weber v. Kansas City Cable Ry. Co.*, (Mo.) 12 S. W. 804.

17. A shipper of stock is not guilty of contributory negligence, who uses the only platform provided by the railroad company for that purpose, and is injured in so doing, though he knows it to be unsafe, if he exercises reasonable care in its use.—*White v. Cincinnati, N. O. & T. P. Ry. Co.*, (Ky.) 12 S. W. 936.

#### — Ejection from train.

18. Plaintiff bought a ticket to a point on defendant's road. A wreck occurred on the way, and the train was delayed over night. Plaintiff,

being sick, was unable to wait on the train, and asked the conductor if the check he had given him would be good for the next day, and was told it would not. The next day plaintiff boarded another train for his destination. After some dispute as to riding on the check, he offered the regular fare, but, on refusing to pay the extra price demanded when tickets are not bought before entering the train, he was ejected. Held, that plaintiff was entitled to damages for such ejection.—*Louisville & N. R. Co. v. Wilsey* (Ky.) 12 S. W. 275.\*

19. Plaintiff was wrongfully ejected from defendant's train for refusing to pay a penalty exacted from passengers who failed to purchase tickets at a regular station, the conductor having full knowledge of the facts excusing plaintiff. But it did not appear that there was any malice on the part of the conductor. Held, that, while plaintiff was entitled to more than nominal damages, a verdict for \$3,500 was excessive.—*Louisville & N. R. Co. v. Wilsey*, (Ky.) 12 S. W. 275.

#### — Damages.

20. The liability of a railroad company for exemplary damages does not depend on its ability to keep its road in such condition that it can be safely operated.—*Texas Trunk Ry. Co. v. Johnson*, (Tex.) 12 S. W. 482.

21. In an action for injuries sustained through the derailling of a train, where there is evidence that, while the track was not in good condition, trains might be run on it, at a low rate of speed, with reasonable safety, and that at the time of the accident the train was running at a greater rate of speed than was allowed by the orders of the company, and that the wreck might have been caused by this, it is error to refuse to instruct the jury that if they find from the evidence that the injury sustained by plaintiff was the result of fast running of the train, and that the train was so run against the orders of the superior officers, and against the regulations of the company, then plaintiff can only recover actual damages.—*Texas Trunk Ry. Co. v. Johnson*, (Tex.) 12 S. W. 482.

#### Loss of property by passenger.

22. A passenger on defendant's sleeping-car, being told he would have to change cars on account of a wreck, started forward with all the other passengers, but, upon missing his pocket-book, returned to his berth, where he had left it. No one was in the car after the passenger left, except the conductor, porter, and a train brakeman who passed through without stopping. The conductor, porter, and passengers were searched, but the pocket-book could not be found. Held, that a verdict against the sleeping-car company would not be disturbed.—*Pullman Palace Car Co. v. Matthews*, (Tex.) 12 S. W. 744.

#### Liability for loss or injury of goods.

23. Under Rev. St. Tex. art. 277, which declares that "the duties and liabilities of carriers in this state shall be the same as are prescribed by the common law," except when otherwise provided, an interstate carrier, in the absence of contract limiting its liability, is liable for goods destroyed by a mob of rioters.—*Gulf, C. & S. F. Ry. Co. v. Levi*, (Tex.) 12 S. W. 677.

#### Live-stock shipments.

24. A carrier cannot limit its liability for the full value of stock lost, through its negligence, by a contract to pay "the actual cash value at the time and place of shipment, but in no case to exceed one hundred dollars per head," in case of total loss of said stock.—*Southern Pac. Ry. Co. v. Maddox*, (Tex.) 12 S. W. 815.

#### Connecting lines.

25. By a contract between plaintiff and "the L. & N. Ry. and its connecting lines," it was agreed that certain cattle should be carried from Decatur, Ala., to Fort Worth, Tex., the liability of the L. & N. Ry. as carrier to cease at its terminus, New Orleans. From that point the cattle were hauled over several roads, in the same cars, and were finally delivered to the defendant road, in the state of Texas, which delivered them at Fort Worth, and collected all charges for carriage and feeding from

plaintiff. Rev. St. Tex. art. 4251, provides that every railroad company shall, for a reasonable compensation, draw over its road without delay the passengers, merchandise, and cars of every other railroad company which may enter and connect with its road. *Held*, that the facts were insufficient to fix any liability upon defendant, as member of a partnership, or as joint contractor, for injuries received by the cattle on roads other than its own; its action in hauling such cattle, as it was required to do by law, not of itself amounting to a ratification of the contract.—*Gulf, C. & S. F. Ry. Co. v. Baird*, (Tex.) 12 S. W. 530.

26. As Rev. St. Tex. art. 4251, makes it obligatory on a railroad company in the state, without delay, to carry over its road cars, freight, etc., received from any connecting company, a railroad company is not bound by a through bill of lading, under which it receives freight, in ignorance of its terms, the original carrier having no authority to contract for it.—*Gulf, C. & S. F. Ry. Co. v. Dwyer*, (Tex.) 12 S. W. 1001.

27. The way-bill of the company showing that, at the time the defendant company received the freight, it paid accrued charges, amounting to as much as the amount fixed in the bill of lading for the entire transportation, is admissible as evidence that it did not intend to ratify the original contract.—*Gulf, C. & S. F. Ry. Co. v. Dwyer*, (Tex.) 12 S. W. 1001.

### Freights.

28. In an action under Laws Tex. 17th Leg. 35, imposing a penalty on a railroad company for refusing to deliver freight upon the payment or tender of the charges shown in the bill of lading, it is not necessary that the bill of lading shall be shown at the time, to make the tender of the charges effectual, unless its production is demanded.—*Gulf, C. & S. F. Ry. Co. v. Dwyer*, (Tex.) 12 S. W. 1001.

## CARRYING WEAPONS.

On election day, see *Elections and Voters*, 23.

### Exceptions in statute.

1. Pen. Code Tex. art. 319, relating to the offense of unlawfully carrying arms, exempts a person who has reasonable ground for fearing an unlawful attack upon his person, and the danger is so imminent and threatening as not to admit of the arrest of the party about to make such attack, upon legal process. On the trial for a violation of the statute, it appeared that defendant, a few minutes before his arrest, was attacked by one D., a larger and more powerful man than himself. Defendant fled, and was pursued some distance by D., who was armed with a club; D. threatening to kill him. Defendant then procured a pistol. *Held*, that the case was within the exemption of the statute.—*Coleman v. State*, (Tex.) 12 S. W. 590.

### Evidence.

2. On a trial for carrying a pistol as a weapon, the defense was that at the time of his arrest defendant was on a journey. Defendant's witnesses testified that defendant had started by train to go to Fort Smith, 50 miles from his home, and while the train was waiting at Coal Hill, 7 miles from his home, he became involved in a difficulty, and was arrested for having a pistol. A witness for the state testified that, after defendant's arrest, defendant's brother had admitted that defendant was spending the evening at Coal Hill at the brother's invitation, and that defendant had intended to go back to his home that night; and that nothing had been said about defendant's journey to Fort Smith. *Held*, that, as the jury are the judges of the credibility of witnesses, a conviction would not be set aside on the ground of the insufficiency of the evidence to support the verdict. *Richardson v. State*, 2 S. W. 187, followed.—*Stewart v. State*, (Ark.) 12 S. W. 1014.

## CERTIORARI.

### When lies.

1. Const. Tenn. art. 6, § 10, providing that the judges of inferior courts may issue writs of *certi-*

*orari* on sufficient cause, does not give a right to the writ as a substitute for an appeal from the decision of the board of equalization, from which no appeal lies, but only as a substitute for appeals of which the petitioner is wrongfully deprived.—*Tomlinson v. Board of Equalization*, (Tenn.) 12 S. W. 414.

2. Act Tenn. March 25, 1837, provides that, where complaints to a board of equalization are based on excessive values, the board shall have the right to summon witnesses. *Held*, that the summoning of witnesses is not a matter of right to a complainant; and the board, in refusing to summon witnesses, is not "acting illegally," or "exceeding its jurisdiction," within Code Tenn. § 3123, granting *certiorari* when an inferior tribunal or board thus abuses its power.—*Tomlinson v. Board of Equalization*, (Tenn.) 12 S. W. 414.

3. Nor is petitioner entitled to the writ to have the decision reviewed on the merits, as such right exists only where the writ lies as a substitute for appeal or writ of error, or, possibly, instead of *audita querela*.—*Tomlinson v. Board of Equalization*, (Tenn.) 12 S. W. 414.

4. Under Mansf. Dig. Ark. § 1363, authorizing *certiorari* to correct erroneous proceedings, it is the proper remedy to set aside, at the instance of an heir, a sale of decedent's land to satisfy a debt, where it appears that the proceedings were entirely irregular; that petitioner was a young child at the time of sale; that the administrator, who was also petitioner's guardian, was an imbecile; that petitioner was not apprised by the record that a time had been fixed for the sale, and so could not take the proper steps for appeal; that the land was partly deceased's homestead, and was worth far more than was paid; and that the purchaser would not suffer by a revocation of the sale, as he had paid no money, and had not yet received a deed.—*Burgett v. Apperson*, (Ark.) 12 S. W. 559.

## Challenge.

See *Jury*, 8, 9.

## CHAMPERTY AND MAINTENANCE.

### Pleading.

1. Defendant's plea that the suit was not the suit of plaintiff, but the suit of her father, and was instituted without plaintiff's knowledge, and prosecuted without her consent, and against her will, was properly stricken out, since it presented the question of maintenance, which is a question for the court, and not for the jury.—*Graham v. McReynolds*, (Tenn.) 12 S. W. 547.

2. It was not error for the court to allow such a plea to stand as an application for a rule on plaintiff's attorneys to show by what authority they prosecuted the suit, and to discharge the rule after the attorneys had answered by filing the affidavit of plaintiff that the suit was prosecuted by her direction.—*Graham v. McReynolds*, (Tenn.) 12 S. W. 547.

## Change of Venue.

See *Venue in Civil Cases*, 5-9.

## CHATTEL MORTGAGES.

### Possession by mortgagor.

1. A mortgagor of a chattel, retaining possession, has a right to sue a turnpike company for damages to the chattel by its defective road.—*Gallatin & N. Turnpike Co. v. Fry*, (Tenn.) 12 S. W. 730.

2. While the mortgaged chattels are in the custody of the mortgagee, he may lend them to the mortgagor for occasional temporary use, without prejudice to his security.—*Garner v. Wright*, (Ark.) 12 S. W. 785.

### Description of persons.

3. A description of the mortgagees in reciting their name as "Henderson, Echols & Co." is sufficient.—*Henderson v. Gates*, (Ark.) 12 S. W. 780.

**Description of property.**

4. A chattel mortgage describing the mortgaged property, as "my entire crops of cotton and corn to be raised by me the present year, or contracted by me," is not void for insufficient description.—*Henderson v. Gates*, (Ark.) 12 S. W. 780.

5. A description in a chattel mortgage of the property mortgaged as "one black mare mule, six years old," in the mortgagor's possession, in a certain county and state, is sufficient.—*Lightle v. Castleman*, (Ark.) 12 S. W. 564.\*

**Recording.**

6. If a mortgagee takes possession of the mortgaged chattels before any other right or lien attaches, his title is good against everybody, if the mortgage was previously valid between the parties, although it be not acknowledged and recorded.—*Garner v. Wright*, (Ark.) 12 S. W. 785.

7. A certificate showing that a chattel mortgage was recorded in full, instead of being deposited with the clerk as provided by law, would not render the registration invalid, if the law was otherwise complied with.—*Grounds v. Ingram*, (Tex.) 12 S. W. 1118.

8. The registration of a chattel mortgage is not notice thereof to an auctioneer who, in the regular course of business, sells the property, and pays over the proceeds to the mortgagor, and, in the absence of actual notice, he is not liable to the mortgagee.—*Frizzell v. Rundle*, (Tenn.) 12 S. W. 915.

9. *Manaf. Dig. Ark. § 4750*, provides that, in order for a mortgage to become a lien on personal property against strangers, without being filed for record, the mortgagee shall indorse upon it that it is to be filed, but not recorded, and shall then file it with the recorder, who shall then mark it "Filed," with the time of filing on the back of it, and file it in his office, where it shall be kept for the inspection of all persons interested. A mortgagee sent his mortgage to the recorder, by an agent, with verbal instructions, but no indorsement on it, that it should be filed, but not recorded. The agent told the recorder that it was not to be recorded, and the recorder laid it aside, and waited to see the mortgagee. Afterwards the mortgagee saw the recorder, and directed him to record it. The recorder then marked it filed as of the day it was handed him, and recorded it. *Held*, that the mortgage was not filed for record until the instructions were given to record it.—*Deadman v. Earle*, (Ark.) 12 S. W. 880.

**Foreclosure.**

10. In a suit to foreclose a chattel mortgage a certified copy thereof is admissible in evidence, as against the single objection that it is "a copy," where it appears that the original is filed in another county, and cannot be withdrawn, though *Sayles' St. Tex. art. 8190b, § 3*, regulating the registration of chattel mortgages, provides that a copy of such instrument, certified by the clerk, shall be received in evidence of the fact that it was received and filed according to the clerk's indorsement, "but of no other fact."—*Grounds v. Ingram*, (Tex.) 12 S. W. 1118.

11. Where a chattel mortgage contains a power of sale, and provides that costs incurred in selling shall be paid out of the proceeds of the sale, costs incurred by the mortgagee in an attempt to sell which is prevented by the wrongful act of the mortgagor, are recoverable from him in a suit to foreclose.—*Grounds v. Ingram*, (Tex.) 12 S. W. 1118.

**Checks.**

See *Banks and Banking*, 1-4; *Negotiable Instruments*, 10.

**CLERK OF COURT.****Fees.**

1. By agreement, one order was made by the court changing the venue in 91 cases, and only one order was actually entered in the minutes of the court. *Held*, under *Rev. St. Tex. art. 2889*, regulating the fees of clerks of court "for each order, judgment, or decree," that the clerk was entitled to one fee only for entering the one order chang-

ing the venue.—*Hanrick v. Ake*, (Tex.) 12 S. W. 818.

2. Prior to the order changing the venue, five orders had been made and entered, each of which was by its terms made to apply to each of the ninety-one cases. *Held*, that the clerk was entitled to his fees for the five orders entered in each of the ninety-one cases, if they were entered in each case; but, if he only entered them once in one case, he would only be entitled to his fee for one order.—*Hanrick v. Ake*, (Tex.) 12 S. W. 818.

3. Pursuant to an order changing the venue in ninety-one cases, plaintiff, with the assistance of an employe of the clerk of court, made one written transcript, and had from it ninety-one copies printed. The clerk signed and certified, under the seal of the court, each printed transcript. *Held*, that the clerk was entitled to his fee for certifying each printed transcript, from which should be deducted reasonable compensation to plaintiff for the labor done by him, and accepted by the clerk, and the expenses necessarily incurred by him.—*Hanrick v. Ake*, (Tex.) 12 S. W. 818.

**Failure to issue execution.**

4. In an action against a clerk of court for failure to issue an execution when directed, the defense was that the record was lost, and therefore the costs could not be taxed and the execution issued. *Held*, that this was no defense without showing that defendant had exercised proper diligence in preserving the record, and it was error to refuse to permit the answer to be amended by alleging that plaintiff or his attorneys had possession of the alleged lost record at the time of directing the execution to issue, as this would be a good defense.—*McFarland v. Burton*, (Ky.) 12 S. W. 836.

**Community Property.**

See *Husband and Wife*, 16-20.

**Comparative Negligence.**

See *Negligence*, 6.

**Complaint.**

See *Pleading*, 1, 2.

**COMPROMISE.****Consideration.**

1. The widow of a testator was empowered by his will to invest certain personal property in a house and lot, the title to be vested in her during her widowhood, and in the event of her marriage to be divided in the proportion of one-third to her for life and remainder to plaintiffs. The widow had the absolute title to the house and lot conveyed to herself, and married defendant, and lived with him on the property. During this time the taxes on the property were paid, and it was improved. At her death plaintiffs claimed the property, and, on defendant's refusal to surrender possession, the parties compromised by plaintiffs executing a mortgage in favor of defendant for \$800, payable when they should sell the property; defendant to remain in possession, rent free, until such sum should be paid. Defendant was fully aware that he had no estate in the property. *Held*, that there was no consideration for the compromise, and that the fact that defendant threatened, and plaintiff dreaded, a lawsuit, was not sufficient to uphold the agreement.—*Creutz v. Hell*, (Ky.) 12 S. W. 926.

**Pleading.**

2. A plea alleging an agreement to compromise a disputed claim, part payment of the agreed amount, and tender of the balance, is good on general demurrer, though the time of the part payment and of the tender is not stated with certainty; it not appearing that time was of the essence of the contract.—*Schwartz v. B. C. Evans Co.*, (Tex.) 12 S. W. 863.

**Conditional Sale.**

See *Sale*, 7.

## Confession.

Judgment by, see *Judgment*, 1.

## CONFLICT OF LAWS.

### Contracts.

1. A note made in Kentucky and payable in Ohio is governed by the laws of Ohio.—*Stevens v. Gregg*, (Ky.) 12 S. W. 775.

2. In an action in Kentucky on a note payable in another state, and negotiable under its laws, the law of the forum governing defenses between antecedent parties to negotiable instruments will be applied, though the note is not negotiable under the Kentucky laws. Overruling *Davis v. Morton*, 5 Bush, 160.—*Stevens v. Gregg*, (Ky.) 12 S. W. 775.

3. Where a mortgagee in a mortgage executed in the Indian Territory invokes the aid of the Arkansas courts to establish his rights under the mortgage, no presumption will be indulged as to the law in force in the territory; but, in the absence of proof, the law of Arkansas will be applied, and justice will be administered according to its principles.—*Garner v. Wright*, (Ark.) 12 S. W. 785.

### Limitation of actions.

4. The statute of limitations of the state in which an action on a note is brought prevails over the statute of the state in which the maker and promisee resided at the time the note was executed.—*Carrigan v. Semple*, (Tex.) 12 S. W. 173.

## CONFUSION OF GOODS.

### Recovery without identification.

Where a lot of pieces of timber, called "headings," are merged with other headings, of a like description and value, the owner may sue to recover the same number of headings without identifying the particular ones belonging to him.—*Reed v. King*, (Ky.) 12 S. W. 772.

## Consideration.

See *Fraudulent Conveyances*, 8, 9.

## CONSPIRACY.

### Indictment.

1. An indictment charging defendants, in the exact language of Gen. St. Ky. c. 29, art. 36, § 3, with "unlawfully confederating and banding themselves together, and going forth armed," is sufficient, though it alleges that defendants' purpose was to rescue a person from jail, which, if accomplished, would be a distinct offense, and does not allege that such purpose was accomplished.—*Commonwealth v. Bryant*, (Ky.) 12 S. W. 276.

### Evidence.

2. The rule that the acts, conduct, and declarations of one co-conspirator, after the consummation of the conspiracy, are inadmissible as evidence against another conspirator, does not exclude evidence of the subsequent finding of the fruits of the crime in the possession of one of the conspirators whose complicity in the crime has been fully established.—*Clark v. State*, (Tex.) 12 S. W. 729; *Gregg v. Same*, Id. 782.

3. On trial of a joint indictment for larceny, proof of the declarations made by one of the conspirators after the common criminal enterprise had been accomplished and the defendants had separated, reciting the statements made by a fellow-conspirator pending the criminal enterprise, is inadmissible against such fellow-conspirator.—*State v. Melrose*, (Mo.) 12 S. W. 250.

## CONSTITUTIONAL LAW.

Discrimination, see *Railroad Companies*, 43.  
Liquor licenses, see *Intoxicating Liquors*, 1-3.

Venue of trial, see *Btamy*.

## Legislative powers.

1. Act Tex. April 12, 1883, § 1, which discretionary with the commissioners' order the election of public weighers, is constitutional as a delegation of legislative power to the commissioners' court has no power amend the act in any way, it being controlled by legislative enactment, in accordance with constitutional forms, and the subject of local regulation.—*Johnson v. Martin*, (Tex.) 12 S. W. 321.

### Titles of laws.

2. Act Tenn. March 24, 1877, entitled to amend the law in relation to the consolidation of railroad corporations, regulated and defined the powers of railroad corporations, and defined the powers of consolidated companies. The third section provided that no company should have the power to give any mortgage, or other kind of security, which should be valid and binding against judgments and decrees and executions "for timbers for work and labor done on, or for damages to persons and property in the operation of the road." Held, that the proviso was general, and subject of consolidations, and the title indicative of this subject, within the constitutional provision that no bill shall embrace more than one subject, that subject to be expressed in its title.—*Frazier v. East Tennessee, V. & G. R. Co.*, (Tenn.) 12 S. W. 537.

### Amendment of statutes.

3. Act Gen. Assem. Ark. March 4, 1884, to the right of redemption from sales under execution, which declares: "Section 2896, act of 1874, which declares that it was and is the true meaning of sections 2896, 2698, 2699, 2700, should and does apply to all sales made and had under and by virtue of the chancery courts, in the same manner as sales under executions at law," is unconstitutional, under Const. Ark. 1868, art. 1, § 1, which declares that no act shall be revised or amended by reference to its title only.—*Beard v. V. & G. R. Co.*, (Ark.) 12 S. W. 567.

4. The "Drag-Net Proviso" of Act of 1883, which, after re-enacting the part of the license act of 1879 so as to conform with its provisions, declares that the provisions shall have operation in every part of the state, and that no person shall be liable for violation of other prohibitory acts, is unconstitutional, under Const. Ark. 1874, art. 1, § 1, which prohibits the extension of the provisions of the license act by reference to its title.—*Baird v. V. & G. R. Co.*, (Ark.) 12 S. W. 566.

5. Act Tex. April 19, 1879 is unconstitutional, as it creates the office of public weigher, and regulating the appointment of public weighers, and the duties and liabilities thereof. Section 8, which declares it to be unlawful for any person except the public weigher to weigh goods, and provides that any person who violates this provision shall be liable to damages to the public weigher, is not in violation of the constitution, under art. 5, § 35, which provides that a bill shall not embrace more than one subject, which is expressed in its title.—*Johnson v. M. & T. R. Co.*, (Tex.) 12 S. W. 321.

### Local and special laws.

6. Act Tex. April 19, 1879 authorizing the appointment of public weighers for and other incorporated towns as might be deemed expedient. The act is amendatory thereof, provides that the public weigher shall make such appointment in every town which annually receives over 100,000 barrels of goods for sale or shipment, and vests a discretion in the commissioners' court to order an election of public weighers in any town, or railroad stations which



that amount. *Held*, that the acts are not in conflict with Const. art. 8, § 58, which declares that the legislature shall not, except as otherwise provided, pass any local or special law "regulating the affairs of counties, cities, towns, wards, or school-districts."—*Johnson v. Martin*, (Tex.) 12 S. W. 821.

#### Obligation of contracts.

7. Const. Tex. April 17, 1876, art. 18, § 4, provides that no claim or right to land which issued prior to November 13, 1885, shall ever hereafter be used in evidence in any courts of the state unless archived in the general land-office, or recorded in the county in which the land is situated. Before the adoption of the constitution, failure to record titles did not render them inadmissible in evidence on proof of their execution; and the protocols under which the *testimonios* were granted were filed in the office of a foreign government, and no provision was made for archiving authenticated copies thereof, nor for archiving the *testimonios* to individuals. *Held*, that article 18, § 4, is in violation of Const. U. S. art. 1, § 10, providing that "no state shall \* \* \* pass any \* \* \* law impairing the obligation of contracts."—*Texas Mex. Ry. Co. v. Locke*, (Tex.) 12 S. W. 80; *Same v. Carr*, *id.* 90.

#### Regulation of commerce.

8. Act Ky. March, 1860, as amended by act 1866, which requires the agents of foreign express companies doing business in that state to take out a license, and to pay a fee of five dollars for issuing the license, is not unconstitutional, as placing a burden upon interstate commerce. *Woodward v. Com.*, 7 S. W. 618, followed.—*Crutcher v. Commonwealth*, (Ky.) 12 S. W. 141.

9. Laws Tex. 17th Leg. 85, imposing a penalty on a railroad company for refusing to deliver freight, upon the payment or tender of the charges shown in the bill of lading, is not unconstitutional, as a regulation of interstate commerce, though applied to freight shipped from a point without the state.—*Gulf, C. & S. F. Ry. Co. v. Dwyer*, (Tex.) 12 S. W. 1001.

#### Due process of law.

10. The taxation of property for the support of free public schools, in accordance with the constitution and laws of a state, is not a taking of property without due process of law, within the meaning of Const. U. S., 14th amend.—*Werner v. City of Galveston*, (Tex.) 12 S. W. 159.

11. Const. Tex. April 17, 1876, art. 18, § 4, provides that no claim or right to land which issued prior to November 13, 1885, shall ever hereafter be used in evidence in any courts of the state unless archived in the general land-office, or recorded in the county in which the land is situated. Before the adoption of the constitution, failure to record titles did not render them inadmissible in evidence on proof of their execution; and the protocols under which the *testimonios* were granted were filed in the office of a foreign government, and no provision was made for archiving authenticated copies thereof, nor for archiving the *testimonios* to individuals. *Held*, that article 18, § 4, is in violation of Const. U. S. amend. 14, providing that no state shall deprive any person of property without due process of law.—*Texas Mex. Ry. Co. v. Locke*, (Tex.) 12 S. W. 80; *Same v. Carr*, *id.* 90.

#### Taxation.

12. Act Tex. April 3, 1879, authorizing municipal corporations to take control of the public schools within their respective limits, and to levy a tax to support the schools as free schools, is not unconstitutional. 7 S. W. 726, affirmed.—*Werner v. City of Galveston*, (Tex.) 12 S. W. 159.

#### Discrimination.

13. Act Ky. April 10, 1873, providing that, where a fine imposed in a misdemeanor case is unpaid, defendant may be required by the verdict to be put at hard labor for a certain time, is not unconstitutional, or discriminating between the rich and poor.—*Commonwealth v. Sherley*, (Ky.) 12 S. W. 771.

#### Creation of judicial districts.

14. Const. Tex. art. 5, § 1, vests the judicial power in certain courts, including district courts. Section 7 provides that the state shall be divided into 26 judicial districts, which may be increased or diminished by the legislature, and that the district judges shall be elected by the qualified voters of the district. Section 14 fixes the judicial districts, and the time of holding the court therein, until otherwise provided by law. Section 7 further provides that a district judge shall hold the regular terms of court at one place in each county in the district twice a year, in such manner as shall be prescribed by law, and that the legislature may increase the number of terms, when necessary for the dispatch of business; and section 9 provides for a clerk of the district court of each county. *Held*, that such sections do not show an intention to forbid the creation of more than one judicial district in a county, or the sitting of two district courts, with a single clerk, at one place, the county-seat.—*Lytle v. Half*, (Tex.) 12 S. W. 610.

15. As the leading purpose of Gen. Laws Tex. 1889, p. 165, was to establish two judicial districts, and to secure the holding of two district courts, in Bexar county, provisions of the act declaring that grand juries shall be impaneled in only one of the districts, and that criminal cases shall reach the other only when transferred from the first, as to the legality of which there may be question, are not so inseparably connected with the leading purpose of the act as to require the entire act to fall, nor are they such as to induce the belief that the legislature would not have passed the act with them omitted.—*Lytle v. Half*, (Tex.) 12 S. W. 610.

#### Constructive Trusts.

See *Trusts*, 9.

#### CONTEMPT.

##### What constitutes.

Where a judge has, in a case within his jurisdiction, ordered the discharge of a prisoner on *habeas corpus* proceedings, and has refused the prayer of the sheriff for an appeal from such order, the latter is guilty of contempt of court, within Code Tenn. 1888, § 4106, when, all the parties being present in court, he refuses to release the prisoner, though both the order of discharge and the refusal of an appeal were erroneous.—*In re Vanvaver*, (Tenn.) 12 S. W. 786.

#### Contest.

Of elections, see *Elections and Voters*, 5-18.  
wills, see *Wills*, 11-14.

#### CONTINUANCE.

In criminal cases, see *Criminal Law*, 11-20; *Homicide*, 43.

##### Application.

1. An application for a continuance on the ground of the absence of the applicant as a witness, which does not show that by reasonable diligence he could not have been present, or that his deposition could not have been taken, is insufficient.—*Grounds v. Ingram*, (Tex.) 12 S. W. 1118.

##### Absence of witnesses.

2. A second continuance for absence of witnesses is properly refused where commissions to take depositions of those out of the state were mailed about six weeks before trial, without sending any money, or making any arrangements with the officers, and those in the state reside in the county from which the cause had been removed, and commissions to take their depositions were issued only a month before trial; no excuse being shown for the delay, and it not appearing that the depositions could not have been procured.—*Little v. State*, (Tex.) 12 S. W. 965.

3. To a bill of exceptions to the refusal of a continuance on account of the absence of a witness, the judge appended a statement that witness was

arose, and that the motion for a new trial sets forth no facts that could have been proven by the witness. *Held*, that this did not show any reason to deprive the party of the privilege of having the witness sworn, and of process to bring him into court, nor that his attendance could have been procured at the trial; and the refusal of the continuance was erroneous.—*City of Corsicana v. Carr*, (Tex.) 12 S. W. 982.

#### Another suit pending.

4. A continuance will not be granted because an appeal is pending in another suit between one of the parties and third persons, which, it is alleged, will determine the questions raised in the suit in which the continuance is asked.—*Cates v. Mayes*, (Tex.) 12 S. W. 51.

#### Discretion of court.

5. The refusal of a court to postpone the trial of a cause is a matter in its discretion, and the appellate court will not interfere, except where abuse is shown.—*Davis v. Read*, (Ark.) 12 S. W. 558.

### CONTRACTS.

See, also, *Assignment; Assignment for Benefit of Creditors; Bonds; Carriers; Chattel Mortgages; Covenants; Deed; Fraudulent Conveyances; Frauds, Statute of; Insurance; Landlord and Tenant; Marriage; Master and Servant; Mortgages; Negotiable Instruments; Partnership; Principal and Agent; Principal and Surety; Sale; Specific Performance; Vendor and Vendee.*

Impairing obligation, see *Constitutional Law*, 7. Of counties, see *Counties*, 2-4.

To make wills, see *Wills*, 29.

With municipalities, see *Municipal Corporations*, 28, 24.

#### Validity—Public policy.

1. A contract by which a sheriff hires out to another the labor of a convict for 24 months to satisfy a fine and costs amounting to \$283.90, is contrary to public policy, and void.—*State v. Stanley*, (Ark.) 12 S. W. 827.

2. If the offer of donations to secure the removal of a county-seat, more than sufficient to pay the expenses of such removal, is the holding out of improper inducements to unduly influence voters, the contract to secure the payment of the donations will not be held to be void, unless it is shown that the amount offered is more than a sufficient indemnity.—*Behan v. Ghio*, (Tex.) 12 S. W. 996.

#### —Consideration.

3. The abandonment of the use of tobacco is sufficient consideration to support an agreement to pay the promisee \$500 if he would never take another chew of tobacco or smoke another cigar during the life of the promisor.—*Talbott v. Stemmons' Ex'r*, (Ky.) 12 S. W. 297.

4. A justice who had fraudulently collected and appropriated the amount of a judgment belonging to plaintiff represented to him and another that it had been converted by a constable, and induced the other to sign with him, as security, a forged note purporting to have been executed by the constable to plaintiff in payment of the pretended defalcation, and induced plaintiff to accept it. At the time the note was executed, and thereafter, neither the constable nor the justice owed plaintiff anything, nor had the latter ratified the collection of the judgment by the justice. *Held*, that the note was without consideration.—*Talbot v. Carroll*, (Ark.) 12 S. W. 1071.

#### Interpretation.

5. Where, from shafts already sunk, it was known that there was in a tract of land a deposit of iron ore difficult to work and of inferior quality, an agreement to give one a deed of an interest "as soon as he may have successfully developed a deposit of iron ore of sufficient value to warrant fur-

time the right to use a brand on the whisky manufactured by him gives him the right to use the brand, at any time after the expiration of the period, on whisky which was manufactured within the period specified in the contract.—*Mattingly v. Stone*, (Ky.) 12 S. W. 467.

7. A railroad company agreed to pay complainant, in liquidation of his claim for personal injuries, a certain sum per month for five years, complainant to do such work in the company's shops as he should be called upon to do, and which he might be physically able to do. During the entire time covered by the contract he was not able to work in the shops, but a part of the time he ran a small grocery. *Held*, in an action to enforce his claim under the contract against the purchasers of the road at foreclosure sale, that it was error to abate complainant's claim by the value of his labor in his own store.—*Frazier v. East Tennessee, V. & G. R. Co.*, (Tenn.) 12 S. W. 537.

8. In a contract by a ferry-man to transport all the passengers presented for ferriage by a railway company, from its terminus to a certain town, in consideration of one-fifth of the gross earnings of the railway on such passengers, the term "gross earnings" includes the entire sums received from passengers, including the amounts paid to a transfer company to which the railway has let the contract of hauling its passengers from its terminus to the specified town, where the railway sells the tickets of the transfer company, and manages it as part of its system.—*Dardanelle & R. Ry. Co. v. Shinn*, (Ark.) 12 S. W. 183.

9. Plaintiff entered into the following contract with defendant: "Whereas, W. [plaintiff] has between 85 and 100 head of saddle-horses in a pasture, near the town of H., which have been examined by the said C., [defendant's] agent, and said C. having decided to take a certain lot of said horses, it is hereby agreed and understood that the said C. is to receive the said horses between the 1st and 5th of April following, and is to be allowed to cut back all horses not desired, and he hereby agrees to take all the remainder, and pay therefor the sum of \$55.00 per head for the same at the time of receiving." *Held*, that plaintiff's recovery for a breach of this contract should be based upon the number of horses shown by the evidence to have been examined and accepted by the agent, C., at the time of the execution of the contract, and which the defendant refused to receive at plaintiff's pasture on April 5th.—*White v. Matador Land & Cattle Co.*, (Tex.) 12 S. W. 866.

#### Rescission.

10. Defendant sold the O. D. Co. the exclusive right to use his name as a brand on its whisky until December 1, 1883, and afterwards made a contract with plaintiff, giving him, for an interest in his business, the exclusive use of the same brand from September, 1883; the latter contract reciting, by mistake, that the contract with the O. D. Co. would expire on the — day of September, 1883. The O. D. Co. did not make any whisky after September, 1883, and plaintiff used the brand from that time. *Held*, that the conflict between the contract of plaintiff and that of the O. D. Co. did not prejudice plaintiff, and is no ground for the rescission of his contract with defendant.—*Mattingly v. Stone*, (Ky.) 12 S. W. 467.

11. One who is induced to sign a written instrument by a parol promise made to him before the execution of the instrument by some of the parties, but not assented to by others who are interested, cannot have the instrument declared void as to him because of the failure to perform the parol promise.—*Martin v. Taylor*, (Ark.) 12 S. W. 1011.

#### Actions on—Evidence.

12. Where specifications are embraced in an advertisement for proposals to do work, and a contract results on which suit is brought, the specifications, being the basis of the contract, cannot be

excluded as evidence.—Campbell County v. Youtsey, (Ky.) 12 S. W. 305.

#### — Instructions.

13. Where plaintiffs sue upon a contract that has been altered after it was signed by defendant, and procure the court to instruct that it required a ratification of the contract by defendant, after the alteration, to give it validity, thus abandoning the contract, unless the proof shows a ratification, and that issue is found against them, they cannot complain of the action of the court in giving the instruction.—Sithen v. Murphy, (Ark.) 12 S. W. 497.

### CONTRIBUTION.

#### Who entitled to.

Plaintiffs and defendants bound themselves to furnish a court-house for the county, in the event the county-seat was removed to Texarkana, or to pay \$500 per annum for five years. The county-seat was removed. The defendants did nothing towards complying with the contract; and the plaintiffs performed it, and took for their protection a transfer of the bond. *Held*, that defendants were bound to contribute their part of the expense towards reimbursing plaintiffs.—Behan v. Ohio, (Tex.) 12 S. W. 996.

### Contributory Negligence.

See *Negligence*, 3.

### CONVERSION.

#### Testamentary conversion.

Testator, by his will, declared that, after the satisfaction of certain devises and bequests, "I desire the remainder of my estate to be equally divided between my children," naming them. "I desire that my executor will dispose of all my real estate as soon as it can be done without loss to my estate." *Held*, that the will did not operate by its own force to convert the land into money, so as to place it beyond the lien of a judgment recovered against one of the children before the sale by the executor, which lien, by Rev. St. Mo. 1879, §§ 2854, 2780, 2781, 2787, attaches to any interest of the debtor in land, whether legal or equitable.—Eneberg v. Carter, (Mo.) 12 S. W. 522.

### CORONER.

#### Necessity of inquest.

Manst. Dig. Ark. § 692, which provides for a coroner's inquest when a person dies an unnatural death, does not authorize the coroner, in the absence of any circumstance tending to induce the belief that death resulted from an unnatural cause, to hold an inquest on the body of a person who died from apoplexy.—Clark County v. Callaway, (Ark.) 12 S. W. 756.

### CORPORATIONS.

See, also, *Banks and Banking; Building and Loan Associations; Carriers; Horse and Street Railroads; Insurance; Municipal Corporations; Railroad Companies; Telegraph Companies; Turnpikes and Toll-Roads; Water Companies.*

#### Incorporation.

1. A corporation formed for "buying, selling, and dealing in real estate, live-stock, bonds, securities, and other properties of all kinds, on its own account and for commission," may be incorporated under Rev. St. Tex. art. 566, which provides that a corporation may be created for the purposes therein enumerated, and (subdivision 27) "for any other purpose intended for mutual profit or benefit not otherwise specially provided for," and consistent with the constitution and laws of the state.—National Bank v. Texas Investment Co., (Tex.) 12 S. W. 101.

2. There is no provision in the Texas statutes making the incorporation of a company dependent

upon the subscription to its stock and therefor. Rev. St. art. 570, expressly deems its existence shall date from the filing of the charter in the office of the secretary of state required, by article 567, to state only the amount of the capital stock, and the number of which it is divided.—National Bank v. Investment Co., (Tex.) 12 S. W. 101.

#### Corporate existence.

3. The charter of the Ladies of the Sacred Heart named no limitation to its corporate existence. It stated the purpose of the corporation to be to conduct a seminary of learning and asylum, and provided that it "by that style shall have succession." The charter was specific in its grant of powers. The corporation was purely a charitable one. Rev. St. Mo. c. 34, § 1, par. 1, provides that every corporation, as such, has power to have succession for a period limited in its charter, and when no period is limited in its charter, it shall not be limited to more than 20 years. It also gives power to make transfer of stock, and makes other provisions which could not apply to charitable corporations having no shareholders. *Held*, that the existence of the Ladies of the Sacred Heart was not limited to 20 years, but was made perpetual.—State v. Ladies of the Sacred Heart, (Mo.) 12 S. W. 298.

4. Rev. St. Mo. 1855, p. 1026, provided that acts of a public, general, or permanent character, passed at the present session, shall be repealed at the next session. The corporation of 1845 was revised in 1855. The latter retained the same provision as to limitation of corporate existence, and provided, in section 1, "the powers enumerated in the preceding section shall vest in every corporation that shall be created." *Held*, that the second section did not destroy the effect of the first, but that specified powers were made to apply to corporations then, before, and thereafter created.—State v. Ladies of the Sacred Heart, (Mo.) 12 S. W. 298.

#### Liability of officers.

5. The directors of a company, holding property of an insolvent company in trust, and applying such assets, are individually liable to the creditors of the insolvent company to the extent of the assets so misapplied.—National Bank v. Texas Investment Co., (Tex.) 12 S. W. 101.

6. Where the capital stock of a corporation is not paid, but directors represent that it is paid up, and plaintiff, relying on such representation, purchases the note of such corporation, the liability of the directors must be determined by the action of deceit, and they cannot be joined as defendants in an action to recover of the makers of the note and others liable for the same.—National Bank v. Texas Investment Co., (Tex.) 12 S. W. 101.

#### Subscriptions to stock.

7. A note, executed as a subscription to a proposed mining corporation to be organized by the promisees, was given partly for the interest of the maker agreed to take in the mining property which were to constitute the capital stock of the corporation which the promisees claimed to own. *Held*, that the failure to incorporate the mining property would not entirely defeat a recovery on the note as the equitable right which the maker had in whatever interest the promisees might acquire in the property constituted a valuable consideration.—Smith v. Gillen, (Ark.) 12 S. W. 1073.

#### Stockholders.

8. Directors of a railroad company executed a deed of trust to secure bonds issued to them as creditors. The board next elected brought an action to annul the deed and bonds for want of authority. Pending the suit, the trustees sold the property for sale under the power in the deed. At the sale the property was purchased by a third party, and a compromise was made between the bondholders and the stockholders, except the plaintiffs, by which it was agreed that the suit should be dismissed and that the purchaser should convey one portion of the property to the plaintiffs.

trust for the stockholders who had received no bonds. The trustee under the compromise, however, transferred the property to a new corporation, composed almost exclusively of persons who had never been stockholders in the old company. *Held*, that eleven years having elapsed since the deed of trust, and seven years since the compromise, and the property having, in the mean time, been transferred seven times, including one under foreclosure of a mechanic's lien, plaintiffs have been guilty of such laches as barred their right to recover, and it was immaterial that the acts complained of were *ultra vires*.—*Burgess v. St. Louis Co. R. Co.*, (Mo.) 12 S. W. 1050.

#### Stockholders—Liabilities on shares.

9. The facts that the manager of a corporation, at the request of a shareholder to dispose of his shares, procures an additional subscription to the capital stock, in an amount nearly equal to the shares to be disposed of, and that the balance due against the shareholder for unpaid calls is charged off on the books of the corporation, and credit given him on his personal account for the amount paid in by him, are inoperative to cancel his shares, or to discharge his obligation to pay for them.—*Cartwright v. Dickinson*, (Tenn.) 12 S. W. 1080.

10. The fact that a corporation has received from new subscribers the same amount of money that was to be contributed by the old shareholders will not be allowed to operate as a substitution of the capital of the former for that of the latter, as the new subscribers, as well as the old, have a right to demand that every shareholder be compelled to pay his shares up according to contract.—*Cartwright v. Dickinson*, (Tenn.) 12 S. W. 1080.

11. The issuance of shares of stock by a corporation in excess of the amount authorized by its by-laws and charter is no defense to an action for calls due from a shareholder on shares subscribed for by him before the alleged unlawful issue.—*Cartwright v. Dickinson*, (Tenn.) 12 S. W. 1080.

#### — Personal liability for debts.

12. A traveling salesman, who spends about half of his time on the road, selling goods and collecting, and the rest in shipping and receiving goods, and making sales and collections in the city, is a clerk, within the meaning of Act Tenn. 1875, § 11, making stockholders liable for money due "laborers, servants, clerks, and operatives."—*Hand v. Cale*, (Tenn.) 12 S. W. 922.

#### Insolvency.

13. A petition by a creditor of an insolvent company which alleges that the insolvent corporation transferred its assets to another company, which agreed to pay its debts; that among the assets were 288 shares of corporate stock in a cattle company, which certain defendants had acquired with full notice of the facts; that by reason thereof said defendants were trustees for the creditors of the insolvent corporation; but had transferred the stock and misapplied the proceeds,—states a cause of action, as the second company took the assets subject to a lien in favor of the creditors of the old company, which practically ceased to exist.—*National Bank v. Texas Investment Co.*, (Tex.) 12 S. W. 101.

14. But allegations that the insolvent company owned the property of a publishing company, and transferred it in trust to another company for benefit of creditors, which company issued certain stock to certain persons to enable them to become directors of the publishing company, who issued bonds of the publishing company which were pledged to and sold by one of the defendant banks, show no liability of the bank to plaintiff or the creditors of the insolvent corporation.—*National Bank v. Texas Investment Co.*, (Tex.) 12 S. W. 101.

15. An assignee of an insolvent corporation, who has not resigned his trust, may maintain an action for calls due from a shareholder, so long as there are creditors for whose claims he must provide, though he has suffered the shareholders to resume business, and the greater part of the debts have been compromised.—*Cartwright v. Dickinson*, (Tenn.) 12 S. W. 1080.

#### Foreign corporations.

16. Act Tenn. 1887, c. 226, which provides that any non-resident corporation, "found doing business in this state," shall be subject to suit here, defines "doing business in this state" as "any transaction with persons, or having any transactions concerning any property situated in this state, through any agency whatever, acting for it within the state," and requires service of process on the agent "found within the county where the suit is brought," and that the clerk shall mail a copy of the process to the home office of the corporation, does not, by implication, repeal the provisions of Code Tenn. §§ 2831-2834, (Mill. & V. Code, §§ 3586-3589), regulating the service of process on foreign corporations having a resident local agent, and does not apply to such corporations.—*Cumberland Telephone & Telegraph Co. v. Turner*, (Tenn.) 12 S. W. 544.

#### COSTS.

On will contests, see *Wills*, 14.

#### Right to costs.

1. Under Mill. & V. Code Tenn. § 8940, providing that, where a suit is dismissed for want of jurisdiction, costs shall be adjudged against the party attempting to institute it, costs may be adjudged against a city attempting to enforce a tax-lien by attachment before a magistrate without jurisdiction to issue the attachment. *Walkerv. Snowden*, 1 Swan, 192; *Evans v. Shields*, 8 Head, 70; *Cannon v. McAdams*, 7 Heisk. 878, overruled.—*City of Nashville v. Wilson*, (Tenn.) 12 S. W. 1082.

2. Rev. St. Tex. art. 3066, which provides for the payment of five dollars in the district and three dollars in the county court when a jury is demanded, does not require a defendant who pays the jury fee of three dollars in the county court to pay an additional fee when the case is removed to the district court, because the county judge is related to one of the parties.—*Warner v. Crosby*, (Tex.) 12 S. W. 745.

3. Under Rev. St. Tex. art. 1421, providing that the successful party shall recover costs, a judgment for costs of a suit dismissed for want of jurisdiction is proper.—*Baines v. Mensing*, (Tex.) 12 S. W. 984.

#### Who liable.

4. In trespass to try title, the tenant of a trespasser on lands who is a defendant is properly chargeable with costs.—*King v. Haley*, (Tex.) 12 S. W. 1112.

5. Where a *remititur* for the excess of a verdict is not filed until after a writ of error has been sued out, the judgment will be reversed, and defendants in error adjudged to pay the costs.—*Pearce v. Tootle*, (Tex.) 12 S. W. 536.

#### Attorney's fees.

6. The resort to the probate court for the collection of a note against an estate, by procuring its allowance by the administrator, and the approval of the county judge, is such a suit as will entitle the holder of the note to the allowance of attorney's fees, which the note stipulates shall be paid in case suit is necessary to collect it.—*Simmons v. Terrell*, (Tex.) 12 S. W. 854.

#### Security for costs.

7. In an action on a cost-bond executed by defendant in another cause it was error to refuse to instruct that plaintiffs must show, by a preponderance of evidence, that the costs claimed by them were incurred, and adjudged to them by a court having jurisdiction of the subject-matter in the action in which such costs were incurred and adjudged.—*Cary v. Ducker*, (Ark.) 12 S. W. 204.

8. In an action on a cost-bond executed by defendant in another cause the rendition of the prior judgment, the appeal therefrom, and its reversal by the supreme court, and the taxation of costs by the clerk, are provable by the record only, where it is not shown that it has been destroyed.—*Cary v. Ducker*, (Ark.) 12 S. W. 204.

9. A request to instruct that plaintiffs must show, by a preponderance of testimony, that the

action; and that the costs paid by plaintiffs were costs allowed by law for such services as were rendered,—was properly refused, as the term "costs" has a known technical meaning, of expenses pending the suit as allowed by the court, and the supreme court, having jurisdiction, had a right to adjudge costs.—*Cary v. Ducker*, (Ark.) 12 S. W. 204.

10. In an action on a cost-bond executed by defendant and others in another cause, the second paragraph of defendant's answer admitted the execution of the bond, but alleged that defendant had no knowledge or information sufficient to form a belief as to whether any costs had been adjudged to plaintiffs. The third paragraph alleged that defendant had no knowledge or information sufficient to form a belief as to whether the costs claimed to be paid by plaintiffs were the fees authorized by law, and as to whether the same or any part thereof had been paid by them. The fourth paragraph alleged that the court which tried the former cause had no jurisdiction thereof, and no authority to order the execution of the bond. *Held*, that the second and third paragraphs presented good defenses, but that the fourth was demurrable.—*Cary v. Ducker*, (Ark.) 12 S. W. 204.

#### Taxation of costs.

11. In the chancery court the taxation of costs is so largely within the discretion of the chancellor that his action will not be disturbed, on that account, unless the alleged error is very manifest.—*McDonald v. Unaka Timber Co.*, (Tenn.) 12 S. W. 420.

#### Costs on appeal.

12. Where, pending an appeal, the original transcript is destroyed by fire, and the appellant has another made out, the cost of such second transcript is taxable as part of the costs to be paid by appellee on reversal.—*Moore v. Bayne*, (Tex.) 12 S. W. 850.

13. Under Rev. St. Tex. art. 1482, providing that in appeals from a justice's court to a district court, if the judgment on appeal be against appellant, but for a less sum, he shall recover the costs of the appellate court, and if for the same or a greater sum he shall pay the costs of both courts, the interest pending the appeal should not be counted, in determining the amount of judgment, to ascertain the liability for costs.—*Galveston, H. & S. A. Ry. Co. v. Wiemers*, (Tex.) 12 S. W. 281.

#### Costs in criminal cases.

14. Under Mansf. Dig. Ark. § 2843, which provides that, in criminal cases where the defendant is acquitted, the county shall pay the costs, except where the prosecutor is adjudged to do so, the county is not liable for costs upon acquittal for a misdemeanor where the justice of the peace should have exacted a bond for costs, but did not do so.—*Harvey v. Crawford County*, (Ark.) 12 S. W. 240.

## COUNTIES.

County courts, see *Courts*, 4.

#### Division and annexation.

1. Where a part of the territory of a county is separated from it and annexed to another, it is not necessary that the act of segregation should impose such proportion of the debt of the old county on the county receiving the detached territory, but subsequent legislation may make the imposition.—*Perry County v. Conway County*, (Ark.) 12 S. W. 877.

#### Contracts.

2. Where a road commissioner contracts orally with plaintiff to do certain work on a bridge, without advertising the time and place of letting the contract, or in other respects complying with the provisions of Laws Mo. 1883, §§ 4314-4320, relating to the building of bridges, the contract is void.—*Heidelberg v. St. Francois County*, (Mo.) 12 S. W. 914.

der contract with the county authorities, the claimant shall be entitled to recover, though the authorities, in making the contract, may not have pursued the form prescribed by law, has no connection with the special statute in relation to bridges, which confers special powers, and prescribes a special method for their exercise and execution.—*Heidelberg v. St. Francois County*, (Mo.) 12 S. W. 914.

4. The acceptance by the commissioner of a bridge built under a contract which is void because the law has not been complied with, and the acceptance by the county of the commissioner's report, and payment of a claim for work done on the bridge, will not preclude the county from denying the validity of the contract, as the doctrine of estoppel does not apply to counties.—*Heidelberg v. St. Francois County*, (Mo.) 12 S. W. 914.

5. A lease of the building furnished by plaintiffs for a court-house, containing a provision that, should the commissioners' court at any time select another court-house, the leased premises should revert to the lessors, gave the court the power at any time to terminate the lease, by providing another building for court-house purposes, and it would be presumed that, upon the destruction of the building by fire, they at once exercised this power; and plaintiff's recovery was properly confined to the time elapsed between the making of the lease and the destruction of the building.—*Behan v. Ghio*, (Tex.) 12 S. W. 996.

#### Presentation of claims.

6. The general statute of Arkansas requiring ordinary demands against counties to be authenticated when presented for allowance in the county court has no application to a demand, the right to sue for which is given by special act.—*Perry County v. Conway County*, (Ark.) 12 S. W. 877.

#### Officers and agents.

7. Where a county employs an agent to sell its school lands at a value fixed by the commissioners' court, and subject to the approval of said court, and the lands are sold at less than the fixed price, but the sale is reported to the court while busily engaged, and the agent prevents a delay for examination of the report, by assuring the commissioners that the sale is in full compliance with the terms and prices fixed, and the purchaser is waiting for his deed, the approval of the sale constitutes no bar to an action by the county to recover of the agent the amount lost by the sale.—*Smith v. Moseley*, (Tex.) 12 S. W. 748.

#### Fraudulent taking of money.

8. The term "money," as used in Pen. Code Tex. art. 103, which provides for the punishment of any county officer who shall fraudulently take or misapply any "money" belonging to the county, means legal-tender metallic coins or legal-tender currency of the United States; the definition of the term in articles 789 and 792 being confined to the offenses of embezzlement and swindling.—*Lewis v. State*, (Tex.) 12 S. W. 736.

## COURTS.

See, also, *Judge; Justices of the Peace*.

#### Jurisdiction in general.

1. Under Mansf. Dig. Ark. § 6438, providing that, if the clerk's fees on order for a change of venue are not paid by the party asking the order within 15 days, the order shall be void, where such order is made, and the parties thereafter voluntarily go to trial in the court in which the action was first brought, it will be presumed that the fees were not paid, and that the court retained jurisdiction.—*Duncan v. Tufts*, (Ark.) 12 S. W. 873.

2. Where an information to contest an election alleges that the office is reasonably worth \$2,000, testimony of relator that the office was worth \$1,200, and that respondent told him the commissioners had allowed that sum, if erroneous, is immaterial, since the allegation of value, being wholly juris-

dictional, controls, in the absence of plea in abatement.—*Little v. State*, (Tex.) 12 S. W. 965.

8. An action to enforce a vendor's lien does not involve the title to real estate, within Acts Mo. 1874, p. 256, § 2, giving the court of common pleas jurisdiction in all civil actions except where the title to real estate is involved.—*Bailey v. Winn*, (Mo.) 12 S. W. 1045.

### County courts.

4. Act Tex. April 2, 1889, changing the terms of holding district court in Goliad county, and providing that the act shall take effect from passage, is constitutional, and, though containing an emergency clause, does not take effect until two terms can be held thereunder in the county each year, as provided by Const. art. 5, § 7. Following *Ex parte Murphy*, 11 S. W. 487.—*Prescott v. Linney*, (Tex.) 12 S. W. 1128.

### District courts.

5. Where the claim presented against an intestate's estate, and rejected by the administratrix, consists of a judgment against decedent and a vendor's lien on real estate, the district court has jurisdiction of the action to establish the claim by reason of the lien claimed, though the amount of the claim is less than \$500.—*Jenkins v. Cain*, (Tex.) 12 S. W. 1114.

6. Where a note against an estate is allowed as to the principal and interest, but a claim for attorney's fees, which the note stipulates shall be paid, is rejected, such rejection authorizes the holder to sue for the full amount of principal, interest, and attorney's fees; and, if the amount thereof be sufficient, the district court has jurisdiction, though the claim for attorney's fees is not sufficient of itself to give the court jurisdiction.—*Simmons v. Terrell*, (Tex.) 12 S. W. 854.

7. The judgment of the district court that decedent's estate is indebted to plaintiff in a certain amount, and that a lien exists on certain land to secure its payment on account of a judgment and lien obtained against decedent in his life-time, is not an interference with the right of the probate court to classify the claim.—*Jenkins v. Cain*, (Tex.) 12 S. W. 1114.

### Common pleas courts.

8. If Rev. St. Mo. 1879, § 1884, providing for the transfer of causes from the Jefferson court of common pleas, when the judge thereof cannot properly preside, to the vice-chancellor of the Louisville chancery court, is not in contravention of Const. Ky. art. 4, § 23, providing that "the general assembly shall provide by law for holding circuit courts when, for any cause, the judge shall fail to attend, or, if in attendance, cannot properly preside;" the court of common pleas being a statutory court in aid of the circuit courts.—*Royal Ins. Co. v. Ruffer's Adm'r*, (Ky.) 12 S. W. 1043.

### Probate courts.

9. If Rev. St. Mo. 1879, § 1044, requiring an order for a special term of a court to be entered by the court in term-time, applies to probate courts, it will be presumed, in the absence of any showing on the subject, that a special term of that court was held in pursuance of an order so entered.—*State v. Nolan*, (Mo.) 12 S. W. 1047.

## COVENANTS.

### Warranty.

1. A judgment against a covenantee in possession, upon foreclosure of a lien created prior to the covenant, rendered after notice to the warrantor to appear and defend, is conclusive of the existence of an outstanding paramount incumbrance. It is a constructive eviction, and entitles him to bring his action on the covenant.—*Collier v. Cowger*, (Ark.) 12 S. W. 702.

### Damages.

2. Where the covenantee buys in the outstanding incumbrance to protect his estate, he is entitled to recover the sum so expended, provided it does not exceed the amount paid to the warrantor for the property, with legal interest on such sum from the date of the extinguishment of such in-

cumbrance.—*Collier v. Cowger*, (Ark.) 12 S. W. 702.

3. When paramount title is asserted, and maintained by judgment in ejectment, the recovery of interest, prior to eviction, upon the sum paid the warrantor, will depend upon whether or not there has been a recovery of mesne profits by the plaintiff in ejectment.—*Collier v. Cowger*, (Ark.) 12 S. W. 702.

## CREDITORS' BILL.

### Jurisdiction—Remedy by garnishment.

In an action to recover a debt, the petition alleged that various parties, who were made parties defendant, were indebted by promissory note to defendant, which notes had been assigned to defendant J. to defraud creditors. The defendant's creditors were also made parties, and an injunction and appointment of a receiver were prayed for. The petition further alleged "that the plaintiffs are informed and believe that a large portion of said above-mentioned notes are now due and unpaid, and are upon good and solvent parties, out of whom can be made and collected the amount due upon each of said notes, and the plaintiffs are unable to give the amounts due upon any of said notes." Held, that the petition should be dismissed, as it failed to show that plaintiff did not have an adequate remedy by garnishment.—*White Sewing-Machine Co. v. Atkeeson*, (Tex.) 12 S. W. 812.

## CRIMINAL LAW.

See, also, *Bail*; *Coroner*; *Habeas Corpus*; *Indictment and Information*; *Witness*.

Costs in criminal cases, see *Costs*, 14.

Fraudulent taking of money, see *Counties*, 8.

Illegal branding of cattle, see *Animals*.

Indictment for illegal liquor selling, see *Intoxicating Liquors*, 12.

Particular crimes, see *Arson*; *Assault and Battery*; *Bigamy*; *Burglary*; *Carrying Weapons*; *Conspiracy*; *Embezzlement*; *Escape*; *Falses Pretenses*; *Forgery*; *Fornication*; *Gaming*; *Larceny*; *Obstructing Justice*; *Perjury*; *Rape*; *Receiving Stolen Goods*; *Robbery*.

Right of defendant to testify, see *Witness*, 4-6.

### Capacity to commit crime.

1. Pen. Code, art. 40a, provides that neither intoxication nor temporary insanity produced by the recent voluntary use of liquor shall constitute an excuse for crime, but that evidence of such temporary insanity may be shown in mitigation of the penalty, and, in cases of murder, for the purpose of determining the degree. Held, that, where a specific intent is necessary to the commission of a crime, the statute does not eliminate that element, and, in determining the existence of such intent, the jury should be allowed to consider the mental condition of the accused, and the fact that he was intoxicated at the time of the alleged commission.—*Reagan v. State*, (Tex.) 12 S. W. 601.

### Jurisdiction.

2. Rev. St. Mo. 1879, § 1878, provides that whenever defendant shall make application, supported by the affidavits of two or more reputable persons not of kin or counsel for defendant, for a change of venue for any of the reasons specified by statute, it shall be lawful for the court to order the election of a special judge "for the trial of the particular cause pending or to decide defendant's application for a change of venue." Section 1879 provides that the special judge shall take an oath "to hear and try the particular cause or motion pending without fear, favor, or partiality." Held, that as a defendant is entitled to only one application, based upon the disqualification of the judge, the word "or" will be construed to mean "and," and the election of a special judge merely "to decide the defendant's application for a change of venue" is unauthorized, and confers no jurisdiction, and any consent of defendant to the trial of a cause upon its merits by such special judge is of no avail.—*State v. Bulling*, (Mo.) 12 S. W. 356.

arrested the deceased persons, and while conducting them to the county seat to be tried were overtaken by defendant, who was an officer in Virginia, and others, who relieved them of the prisoners, on the ground that they should be tried where the offense was committed, and took them back, and afterwards over the line into Virginia, where they tied them and guarded them till they learned of the death of defendant's brother. The party then, without defendant, took the prisoners to the Kentucky side of the line and shot them, defendant meanwhile remaining with his gun on the Virginia side, two or three hundred yards distant, ready and near enough to give aid, should an attempt be made to rescue the prisoners. Defendant, after the murder, administered an oath to the party never to reveal the acts of any one connected with the affair. *Held*, that defendant was guilty of an offense against the state of Kentucky, and could be convicted therein.—*Hatfield v. Commonwealth*, (Ky.) 12 S. W. 809.

#### **Pleas—Withdrawal of plea of guilty.**

4. A defendant on trial for murder, who, of his own motion, and without persuasion or promise on the part of the prosecution, enters a plea of guilty, is properly refused permission to withdraw his plea and enter a plea of not guilty after verdict and assessment of the maximum punishment, on the ground that the prosecution was permitted to prove the circumstances of the killing, where he did not then move to withdraw his plea, though *Crim. Code Ky. § 174*, provides that a plea of guilty may be withdrawn, and a plea of not guilty substituted "at any time before judgment."—*Mounts v. Commonwealth*, (Ky.) 12 S. W. 811.

#### **—Former jeopardy.**

5. A plea of former conviction cannot avail defendant where it appears that such conviction was under an indictment which charged her with keeping a disorderly house from the 1st to the 29th day of February, 1938.—*Fleming v. State*, (Tex.) 12 S. W. 605.

6. A plea of former jeopardy is not sustained where it appears that the defendant agreed to the discharge of the jury complained of, upon condition that the trial be continued until the next term, which condition was fulfilled.—*Arcla v. State*, (Tex.) 12 S. W. 599.\*

7. A new trial, after a verdict in a criminal case has been set aside by the court of its own motion, is in contravention of article 2, § 23, Bill of Rights Mo., providing that no person can "for the same offense be again put in jeopardy of life or liberty."—*State v. Snyder*, (Mo.) 12 S. W. 369.

#### **Venue.**

8. Where no evidence was given as to the county in which the crime was committed, judgment will be reversed.—*State v. Young*, (Mo.) 12 S. W. 642.

9. Venue is an issue to which the doctrine of reasonable doubt does not apply, and which, like any other issue on a trial, may be proved by circumstantial evidence.—*Cox v. State*, (Tex.) 12 S. W. 493.

#### **—Change.**

10. The action of the trial court in refusing a defendant, under indictment, a change of venue on account of the prejudice of the community, will not be revised on appeal, unless it appears that there has been a palpable abuse of judicial discretion.—*State v. Lee*, (Mo.) 12 S. W. 254.

#### **Continuance.**

11. Where the commonwealth's attorney admits as true the facts to which it is alleged in an affidavit for continuance that an absent witness would testify, it is proper to refuse a continuance and allow the contents of the affidavit to be read to the jury as admitted facts.—*Pace v. Commonwealth*, (Ky.) 12 S. W. 271.

12. Where defendant asks for a continuance on account of an absent witness, and attachment issues, which fails to secure his attendance on the

prosecuting attorney admits that a statement of what defendant proposed to prove by the absent witness might be read to the jury.—*State v. Lee*, (Mo.) 12 S. W. 254.

13. The question whether certain fugitives from justice could probably be obtained as witnesses in a criminal case by the next term of court rests in the sound discretion of the trial court, and, unless an abuse of discretion is shown, a refusal to grant a continuance to procure such witnesses will not be disturbed.—*State v. Day*, (Mo.) 12 S. W. 865.

14. Defendant, charged with the forgery of an order for money, in his application for a continuance, stated that he had been unable, by the use of reasonable diligence, to have a certain witness at the trial; and that he expected to prove by said witness that he heard the supposed drawer of the order authorize defendant to obtain from the drawee the amount named in the order, on the credit of him, (the said drawer.) *Held*, that the application should have been granted.—*Sweet v. State*, (Tex.) 12 S. W. 590.

15. On a trial for murder, with plea of self-defense, the testimony of one not present at the trial was to the effect that he was near the place of the killing and that he heard the accused say, "Don't you come," and deceased, who was carrying an axe, responded, "By ———, I am coming!"—"and then the rocks began to rattle." There were no eye-witnesses but deceased's son, who swore that his father did not attempt to use the axe. *Held*, that the testimony was material to the defense, and that, it appearing that the defense made every effort to procure the attendance of such witness, the court erred in not continuing the trial until it could be procured.—*Costigan v. Commonwealth*, (Ky.) 12 S. W. 639.

16. On trial for an assault, the refusal of defendant's application for a continuance because of the absence of witnesses who would testify that the person assaulted had made threats against defendant's life, which had been communicated by the witnesses to defendant before the alleged assault, is ground for a new trial, in view of testimony adduced at the trial that defendant acted in self-defense.—*Akin v. State*, (Tex.) 12 S. W. 1101.

17. When evidence relating to certain articles found near the scene of a murder, and claimed to belong to defendant on trial for the crime, was introduced, defendant moved to withdraw the case from the jury and to continue, claiming that he could prove by a witness, who had been subpoenaed, but who was unable to attend on account of sickness, that the articles did not belong to him. On the preliminary examination there had been no mention of these articles, and defendant and his counsel swore they had never heard of them before. *Held*, that the motion should have been granted.—*Shulze v. State*, (Tex.) 12 S. W. 1084.

#### **—Affidavit.**

18. Allowance of an amendment to an affidavit for a continuance by defendant, and the granting of a continuance thereon, are within the discretion of the trial court.—*Commonwealth v. Hourigan*, (Ky.) 12 S. W. 550.

19. An affidavit for a continuance on account of absent witnesses, which states that it can be shown by such witnesses that at the time of the alleged larceny the stolen property was owned by one M., and afterwards that it was the property of one W., who hired defendant to take it to a city to sell, is so contradictory and unreasonable that the continuance should be denied.—*Haywood v. Commonwealth*, (Ky.) 12 S. W. 181.

20. On a murder trial, an application for continuance stated that defendant could not with safety proceed to trial without the testimony of a certain physician, who was, when last seen by affiant, living in L. county, Kan.; that defendant expected to prove by him that defendant was thrown from a horse, causing a serious injury to the brain, so that he had times of mental derangement, etc.; that affiant had written letters to those who, he



had reason to believe, knew the address of the physician; and that he had made diligent and earnest inquiry for the address, but was as yet unable to obtain it. The affidavit did not state the name of the witness, nor did it show that the defense of insanity was contemplated. *Held*, that the application was insufficient.—*State v. Mitchell*, (Mo.) 12 S. W. 879.

### Conduct of trial.

21. Under Code Crim. Proc. Tex. art. 697, which provides that, after the retirement, if the jury disagrees as to a particular matter of testimony, the witness may be recalled, and required to detail again his testimony as to the point of disagreement, it is proper to permit the rereading of a deposition, when the jury disagrees as to its contents.—*Clark v. State*, (Tex.) 12 S. W. 729; *Gregg v. Same*, *Id.* 732.

22. In response to remarks of accused's attorney that no case could be found of conviction for killing the abuser of defendant's wife, the prosecuting attorney stated that the accused had on a former trial been sentenced to 21 years in the penitentiary, and the jury could see what had been done by looking at the back of the indictment. *Held*, that the statement being promptly rebuked, and the jury instructed not to consider the action of the former jury, the error was cured.—*Brewer v. Commonwealth*, (Ky.) 12 S. W. 672.

23. Crim. Code Ky. § 220, providing that the prosecuting attorney may "state to the jury the nature of the charge against the defendant, and the law and the evidence upon which he relies in support of it," does not authorize him to read to the jury, in his opening statement, writings which he intends to offer as evidence.—*O'Brien v. Commonwealth*, (Ky.) 12 S. W. 471.

24. But such action is not reversible error, where the writings are afterwards offered in evidence and found competent.—*O'Brien v. Commonwealth*, (Ky.) 12 S. W. 471.

25. In a prosecution for murder, at the suggestion of the state, and without any objection on his part, defendant stood up before the jury with a handkerchief over his face, and a broad-brimmed hat on his head, and a witness for the state testified that that was exactly the way defendant looked on the night of the murder. *Held* that, the act being voluntary, he could not complain.—*Gallaher v. State*, (Tex.) 12 S. W. 1087.

26. Mansf. Dig. Ark. § 2213, providing that a defendant on trial for a felony must be present at the trial, but that if he escapes from custody after commencement of trial, or, "if on bail, shall absent himself during the trial," the trial may progress to a verdict, does not violate the constitutional guaranty (Const. Ark. art. 2, § 10) that the accused shall have the right to be confronted with the witnesses against him.—*Gore v. State*, (Ark.) 12 S. W. 564.

27. An agreement between three persons, jointly indicted, that two of them should be tried first, which is signed only by the one whose trial is postponed, is not binding on the other two so as to deprive them of their right conferred by Code Crim. Proc. Tex. arts. 669, 670, to a severance as between themselves, and to indicate the order in which they wish to be tried.—*Tieman v. State*, (Tex.) 12 S. W. 742.

### — Arguments of counsel.

28. Objections to remarks used in argument by the state's attorney must be interposed at the time. They cannot be raised for the first time on motion for new trial.—*Watson v. State*, (Tex.) 12 S. W. 404.

29. Under Act Tex. April 4, 1889, § 1, repealing Code Crim. Proc. art. 780, subd. 4, and providing that any defendant in a criminal action shall be permitted to testify in his own behalf, but the failure of any defendant to so testify shall not be alluded to or commented on by counsel in the cause, any allusion by the prosecuting attorney to defendant's failure to testify in his own behalf is ground for a new trial, though the allusion was called forth by remarks of defendant's attorney, and the court admonished him that he could not read or

comment on the law.—*Hunt v. State*, (Tex.) 12 S. W. 737.

30. It is error to permit the prosecuting attorney to state in his argument that "the defendant is a mean, low-down, wicked, dirty devil," and that "when we proved that defendant admitted the killing the presumption of innocence was overthrown," as this presumption continues till verdict, and an admonition by the court "to keep within the record" does not cure the error, where the obnoxious remarks were still persisted in.—*State v. Young*, (Mo.) 12 S. W. 879.

### Evidence.

31. The exclusion of merely cumulative evidence is no ground for exception.—*Levy v. State*, (Tex.) 12 S. W. 596.

32. A statement to the officer that he had the right man, made in the presence of defendant, when under arrest, by a stranger to him, is not admissible, though not replied to.—*State v. Young*, (Mo.) 12 S. W. 879.

33. Where defendant's testimony as to an alleged conversation with a certain person is excluded, it is proper to refuse to allow the other person to testify thereto.—*Commonwealth v. Hourigan*, (Ky.) 12 S. W. 550.

34. The fact that in Texas a defendant can testify in his own behalf does not render admissible his declarations that are not a part of the *res gestæ*.—*Gonzales v. State*, (Tex.) 12 S. W. 733.

35. The fact that irrelevant and immaterial evidence was admitted for the state without objection by the defense affords no reason why the same character of evidence should be admitted for the defense over the state's objection.—*Giebel v. State*, (Tex.) 12 S. W. 591.

36. The state, to prove a prior conviction, introduced the docket of a justice of the peace showing that a private citizen made an affidavit before him charging defendant with theft; that a warrant issued, defendant pleaded guilty, and was sentenced. *Held*, that it was competent to prove by the justice that before plea an information was filed by the prosecuting attorney in accordance with Acts Mo. 1885, p. 145, amending sections 2025, 2026, and 2028, Rev. St. 1879, providing that a justice shall issue a warrant on a verified complaint, and that an information shall be filed before the party is put on trial or required to plead.—*State v. Hockaday*, (Mo.) 12 S. W. 246.

37. Code Crim. Proc. Tex. art. 751, provides that "when a detailed act, declaration, conversation, or writing is given in evidence, any other act, declaration, or writing which is necessary to make it fully understood may also be given in evidence." In a prosecution for rape, committed in the town of S., the state had proved that defendant told the sheriff, at the time of his arrest, that he had seen one G. in D. on Tuesday night, (the night before the rape.) Defendant offered in evidence a declaration previously made to the sheriff, that he (defendant) was in D. on Wednesday night, (the night of the rape,) and that he was innocent of the crime. *Held*, that this declaration was properly excluded, as not coming within the purview of said statute.—*Wood v. State*, (Tex.) 12 S. W. 405.

38. An indictment for the larceny of a horse contained four counts, the first alleging the ownership of the stolen animal in A.; the second, in B.; the third, in C.; and the fourth, in a person unknown. Defendant had been previously tried for the same theft, under an indictment alleging the ownership in A.; and on that trial a witness testified that on a certain day he saw some parties pen some horses; that he saw them rope a gray animal; and that one of these parties had a knife in his hand. The witness being dead, his testimony was reproduced on the second trial. After the evidence was closed the state dismissed as to the first three counts in the indictment. The theory of the prosecution was that the stolen animal had been thrown down, and the brand picked out. *Held*, that the dismissal did not destroy the competency of the reproduced testimony.—*Cox v. State*, (Tex.) 12 S. W. 498.

39. Where it appears that defendant in a prosecution for receiving stolen goods paid a witness for the commonwealth to leave the county, and also paid half of a sum afterwards demanded by the witness in a letter to defendant's partner, who was also concerned in receiving the stolen property, the letter is admissible to show why the money was advanced.—*Sanderson v. Commonwealth*, (Ky.) 12 S. W. 138.

40. Defendant confessed that her child was born alive, and that she put it into a certain spring. There was corroborative evidence that it was born alive. There was also evidence that it was not killed by violence; but it was not shown that it was found in the spring, or that it was drowned. *Held*, that the corroborative evidence was not sufficient to prove the *corpus delicti*.—*Harris v. State*, (Tex.) 12 S. W. 1102.

41. Where defendant, charged with aiding and abetting a husband in the murder of his wife, on cross-examination denies that he surrendered himself for the purpose of obtaining the reward offered, testimony of other witnesses that he admitted that his surrender was made in order to obtain the reward, if incompetent, is no ground for reversal.—*Allen v. Commonwealth*, (Ky.) 12 S. W. 583.

42. Code Crim. Proc. Tex. art. 751, provides that, when part of a conversation is given in evidence by one party, the whole, on the same subject, may be inquired into by the other party. In a prosecution for murder, B., a state witness, was asked by defendant's counsel, on cross-examination, if he did not say to J., a witness for the state, that her husband's neck was in danger if she did not tell what she knew about the murder, and testified that he did. *Held*, that it was then competent for the state, within the statute, to show by B. that, in reply to this question, J. had said that she was afraid to tell what she knew about the murder, in the crowd, because the accused was one of the men.—*Gallaher v. State*, (Tex.) 12 S. W. 1087.

#### — Confessions and admissions.

43. Accused's affidavit for continuance at a former term is admissible to show an admission therein contained.—*State v. Young*, (Mo.) 12 S. W. 879.

44. Evidence that defendant pleaded guilty at a former term of court, which plea the court refused to receive, is inadmissible, and does not require a special objection.—*State v. Meyers*, (Mo.) 12 S. W. 516.

45. The fact that one accused of murder, who made voluntary statements to the justice of the peace, after due warning and caution by the justice that the statements could be used in evidence against him, was intoxicated at the time he made them, does not render them incompetent, where it is not shown that he was intoxicated to that extent that he did not comprehend the warning, and was not able to make an intelligible statement.—*Lienpo v. State*, (Tex.) 12 S. W. 538.

46. Crim. Code Ky. § 240, provides that a "confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such an offense was committed." Defendant confessed out of court to having stolen a horse, and stated where it might be found. *Held*, that evidence that the owner had been deprived of his property, together with the confession and the finding of the horse at the place designated, authorized a conviction.—*Greenwade v. Commonwealth*, (Ky.) 12 S. W. 131.

47. One on trial for murder had stated, on his own examining trial, that what he testified as state's witness on the examining trial of another, accused of the same offense, was the truth, and that he had no more to say. Such testimony was reduced to writing, but was sworn to by defendant, and was not attested by the magistrate. *Held*, that it was inadmissible against him, as a "voluntary statement," under Code Crim. Proc. Tex. art. 262, which provides that an accused may make a voluntary statement before the examination of the witnesses, which shall be reduced to writing and signed, but not sworn to, by him, and which shall be attested by the magistrate.—*Walker v. State*, (Tex.) 12 S. W. 503.

48. Article 750 provides that the confession of an accused shall not be used, if made voluntarily, unless it be made in his voluntary statement, taken before an examining court, in accordance with law, "or be made voluntarily, having been first cautioned that it may be used against him, or unless, in connection with confession, he make statement of facts or stances, that are found to be true, which tend to establish his guilt." *Held*, that such a confession was not admissible under this section, if defendant was in custody when it was made, and was not warned that it might be used against him, or unless it was accompanied by a statement of facts or circumstances which would conduce to establish guilt, if true.—*Walker v. State*, (Tex.) 12 S. W. 503.

49. Defendant, being on the stand in his own behalf, was asked about certain material facts made by him on his preliminary examination. He qualifiedly denied that he made them. *Held*, that this was sufficient to authorize admission in evidence of the record of his testimony as given on said preliminary examination.—*Huffman v. State*, (Tex.) 12 S. W. 58.

#### — Character.

50. Where defendant in a criminal case introduces evidence as to his general reputation for morality is admissible.—*State v. Day*, (Mo.) 12 S. W. 365.

51. On a trial for murder, it is not competent to introduce the general character of one of the parties in the fight in which deceased was killed, reciting the history of a difficulty that previously occurred between him and the witness, and asking in regard to it.—*Logsdon v. Commonwealth*, (Ky.) 12 S. W. 628.

52. Evidence is admissible as to defendant's general character for morality and truthfulness at the time he testified, and it need not relate to the time of the offense charged.—*Commonwealth v. Hourigan*, (Ky.) 12 S. W. 550.

#### — Accomplice testimony.

53. On a trial for theft of a mule, a witness for the state testified that he was employed by the owner of the animal to look after and watch it, that he found it in defendant's possession; that defendant told him that he intended to appropriate it; that the owner offered a reward for the return of the animal; and that witness did not inform that defendant had the animal until a year afterwards when, having been arrested for a theft, he made terms with the state to turn him over. *Held*, that the testimony of the witness should be treated as accomplice testimony.—*Chun v. State*, (Tex.) 12 S. W. 491.

#### — Variance.

54. In criminal cases, when a continuing offense is alleged to have been committed on a certain day and on divers days and times between that day and another day specified, the proof must be confined to the acts done within the time.—*Fleming v. State*, (Tex.) 12 S. W. 605.

#### Instructions.

55. Where the accused is a witness in his own behalf, it is not prejudicial error to charge the jury that what he testified to against his interest is to be taken as true.—*State v. Brooks*, (Mo.) 12 S. W. 879.

56. Under Rev. St. Mo. § 4220, prohibiting the admission of evidence in a criminal case from commenting on the character of the accused, and section 4218, making the accused his wife competent witnesses, but allowing facts to be shown for the purpose of affecting the credibility, the court may instruct the jury to weigh their testimony, to consider that he is accused, and she his wife.—*State v. Young*, (Mo.) 12 S. W. 879.

57. It is improper to instruct specially as to the mere matter of evidence already before the jury, and thus give undue prominence thereto.—*Commonwealth v. Hourigan*, (Ky.) 12 S. W. 550.

58. However correct in principle a request for a charge may be, it is properly refused, if it is upon no evidence in the case.—*Levy v. State*, (Tex.) 12 S. W. 503.

59. An instruction, objected to by defendant, making it discretionary with the jury whether or not defendant shall be imprisoned, when the law requires such imprisonment, is reversible error.—*Jenkins v. State*, (Tex.) 12 S. W. 411.

60. Where an indictment alleges the keeping of a disorderly house from October 23, 1887, and on each day thereafter, to October 28, 1887, it is error for the court to instruct the jury that the indictment charges the keeping of the house from October 8 to January 31, 1888.—*Fleming v. State*, (Tex.) 12 S. W. 605.

#### Instructions—Reasonable doubt.

61. When accused has by a proper instruction been given the benefit of reasonable doubt on the entire case, he is not prejudiced by the omission of it from a clause in one of the instructions.—*McClelland v. Commonwealth*, (Ky.) 12 S. W. 148.

62. A charge, on the presumption of innocence and reasonable doubt, that "the defendant is presumed by law to be innocent until his guilt is established, by legal evidence, to the satisfaction of the jury, beyond a reasonable doubt," held to be full and correct.—*Gallaher v. State*, (Tex.) 12 S. W. 1087.

63. On a trial for murder, error cannot be predicated on an instruction requiring the jury to find the issues "on the evidence introduced by the state," where the other instructions require the jury to find defendant guilty upon the evidence, beyond a reasonable doubt, and tell them that if, upon a view of the whole case, they have a reasonable doubt of the guilt of defendant, they should acquit.—*State v. Jackson*, (Mo.) 12 S. W. 867.

#### Accomplice testimony.

64. To require or warrant an instruction on accomplice testimony, there must be some evidence of a witness' complicity in the crime for which defendant is being tried; mere knowledge on the part of a witness that defendant committed the crime does not call for such instruction.—*Smith v. State*, (Tex.) 12 S. W. 1104.

#### Circumstantial evidence.

65. It is only when the inculpatory evidence is wholly circumstantial that an instruction as to circumstantial evidence is necessary, and that is not the case where there is proof that defendant confessed to the crime.—*Smith v. State*, (Tex.) 12 S. W. 1104.

66. Refusal to instruct as to the law of circumstantial evidence is error, where such is the only evidence in the case.—*Scott v. State*, (Tex.) 12 S. W. 504.

67. A charge on circumstantial evidence: "In order to warrant a conviction of a crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proven by competent evidence beyond a reasonable doubt. All the facts (that is, the facts necessary to the conclusion) must be consistent with each other and with the main fact sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the defendant, and no other person, committed the offense charged, and, unless the evidence does so, you will acquit the defendant. But if the evidence does satisfy the understanding, reason, and conscience of the jury, and produces in their minds a reasonable and moral certainty of the guilt of the defendant beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis than that of his guilt, then the jury should convict the defendant,"—held correct, though the last sentence is not usually given.—*Gallaher v. State*, (Tex.) 12 S. W. 1087.

#### Alibi.

68. On the subject of *alibi*, the court charged: "Among other defenses interposed in this case by the defendant is what is known, in legal phraseology, as an '*alibi*,' that is, that, if the deceased was killed as alleged, the defendant was, at the time of such killing, at another and different place from that at which said killing was done, and therefore was not, and could not have been, the person who killed deceased. Now, if the evidence raises

in your minds a reasonable doubt as to the presence of the defendant at the place where the defendant was killed, (if killed,) at the time of such killing, then you should acquit the defendant." Held correct; that it properly designated *alibi* as a defense; and that it did not impose the burden of proving an *alibi* on the defendant, or make him prove that it was impossible for him to have been present at the time and place of the killing.—*Gallaher v. State*, (Tex.) 12 S. W. 1087.

#### Custody and conduct of jury.

69. As by Code Crim. Proc. Tex. art. 701 it is left to the discretion of the trial judge to discharge a jury or not, after they have been kept together such a length of time as to render it altogether improbable that they will agree upon a verdict, his action will be revised only when that discretion has been manifestly abused.—*Clark v. State*, (Tex.) 12 S. W. 729; *Gregg v. Same*, id. 732.

70. When the jury, after remaining out some time, have informed the court that there is no probability of their agreeing on a verdict, their discharge, while the accused is absent in jail, is harmless error.—*Yarbrough v. Commonwealth*, (Ky.) 12 S. W. 143.

71. Rev. St. Mo. § 1909, provides that, with the consent of the prosecuting attorney and the defendant, the court may permit the jury to separate at any adjournment or recess during trial, in all cases of felony except capital cases, under proper instructions as to their conduct. Section 1910 provides that at the conclusion of the argument the jury "may retire under the charge of an officer, who, in case of a felony, shall be sworn to keep them together, \* \* \* and not permit any person to speak or communicate with them, nor do so himself, unless by order of the court, or to ask them whether they have agreed." Section 1906 provides that a new trial may be granted "when the jury has been separated without leave of the court, after retiring to deliberate upon their verdict, or has been guilty of any misconduct tending to prevent a fair and due consideration of the case." Held, that a person who took out a juror during the trial, and returned with him through a saloon, but who was not the officer sworn to take charge of the jury, will be presumed to have been a subordinate officer of the sheriff, qualified to take such juror in charge, in the absence of evidence to the contrary; and a new trial will be refused, as section 1910 will not be construed to mean that the sheriff has no right to give a juror in charge to another sworn officer.—*State v. Crawford*, (Mo.) 12 S. W. 854.

#### Verdict.

72. It is not error for the court to receive the verdict on Sunday, in the absence of defendant's counsel, defendant being present.—*Huffman v. State*, (Tex.) 12 S. W. 588.

#### Judgment and sentence.

73. Rev. St. Mo. § 6533, reducing by one-fourth the period of imprisonment of orderly and peaceable convicts, does not prevent a jury from awarding imprisonment for life for murder.—*State v. Burns*, (Mo.) 12 S. W. 801.

74. Where the court improperly sets aside a verdict in a criminal case of its own motion and orders a new trial, though defendant cannot be said to have suffered strictly legal punishment by his imprisonment, yet, as his term would long ago have expired had the court sentenced him at the proper time, he is now entitled to discharge under the rule that "the default of the court shall not prejudice any one."—*State v. Snyder*, (Mo.) 12 S. W. 869.

75. Pen. Code Tex. art. 15, providing that, when the punishment for an offense is ameliorated by statute subsequent to its commission, the defendant, upon conviction, must be punished according to the latter enactment, unless he elect to receive the penalty affixed by the former law, does not apply to cases tried before the ameliorating act becomes operative.—*Jenkins v. State*, (Tex.) 12 S. W. 411.

76. Act Tex. Jan. 30, 1889, ameliorating the penalty provided by Pen. Code, art. 318, for carrying

a pistol, was not passed under an "emergency clause;" and therefore, under Const. art. 8, § 89, does not take effect until 90 days after the adjournment of the session of the legislature.—*Jenkins v. State*, (Tex.) 12 S. W. 411.

77. Act Ky. April 10, 1878, § 2, providing that if a part or all of the penalty for a misdemeanor prescribed in Gen. St. c. 29, be a fine, the jury, in fixing the amount, shall say in its verdict whether, on failure to pay, defendant shall be put to hard labor in lieu of imprisonment, does not apply to a conviction for betting on an election, made a misdemeanor by Gen. St. c. 47; and, on default by defendant, it is not necessary to impanel a jury to fix the punishment.—*Commonwealth v. Neat*, (Ky.) 12 S. W. 255.

78. Gen. St. Ky. c. 29, art. 1, § 12, which provides that "every person convicted a second time of felony \* \* \* shall be confined in the penitentiary not less than double the time of the first conviction," simply fixes the minimum punishment for the second offense. Where the punishment awarded by the jury for the second offense equals or exceeds double the time of the former, judgment is to be entered for the amount thus awarded. Where it is less, it must be increased to double the time of the former.—*Chenoweth v. Commonwealth*, (Ky.) 12 S. W. 585.

79. It is the office of the jury, in such cases, to merely find whether there has been a former conviction; and the addition by them of double the former time to the amount awarded for the second offense must be regarded as mere surplusage.—*Chenoweth v. Commonwealth*, (Ky.) 12 S. W. 585.

80. Crim. Code Ky. § 184, provides that a misdemeanor may be tried in the absence of the accused; section 157 provides that, on the call of an indictment for a misdemeanor for trial, he must either move to set it aside or plead; and section 171 provides that, if he fail to do so, final judgment shall be entered against him, and, if necessary, a jury impaneled to fix the punishment. Defendant was indicted for betting on an election, the punishment for which is a fine of \$100, (Gen. St. 695;) and at the trial neither pleaded nor moved to set the indictment aside. *Held*, that the court should, on motion of the state, have entered final judgment against defendant.—*Commonwealth v. Neat*, (Ky.) 12 S. W. 255.

81. Rev. St. Mo. 1879, § 1929, provides that, where the punishment is alternative, the jury may assess it, and the court shall render judgment accordingly, except as otherwise provided. Sections 1980-1983 provide that, where the punishment is assessed in excess of the highest penalty allowable, the court may reduce it to the highest penalty, and, where assessed below the lowest penalty, the court may raise it to the lowest allowable, but may in any case reduce a penalty fixed by a jury. Section 1965 provides that proceedings for new trials may be had on the motion of defendant. *Held*, that, where the jury has assessed the minimum penalty, the court has no authority, on its own motion, to set aside the verdict, and order a new trial.—*State v. Snyder*, (Mo.) 12 S. W. 869.

82. Under Crim. Code Ky. § 288, providing that, "if the defendant be convicted of two or more offenses, the punishment of each of which is confinement, the judgment shall be so rendered that the punishment in one case shall commence after the termination of it in the others," a defendant convicted and sentenced, at same term of court, of house-burning and malicious striking, may be confined for the full period embraced in each sentence; and it is proper to provide that the punishment for the second conviction shall not commence until that for the first had expired.—*Evans v. Commonwealth*, (Ky.) 12 S. W. 768.

83. Act Tenn. 1875, § 1, provides that every person convicted of a misdemeanor who fails to pay or secure the fine and costs adjudged against him shall be sentenced to be confined, and shall be confined, in the county work-house, after his imprisonment has expired, until he works out his fine and costs. Section 4 provides that every person so confined shall be credited at the rate of 25 cents per day, and no person shall be discharged from the work-house before his fine and costs have

been fully paid. Act 1889, c. 155, provides for the election of work-house commissioners, who shall have complete control over the institution, but does not give them any power to make rules for the discharge of prisoners. *Held*, that the commissioners have no authority to make rules by which, if a prisoner charged with a misdemeanor goes to work as soon as imprisoned, any subsequent sentence against him shall date from the day of his incarceration, and by which deductions from sentences shall be made for good behavior.—*In re Vanvaver*, (Tenn.) 12 S. W. 786.

84. Section 4 further provides that a prisoner may be discharged by the county judge before he has worked out his fine, but that no person shall be so discharged except on the certificate of a physician that such person is physically unable to labor. *Held*, that a discharge by such judge, in the absence of such a certificate, is a nullity.—*In re Vanvaver*, (Tenn.) 12 S. W. 786.

85. Under Crim. Code Ky. § 283, providing that, on verdicts of conviction in felony cases, "the court shall not pronounce judgment until two days after the verdict is rendered," it is error to pronounce judgment on Monday on a verdict rendered on Saturday, as Sunday, not being a judicial day, should not be counted.—*O'Brien v. Commonwealth*, (Ky.) 12 S. W. 471.

86. But such error is not prejudicial, where defendant's motions in arrest of judgment and for new trial have been made and overruled before judgment is pronounced.—*O'Brien v. Commonwealth*, (Ky.) 12 S. W. 471.

87. A judgment, on *habeas corpus* proceedings, rendered by a court having jurisdiction of the person and power to grant the relief prayed, that certain jail rules giving "good time" to prisoners were valid, and that consequently petitioner's sentence had expired, and that he should be released from custody, though erroneous, is not void.—*In re Vanvaver*, (Tenn.) 12 S. W. 1026.

#### New trial.

88. Under Code Crim. Proc. Tex. art. 781, providing that where the truth of the causes set forth in the motion for a new trial is controverted the judge shall hear the evidence by affidavit or otherwise, it is improper for the judge to base his decision on information obtained from private sources.—*Richardson v. State*, (Tex.) 12 S. W. 870.

89. Where exceptions are not taken when the instructions are given or refused, it is too late to raise objections thereto on motion for a new trial.—*State v. Meyers*, (Mo.) 12 S. W. 516.

90. Though it is error to permit the state to show that the reputation of the prosecuting witness for truth and veracity was good when his credibility has not been attacked, a new trial will not be granted on this ground alone.—*Green v. State*, (Tex.) 12 S. W. 872.

91. Where affidavits in support of a motion for a new trial are opposed by affidavits denying the grounds relied on, the trial judge, after making full inquiry as to the truth of such grounds, cannot be held to have abused his discretion in overruling such motion.—*Hunt v. Commonwealth*, (Ky.) 12 S. W. 127.

92. After verdict of conviction, a motion for new trial was made, and continued until the next morning, when it was moved to continue it again, which was refused, unless for cause shown on affidavit. Thereupon an hour's time was asked to prepare such affidavit, but no fact was stated which was to be placed therein, and no reason shown for delay. *Held*, that the motion for new trial was properly overruled.—*Barnard v. State*, (Tenn.) 12 S. W. 431.

93. A new trial should be granted where a juror was incompetent, as being neither a freeholder in the state nor a householder in the county, and he had answered on his *voir dire* affirmatively, thinking that he was a householder in the county; and neither defendant nor his counsel knew till after verdict that the juror was incompetent.—*Read v. State*, (Tex.) 12 S. W. 418.

94. Defendant pleaded not guilty to an indictment for larceny. He afterwards withdrew the plea, and pleaded guilty, and was sentenced for two

years. The next day he moved to have the judgment and plea set aside, and for leave to plead not guilty; alleging in his affidavit that he was not guilty, and that his plea was made under a mistake as to statements made at the time by the officers of the court. An affidavit of the state's attorney and the clerk of the court, and the statement of the judge in the bill of exceptions, were to the effect that there were two indictments against him; that he was told that if he pleaded guilty he would be sentenced for two years on one, and the other would be dismissed. He stated to the court that he wished to plead guilty. One indictment was dismissed, and he was sentenced for two years on the other. *Held*, that the motion was properly denied.—*State v. Richardson*, (Mo.) 12 S. W. 245.

#### New trial—Misconduct of jury.

95. A mere statement by one juror to his fellows that defendant was a man of bad character; that he had been charged with divers thefts; that he had been known to harbor thieves; and that his witnesses were all of bad character,—is not *per se* ground for new trial. It must appear that the verdict was probably influenced by such statement.—*Cox v. State*, (Tex.) 12 S. W. 498.

96. Code Crim. Proc. Tex. art. 687, provides that after the jury has been impaneled and sworn, to try a felony, they shall not separate until they have returned a verdict, unless by permission of court, with the consent of counsel, and in charge of an officer. After the jury had been impaneled and sworn, and one witness examined, on trial for theft, a juror separated from his fellows during adjournment,—a whole night. His affidavit alleges that "no one said anything to him about the case," and that his separation in no way influenced his finding. It did not appear where or with whom he was during the interim, nor what part he took in the deliberations, nor whether he influenced his fellows. *Held*, that the separation was ground for new trial, under article 777, subd. 8, providing that misconduct of the jury shall be ground for a new trial.—*Kelly v. State*, (Tex.) 12 S. W. 505.

#### Absence of witness.

97. Where defendant discovers the absence of one of his witnesses before the conclusion of the testimony, and ascertains that he cannot be present, but fails to move for a continuance or postponement because of the absence of such witness, such absence is not ground for a new trial.—*Reagan v. State*, (Tex.) 12 S. W. 601.

98. A witness for defendant was present on the day set for trial, but the case was continued till the next term. At the next trial day the witness was in jail in another county, and defendant's attorney caused attachment to issue to produce him. No return was made to the writ, but the witness was brought to the county of the trial, and placed in jail. He was not produced on the trial, but was discharged from custody on the evening before, which was not known to defendant's counsel, but was known to defendant, who supposed his counsel knew it, and that the witness would be present at the trial. The witness could not be found at the time of trial. *Held*, that there was sufficient diligence to entitle defendant to a new trial.—*Chumley v. State*, (Tex.) 12 S. W. 491.

99. Defendant's theory was that he got the mule with the theft of which he was charged, from a person who gave accomplice testimony, by trading a certain mare therefor. This person testified that he bought the mare from defendant at about the time of the alleged theft, and another witness testified that he was present, and witnessed the trade, by which defendant traded the mare and \$35 for the mule. He also testified that an absent witness was also present at the trade. Defendant alleged in his application for a new trial that he expected to prove these same facts by the absent witness. *Held*, that the testimony of the witness was so necessary and probably true as to entitle defendant to a new trial.—*Chumley v. State*, (Tex.) 12 S. W. 491.

#### New trial—Newly-discovered evidence.

100. Evidence will not be regarded as newly discovered, so as to entitle defendant to a new trial, where it appears that by reasonable diligence defendant could have produced it on the trial.—*Reagan v. State*, (Tex.) 12 S. W. 601.

101. Newly-discovered evidence is not ground for new trial, in the absence of a showing that such evidence could not, by reasonable diligence, have been had on the trial.—*Huffman v. State*, (Tex.) 12 S. W. 588.

102. After a trial for incest, the prosecutrix having testified that defendant was the father of the child, and that she never had sexual intercourse with any other man before the birth of the child, newly-discovered evidence that sexual relations had existed between prosecutrix and a certain other man before the birth of the child is sufficient to require a new trial.—*Read v. State*, (Tex.) 12 S. W. 413.

103. A motion for a new trial, on the ground of newly-discovered evidence, is insufficient, where it is not supported by affidavit, as required by law of court, and where it is not shown what diligence was used in procuring the evidence, nor that it is material.—*State v. Crawford*, (Mo.) 12 S. W. 354.

104. There is no error in denying a motion for a new trial, on the ground of newly-discovered evidence, where the state shows that such evidence is not worthy of credit, and it is of such a character that it would not be likely to change the result on a new trial.—*Smith v. State*, (Tex.) 12 S. W. 1104.

#### Appeal.

105. Crim. Code Ky. § 385, provides that an appeal shall only be taken from a final judgment, except by the commonwealth; and that an appeal by the commonwealth from a decision of the circuit court shall not suspend the proceedings in the case. Section 387 provides that the attorney general may appeal, if satisfied that prejudicial error has been committed, on which it is important that the court of appeals should pass. *Held*, that the commonwealth may appeal from decisions of the trial court where the jury disagreed and were discharged, and the case was not finally disposed of.—*Commonwealth v. Matthews*, (Ky.) 12 S. W. 333.

106. Under Rev. St. Mo. 1879, App. p. 1515, § 26, giving an appeal to the defendant from a judgment of the St. Louis court of criminal correction, and providing for writ of error upon any final judgment of said court, the city of St. Louis cannot appeal from a judgment of acquittal of the defendant, sued for violation of an ordinance, as the charter of the city does not authorize appeals in such cases, and Rev. St. Mo. 1879, § 1983, authorizing appeals by the state when an indictment is quashed, or judgment thereon is arrested, does not apply to such cases.—*City of St. Louis v. Marchel*, (Mo.) 12 S. W. 1050; *Same v. White*, *Id.*

107. Rev. St. Mo. 1879, App. p. 1515, § 26, giving an appeal to the defendant only, from a judgment of the St. Louis court of criminal correction, does not infringe the constitutional right of plaintiff to a review by the supreme court of the judgment, as it gives him a convenient and efficient mode of review by writ of error.—*City of St. Louis v. Marchel*, (Mo.) 12 S. W. 1050; *Same v. White*, *Id.*

#### Practice.

108. A bill of exceptions to the rejection of testimony, unless definite in the recital of facts, will not be considered on appeal.—*Jacobs v. State*, (Tex.) 12 S. W. 408.

109. Appeals must be determined upon the record of the particular proceeding appealed from, and the court of appeals cannot resort to the transcript on a former appeal of the same case in order to supply evidence, or correct possible or manifest inaccuracies in the record of the testimony.—*Arcia v. State*, (Tex.) 12 S. W. 599.

110. A bill of exceptions, to be sufficient, must show, not only that the testimony objected to was offered, but that it went to the jury, as evidence.—*Jacobs v. State*, (Tex.) 12 S. W. 408.

111. It is not sufficient that a bill of exceptions recites that a particular objection was taken to a

certain proceeding. It must further show that the ground of objection actually existed.—*Huffman v. State*, (Tex.) 12 S. W. 588.

112. Under Crim. Code Ky. § 841, providing that a judgment shall not be reversed for error in instructing or refusing to instruct the jury, unless the bill of exceptions contain all the instructions given, the court of appeals cannot consider instructions unless they are made part of the record by a bill of exceptions.—*Colley v. Commonwealth*, (Ky.) 12 S. W. 182.

#### — Review.

113. Instructions to which no exceptions are saved will not be reviewed in a criminal case.—*State v. Day*, (Mo.) 12 S. W. 865.

114. Unless the motion for a new trial assigns rulings on evidence as error, they will not be considered on appeal.—*State v. Mitchell*, (Mo.) 12 S. W. 879.

115. Objections to statements of an attorney in argument to the jury cannot be raised for the first time on appeal.—*O'Brien v. Commonwealth*, (Ky.) 12 S. W. 471.

116. Papers, brought up with the record, which constitute no part of the transcript, will not be considered on appeal.—*Watson v. State*, (Tex.) 12 S. W. 404.

117. Where the instructions to the jury are not identified and made a part of the record by any bill of exceptions, or even by any order of court, no claims of error can be considered.—*Evans v. Commonwealth*, (Ky.) 12 S. W. 768.

118. Under Rev. St. Mo. § 1993, which provides that no assignment or joinder in error is necessary in criminal prosecutions, but the court shall render judgment on the record before it, the sufficiency of an indictment will be reviewed on appeal, whether or not defendant's objection thereto is defective.—*State v. Meyers*, (Mo.) 12 S. W. 516.

119. Defendant cannot complain of improper questions by the state that were answered favorably to him.—*Green v. State*, (Tex.) 12 S. W. 872.

120. Judgment in a criminal case will be reversed for substantial error apparent on the record, though no motion in arrest or for new trial was made.—*State v. Burns*, (Mo.) 12 S. W. 801.

121. When certain questions detailing expected testimony have been asked by the prosecuting attorney, and excluded on objections to the questions themselves, and not to the statements contained in them, it cannot be urged in the appellate court that the attorney was allowed to make prejudicial statements in the presence of the jury.—*McClernand v. Commonwealth*, (Ky.) 12 S. W. 148.

### Curtesy.

Levy on, see *Execution*, 2.

### Custom and Usage.

Proof of custom, see *Taxation*, 21.

### DAMAGES.

For breach of covenant, see *Covenants*, 2, 3.  
causing death, see *Death by Wrongful Act*, 10-16.

conversion, see *Trover and Conversion*, 4.  
negligence in transmitting messages, see *Telegraph Companies*, 8.

personal injuries, see *Carriers*, 20, 21.

wrongful attachment, see *Attachment*, 19-24.

#### Measure for breach of contract.

1. In an action for failure to deliver railroad ties under a contract of sale, evidence that plaintiff bought ties at other places than that to which defendant was to deliver them, for which he had to pay more than he was to have paid defendant, will not sustain a judgment for him for the difference in price.—*Griffith v. Lake*, (Tex.) 12 S. W. 285.

2. In an action for breach of contract to employ plaintiff to do certain work for a specified sum, an instruction that, the breach being proved, the plaintiff is entitled to recover the sum agreed,

less the cost of material and labor necessary to complete the contract, unless defendant shows that during the time for the performance of such contract plaintiff was or might have been engaged in "work of like kind, which would have yielded him the same profits," is erroneous, as the measure of plaintiff's damages is the sum agreed on, less the cost of material and labor, and what he gained, or might have gained, by the saving of his time not employed in completing the contract.—*Gibney v. Turner*, (Ark.) 12 S. W. 201.

3. Plaintiff was entitled to recover, as the measure of damage, for failure to take certain horses at a fixed time and place, the difference between the contract price agreed to be paid for such horses and the net proceeds realized from the sale of the same at the nearest market to the place of delivery, as shown by the evidence.—*White v. Matador Land & Cattle Co.*, (Tex.) 12 S. W. 866.

#### Measure for tort.

4. An instruction authorizing assessment of sums expended for professional services and medicines is sufficient to cause a verdict, in an action for personal injuries, to be set aside, where it merely appears that plaintiff was treated in a city hospital, and there is no evidence as to the value of the services and medicines, or that she paid or incurred any liability therefor.—*Duke v. Missouri Pac. Ry. Co.*, (Mo.) 12 S. W. 636.

5. An instruction to assess sums expended "for professional services, physicians, and nurses," authorizes assessment only for services of physicians and nurses.—*Duke v. Missouri Pac. Ry. Co.*, (Mo.) 12 S. W. 636.

6. Complainant contracted to cut timber, and place it in a river, in a good, workman-like manner, knowing it was to be floated to the owner's mill. Held, that in an action on the contract, where defendant was allowed to recoup for a portion of the timber destroyed by the negligence and unskillful work of complainant, evidence of the market value of the timber at the mill was admissible to show the measure of damages, it not appearing that there was a market value for it at the time and place it was put in the river, and the mill being the point nearest thereto at which such timber had a market value.—*McDonald v. Unaka Timber Co.*, (Tenn.) 12 S. W. 420.

7. In an action for the destruction of grass by fire alleged to have been communicated from defendant's engines, an instruction that if defendant is liable, and if the turf was injured by the burning of the grass, the measure of damages is the difference in the value of the land immediately before and after the injury, if any, is correct, and is sufficiently supported by an averment that there was a good turf; that the fire parched the roots of the grass so as to injure the same; and that it will be three or four years before it will be as productive as before the fire; and defendant cannot set up that the land will be as valuable as before if plaintiff uses it for another purpose than the one to which it has been applied.—*Ft. Worth & N. O. R. Co. v. Wallace*, (Tex.) 12 S. W. 227.

8. In an action against a city for damages caused by discharges from an unskillfully constructed sewer, the value of the premises of plaintiff before and after the alleged wrong cannot be shown as a means of ascertaining the amount of damages, as it is not to be presumed that the city will always maintain the sewer in a defective condition.—*City of Nashville v. Comer*, (Tenn.) 12 S. W. 1027.

#### Excessive damages.

9. Verdict for \$2,725 is not excessive for injuries which produced pains in the back, loss of memory, paralysis in one side for three weeks, and some hemorrhage, with a tendency to miscarriage; the plaintiff being pregnant at the time, and still suffering occasional pains in her sides and legs.—*Brown v. Hannibal & St. J. R. Co.*, (Mo.) 12 S. W. 655.

10. Where a mother who is 60 years old, and in good health, had for many years been supported by her son, who was killed by the negligence of a railroad company at the age of 23½ years, and who at the time of his death was earning from \$60 to \$65

per month, one-half of which he had been in the habit of giving to his mother, a verdict against the company for \$3,550 damages for negligently causing his death is not excessive.—*Missouri Pac. Ry. Co. v. Henry*, (Tex.) 12 S. W. 823.

11. A verdict for \$3,000 for the loss of the use of one hand is not excessive.—*Missouri Pac. Ry. Co. v. Jones*, (Tex.) 12 S. W. 972.

### Exemplary damages.

12. Where a petition states a claim for damages both actual and exemplary, a verdict for exemplary damages cannot be sustained, unless there is also a verdict for actual damages.—*Jones v. Matthews*, (Tex.) 12 S. W. 823.

### Pleading.

13. Where special damages are sought to be recovered for time lost and expense incurred, the amount of expense and length of time must be particularly set forth.—*Jesse v. Shuck*, (Ky.) 12 S. W. 804.

14. Under an allegation of bodily injuries, plaintiff may recover for physical pain and mental anguish, though not stated in the petition.—*Brown v. Hannibal & St. J. R. Co.*, (Mo.) 12 S. W. 655.

### Evidence.

15. Though evidence is not necessary to aid the jury in estimating damages for mental anguish through failing to receive a telegram, its admission is not reversible error.—*Western Union Tel. Co. v. Adams*, (Tex.) 12 S. W. 857; *Same v. Peegles*, *Id.* 860.

### Instructions.

16. In an action for the destruction of grass by fire, alleged to have been communicated from defendant's engines, an instruction that the measure of damages is the market value of the grass for pasturage or hay purposes at the time and place of the fire is proper, though plaintiff did not aver the manner in which she desired to use the grass.—*Ft. Worth & N. O. R. Co. v. Wallace*, (Tex.) 12 S. W. 227.

17. Where there is evidence, in an action for injuries sustained while traveling on a railroad train which was derailed, that the injuries might have been received in a subsequent fall from a wagon, but the charge of the court clearly informs the jury that in estimating damages they are to take into consideration only such injuries as were caused by the derailment, further instructions on that point are properly refused.—*Texas Trunk Ry. Co. v. Johnson*, (Tex.) 12 S. W. 489.

## Death.

Of party to action, see *Abatement and Revival*, 1.

## DEATH BY WRONGFUL ACT.

Venue of action for, see *Venue in Civil Cases*, 3.

### When action lies.

1. In an action for the alleged wrongful killing of plaintiff's decedent in a personal difficulty with defendants, an instruction that if, at the time decedent was killed, he had abandoned the fight, and defendant "had no reason to believe, and did not believe," that he was in danger of losing life, or of serious harm, at decedent's hands, the killing would be wrongful, is erroneous, as requiring plaintiff to show, not only that defendant had no reason to believe that there was danger, but that he did not believe it.—*Wallace v. Stevens*, (Tex.) 12 S. W. 283.

### Parties.

2. Under Gen. St. Ky. c. 57, § 3, giving an action to recover punitive damages to the widow, heir, or personal representative of a person whose death is caused by willful neglect, no recovery can be had if the deceased left neither widow nor child. *Jordan's Adm'r v. Railway Co.*, 11 S. W. 1013, followed.—*Louisville & N. R. Co. v. Merriweather's Adm'r*, (Ky.) 12 S. W. 935.

3. Under Gen. St. Ky. c. 57, § 3, giving the "widow, heir, or personal representative" of a person alleged to have been negligently killed the

right to sue therefor, where such a decedent leaves neither widow nor child, his personal representative cannot sue for his killing.—*Koenig's Adm'r v. Covington*, (Ky.) 12 S. W. 123.

4. The word "heir" in Gen. St. Ky. c. 57, § 3, which provides that "the widow, heir, or personal representative" of one whose life is lost by the willful neglect of another may sue the person causing the death, and recover punitive damages, means "child," and does not include parents or collateral relatives. Following *Jordan's Adm'r v. Railway Co.*, 11 S. W. 1013.—*Henning's Adm'r v. Louisville Leather Co.*, (Ky.) 12 S. W. 550.

5. A married woman, in an action for damages for negligence in causing the death of her son, alleged that her husband had abandoned her, and for many years contributed nothing to her support; that her son had supported her, but had never given anything towards the support of his father; and asked to be permitted to prosecute the action in her own name, and for her own benefit; or in her own name for the benefit of both. *Held* that, under Rev. St. Tex. arts. 2903, 2904, giving a right of action, for death caused by negligence, for the benefit of the surviving wife, child, or parents, and authorizing suit by all, or by any one for the benefit of all, plaintiff was entitled to sue without joining her husband.—*Missouri Pac. Ry. Co. v. Henry*, (Tex.) 12 S. W. 823.

6. Gen. St. Ky. c. 57, § 1, gives to the personal representative of one killed by the negligence of the proprietor or servants of a railroad company, of which deceased was not a servant, the right to recover damages in the same manner that the person himself might have done for an injury where death did not ensue. Section 3 gives the widow, heir, or personal representative of one killed by the willful neglect of another a right of action for punitive damages. *Held*, that the personal representative of a child nine years of age, who was killed by a train through the negligence of the railroad employee, can recover under section 1, but only compensatory damages.—*Givens' Adm'r v. Kentucky Cent. R. Co.*, (Ky.) 12 S. W. 257.

7. Act Tenn. 1851, (Thomp. & S. Code, §§ 2291, 2292,) provided that the right of action which a person who dies from injuries received from another, etc., would have had in case death had not ensued shall pass to his personal representative, for the benefit of his widow and next of kin; and that, if the personal representative declines to sue, the widow and children may, without his consent, use his name. Section 2293 provided that if deceased had commenced an action it shall proceed without revivor, and the damages shall go to the widow and next of kin, free from the claims of creditors. Act 1871, c. 78, § 1, provides that section 2291 be so amended as to provide that the right of action shall pass to the widow, and, in case there is no widow, to the children or the personal representative for the benefit of the widow or next of kin. Section 3 provides that section 2293 be so amended as to allow the widow, or, if there be no widow, the children, to prosecute suit; and that this remedy is provided in addition to that now allowed by said section and section 2291. *Held*, that the amendment did not take away the right of the personal representative to sue, when deceased left a widow; but, if the widow waives her right to sue, the right remains to the personal representative.—*Webb v. East Tennessee, V. & G. R. Co.*, (Tenn.) 12 S. W. 423.

### Pleading.

8. Though, under Gen. St. Ky. c. 57, § 3, an action cannot be maintained for punitive damages for the killing of a person by the willful neglect of any one, unless the person so killed leaves a widow or minor child, a recovery may be had under section 1, giving compensatory damages to the personal representatives for death caused by negligence, and an allegation in the petition of "willful" negligence may be disregarded as surplusage.—*Morris' Adm'r v. Louisville & N. R. Co.*, (Ky.) 12 S. W. 940.

### Evidence.

9. In an action for the death of plaintiff's son, who, while acting as defendant's locomotive engi-



neer, was crushed by the cars of his train, the admission of evidence that deceased "moaned until he died" is not prejudicial error, the jury having been instructed that his physical suffering was not in issue.—*Texas & P. Ry. Co. v. Lester*, (Tex.) 12 S. W. 955.

### Damages.

10. In an action for the wrongful killing of plaintiff's decedent by defendants, where there is evidence that one defendant only committed the wrong sued for, it is error to limit the liability to a joint wrong, though that is what the petition alleges.—*Wallace v. Stevens*, (Tex.) 12 S. W. 283.

11. A verdict of \$10,000 will not be set aside as excessive, in view of testimony that deceased was a "stout, healthy, and sober" laborer, about 35 years old, earning \$1.25 a day, and that he left a widow and two infant children.—*Missouri Pac. Ry. Co. v. Lehmberg*, (Tex.) 12 S. W. 838.

12. Deceased was industrious and economical, and, at the age of 26 years, earning \$1,000 a year, out of which he was furnishing plaintiff, his mother, then 51 years old, \$200 per annum. *Held*, that a verdict of \$4,200 would not be disturbed.—*Texas & P. Ry. Co. v. Lester*, (Tex.) 12 S. W. 955.

13. In a suit by a mother for damages for the death of her son, if it was shown that the husband would have received any pecuniary benefit from the son during his life-time, the verdict should be for the amount the father and mother would both have received, to be apportioned between them, and if the father would not have received any pecuniary benefit from the son, if he had lived, the verdict should be for the mother alone.—*Missouri Pac. Ry. Co. v. Henry*, (Tex.) 12 S. W. 838.

### Exemplary.

14. Under Rev. St. Tex. § 2901, providing that, in actions for injuries resulting in death, exemplary damages may be recovered when the death is caused by the willful act or omission or gross negligence of the defendant, in order to support a recovery of exemplary damages from a railway company for death, it must appear that there was some willful act or omission or gross negligence on the part of the officers of the corporation.—*International & G. N. R. Co. v. McDonald*, (Tex.) 12 S. W. 860.

15. A railroad corporation can be held in exemplary damages for the negligence of a servant, only when it appears that the act causing death was performed by the direction of the employer, or that the employer ratified and adopted the act after it was performed.—*International & G. N. R. Co. v. McDonald*, (Tex.) 12 S. W. 860.

16. The mere fact that the defendant retained the servant in its employ after the act was performed does not constitute a ratification.—*International & G. N. R. Co. v. McDonald*, (Tex.) 12 S. W. 860.

### DECEIT.

#### Evidence.

1. Where defendant, in an action on a promissory note, given for stock in an insolvent corporation, alleges that the agents of the payee falsely represented such corporation as solvent and in good financial condition, and that, confiding in the truth of these statements, he made and delivered said note, it is not error to permit him to state that he would not have purchased the stock but for the representations made to him.—*Fridham v. Weddington*, (Tex.) 12 S. W. 49.

#### Instructions.

2. An instruction to the jury that "if one, with intent to induce another person to enter into a contract, represents as true that which is untrue, and such person, relying upon such representations, acts upon the same, such representations are a fraud, and the contract procured thereby cannot be enforced; but mere erroneous statements of opinion as to future results would not render the contract void,"—is fully cured by other instructions as to what particular representations they must find were made to defendant that were untrue, and believed by him to be true, and by which

he was induced to enter into the contract, before they could find a verdict for him.—*Fridham v. Weddington*, (Tex.) 12 S. W. 49.

### Declaration.

Evidence of, see *Evidence*, 7-9.

### DEDICATION.

#### What constitutes.

1. Evidence that the owner of land platted it and conveyed the lots with reference to an alley, and that subsequent conveyances of the lots were executed, designating and referring to such alley, is sufficient to show a dedication of the land occupied by the alley, as between subsequent grantees of the lots, whether or not there has been a dedication to public use.—*Wolf v. Brass*, (Tex.) 12 S. W. 159.

2. The approval of an ordinance by one of the proprietors of the land, as mayor of the city in which it was situate, appropriating money to pay for maps of the city on which said block was marked "Park," was not an assertion by the proprietor that the block was in fact a park.—*Baker v. Vanderburg*, (Mo.) 12 S. W. 463.

3. Within the boundary lines of a square on a plat was written: "This park is reserved from public use, and title kept in proprietors." A clause in the certificate of acknowledgment thereof stated that the proprietors adhered to the reservations made in the specifications therein as to parks. *Held*, that there was no dedication to the public, within 2 Rev. St. Mo. 1855, p. 1536, § 8, providing that such plat "shall be a sufficient conveyance to vest the fee of such parcels of land as are thereon expressed, named, or intended for public use in the county in which such town \* \* \* is situate, in trust and for the uses therein named, expressed, or intended, and for no other use or purpose."—*Baker v. Vanderburg*, (Mo.) 12 S. W. 463.

#### Acceptance.

4. The declarations of the proprietors of a town-site that they intended to turn a certain square over to the city for a park when the city was ready to accept and improve it, and the selling of lots fronting on the block at a higher price than those not facing on it, did not show a dedication to the public use, where the offer was never accepted by the city, and the land was not used as a park.—*Baker v. Vanderburg*, (Mo.) 12 S. W. 463.\*

### DEED.

See, also, *Covenants*.

Acknowledgment, see *Husband and Wife*, 12-15.

Cancellation, see *Equity*, 4-11.

Estoppel by, see *Estoppel*, 1-4.

Reformation, see *Equity*, 12-14.

Sheriff's, see *Execution*, 15, 16.

#### Acknowledgment.

1. Rev. St. Tex. art. 600, making acknowledgment or proof of execution of a deed by a corporation necessary before record, does not make such deed invalid and inadmissible in evidence, though not acknowledged or proved as therein required.—*Kimmarle v. Houston & T. C. Ry. Co.*, (Tex.) 12 S. W. 698.

2. A recorded deed, executed out of the state, the acknowledgment of which before a notary public is certified under his official seal, takes priority over a deed executed out of the state, which was recorded before the former deed, but the acknowledgment of which before a notary public is not certified under his seal, as required by Gen. St. Ky. c. 24, § 16, which provides that "deeds executed out of the state \* \* \* may be admitted to record, when the same shall be certified under his seal of office \* \* \* by a notary public," etc.—*Herd v. Cist*, (Ky.) 12 S. W. 466.

#### By married woman.

3. Gen. St. Ky. c. 81, § 17, which provides that the certificate of an officer may be called in question for a mistake on his part, does not apply to a

certificate of acknowledgment of a deed by a married woman, given under chapter 24, § 21, which requires the officer to examine the married woman privily, to explain the deed, etc., and makes the certificate evidence of these facts; and such certificate cannot be contradicted by parol testimony. Following *Cox v. Gill*, 88 Ky. 669.—*Tichenor v. Yankee*, (Ky.) 12 S. W. 947.

### Recording.

4. A deed to land, in an unorganized county, is properly recorded in the county of which it had been a part, in the absence of any law at the time requiring titles to such lands to be recorded in counties to which such counties are attached for judicial purposes, and of a statute directing where such deeds should be recorded.—*Baker v. Beck*, (Tex.) 12 S. W. 229.

### Validity.

5. A deed conveying property by lot numbers is not void for uncertainty, though the recorded plat shows no division of the blocks into lots; it being shown that the proprietors had always treated the blocks as divided into lots, and that for many years the property had been assessed, conveyed, and generally known by the lot numbers.—*Marvin v. Elliot*, (Mo.) 12 S. W. 899.

6. Plaintiffs are bound to take notice of the contents of a deed through which both they and defendant claim, describing the property, not only as the east half of the block, but also by the lot numbers; and of the fact that the property was known by the lot numbers, though no plat was recorded at the time of the conveyance.—*Marvin v. Elliot*, (Mo.) 12 S. W. 899.

### — Estoppel to deny.

7. One claiming under a deed cannot deny its validity as a conveyance of the legal title to the grantees named therein, though it was delivered to him, and not to them.—*Glover v. Thomas*, (Tex.) 12 S. W. 684.

### Construction and effect.

8. A deed which creates a life-estate in the grantee, and provides that after his death the title in fee-simple shall "go and vest in his children and heirs at law equally, to be divided between them as tenants in common," creates a vested remainder in the children of the grantee in being at the time of its execution; and as the words "children and heirs at law," as used therein, constitute a class, the estate in remainder will open, and let in such of the same class as come into being during the continuance of the particular estate, who likewise take a vested remainder.—*Waddell v. Waddell*, (Mo.) 12 S. W. 849.

9. Under a conveyance by the widow of "all her right and title to the house and lot in the town of G., occupied during the life-time of her husband by his family as a residence, and vested in her by an order of the probate court, more particularly known as 'lot number one,'" the grantee cannot take, as a curtilage to said lot, another lot, which, though inclosed with the lot on which the residence stood, was conveyed to the widow by a deed executed before she was invested with title to the residence lot.—*Hodgens v. Powell*, (Ark.) 12 S. W. 574.

10. The property of a decedent having been partitioned between the widow and her son, who subsequently died unmarried, a deed signed by her, as the administratrix and sole heir of her husband, passes her title, and, even if it does not, it cannot be questioned by one who claims title under a void sale of the property as that of the decedent.—*Henderson v. Lindley*, (Tex.) 12 S. W. 979.

11. G. conveyed to D. all of his estate, with power to sell and convey the same, and distribute the proceeds among his creditors, reserving his homestead right, and all other property exempt from execution. Subsequently G. and wife executed another deed to D. for a money consideration, conveying to him "all the interest, right, title, and benefit which we \* \* \* and each of us have, or may have, in and to all the property and premises of every character whatever, conveyed by G. in a certain deed of assignment to D." The deed further recited that it was "intended to

cover, embrace, and convey the husband's right of homestead, and the wife's potential right of dower." Held, that this deed must be construed as conveying all of the estate of the grantor to D. absolutely, and vested the whole estate in him.—*Porter v. Giltner*, (Ky.) 12 S. W. 1069.

### — Parol evidence.

12. Parol evidence is admissible to show that Eugene J. Gannon, the grantor in a deed, was the person described as "Joseph E. Gannon" in a devise of the land, and that the grantee described as "Michael J. Gannon, his wife," was not the wife of the grantor, but his brother, to whom was devised an undivided interest in the land.—*Skinker v. Haagsma*, (Mo.) 12 S. W. 659.\*

### Proof of deeds.

13. The grantor in a deed may testify to its execution in any case when it is offered in evidence.—*Bohn v. Davis*, (Tex.) 12 S. W. 837.

14. Where a proper predicate has been laid by proof that a deed is lost, its execution may be established by circumstantial evidence.—*Bounds v. Little*, (Tex.) 12 S. W. 1109.

15. Under Rev. St. Tex. art. 4314, relating to the proof of instruments by a witness to the signature, a declaration by such witness that the grantor signed the instrument in his presence is equivalent to a declaration that the witness saw the grantor sign it, and it is not necessary that the witness should further declare that he signed the instrument at the request of the grantor.—*Jones v. Robbins*, (Tex.) 12 S. W. 824.

### Default.

Judgment by, see *Judgment*, 2, 3.

### Delivery.

Of goods sold, see *Sale*, 1.

### Demurrer.

See *Pleading*, 4.

### Dentists.

Certificate, see *Physicians and Surgeons*.

## DEPOSITARIES.

### Liabilities.

1. A bank duly selected as the depository of money collected by way of taxes to satisfy county bonds issued in aid of a railroad company, cannot be held responsible for money which it pays out by order of the committee having charge of the fund, on the ground that an excess of bonds had been issued, in the absence of fraud or collusion between it and the committee in an appropriation of the fund to a purpose known to be unauthorized.—*Deposit Bank v. Daviess County Court*, (Ky.) 12 S. W. 930.

2. The facts that the president of the bank was the president of the railroad company, and that one of the committee was cashier of the bank and secretary of the railroad company, did not impose upon them the duty of knowing which of the bonds were valid and which invalid.—*Deposit Bank v. Daviess County Court*, (Ky.) 12 S. W. 930.

## DEPOSITION.

### Notice to adverse party.

1. It is not error to suppress the admission of depositions which were shown to have been taken without notice to the adverse party, as required by *Sayles' Civil St. Tex. art. 2213*.—*Millikin v. Smoot*, (Tex.) 12 S. W. 59.

### Commissioner.

2. Code Crim. Proc. art. 760, designating tax officers before whom depositions outside of the state are to be taken in criminal cases, does not authorize them to be taken before a notary public.—*Lienpo v. State*, (Tex.) 12 S. W. 568.

8. Under Rev. St. Tex. art. 2235, Code Crim. Proc. art. 762, depositions cannot be read in evidence in criminal cases unless filed at least one entire day before the beginning of the trial; and objections thereto, when so properly filed, must be made in writing, with notice to opposing counsel. The objection urged to depositions taken out of the state, offered by defendant, was to the form and taking of the same. The bill of exceptions did not show that the depositions were filed in time. *Held*, that the presumption was that they were not properly filed, and hence their exclusion because not taken and returned by an authorized officer was not error.—*Lienpo v. State*, (Tex.) 12 S. W. 588.

#### Refusal of witness to answer.

4. Sayles' Civil St. Tex. art. 2243, which provides that, upon the refusal of a party whose deposition is taken to answer the interrogatories propounded, they shall be taken as confessed, upon the certificate of the officer taking the deposition, is intended to apply only to the case of a deliberate refusal to answer, and if it be shown that the party declined under a mistake as to his rights, and not contumaciously, the interrogatories should not be taken as confessed, provided that at the trial he shows that he is willing to answer them.—*Bounds v. Little*, (Tex.) 12 S. W. 1109.

#### Certificate of authentication.

5. The Texas statute prescribing no particular form for the certificate of a justice of the peace authenticating written testimony, a justice's certificate to the deposition of a deceased witness, reading, "the foregoing testimony was sworn to and subscribed before me this 16th day of October, 1888. J. T. WASHINGTON, J. P.," etc., is sufficient.—*Clark v. State*, (Tex.) 12 S. W. 729; *Gregg v. Same*, *Id.* 732.

#### Objections.

6. An answer to an interrogatory in a deposition will not be stricken out on an objection, made for the first time during the trial, that it was not responsive to the interrogatory.—*Brown v. Mitchell*, (Tex.) 12 S. W. 606.

### DESCENT AND DISTRIBUTION.

See, also, *Executors and Administrators; Wills.*

#### Proof of legitimacy.

1. A child was born on January 8, 1885. It appeared that the mother had left her husband's house on April 4, 1884, and never saw him again, he dying on June 3, 1884. The mother testified that she had sexual intercourse with her husband on April 3, 1884. The husband was afflicted with Bright's disease and dropsy from November, 1883, until his death. His attendant physician testified that he could not have had sexual intercourse after January, 1884, owing to his swollen condition. This physician visited him on March 31, and April 8, 1884, and frequently before and after, and found him growing worse constantly. The nurse who was with him daily, and slept with him, testified that his swelling did not abate between March 31st and April 8th, and that he did not have sexual intercourse with his wife on April 3d, nor at any other time for several months before. It appeared that husband and wife quarreled frequently before she left him; that the wife often said that he could not have sexual intercourse before his sickness; and that both said that they had ceased such intercourse for at least a year before his death. The wife had sexual intercourse with another man on April 4, 1884, and several times thereafter. Other witnesses testified that the husband was seen going about his business in April and May, and that no swelling was observed. *Held*, on claim by the child to the husband's estate, that the child was illegitimate.—*Goss v. Froman*, (Ky.) 12 S. W. 337.

2. Evidence is admissible of the conduct and statements of the husband and wife while living together, apparently, in that relation, tending to show non-access, as the presumption of access, from opportunity, is not conclusive.—*Goss v. Froman*, (Ky.) 12 S. W. 337.

v. 12s. w.—74

3. In such case, evidence is admissible of adultery on the part of the wife as corroborating the evidence of non-access.—*Goss v. Froman*, (Ky.) 12 S. W. 337.

#### Discharge of incumbrances.

4. The personal estate of an intestate is primarily liable for the discharge of incumbrances upon his land for the purchase money thereof, whether such incumbrance was created by the intestate himself, or by his grantor, when, in the latter case, he assumes its discharge as part of the consideration of the grant to him.—*O'Conner v. O'Conner*, (Tenn.) 12 S. W. 447.

#### Rights of widow.

5. Under Gen. St. Ky. c. 81, § 17, providing that a man and his wife may join in a petition for the adoption of a person as their heir at law, and that such a person will inherit from either in the same manner as a child in fact, the widow of the adoptive father, who dies intestate, is entitled to only one-third of the personalty as provided by statute, as where the intestate leaves issue.—*Atchison v. Atchison's Ex'rs*, (Ky.) 12 S. W. 943.

#### Advancements.

6. An intestate divided a tract of land, conveying a portion to one of his sons, and the balance to his son-in-law, and took their notes for \$500 and \$700, respectively, but never made any demand for payment, though strict in such matters as to his other sons, and at his death the notes were barred by the statute of limitations. *Held*, that the son-in-law and his wife must account for said \$700 as an advancement, no interest being charged thereon.—*Sadler v. Huffhines*, (Ky.) 12 S. W. 715.

7. The recitation in the deed as to the consideration or execution of the note is not conclusive that the transaction was a sale, and not an advancement.—*Sadler v. Huffhines*, (Ky.) 12 S. W. 715.

#### Action by heirs.

8. In an action by brothers and sisters of an intestate to recover her lands, an allegation that they are the "only heirs" of said intestate is insufficient in Kentucky, where the father, if living, is preferred.—*Nickell v. Fallen*, (Ky.) 12 S. W. 767.

9. The sole heir of a decedent, upon whose estate administration has ceased by the death of the administrator, and no effort has been made by the creditors, if there are any, to renew it, may maintain an action to enforce a vendor's lien existing on land of the estate sold by the administrator under order of court.—*Sanders v. Moore*, (Ark.) 12 S. W. 783.

#### Rights of heirs.

10. Where a widow of a decedent holding lands, belonging to his estate, in trust for his heirs, conveys a part of the land to certain heirs, the latter are properly required, to account for the profit thereon, with interest, before being entitled to share in the proceeds of a sale of the remainder of the land.—*Clayton v. Clayton's Ex'r*, (Ky.) 12 S. W. 812.

11. On the death of some of his children, a husband, tenant by the curtesy of his deceased wife's land, has his life-estate enlarged to an absolute interest by inheritance from them; and any enhanced value arising from improvements made by him should be deducted before allotting a surviving child his share in the land.—*Russell v. Russell*, (Ky.) 12 S. W. 709.

#### Attorney's fees.

12. Where lands belonging to the estate of a decedent are held in trust by his widow for his heirs, attorney's fees of certain heirs, who claim the lands under the widow's will, and resist a division among the other heirs, should not be paid out of the proceeds of the sale of the lands.—*Clayton v. Clayton's Ex'r*, (Ky.) 12 S. W. 812.

#### Discharge.

In bankruptcy, see *Bankruptcy*.

**Dismissal.**

Of action, see *Practice in Civil Cases*, 1, 2.  
 appeal, see *Appeal*, 68-65.

**Dissolution.**

Of injunction, see *Injunction*, 5.

**DISTRICT AND PROSECUTING ATTORNEYS.****Authority.**

The county attorney agreed with the defendant's attorney that if she would abandon her appeal from one conviction, and plead guilty to another indictment, he would dismiss other indictments found against her for keeping a disorderly house. The defendant complied with her agreement, but the county attorney dismissed only a part and refused to dismiss all the cases. It appeared that the statute regulating the dismissal of prosecutions was in no degree complied with. *Held*, that the state could not be held bound by the unauthorized agreement of the prosecuting attorney.—*Fleming v. State*, (Tex.) 12 S. W. 605.

**DIVORCE.****Jurisdiction.**

1. Evidence that petitioner once lived in the county where the suit was brought, but that he went to Central America in 1881, and resided there until December, 1885; that he returned there in January, 1886, and remained until October, 1887, when he returned to the county and filed his petition,—is insufficient to sustain an allegation that petitioner is a *bona fide* inhabitant of the state, and had resided in the county six months next preceding the filing of the petition, as required by Rev. St. Tex. art. 2862, though there was evidence that he never intended to permanently abandon his domicile in the county.—*Haymond v. Haymond*, (Tex.) 12 S. W. 90.

2. Rev. St. Tex. art. 2862, declares that no suit for divorce shall be maintainable unless the petitioner shall, at the time of filing his petition, be an "actual *bona fide* inhabitant of the state, and shall have resided in the county where such suit is filed six months next preceding" its filing. *Held*, that an allegation that the petitioner was "a *bona fide* citizen" of the county, and had been for more than six months prior to filing his petition, is insufficient.—*Haymond v. Haymond*, (Tex.) 12 S. W. 90.

**Grounds.**

3. Evidence that plaintiff "was always more or less disagreeable in the family," and differed with defendant in business as well as religious matters, and that he did not live with her for two years, but occupied a separate room in the house, and after trying to eject her left the country and remained absent for six years, and that during that time defendant had fed, educated, and clothed the children with little aid from plaintiff, and occupied or rented the house for four years after plaintiff left, after which plaintiff directed that she should not receive the rent, is not sufficient to prove abandonment by defendant, and is not aided by proof that the religious society to which she belonged taught that it was sinful for her to live with him, or that other separations had occurred where the wife was a member of the sect.—*Haymond v. Haymond*, (Tex.) 12 S. W. 90.

4. In a suit by a wife for divorce and custody of children, one witness testified that defendant struck plaintiff with his fist while she was trying to prevent his taking their child with him. Plaintiff's father testified that plaintiff and her children had lived with him for several years, defendant contributing nothing to their support, but that witness had no personal knowledge of his failure to support them theretofore. Plaintiff's mother testified that she knew of no neglect on the part of defendant towards his wife; but on one occasion defendant refused to procure medicine for her when she was sick. It also appeared that plaintiff

and defendant had not lived as husband and wife, nor spoken to each other, for a year or more. *Held*, that a judgment for plaintiff would not be disturbed.—*Miller v. Miller*, (Tex.) 12 S. W. 167.

5. Plaintiff alleged that his wife had joined some religious fanatics, called "Sanctificationists;" that the belief separated him from his wife, alienated her affections, and estranged his children; that she believed that a believing wife should not live and cohabit with an unbelieving husband; that "defendant practiced this doctrine, and was thereby led to leave plaintiff's bed and board." *Held* that, under Const. Tex. art. 1, § 6, securing to "all men the right to freedom of worship," and asserting that the rights of conscience in religious matters should be uncontrolled by human authority, that part of the petition setting up the religious belief of defendant as a cause of divorce should have been stricken out on demurrer.—*Haymond v. Haymond*, (Tex.) 12 S. W. 90.

6. Where the husband of a woman of refined sensibilities takes to drink, and leaves the burden of supporting the family upon his wife; habitually addresses her unfeeling, and with oaths; refuses to give medicine prescribed for her when sick; discharges the physician during a critical illness; refuses to milk the cows in bad weather, and leaves his wife to bring on a miscarriage by her exposure while doing the milking, and then refuses to go for a physician when told of her condition,—the wife is entitled to a divorce, under 1 Sayles, Civil St. Tex. art. 2861, allowing a divorce "where either the husband or wife is guilty of excesses, cruel treatment, or outrages towards the other, if such ill treatment is of such a nature as to render their living together insupportable."—*Eatman v. Eatman*, (Tex.) 12 S. W. 1707.

**Custody of children.**

7. A petition for divorce alleging that plaintiff and defendant are negroes, are husband and wife, and lived together as such from August, 1887, to August, 1885, and were so living together on August 15, 1870, is bad on general demurrer, as showing no marriage previous to the filing of the petition, even if Act Tex. Aug. 15, 1870, legalizing marriages between slaves when they had continuously lived together as husband and wife, applies to marriages between freed persons.—*Andrews v. Andrews*, (Tex.) 12 S. W. 1124.

**Alimony.**

8. It being within the power of the circuit court, under Rev. St. Mo. 1879, § 2179, to decree alimony *pendente lite*, the court of appeals, on appeal, may determine the time during which such order shall require payment to be made, and direct all arrears to be paid before entry of judgment in favor of the payor, though no exceptions were taken to such order.—*State v. Rombauer*, (Mo.) 12 S. W. 661.

2. Where the care and maintenance of the only child is given the wife, who has obtained a decree of divorce on the ground of abandonment, and the husband is young and able to labor, the allowance, as alimony, of \$150 per annum for two years, during the pendency of the suit, \$50 attorney's fees, and \$100 per annum during their joint lives, is not excessive, though it does not appear that the husband has any property.—*Green v. Green*, (Ky.) 12 S. W. 945.

**Documents.**

See *Evidence*, 20-28.

**DOWER.****Right to dower.**

1. Under Rev. St. Mo. 1879, § 2186, giving a widow dower in lands whereof her husband, or any other person to his use, was seised of an estate of inheritance, the widow of a lunatic is entitled to dower in lands purchased by his guardian with assets of his estate; and it is immaterial that the assets used arose from a sale of the lunatic's lands to pay debts, and the investment by the guardian was unauthorized.—*Rannells v. Isgrigg*, (Mo.) 12 S. W. 843.

**How divested.**

3. The act of the wife of a lunatic in joining with the husband in a deed of the latter's guardian, ordered to be executed to the purchasers of land at a sale to pay the lunatic's debts, is a nullity, and does not bar her dower. *Rannells v. Gerner*, 80 Mo. 474.—*Rannells v. Isgrigg*, (Mo.) 12 S. W. 848.

3. Under Gen. St. Ky. c. 81, § 13, and Id. c. 53, § 3, providing that if a wife voluntarily leaves her husband, and lives in adultery, she shall forfeit her dower and distributable share in her husband's estate, it is not necessary that the wife, in order to forfeit such rights, shall live constantly with one man in adultery during her abandonment of her husband, but it is sufficient if she has sexual intercourse with any man, or men periodically, or when convenient.—*Goss v. Froman*, (Ky.) 12 S. W. 837.

4. As Gen. St. Ky. c. 52, art. 4, § 2, gives the widow dower in any real estate of which the husband, or any one for his use, "was seised of an estate in fee-simple, at any time during coverture," the fact that the husband lost title to lands of which he was seised during coverture, by adverse possession, does not affect his widow's right to dower therein.—*Williams v. Williams*, (Ky.) 12 S. W. 760.

**Devise in lieu.**

5. Mansf. Dig. Ark. §§ 2538, 2534, provide that "if land be devised to a woman, or a pecuniary or other provision be made for her by will, in lieu of dower," she may elect, and shall be deemed to have elected, such provision, unless within one year after her husband's death she shall enter on the lands to be assigned as dower, or commence proceedings for recovery or assignment thereof. Sections 2594-2598 provide that if a husband devise or bequeath to his wife any portion of his real estate the widow may elect, and must, within 18 months after the death of the husband, execute a deed of release to the heirs,—otherwise she will be deemed to have chosen under the will; also, that the record of the deed shall be sufficient notice of the renunciation of the provision of the will. *Held*, that where a husband devises land and personalty to his wife she is entitled to 18 months to execute the release; and the former statute applies where the husband makes a settlement other than by will, or where he bequeaths personalty alone, or where a provision is made for the wife by another than the husband.—*Pumphrey v. Pumphrey*, (Ark.) 12 S. W. 390.

**Payment of dower.**

6. Where an administrator applies the personalty to the payment of the debts of the estate without paying the widow's claim for dower, she is entitled to be reimbursed out of the real estate.—*Crouch v. Edwards*, (Ark.) 12 S. W. 1070.

**Due Process of Law.**

See *Constitutional Law*, 10, 11.

**DURESS.**

What constitutes, see *Marriage*.

**What constitutes.**

1. Plaintiff, having received money out of which he had promised to pay a debt to defendant, persuaded the latter to accompany him to a certain place, and persisted, against defendant's wishes, in going by a particular route, which was much further than by the direct road. He opposed defendant's son's going, but finally assented thereto. He also opposed defendant's taking his pistol, which was in good condition, but defendant took it. Plaintiff testified that he took the money, which was in an envelope, at defendant's suggestion, but defendant denied this, and disclaimed all knowledge that plaintiff took the money. In the evening defendant endeavored to overtake two men in the road, but they disappeared, and defendant expressed apprehension at their conduct. Plaintiff then asked defendant if he knew that one

J. had written a letter to one S. that he (J.) "would get him," (defendant.) After camping, two armed men rode up, when defendant went to the hack to get his pistol, and found it out of order. Plaintiff had just before this been at the hack for some moments. One of the men then demanded \$5,000 from defendant, saying that he had swindled J., and that they would kill him unless he paid that sum. Plaintiff then whispered to defendant, "Here is that money, and if you want to use it do so." He testified that defendant told him to bring it; that he brought the envelope containing it, which was seized simultaneously by both defendant and the robber. Defendant then insisted that the money should be counted, but the robbers refused, took it, and rode away. It appeared that J. had no ill will towards defendant, had not written the letter mentioned, and had authorized no one to demand \$5,000 from defendant. S. testified that he had not told plaintiff that he had received such a letter from J. The camp was selected by plaintiff, against defendant's wishes. *Held*, that the circumstances showed such a participation by plaintiff in the restraint practiced on defendant as to preclude recovery for the money alleged to have been loaned.—*Dimmitt v. Robbins*, (Tex.) 12 S. W. 94.

2. In such case it was proper to charge that if plaintiff participated in the assault on defendant, or previously knew of the contemplated assault, and entered into a conspiracy to have the assault committed, with a view of extorting money from defendant, he could not recover, and to refuse to charge that if the obligation was incurred by defendant while under duress it was void, regardless of plaintiff's participation therein.—*Dimmitt v. Robbins*, (Tex.) 12 S. W. 94.

**Dying Declarations.**

See *Homicide*, 69-73.

**EASEMENTS.****Conveyance.**

Testator built two houses on adjoining lots. They were two stories high, with a common partition wall. The upper rooms were reached by a stairway wholly in one of the buildings, but attached to the partition wall. *Held*, that a devise of the other building carried the right to use the stairway according to the custom of the testator.—*Howell v. Estes*, (Tex.) 12 S. W. 62.

**EJECTMENT.****Who may maintain.**

1. The assignee of a note secured by mortgage cannot recover in ejectment where there is no assignment of the mortgage, or transfer of the legal estate, by the mortgagee.—*Bailey v. Winn*, (Mo.) 12 S. W. 1045.

**Defenses.**

2. In Missouri a defendant in ejectment may set up his equities as a separate defense in the same suit, and the judgment thereon is final.—*City of St. Louis v. Schulenburg-Boeckler Lumber Co.*, (Mo.) 12 S. W. 243.

**Pleading.**

3. Mansf. Dig. Ark. § 2632, provides that plaintiff in ejectment shall set forth in his complaint all deeds and other written evidences of title on which he relies, and shall file copies as exhibits therewith, and shall state such facts as show a *prima facie* title in himself to the land in controversy, and that "defendant in his answer shall plead in the same manner as above required from the plaintiff;" and section 2633 provides that, when exceptions are sustained to any such documentary evidence, it cannot be used on trial, unless cured by amendment. *Held*, that an answer in ejectment was demurrable where exceptions were sustained to the documentary evidence of title exhibited therewith, so that nothing remained except the general denial.—*Beard v. Wilson*, (Ark.) 12 S. W. 567.

**Instructions.**

4. In ejectment, where plaintiff claimed under a sheriff's deed under a sale on a judgment against defendant's lessor, defendant claimed that his lessor was in possession as agent of a third person merely. *Held*, that an instruction that if the jury believed defendant's lessor was in possession of the premises, and afterwards defendant acquired possession through him, and was in possession at the time the suit was begun, the jury should find for plaintiff, is erroneous, and is not cured by an instruction that if the jury believe defendant's lessor was in possession as the agent of such third person, and not in possession himself, their verdict should be for defendant.—*Duncan v. Able*, (Mo.) 12 S. W. 796.

**Incumbrances paid.**

5. Plaintiff's father, when plaintiff was under two years of age, conveyed land, in consideration of love and affection, to his wife and four children. He had no other property, and was in debt. A few months afterwards he mortgaged the land, his wife joining in the mortgage. The mortgage expressly provided that it should take precedence over the deed. The father afterwards sold the land to defendant, who paid off, with part of the purchase money, the claim of the mortgagee and another claim against the land. Plaintiff, having sued defendant for his share under the original deed, recovered, on the ground that the statutory limitation for attacking a deed for fraud had expired as to the original deed. *Held*, that plaintiff cannot be compelled to account to defendant for one-fifth of the amount paid by defendant to remove the incumbrances on the land.—*Brown v. Connell*, (Ky.) 12 S. W. 267.

**Judgment—Effect.**

6. A judgment in ejectment for defendant is not a bar to the prosecution of another suit between the same parties, for the same land, where it does not appear that an equitable defense was pleaded in the former suit.—*Bailey v. Winn*, (Mo.) 12 S. W. 1045.

**Election.**

To take under will, see *Wills*, 25-28.

**ELECTIONS AND VOTERS.**

Of municipal officers, see *Municipal Corporations*, 8-12.

**Qualification of voters.**

1. Under Const. Tex. art. 6, §2, defining a qualified voter as one "who shall have resided in the state one year next preceding an election, and the last six months in the district or county in which he offers to vote," in a county election, the residence must have been for the last six months in the county, and not merely in the district of which the county forms part.—*Little v. State*, (Tex.) 12 S. W. 965.

2. Refusal to charge that, to constitute a change of residence from one precinct to another, there must be an actual removal, is not error, where the jury have already been told that each voter must vote in the precinct of his residence, and the statutory requirements of residence have been given.—*Little v. State*, (Tex.) 12 S. W. 965.

**Conduct of elections.**

3. Testimony in an election contest that the officer appointed to hold the election refused to act; that witness was selected by the voters present to preside; that the officer appointed by the court to preside administered to witness the proper oath; that witness then administered it to other officers of the election; that the election was fairly held; all legal ballots received and placed in a box, the identity of which is uncontroverted; and that such box was delivered to the proper officer,—sufficiently shows that the officers were legally selected and sworn, and that the election was fairly held.—*Hunnicut v. State*, (Tex.) 12 S. W. 106.

4. 1 Stat. Civil St. Tex. art. 1663a, provides that the commissioners' courts may change the

election precincts in their respective counties, but that each justice's precinct should constitute an election precinct. Article 1664 provides that "in each incorporated city, town, or village each ward shall constitute an election precinct." *Held*, that the fact that the commissioners' court establishes only two voting precincts in an incorporated town having four wards does not invalidate an election held therein.—*Davis v. State*, (Tex.) 12 S. W. 957.

**Contests—Evidence.**

5. Where the ballot-box comes from the proper custody, the ballots contained in it cannot be excluded from evidence until facts are proved which cast suspicion on them.—*Hunnicut v. State*, (Tex.) 12 S. W. 106.

6. Where the information in an election contest avers that there was a specified vote in a certain precinct, but there is a discrepancy between the tally-list and the return, it is proper to allow the ballot-box from that precinct, which is identified and free from suspicion, to be opened, and the ballots counted, though the declaration of the result of the vote in that precinct is not attacked.—*Hunnicut v. State*, (Tex.) 12 S. W. 106.

7. Defendant cannot object to the exclusion of testimony that a witness saw certain illegal voters vote for relator at a certain precinct, when defendant has declined to receive the ballot-box of that precinct in evidence, as the latter is better evidence than the former.—*Hunnicut v. State*, (Tex.) 12 S. W. 106.

8. Where it becomes necessary on the trial of an action to try title to an office to open certain ballot-boxes, the fact that others than those opened are produced in court by their proper custodian, and placed in view of the jury, is not prejudicial to defendant, and it is not error afterwards to refuse to permit him to show all the boxes in evidence in order to prove from the condition of some that those opened, and from which ballots were counted without objection, had not been securely kept, where no question had been raised as to the ballots in the boxes not opened.—*Hunnicut v. State*, (Tex.) 12 S. W. 106.

9. Under Const. Tex. art. 5, §15, providing for the election in each county of "a county judge, who shall be well informed in the laws of the state," it is not competent, on the contest of an election for county judge, to examine the contestant as to his knowledge of law.—*Little v. State*, (Tex.) 12 S. W. 965.

10. County assessment rolls, showing assessments for poll-taxes, are not admissible to show that challenged voters lived in the county, especially when made up from lists furnished by taxpayers, would be hearsay.—*Little v. State*, (Tex.) 12 S. W. 965.

11. Evidence of conversations between witnesses, who challenged certain voters, and the officer of election, is admissible, as part of the *res gestæ*, to show the manner in which the officer treated objections.—*Little v. State*, (Tex.) 12 S. W. 965.

12. Evidence that witness knew S. Foster, and that he was the person known as "Squire Foster," and lived in an adjoining county, does not vary from an allegation that one S. Foster, not a qualified voter, voted for respondent; it not appearing that there was any other person so named in either county.—*Little v. State*, (Tex.) 12 S. W. 965.

13. Where the testimony merely tends to show an opportunity for tampering with ballot-boxes by the friends of a relator, the respondent cannot on that account prevent a recount of the ballots.—*Davis v. State*, (Tex.) 12 S. W. 957.

14. The admission in evidence of declarations of voters on and before election day, as to their residence, is no ground of exception, when the statement of facts shows the same facts properly proven otherwise.—*Davis v. State*, (Tex.) 12 S. W. 957.

15. Where a ballot contains the names of both candidates, and shows a distinct pencil erasure of the name of one, and a very faint pencil mark across the name of the other, the testimony of the witness who made out the ticket, to the effect that

the latter mark was unintentional, is admissible.—*Davis v. State*, (Tex.) 12 S. W. 957.

#### — Instructions.

16. Where uncontradicted evidence shows a valid election in a certain precinct, it is not error to assume that such election was valid in the charge.—*Hunnicut v. State*, (Tex.) 12 S. W. 106.

17. Where there is no evidence that a ballot-box used on the trial had not been securely kept, a charge with reference to its custody is properly refused.—*Hunnicut v. State*, (Tex.) 12 S. W. 106.

18. Where the parties have agreed to a tabulated statement of the vote in a precinct as to which there is a discrepancy between the tally-list and the return, which statement is rendered certain by the count in court, it is proper to charge that they have so agreed, and to attach the statement to the charge, and the return, which conflicts with all other evidence, cannot be considered.—*Hunnicut v. State*, (Tex.) 12 S. W. 106.

19. A charge that, before the jury can reject a vote, they must know for whom it was polled, is properly refused where the original ballots had been offered by the opposite party, and withdrawn on objection, and there was sufficient evidence to enable the jury to find a verdict without knowing for whom any particular vote was cast.—*Little v. State*, (Tex.) 12 S. W. 965.

#### — Procedure.

20. Where the original information in *quo warranto* only alleges error in the count of the ballots in one box, but an amendment avers that none of the boxes were correctly counted, and alleges specifically the number of votes received by each of the contestants at each of the boxes, this amendment is sufficient to authorize a recount of the votes in all the boxes.—*Davis v. State*, (Tex.) 12 S. W. 957.

21. Where a ballot contains the names of both candidates, and shows a broad line drawn just above one of the names, obliterating a part of the first initial, and barely touching the second, in the absence of proof explaining the ambiguity of the ballot, it is proper to treat the name as erased, and count the vote for the other candidate, whose name is not erased.—*Davis v. State*, (Tex.) 12 S. W. 957.

22. On *quo warranto* to oust a sheriff from office, where the court orders a recount of the votes in certain boxes, an objection thereto must be made when the order is made, and after a report of said recount is made and filed a motion to strike it from the files will not be entertained.—*Davis v. State*, (Tex.) 12 S. W. 957.

23. Where the judgment declares the vote a tie, but does not even show how many votes, in the opinion of the court, each candidate received, and there is nothing in the record to show whether a challenged vote was rejected or counted, an assignment that the court erred in not sustaining the challenge is not well taken.—*Davis v. State*, (Tex.) 12 S. W. 957.

#### Carrying weapons.

24. Defendant saw, from his place of business, that his brother, at a polling place near by, was retreating before several persons, who were armed with sticks, and it reasonably appeared to him that his brother was in danger of serious bodily injury. He procured a pistol from his place of business, and went to the polling place, and succeeded in quelling the disturbance peaceably. *Held*, that he was not guilty of violating Pen. Code Tex. art. 163, prohibiting the carrying of a pistol within one-half mile of a polling or voting place.—*Barkley v. State*, (Tex.) 12 S. W. 495.

### EMBEZZLEMENT.

#### Indictment.

By the laws of Kentucky each county has a right to dispose of vacant lands within its limits under the orders of the county court. *Held*, that an indictment against a county judge for embezzlement in misappropriating the proceeds of vacant land, collected by him as county judge, must charge that he refused to pay over the same in the manner

and for the purpose required by law.—*Commonwealth v. Lewis*, (Ky.) 12 S. W. 266.

### EMINENT DOMAIN.

#### The power.

1. Act Ark. April 28, 1873, § 7, (Mansf. Dig. §§ 5464-5466,) providing that when the determination of questions arising in condemnation proceedings is likely to retard the progress of work on a railroad the court, or judge in vacation, shall designate an amount of money to be deposited by the railroad company, subject to the order of the court, and for the purpose of making compensation when the amount thereof shall have been assessed, whereupon the company may enter and proceed with the work upon the land prior to such assessment, is not in contravention of Const. Ark. 1874, art. 12, § 9, providing that no property nor right of way shall be appropriated to the use of any corporation until full compensation is first made to the owner in money, or secured to him by a deposit of money.—*Ex parte Reynolds*, (Ark.) 12 S. W. 570.

#### Procedure.

2. Under the provision of the charter of St. Louis (2 Rev. St. Mo. p. 1607) that if the ownership of property condemned be in controversy the damages shall be paid into court for the use of the successful claimant, the city, where suit has been begun by one claimant, may pay the damages into court and file an answer in the nature of a bill of interpleader, bringing in all the rival claimants.—*Hilton v. City of St. Louis*, (Mo.) 12 S. W. 557.

3. It is not error to allow the voluntary appearance and answer of an adverse claimant who should and would have been brought in by interpleader.—*Hilton v. City of St. Louis*, (Mo.) 12 S. W. 557.

4. The making of an order in vacation for a deposit of money by a railroad company for the purpose of compensation for a right of way is a step taken in the suit to condemn, of the time and place of which proceeding the land-owner is entitled to notice, but notice is waived by his appearance when such order is made.—*Ex parte Reynolds*, (Ark.) 12 S. W. 570.

5. Const. Ark. 1874, art. 12, § 9, provides that "no property nor right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made to the owner in money, or first secured to him by a deposit of money; which compensation \* \* \* shall be ascertained by a jury of twelve men." *Held*, that the clause prescribing trial by jury has reference only to the final assessment of the compensation.—*Ex parte Reynolds*, (Ark.) 12 S. W. 570.

#### Compensation.

6. The amount of a judgment recovered for entering upon land by a railroad company is the proper measure of damages, as against its successor.—*Rio Grande & E. P. Ry. Co. v. Ortiz*, (Tex.) 12 S. W. 1129.

7. The purchaser of a railroad at foreclosure sale, under a decree that the purchaser hold free from all liens and incumbrances, is not an innocent purchaser as against one whose land has been appropriated without condemnation or compensation.—*Rio Grande & E. P. Ry. Co. v. Ortiz*, (Tex.) 12 S. W. 1129.

8. As the Texas statutes require a railroad company to first pay the compensation before appropriating land, one upon whose land a railroad company has entered without condemnation does not lose his lien or title by recovering judgment in a suit for damages, and may recover compensation from the purchaser of the rights of the first.—*Rio Grande & E. P. Ry. Co. v. Ortiz*, (Tex.) 12 S. W. 1129.

9. That, in a suit to foreclose the first mortgage bonds of a railroad company, a judgment for damages against the company for entering upon land was rejected by the court as not being a claim to be paid out of the proceeds of the sale, does not preclude the owner from recovering compensation from the purchaser at the sale, who continues to oc-



copy the land.—*Rio Grande & E. P. Ry. Co. v. Ortiz*, (Tex.) 12 S. W. 1129.

10. In an action by a guardian for damages to the fee of his ward's estate by location and operation of a railroad in front of the land, it appeared that the guardian had a life-estate in a third of the land. There was, however, no plea in abatement for non-joinder of the life-tenant, nor any request for a special charge limiting the recovery to the interest of the minor. *Held*, that a charge which limited the recovery to the permanent injury to the land, though referring to the property as "plaintiff's property," was not prejudicial to the company, as there were no issues as to the right of the life-tenant to recover; besides, he was estopped to claim any interest by the allegation of the petition that his ward was the owner of the land.—*Fort Worth & N. O. Ry. Co. v. Pearce*, (Tex.) 12 S. W. 864.

11. Where, in an action for damages to vacant property caused by the location of a railroad in the street in front of it, the petition alleges that it was valuable only for residence property, and the evidence shows that it would probably be used for this purpose and none other, there is no error, after charging that the measure of damages would be the difference in the value of the property immediately before and immediately after the construction of the road, to further charge that, in estimating the depreciation in value of the property, the jury might take into consideration the depreciation caused by the excavation of the street, and also any depreciation occasioned by the probable fact that defendant, in operating its road, would make loud noises and would emit from its engines smoke and cinders, and cause other annoyances naturally incident to the operation of the railway.—*Fort Worth & N. O. Ry. Co. v. Pearce*, (Tex.) 12 S. W. 864.

#### Compensation—Interest.

12. Refusal to allow interest on damages assessed in condemnation proceedings by a city is not error, where, there being adverse claimants, suit has been inactively prosecuted, and it does not appear whether the property was vacant or improved, or that the city had yet taken possession.—*Hilton v. City of St. Louis*, (Mo.) 12 S. W. 657.

### Equalization.

See *Taxation*, 7, 8.

### EQUITY.

See, also, *Creditors' Bill*; *Fraudulent Conveyances*; *Infraction*; *Mortgages*; *Partition*; *Partnership*; *Quieting Title*; *Receivers*; *Specific Performance*; *Trusts*.

#### Jurisdiction.

1. Where plaintiff has a dispute with an adjoining land-owner as to the proper boundary line, but is in possession of all the land which he claims, equity has no jurisdiction to determine the proper location of the line.—*Wilson v. Hart*, (Mo.) 12 S. W. 249.

2. Where property is in the custody of a sheriff under a writ of attachment from the circuit court, a court of chancery cannot acquire jurisdiction of the same property, so as to take it from the possession of the sheriff into the custody of its receiver. Such powers appertain only to courts of supervisory or appellate jurisdiction.—*Ford v. Judsonia Mercantile Co.*, (Ark.) 12 S. W. 876.

#### Land in another state.

3. Where a devisee was directed by the terms of a will to convey certain land in another state to M., an objection that, as M. could not have maintained an action in such state to recover the land, the will not being recorded there, his heirs could not maintain an action to compel a conveyance, is without merit.—*McQuerry v. Gilleland*, (Ky.) 12 S. W. 1037.

#### Rescission and cancellation of contracts.

4. The equitable relief of cancellation of a patent issued for school lands will be granted the state

only on condition of its restoring purchase money and taxes.—*State v. Morgan*, (Ark.) 12 S. W. 243.

5. After alleging the defalcation and insolvency of a public officer, R., and the liability of all of his bondsmen, plaintiffs, who were part of the bondsmen, alleged, on information and belief, that, at the time of executing a mortgage to defendants, the other bondsmen, to indemnify them against loss, R. was aged and infirm, and was importuned by defendants to execute the mortgage; that he did not execute it voluntarily, but as the result of undue influence, being disturbed and distracted; and that he did not intend to give defendants a preference. *Held*, that these allegations did not show such undue influence or fraud as to warrant setting aside the mortgage.—*Lacy v. Rollins*, (Tex.) 12 S. W. 314.

6. A deed, executed by an aged parent in favor of two of his daughters and a grandson, will not be set aside at the instance of the other children of the grantor, on the ground that he was controlled by the improper influence of one of the daughters, his favorite child, where the facts indicate that his will power was equal to that of such daughter, and that he resisted the influence attempted to be exercised by his son, when the latter told him that the deed ought not to be made.—*Sullivan v. Hodgkin*, (Ky.) 12 S. W. 773.

7. A father, owning about 44 acres of land, being old and infirm, conveyed it to one of his sons, in consideration that the latter would support the father and mother during the life of each. *Held*, that there was nothing irrational in the act, nor an indifference to the rights of his other children, and that the transaction would not be disturbed at the instance of the latter.—*Bush v. Johnson*, (Ky.) 12 S. W. 753; *Id.* 1184.

8. Where one of several heirs to land is induced to give a deed for her share to the husband of a co-heir, pending negotiations for a sale of the land, by misrepresentations as to the amount she will be entitled to receive from the prospective purchaser, and by such misrepresentations her grantee realizes a profit to himself of more than double the consideration paid to her, the deed will be set aside for fraud.—*Moyers v. Evans*, (Ky.) 12 S. W. 1068.

9. Land sold to satisfy a judgment was purchased by the creditor, and before he had received a deed therefor he sold to plaintiffs, who received a deed from the commissioner. Plaintiffs purchased for the use and benefit of the judgment debtor, and held the land in trust for him. The quantity of land sold was never ascertained by survey, but was sold and reported as a certain amount, while, in fact, there was much less. The creditor did not know of the defect, and was innocent of any fraud. *Held*, that plaintiffs could not have the sale to them rescinded on account of the defect, though they would be entitled to such rescission had they purchased in their own right.—*Holmes v. Bramel*, (Ky.) 12 S. W. 262.

10. A paralytic, 10 days before his death, and when he could not speak, or be induced to write or use a tin alphabet of large letters prepared for his benefit, executed a conveyance of his entire estate, consisting of land worth \$8,000 and personal property, the recited consideration being an agreement by the grantees to pay off a mortgage of \$2,500, a medical account due one of the grantees for \$375, and to provide for the grantor during his life a comfortable home and support, competent attendance, necessary medical attendance, and to decently bury him. The deed was prepared by the county clerk, without any suggestion from the grantor, and taken to his house, and his mark made to it without any alteration, although he expressed a desire to reserve the use of his dwelling-house, yard, and garden. *Held*, that it was a nullity, and would be set aside at the instance of his heirs at law.—*McElwain v. Russell*, (Ky.) 12 S. W. 777.

11. Plaintiff conveyed his hotel to defendants in exchange for stock in a tobacco company, and afterwards sought to set aside the deed on the ground that defendants had falsely represented the value of the stock. This action he dismissed, and executed to defendants a formal release, acknowledging the receipt of an additional sum of money, and

admitting that he was fully satisfied. Before the settlement, he had been elected a director in the company, having access to its records and books of account. Subsequently, upon the failure of the company, he again sought to set aside the deed on the ground of false representations. *Held*, that as at the time of the last settlement, he was in a position where, with ordinary prudence, he could have known the condition of the company's affairs, and it did not appear that the settlement was induced by false representations, he was not entitled to recover.—*Powell v. Adams*, 12 S. W. 295, 98 Mo. 598.

#### — Reformation of contracts.

12. Where a deed calls for a certain corner, and the testimony of the surveyor and others is clear and explicit that the corner is at a certain other point, and the location of the land is such as would negative the description in the deed, the deed will be reformed.—*Moye v. Lane*, (Ky.) 12 S. W. 154.

13. The description of land in a mortgage was copied from a deed to the mortgagor which conveyed a tract by metes and bounds, and then excepted from the grant a portion of the tract, but the mortgage described only the excepted portion. The draughtsman testified that the description of the excepted portion was copied into the mortgage, by mistake, instead of the portion conveyed by the deed, which was intended by the parties. *Held*, that the mortgage should be reformed.—*Tichenor v. Yankee*, (Ky.) 12 S. W. 947.

14. A mortgage which reserves to the mortgagor a homestead in the land will be corrected, where it appears that both parties supposed that the mortgagor had a homestead by law in the land, and they only intended the reservation as declaratory of that right, and fully intended to mortgage all of the land which was subject to mortgage; but it is incumbent on the mortgagee to prove these facts.—*Lear v. Prather*, (Ky.) 12 S. W. 946.

#### — Accounting.

15. In a suit to compel defendant to account for and turn over certain funds collected under a certain contract and unaccounted for, defendant, in a cross-complaint, alleged that plaintiff was indebted to him for commissions upon moneys collected by plaintiff under the same contract, and never turned over to him. *Held*, that the burden of proof was upon plaintiff in the bill, and upon defendant in the cross-complaint, and, neither being sustained by satisfactory proof, both should be dismissed.—*Crawford v. Norris*, (Ark.) 12 S. W. 707.

#### Pleading.

16. Although a plaintiff in his special prayer may mistake the relief to which he is entitled, he may, in response to a prayer for general relief, be awarded the relief to which the pleadings and evidence may entitle him.—*Silberberg v. Pearson*, (Tex.) 12 S. W. 850.

17. In an action on a corporation note, indorsed by its members, and subsequently indorsed by one of the partners of the firm to which it was payable, in his own name, and that of another firm to plaintiff, the petition alleged that the note was a corporate act, and made by a *de facto* corporation, and attached a copy of the articles of incorporation, making them part of the petition, and asked judgment either against the members of the company as partners or against the company as such, if legally incorporated, and also alleged that after the debt was created a new corporation was formed, and that the old company, being insolvent, transferred its assets to the new, which assumed all its liabilities, but that the assets were not applied to the payment of its debts, although held in trust for that purpose, but diverted by the managers and directors of the new company to other objects, and asked to recover against the trust company, and also against the managers for misapplication of the assets, and others who received and appropriated a portion thereof. *Held*, that it was not multifarious, and the causes of action against all the parties were properly joined in one suit.—*National Bank v. Texas Investment Co.*, (Tex.) 12 S. W. 101.

#### Masters in chancery.

18. Where the facts on which the rights of the parties on a particular point depend appear on the face of the pleadings, and are undisputed, the question is for the court, and no report of the master is necessary.—*Clark v. Hershey*, (Ark.) 12 S. W. 1077.

#### ERROR, WRIT OF.

See, also, *Appeal; Certiorari; Exceptions, Bill of; New Trial.*

#### When lies.

Rev. St. Mo. 1879, § 439, which provides that, upon determination in favor of plaintiff of a plea in the nature of a plea in abatement, putting in issue the facts alleged in an affidavit for attachment, the cause shall proceed, and that proceedings upon the plea shall be reviewable by appeal, does not authorize their review by writ of error, as a longer time is allowed for error than for appeal.—*Young v. Hudson*, (Mo.) 12 S. W. 632.

#### ESCAPE.

##### Evidence.

There was evidence that defendant went to the jail, was asked by a prisoner for his knife, and threw it into the jail to him; that the prisoner did not state what he wanted with the knife, and that defendant went away without saying anything. There was no evidence that the knife could be useful in effecting an escape, or that the prisoner ever attempted to use it for such purpose. *Held*, that the evidence was insufficient to convict, under Pen. Code Tex. art. 210, of conveying into the jail an instrument "with intent to facilitate the escape of a prisoner."—*Poncio v. State*, (Tex.) 12 S. W. 413.

#### ESCROW.

##### What constitutes.

1. Where a deed is delivered directly to the grantee, it cannot be treated as an escrow.—*Campbell v. Jones*, (Ark.) 12 S. W. 1016.

##### Performance of conditions.

2. In an action on a mortgage, and notes secured thereby, defendant testified that the instruments were delivered to a third person in escrow, to be delivered to plaintiff when defendant's counsel had examined them and so directed. Plaintiff testified that they were to be delivered upon his dismissing a certain suit, and six days after such dismissal they were so delivered. Upon this point there was no other testimony. It appeared that the third person, before delivering the instruments, asked defendant's attorney if he should do so, but received no directions; and that the instruments in question were of plain import. Before they were delivered to plaintiff, defendant made no effort to consult her attorney, though she had ample time; and it did not appear that when she learned of such delivery she made any objection thereto. It appeared that said notes and mortgage were executed in settlement of the debt sued for. *Held*, that a conclusion that the condition had been performed before the writings were delivered was warranted.—*Mudd v. Green*, (Ky.) 12 S. W. 139.

#### ESTATES.

See, also, *Dower; Easements; Homestead; Tenancy in Common and Joint Tenancy.*

##### Life-tenants—Improvements.

A life-tenant is entitled to no compensation for taxes or improvements against the remaindermen, and where a married woman is the life-tenant the same rule applies to her husband.—*Creutz v. Heil*, (Ky.) 12 S. W. 926.

#### ESTOPPEL.

##### By deed.

1. A deed to a husband and wife, for their joint lives and the life of the survivor, gave the husband

power to convey an undivided half of the premises in fee, with remainder over to the wife's heirs. The husband and wife conveyed an undivided half to defendant's grantor in fee. They then conveyed the west half to their grantees, and he reconveyed the east half to them. *Held*, that the first conveyance by the husband and wife limited the interest of an heir of the wife, who would have taken an undivided one-third, had the husband not executed his power, to an undivided one-sixth in the entire tract; and, while such heir's rights were not affected by the subsequent partition deeds, yet where she subsequently attempted to convey an undivided one-third of the east half, and in her deed expressly recognized the conveyance of the west half, and adopted the dividing line between the two halves as thereby established, she was estopped to claim an undivided sixth of the west half.—*Cordier v. Brown*, (Mo.) 12 S. W. 351.

2. B., who held land in trust for his father, conveyed it, at his father's request, in trust for his half-sister, who was about to be married, and for whom his father wished to make some provision. B. drew up the conveyance himself, and at his instance his sister gave a receipt for the value of the property, as an advance from her father; the receipt setting forth that the property had belonged to the father, and was conveyed at his request. B., when he made the deed, was conversant with his father's affairs and financial condition, and there was no evidence of fraud on his father's part in causing the conveyance to be made. *Held*, that he was estopped to attack the deed by a creditors' bill against the father.—*Bobb v. Bobb*, (Mo.) 12 S. W. 898.

3. A deed, signed and executed by the president of a corporation, purporting to convey a corporate interest in land, when in fact the interest is owned by the president individually, is not sufficient to pass his title by estoppel, unless by the terms of the deed the conveyance is definite and absolute.—*Carothers v. Alexander*, (Tex.) 12 S. W. 4.

4. A deed which in one portion purports to convey only the interest of the grantor, though in another portion it speaks of "the land" as being sold to the vendee, does not bind one who, without being named in it, signs and acknowledges while a minor, and reacknowledges it after attaining her majority, and she is not thereby estopped to claim the land.—*Hall v. Ditto*, (Ky.) 12 S. W. 941.

#### By record.

5. Where a defendant in an action to sell land under a deed of trust claims only a portion of the land, and she is invested with title to that portion as against her co-defendants, she cannot question the trustee's title to the balance of the lands.—*Herd v. Cist*, (Ky.) 12 S. W. 466.

#### In pais.

6. A defendant in ejectment wherein plaintiff recovered is not estopped by conduct to bring a subsequent action for the same land against plaintiff's grantees, who supposed the judgment to be conclusive, where such defendant neither induces them to buy nor knows of the purchase.—*City of St. Louis v. Schulenburg-Boeckler Lumber Co.*, (Mo.) 12 S. W. 248.

7. It appeared that property sold under order of court to pay the debts of a decedent, but claimed by an heir, had been in fact paid for by the decedent, but owing to his financial difficulties the legal title was conveyed to claimant. The occupied portion of the property was occupied by decedent in his life-time, and rented by him, and during some of this time claimant collected the rent for decedent. Upon decedent's death, claimant, together with the other heirs, executed a written authority to the administrator to collect the rent, which he exercised until the property was destroyed by fire, when he collected the insurance. As to the unoccupied portion claimant only made a claim to a half interest, and offered to convey the other half to the administrator. When the administrator was preparing a list of decedent's property for the purpose of procuring an order of sale, which was known to claimant, the latter made no claim to any

except the undivided interest in the unoccupied lots. *Held*, that he was estopped to claim any further interest in the property.—*Greer v. Greer's Adm'r.* (Ky.) 12 S. W. 152.

8. A person who, as member of the town council, agrees that a town building, located on state land, shall be removed when the land is sold, and who subsequently purchases the land with the understanding that the building does not pass with it, is estopped from denying that it is personally belonging to the town.—*Harmon v. Kline*, (Ark.) 12 S. W. 496.

9. Where the indorsee of one of several notes secured by a trust-deed obtains judgment against the indorser for the proceeds of the trust property derived from a sale to pay the notes retained by the indorser, he thereby elects to affirm the sale; and he cannot, after failing to obtain full payment of his note, resell the property for the residue, and, as purchaser, maintain ejectment for it against the former purchaser's grantees.—*Boogher v. Frazier*, (Mo.) 12 S. W. 885.

10. The fact that a widow, as executrix, inventories land as part of the testator's estate, does not preclude her from showing that it is her separate property.—*Haley v. Gatewood*, (Tex.) 12 S. W. 25.

11. A married woman devised all her land to her daughter, appointing her husband executor, with power to manage the estate, and sell any part thereof, and invest in other property, and to surrender it to the daughter when deemed for her interest. The land described in the will was conveyed in exchange for other land, after the execution of the will, by her husband under an invalid power of attorney previously given by her, and after her death he took possession of the land received, sold a part of it, and managed it as decedent's estate until the daughter was of age. *Held*, that the power given being with reference to the particular land described, and it not appearing that the wife knew of or ratified the exchange the acts of the executor did not amount to an estoppel or ratification of the invalid conveyance.—*Cardwell v. Rogers*, (Tex.) 12 S. W. 1006.

#### Pleading.

12. Where plaintiff claims a strip of land as part of land conveyed to him, a plea of estoppel by virtue of the acts of plaintiff's vendor at the survey of the land is insufficient which fails to allege that, at the time of the survey, the latter knew the exact location of the boundary line, and never set up any claim to the disputed strip, and that the other side did not know the true state of the case.—*Wait v. Gover*, (Ky.) 12 S. W. 1068.

## EVIDENCE.

See, also, *Deposition; Witness*.

In actions for negligence, see *Negligence*, 8-11.

— for personal injuries, see *Bridges*, 2-4;

*Carriers*, 11-15.

— on policy, see *Insurance*, 23, 24.

attachment, see *Attachment*, 8.

criminal cases, see *Arson*, 2, 3; *Burglary*, 2-4;

*Criminal Law*, 31-54; *Escape*; *Fornication*;

*Homicide*, 44-75; *Larceny*, 8-15; *Perjury*, 5; *Robbery*, 2, 3.

election contests, see *Elections and Voters*,

5-15.

particular actions, see *Assumpsit*; *Malicious*

*Prosecution*, 5-7; *Replevin*, 6-9; *Trespass*

*to Try Title*, 11-29.

Of adverse possession, see *Adverse Possession*, 14-16.

fraud, see *Fraudulent Conveyances*, 31-34.

payment, see *Payment*, 1, 2.

signing release, see *Release and Discharge*.

Parol, see *Deed*, 12.

Reception of, see *Trial*, 5.

To establish boundaries, see *Boundaries*, 12-16.

#### Presumptions.

1. The fact that the application for an order is addressed to a certain person as county judge creates no presumption that he was the county judge when the order was made.—*Henderson v. Lindley*, (Tex.) 12 S. W. 979.

**Best and secondary.**

2. Statements contained in an encyclopedia as to the date of settlement of a town are not admissible to disprove the statement of a witness that on a certain date he received a letter postmarked and mailed at such town, as there is better evidence to be had in the records of the post-office department.—Howard v. Russell, (Tex.) 12 S. W. 525.

3. Error in admitting a copy of a deed in evidence is cured by the introduction by the opposite party of the original deed.—Glover v. Thomas, (Tex.) 12 S. W. 684.

4. In the second trial of an action one of the plaintiffs testified that a list of the claims was given plaintiffs' attorney, and was used on the first trial of the cause; and that witness had not seen it since the trial. The attorney testified to receiving the list; that it was used on the first trial, and that it was put among the papers of the cause; and that he had not seen it since. *Held*, that secondary evidence of its contents was admissible.—Ramsey v. Hurley, (Tex.) 12 S. W. 56.

**Hearsay.**

5. In an action against a carrier to recover the value of mules shipped to a certain town which were killed in transit, it is error to permit a witness to state what persons there told him such mules, as he described those killed to have been, were worth in the market of said town.—Southern Pac. Ry. Co. v. Maddox, (Tex.) 12 S. W. 815.

6. In a suit on a note, testimony as to payments made on it by defendant, as to which witness knew nothing personally, is hearsay, and inadmissible.—Sangster v. Dalton, (Ark.) 12 S. W. 202.

**Declarations and admissions.**

7. Threats made by the engineer after his engine had struck a person walking on the track, that he "would finish" the job with a coal-pick, and declarations made by him as to the number of men he had killed, are no part of the *res gestae*, and are inadmissible in an action for the injuries received.—Gulf, C. & S. F. Ry. Co. v. York, (Tex.) 12 S. W. 68.

8. Declarations of a grantor in a deed, made before its execution, that he did not claim the land, are admissible against his grantee, and declarations that he owned the land are not admissible in rebuttal.—Snow v. Starr, (Tex.) 12 S. W. 673.

9. The statement of the station agent of defendant railroad company, made at the time plaintiff received injuries for which he sues, that the hole in the platform into which plaintiff fell "ought to have been fixed," is incompetent to show unreasonable delay on the part of the company in repairing the platform after the defect became known.—St. Louis & S. F. Ry. Co. v. Barger, (Ark.) 12 S. W. 156.

10. On *quo warranto* to oust a sheriff from office, the declarations of a voter after he has voted, and after the election has closed, in regard to his qualifications, are not in derogation of any existing right, and cannot be admitted in evidence, as against interest.—Davis v. State, (Tex.) 12 S. W. 957.

11. In an action for the death of a locomotive engineer, caused by the track being out of line and so spread that the cars rolled off, a statement of a track-walker relative to the condition of the track, made half an hour before the accident, to the section boss, is admissible as part of the *res gestae*.—Texas & P. Ry. Co. v. Lester, (Tex.) 12 S. W. 955.

12. In trespass to try title, evidence of declarations of the attorney of plaintiffs' ancestor, under whom she claims, made at a sale of the ancestor's property under execution, is inadmissible.—Morris v. Balkham, (Tex.) 12 S. W. 970.

**Opinion evidence.**

13. The evidence of a witness who was a fireman on the engine at the time it was derailed, and who helped to construct the road, was admissible to show the liability of the track to "get out of line" at that point by reason of rain.—Fort Worth & Denver C. R. Co. v. Thompson, (Tex.) 12 S. W. 742.

14. The opinion of a brakeman who had been doing such work 10 years was admissible to show the cause of derailment, it appearing that he was on the train and investigated the accident at the time it occurred.—Fort Worth & Denver C. R. Co. v. Thompson, (Tex.) 12 S. W. 742.

15. The opinion of a witness, as to whether the plaintiff's demand, in an action on an insurance policy, was based on a fair valuation of the property, is inadmissible.—Lion Fire Ins. Co. v. Starr, (Tex.) 12 S. W. 45.

16. The testimony of one not an expert is incompetent to prove the mental condition of a person whose deposition has been read in evidence, at a time other than when the deposition was given, or to show the value of the deponent's testimony.—Howard v. Russell, (Tex.) 12 S. W. 525.

17. The question as to whether a witness, who heard no signal of an approaching train, could have heard it had it been given, calls for an opinion merely, and is properly ruled out.—Eskridge's Ex'r v. Cincinnati, N. O. & T. P. Ry. Co., (Ky.) 12 S. W. 580.

**Experts.**

18. It is not error to permit an expert to state his conclusions from facts which are undisputed.—Fort Worth & Denver C. R. Co. v. Thompson, (Tex.) 12 S. W. 742.

19. The opinion of a physician as to the nature and extent of personal injuries is admissible, although formed from an examination made two years previous to the trial.—Missouri Pac. Ry. Co. v. Callahan, (Tex.) 12 S. W. 833.

**Documents.**

20. A party to an action on a contract cannot read letters purporting to have been written by himself to the other party as evidence that the contract was as he claims, in the absence of evidence that the other party received and acted on, or agreed to act on, such letters.—Griffith v. Lake, (Tex.) 12 S. W. 235.

21. The exclusion of traced copies of signatures is harmless error, where authenticated photographic copies of the same signatures are already in evidence.—Howard v. Russell, (Tex.) 12 S. W. 525.

**Record of foreign judgment.**

22. In proceedings by heirs to set aside the probate of a will, a decree of a court of another state will be admitted to show the adoption of a petitioner by deceased, without proof as to the law of adoption in that state; there being no proof that the court had not jurisdiction.—Brown v. Mitchell, (Tex.) 12 S. W. 606.

**Ancient instruments.**

23. An entry on the minutes of a Masonic lodge is admissible in evidence, where it is 30 years old, the presumption being, after such a length of time, that it was correctly made.—Howard v. Russell, (Tex.) 12 S. W. 525.\*

**Competency.**

24. In support of the theory that a decedent was a brother of a witness who does not bear the same name, it is competent to show that decedent changed his name, and also to show the circumstances that induced such change, as detailed by himself at the time it was done.—Howard v. Russell, (Tex.) 12 S. W. 525.

25. Such witness testified that he was once introduced by decedent to a third person, who remarked, "You look enough alike to be kin folks," whereupon decedent replied, "O, no; not kin, exactly." *Held*, that decedent's reply was relevant to the issue as to whether he was witness' brother, and the remark which elicited such reply was admissible, in order to make it intelligible.—Howard v. Russell, (Tex.) 12 S. W. 525.

26. Testimony as to the skill of a physician who had testified in the case, by another, who knew him, and spoke from such knowledge, is admissible to show the value of his evidence.—Thompson v. Ish, (Mo.) 12 S. W. 510.

## EXCEPTIONS, BILL OF.

On appeal, see *Appeal*, 37-34.

### Settlement and signing.

1. In Missouri, where the court has adjourned, after making an order allowing a certain time in which to file a bill of exceptions, it cannot extend the time by a similar order, at a subsequent term.—*State v. Hill*, (Mo.) 12 S. W. 340.

2. Carroll's Civil Code Ky. § 334, provides that "time may be given to prepare a bill of exceptions, but not beyond a day in the succeeding term, to be fixed by the court." An amendment of May 12, 1886, provides that "if the judge of said court, for any cause, does not preside at the said term of the court, or no court is held, then the party offering the bill of exceptions shall have until the next term of the court to perfect and prepare the bill of exceptions." *Held*, that the amendment applies as well to a special judge, legally elected to try a case, as to the regular judge; and where such special judge is absent at the day set for filing a bill of exceptions, when it is tendered, it may be continued to the next term, and it is sufficient for him to sign it then.—*McFarland v. Burton*, (Ky.) 12 S. W. 386.

3. Crim. Code Ky. § 282, provides that bills of exception in criminal cases shall be prepared, settled, and signed as in civil cases. Civil Code Ky. § 337, subsec. 3, 5, provide that if the bill of exceptions be approved by the judge he shall sign it, and, if not approved, he shall correct it; that one objecting to the judge's corrections may file his exceptions as written, if attested by the affidavits of two by-standers; and that where a trial judge does not preside when a motion for new trial is overruled the bill of exceptions may be certified by by-standers. *Held*, that where a trial judge refuses to sign a bill of exceptions it may be certified by by-standers.—*Commonwealth v. Hourigan*, (Ky.) 12 S. W. 550.

4. Where a bill of exceptions signed by the by-standers is allowed by the judge to be filed, but he certifies that it is untrue, and it is supported by affidavits, there being no counter-affidavits, it is a sufficient verification of the facts, within Rev. St. 1879, §§ 3638-3640, providing that, where the judge refuses to sign a bill of exceptions, it may be signed by three by-standers, and, if true, he shall allow it to be filed; but when he refuses to allow it to be filed, and certifies that it is untrue, either party may take not exceeding five affidavits as to its truth.—*State v. Snyder*, (Mo.) 12 S. W. 369.

### Necessary contents.

5. A bill of exceptions is insufficient which merely recites that the testimony objected to was offered, and fails to show that it went to the jury.—*Jackson v. State*, (Tex.) 12 S. W. 701.

## Excessive Damages.

See *Damages*, 9-11; *New Trial*, 5, 6.

## EXECUTION.

See, also, *Attachment*; *Garnishment*; *Judicial Sales*.

### Power to issue.

1. A sale of land under execution issued from the court of common pleas is valid, as Acts Mo. 1874, establishing that court, give it all the powers of a court of record, and the power to issue executions is a necessary incident to such courts.—*Bailey v. Winn*, (Mo.) 12 S. W. 1045.

### Property subject to.

2. In Arkansas, the husband's right of curtesy in his deceased wife's statutory separate estate is subject to execution for the payment of his debts.—*Stanley v. Bonham*, (Ark.) 12 S. W. 706.

3. Where land has been partitioned among joint tenants, by parol agreement, the equitable title in the different parcels vests at once in the persons to whom the same have been allotted,—the legal title being held for them, respectively, in

trust; and an execution levied on a parcel thus allotted to one of the joint tenants, to satisfy a judgment against another of them, cannot affect the rights of the one in whom the equitable title vests.—*Aycock v. Kimbrough*, (Tex.) 12 S. W. 71.

4. Money made by a sheriff on an execution may be applied to the payment of another execution which he holds against the first judgment creditor.—*Mann v. Kelsey*, (Tex.) 12 S. W. 43.

### Claims by third persons.

5. On a trial of the right of property in certain horses, levied on as the property of the execution debtor, it appeared that the levy was made without actual seizure, by giving notice to one B., "in charge and controlling said horses." *Held*, under Rev. St. Tex. arts. 4838, 4839, providing that in such trials, if the property was taken from the possession of a claimant, the burden of proof shall be on plaintiff, and that the burden shall otherwise be on the claimant, that it was error for the court to permit the sheriff's return on the execution to be amended so as to show that B. had charge of the horses as the claimant's agent, solely on B.'s declaration made at the time of the levy, refusing to hear other evidence, and rule that the burden was on the execution plaintiff.—*Pan Handle Nat. Bank v. Foster*, (Tex.) 12 S. W. 223.

6. The statutory remedy by which a claimant of property seized under judicial process as the property of another may try his right thereto is not exclusive, and he may sue at law instead.—*Lang v. Daugherty*, (Tex.) 12 S. W. 20.

### Sale.

7. Where several witnesses testify that a sale under execution was not made subject to a certain mortgage, and it appears that the property was sold for as much as it would probably have brought if unincumbered, and the mortgagee immediately thereafter conveyed her title to the purchaser, a finding that the sale was not subject to the mortgage is justified.—*Bryan & Brown Shoe Co. v. Block*, (Ark.) 12 S. W. 1073.

8. A sale on execution, under a judgment against a firm, of the homestead of one of its members, which had been conveyed before the judgment creditors had done anything to fix a lien on the land, and of which conveyance they had notice when they levied their execution, will not be enjoined, as the possession of the grantee will not be disturbed by the sale, and he has an ample remedy in trespass to try title.—*Mann v. Wallis*, (Tex.) 12 S. W. 1123.

9. A sale under execution issued against "William V." on a judgment rendered against H. W. V., which is levied on the property of H. W. V., whose Christian name was Hiram Watkins, is void; and the defective execution cannot be cured by a motion to amend it, made after the sale.—*Morris v. Balkham*, (Tex.) 12 S. W. 970.

10. A purchaser of a cotton crop at execution sale, "subject to landlord's lien," has the right, but is not bound, to gather and market the cotton, either for the benefit of the landlord or chattel mortgagees thereof; and, before the latter can recover any judgment against him, it is necessary for them to show that there was in his hands a balance of the net proceeds of the cotton gathered by him, after paying the landlord's lien.—*Davis v. Goldberg*, (Tex.) 12 S. W. 952.

11. A purchaser at execution sale of the interest of the equitable owner of an undivided one-half interest in land is entitled to a decree vesting the title in him, and also to half the money received from the sale of timber cut from the land.—*Thorn v. Weatherly*, (Ark.) 12 S. W. 159.

12. A sale of land under an execution issued and levied after the death of the debtor on a judgment rendered against him during his life-time is voidable.—*Cain v. Woodward*, (Tex.) 12 S. W. 819.

13. A sale of land on an execution made after the return-day thereof is a nullity.—*Cain v. Woodward*, (Tex.) 12 S. W. 819.

### Return.

14. Under Laws Tex. 1873, p. 209, (Pasch. Dig. art. 3775,) requiring all executions to be made returnable on or before the first day of the next term

of court; the clerk cannot, by an indorsement "returnable in sixty days," make the writ returnable after the expiration of the statutory limit.—*Cain v. Woodward*, (Tex.) 12 S. W. 819.

#### Sheriff's deed.

15. Rev. St. Mo. § 2392, provides that deeds for property sold under execution shall recite "the names of the parties to the execution, the date when issued, the date of the judgment, order, or decree, and other particulars, as recited in the execution." *Held*, that where a deed for property sold on execution contains the names of the parties to and date of the execution, and the date and amount of judgment, it may be shown by evidence *alunde* that the judgment and execution were special, and against the property sold.—*Hall v. Klepzig*, (Mo.) 12 S. W. 872.

16. It is not error to refuse to correct a sheriff's deed by making the recitals conform to the judgment and execution, even though the mistake is satisfactorily shown.—*Hall v. Klepzig*, (Mo.) 12 S. W. 872.

17. A deed from a widow to the heirs of her deceased husband will not prevail as against a sheriff's deed to plaintiff, executed during the life of the husband, though not recorded until after the execution of the deed from the widow to the heirs.—*Bailey v. Winn*, (Mo.) 12 S. W. 1045.

#### Relief against execution.

18. In a suit to enjoin the execution of a writ of restitution issued on a judgment of forcible detainer, on the ground that such judgment did not embrace 49 acres of which it was proposed to put the judgment plaintiffs into possession under the writ, the description in that judgment is not controlling, but defendants are entitled to show that by former conveyances and transactions between the parties and their privies such a construction should equitably be put upon the description in the judgment, which followed the description in the deeds, as would embrace the 49 acres in dispute, and that plaintiff is by his acts precluded from denying the correctness of such a construction.—*Pardue v. James*, (Tex.) 12 S. W. 1.

## EXECUTORS AND ADMINISTRATORS.

### Appointment.

1. Where a ward dies owing debts and owning property, the county court of the county where the death occurred has jurisdiction to appoint an administrator of the estate, though the guardian has not made final settlement.—*Alford v. Halbert*, (Tex.) 12 S. W. 75.

### Bonds—Liability of sureties.

2. Where a settlement of a deceased administrator's accounts, which is relied upon as a basis of the breach of his bond, is made before the appointment of his administrator, neither the principal nor his administrator is legally before the probate court at the time of the settlement, and the judgment of the court is not binding upon the sureties in the bond.—*Hecht v. Drake*, (Ark.) 12 S. W. 706.

3. Until the judgment of a probate court settling an administrator's accounts, and showing nothing due from him, is overturned in a court of equity, no liability rests on his bondsmen.—*Crouch v. Edwards*, (Ark.) 12 S. W. 1070.

4. In an action by a widow, against her deceased husband's administrator *de bonis non* for her dower, a finding that the husband's administrator, for whom the widow was surety, had defaulted, is not warranted by a judgment to that effect rendered in an action by the husband's creditors against the administrator *de bonis non* alone, to surcharge the administrator's accounts, as such judgment proved nothing against the sureties.—*Crouch v. Edwards*, (Ark.) 12 S. W. 1070.

5. Rev. St. Mo. 1879, § 307, making public administrators "subject to the same duties, penalties, provisions, and proceedings as are enjoined upon or authorized against executors and administrators by this chapter, as far as the same may be applicable," does not exclude public administrators

and their sureties from the benefits of chapter 66, section 3906 et seq., providing for the discharge of sureties on official bonds, and limit them to the provisions for sureties on executors' and administrators' bonds.—*State v. Nolan*, (Mo.) 12 S. W. 1047.

### Settlement and accounting.

6. Under Rev. St. Mo. § 229, providing that executors and administrators shall be allowed "all reasonable charges for legal advice and service," an executrix is entitled to attorney's fees for defending her final settlement in the probate and circuit courts.—*Jacobs v. Jacobs*, (Mo.) 12 S. W. 457.

7. An executrix is not entitled to an allowance for commissions paid her agents for effecting the sale of real estate of her testator, beyond the "commission of 5 per cent. \* \* \* on money arising from the sale of real estate," allowed to executors and administrators by Rev. St. Mo. § 229.—*Jacobs v. Jacobs*, (Mo.) 12 S. W. 457.

8. As to claims arising before the commencement of administration, Rev. St. Tex. art. 2081, provides that the action of the court in approving or disapproving such a claim shall have the force and effect of a final judgment. Articles 2192, 2198, provide that executors and administrators shall be allowed all reasonable expenses, necessarily incurred by them in the administration, which charges shall be acted upon by the court in like manner as other claims against the estate. Article 2142 provides that the court shall examine the final account of an executor or administrator, and the vouchers accompanying the same, and, after hearing all the exceptions and objections thereto, and the evidence in support of or against such account, shall restate the account if necessary, and audit and settle the same. *Held*, that these provisions do not give the force and effect of a final judgment to the action of the court upon expenses of administration, they being established upon *ex parte* proceedings, without notice to any one interested in the estate.—*Richardson v. Kennedy*, (Tex.) 12 S. W. 219.

9. The final account of executors contained the following items: "Dec. 16, Jake Maurer, \$43.85; Aug. 12, Malin & Colvin, \$43.90." One of the executors testified that one of them "was for board and meals furnished myself and hands while attending to business for the estate;" and that the other "was for board and feed for horses while looking after stock belonging to the estate, and also for feed for stock while attending to business for the estate." *Held*, that neither the account nor the evidence contained the specific statements of expense required by Rev. St. art. 2193, providing that such charges shall be made in writing, showing specifically each item of expense, and the date thereof.—*Richardson v. Kennedy*, (Tex.) 12 S. W. 219.

10. The final account of executors contained this item: "June 25, to O. J. Wren, stable bill, \$138.84." The evidence showed that the bill was for keeping two horses belonging to the estate, and accrued partly before and partly after the death of the testator, and was a lien on the horses; that there was an immediate necessity for the use of these horses in preserving stock belonging to the estate, and, the party in possession refusing to release them, the debt was paid to get possession of them. The estate was insolvent, and there was no evidence as to the value of the horses. *Held*, that the facts did not show the release of the property to have been so much for the benefit of the estate as to make it proper for the executor to procure such release by paying the debt, making it a debt of the second class, whereas it was one of the third or fourth class.—*Richardson v. Kennedy*, (Tex.) 12 S. W. 219.

11. An executrix who has accounted for the full amount received by the compromise of a note belonging to the estate, for less than its inventoried value is not liable for more than is thus accounted for, where it is shown that the compromise was made in good faith, and that more money was realized thereby than would have been by an attempt to enforce the payment of the note.—*Jacobs v. Jacobs*, (Mo.) 12 S. W. 457.

12. Rev. St. Mo. § 280, provides that upon every settlement the executor shall show that every claim for which disbursements have been made has been allowed by the court according to law, or shall produce such proof of the demand as would enable the claimant to recover in a suit at law. Held that, upon the production of the latter proof, credit will be allowed for the disbursement, though the voucher for such credit was not allowed as a demand against the estate.—*Jacob v. Jacobs*, (Mo.) 12 S. W. 457.

### **Actions.**

13. Where the petition in an action against an administrator on a note of his intestate fails to allege that the note was for valuable consideration, or to state the precise date of the transfer to plaintiff, and that plaintiff is still the owner, an amending these formal defects does not constitute a new cause of action entitling defendant to plead the statute of limitations prescribed in case of failure to bring suit within 90 days after a claim is rejected by an administrator.—*Tolbert v. McBride*, (Tex.) 12 S. W. 752.

14. Under Rev. St. Tex. art. 2028, providing that the memorandum of the executor or administrator, indorsed on claims presented to him, may be given in evidence, to prove the facts stated therein, without proof of the handwriting, unless the same is denied under oath, where the note sued on has a rejection indorsed with defendant's name, without being signed as administrator of the estate sued, it sufficiently proves the presentation and rejection of the note by the administrator, in the absence of evidence to show that there is another person bearing the same name as himself.—*Tolbert v. McBride*, (Tex.) 12 S. W. 752.

15. A judgment against an administrator on a note given by his intestate is not invalidated by failure to prove that he is the administrator of the person who signed the note sued on, where there is no special plea that he is not the administrator, but a mere general denial.—*Tolbert v. McBride*, (Tex.) 12 S. W. 752.

16. In an action to establish a claim against an intestate's estate, the joinder of the heirs with the administratrix as defendants is harmless error, where the judgment is against the estate alone.—*Jenkins v. Cain*, (Tex.) 12 S. W. 1114.

### **Administrator de son tort.**

17. That the widow has taken possession of the community property is not sufficient to authorize suit against her on a note of her deceased husband.—*Vela v. Guena*, (Tex.) 12 S. W. 1127.

### **Sale under order of court.**

18. Though it is error for the probate court to approve an administrator's execution of an order of sale, without learning from the record the disposition made of the case on appeal, yet, if the order of sale was affirmed, the jurisdiction to execute it, which was suspended by the appeal, was restored.—*Burgett v. Apperson*, (Ark.) 12 S. W. 559.

19. Mansf. Dig. § 184, requiring that lands offered by an administrator, and not sold for want of a bid equal to two-thirds of their appraised value, shall not be reoffered within 12 months, does not require a new order of sale, as judgment has already been entered as required by section 173, and the court need only provide anew for execution as prescribed by section 174 et seq.—*Burgett v. Apperson*, (Ark.) 12 S. W. 559.

20. Under Mansf. Dig. Ark. §§ 170, 171, providing that "lands and tenements shall be assets in the hands of every executor or administrator for the payment of the debts of the testator or intestate," and that if any person die intestate as to any lands or tenements, who "shall not have sufficient personal estate to pay his debts, it shall be the duty of the \* \* \* administrator to apply to the court of probate by petition, \* \* \* containing a true and just account of all the debts of the \* \* \* intestate which shall have come to his knowledge," where an application is made to sell lands to pay the expenses of administering the estate only, it must be made to appear that the expenses were incurred in the course of administering the estate to pay debts due personally by the

decedent, and if no debts are due by him there can be no sale of his lands.—*Mays v. Rogers*, (Ark.) 12 S. W. 579.

21. Where an heir, claiming ownership of a lot sold under order of court to pay the debts of a decedent, seeks to have the sale set aside, and the executor and the other heirs make no objection to the claimant's effort to set aside the order, save by a denial by pleading of his ownership, they are estopped to urge that the order of sale became final when the term at which it was entered expired.—*Greer v. Greer's Adm'r*, (Ky.) 12 S. W. 152.

22. Where it appears that an heir had an undivided half interest in lots sold under an order of court to pay the debts of a decedent, the heir cannot be compelled to accept one-half the proceeds of such sale in lieu of having the sale set aside, unless it be shown that the land was indivisible.—*Greer v. Greer's Adm'r*, (Ky.) 12 S. W. 152.

23. In Arkansas, a private sale of land by an administrator, upon order of the probate court, is not void when confirmed.—*Apel v. Kelsey*, (Ark.) 12 S. W. 703.

24. Where, after a sale under order of court of a decedent's land to pay his debts, an heir makes a claim of ownership to one of the lots, and, on an application to set aside the order of sale, the issue of ownership is made and tried, the objection that no summons was issued on the amended petition, which asked for the sale of that lot, is waived.—*Greer v. Greer's Adm'r*, (Ky.) 12 S. W. 152.

25. A representation by an administrator, in an application to have his bond reduced, that all the estate was distributed except the money in his hands, does not, where the facts are otherwise, deprive the court of power to order a sale of the land belonging to the estate.—*Lee v. Henderson*, (Tex.) 12 S. W. 981.

26. An order directing all of decedent's land to be divided between his widow and son, may be revoked at any time before partition is actually made and any portion of the land ordered to be sold for the payment of debts.—*Lee v. Henderson*, (Tex.) 12 S. W. 981.

27. After a decree under Act Tex. Aug. 9, 1876, (Laws 15th Leg. 117,) providing for the distribution of decedent's estates after 12 months from the issue of letters, and the retention by the executor of sufficient assets to pay all debts that have been or may yet be established, the court has no authority to order a sale of any of the property so partitioned for the payment of debts, upon the amount retained proving insufficient.—*Henderson v. Lindley*, (Tex.) 12 S. W. 979.

### **Allowance to widow and minor children.**

28. Under the Texas statute allowing to the widow and minor children of a decedent who have no property adequate to their maintenance one year's support from decedent's estate, a minor son is entitled to such allowance, though he is earning wages sufficient for his support, and is allowed to appropriate them to his own use.—*Cooper v. Pierce*, (Tex.) 12 S. W. 211.

29. Under the provision making it the duty of the court to allow to the widow and children a certain sum in lieu of exempt property not existing in kind, the value of existing exempt property turned over in kind cannot be deducted from the sum allowed.—*Cooper v. Pierce*, (Tex.) 12 S. W. 211.

### **Probate practice.**

30. An order of the probate court authorizing an administrator, on his *ex parte* petition, to relinquish land belonging to the estate of his decedent to the vendor thereof, upon the latter's surrender of the notes given for the purchase money, does not operate to divest the title of the estate and vest it in the vendor, since it is not binding upon him; and a deed made pursuant to such order after the administrator's removal cannot pass any title.—*Bender v. Bean*, (Ark.) 12 S. W. 180.

### **Foreign administrators.**

31. A judgment on a promissory note recovered against an administrator appointed in another state furnishes no right of action against an ad-



ministrator appointed in Texas, where it is not shown that assets of the former ever came into the latter's hands.—*Carrigan v. Semple*, (Tex.) 12 S. W. 178.

## EXEMPTIONS.

From taxation, see *Taxation*, 4.

### What exempt.

1. Rev. St. Tex. art. 2337, reserving to persons not constituents of a family, as exempt from attachment, all tools, apparatus, and books belonging to any trade or profession, applies to property owned and held in partnership, as well as to property owned in severalty.—*St. Louis Type Foundry v. International Live-Stock Journal Print. & Pub. Co.*, (Tex.) 12 S. W. 842.

### Who entitled to.

2. One temporarily residing in another state, who has a domicile in Arkansas, may claim his exemption from sale of personal property, allowed under Const. Ark. 1874, art. 9, § 1, to residents of the state.—*Birdsong v. Tuttle*, (Ark.) 12 S. W. 158.

## Experts.

See *Evidence*, 18, 19.

## FALSE IMPRISONMENT.

### When action lies.

Under Code Crim. Proc. Tex. tit. 5, c. 1, requiring that a person arrested without a warrant shall have an immediate hearing before the nearest magistrate, where the petition in an action for false imprisonment alleges that plaintiff was arrested without warrant, and was imprisoned without an examination, and these allegations are not contradicted, a judgment for defendants cannot be sustained.—*Newby v. Gunn*, (Tex.) 12 S. W. 67.

## FALSE PRETENSES.

### Criminal prosecution.

Where false statements by which money is obtained manifestly relate to existing facts, they will support an indictment for obtaining money under false pretenses, though the accused promised to do certain things in the future with the money.—*Commonwealth v. Moore*, (Ky.) 12 S. W. 1066.

## Fees.

Of clerk of court, see *Clerk of Court*, 1-3.

## FENCES.

### Removal.

In an action for damages for the removal of a certain fence, where it appears that defendant had originally erected the fence on plaintiff's land under the mistaken belief that he was building it on his own land, plaintiff, in order to maintain his action, must show that he did not consent to the fence being placed on his land, or that he, as well as defendant, was mistaken as to the location thereof.—*Long v. Cude*, (Tex.) 12 S. W. 837.

## FERRY.

### License.

Where one runs a free skiff within a mile of a licensed ferry, as an inducement to trade at his store, he is not liable to pay the penalty imposed by Manuf. Dig. Ark. § 3335, for running a ferry for money or other valuable thing without obtaining a license, where there was no agreement to trade at defendant's store by the parties ferried, and no money paid by them.—*Shinn v. Cotton*, (Ark.) 12 S. W. 157.

## Fires.

See *Arson*.

Liability for, see *Railroad Companies*, 47-54.

## FIXTURES.

### What are.

The poles, wires, and lamps erected in the streets, for lighting purposes, by an electric light company, are real property.—*Keating Implement & Machine Co. v. Marshall Electric Light & Power Co.*, (Tex.) 12 S. W. 489.

## Foreclosure.

Of mortgages, see *Chattel Mortgages*, 10, 11; *Mortgages*, 6-13.

## FORGERY.

### What constitutes.

1. A writing reading, "Mrs. A. C. Neal: Please send my diploma to me by this young man. W. W. Wolfe."—the diploma referred to being an instrument issued to Wolfe by an educational institution,—is the subject of forgery, under Pen. Code Tex. arts. 431, 433, declaring it forgery to make a false instrument, which if true would "have transferred or affected" property.—*Alexander v. State*, (Tex.) 12 S. W. 595.

### Indictment.

2. Under an indictment charging that defendant did willfully and feloniously make, write, sign, and forge the name of C. to a paper, etc., defendant could be convicted though he himself may not have signed the paper, if, being present, he caused it to be signed.—*Hughes v. Commonwealth*, (Ky.) 12 S. W. 269.

3. The indictment set out the instrument alleged to have been forged as follows: "Mrs. A. C. Neal: Please send my diploma to me by this young man, (meaning T. S. Alexander.) [Signed] W. W. Wolfe." Held, that the words in parentheses, inserted by the pleader by way of innuendo, do not constitute a variance, and the instrument was properly admitted in evidence.—*Alexander v. State*, (Tex.) 12 S. W. 595.

4. An indictment charging that defendant, for the purpose of defrauding the commonwealth, made, forged, uttered, and put a survey plat and certificate, purporting to have been made by him, under an order of the court, as county surveyor, for one E., which survey was in fact never made, charges the crime of forgery, since, under Gen. St. Ky. c. 109, §§ 2, 3, such writing would, if genuine, have entitled E. to a patent to the land therein described.—*Commonwealth v. Wilson*, (Ky.) 12 S. W. 264.

5. An indictment charging that defendant, for the purpose of defrauding the commonwealth, uttered, made, and forged a survey plat and certificate purporting to have been made by him under an order of the court, as county surveyor, for one G., which survey was in fact never made, but which was certified to the land-office, and a patent issued thereon to G., charges the crime of forgery.—*Commonwealth v. Howard*, (Ky.) 12 S. W. 265.

6. An indictment for forgery, charging that defendant did willfully and feloniously make, write, sign, and forge the name of C. to a paper purporting on its face to be a promissory note of said C. to S., and that said name was so signed, made, written, and forged by him without knowledge, consent, or authority of, and with intent to perpetrate a fraud on, said C. and S., and setting out the words and figures of the note, is sufficient.—*Hughes v. Commonwealth*, (Ky.) 12 S. W. 269.

### Instructions.

7. On a trial for forgery of an order for money, the evidence showed that defendant, who was an ignorant, illiterate fellow, applied to the drawee of the order for the loan of money to buy a coffin, in which to bury his mother, which was refused. The alleged drawer of the order testified that defendant applied to him for the purchase money of the coffin, and he advised him to apply to the drawee. Defendant left, and shortly afterwards presented the alleged forged order to the drawee, who paid the same. The drawer testified that he did not sign the order, nor authorize the defendant to sign his name thereto. Held, that under the ev-

idence: the court should have given in charge to the jury article 441, Pen. Code Tex., which provides that, when the person making or altering an instrument in writing acts under an authority which he has good reason to believe, and actually does believe, to be sufficient, he is not guilty of forgery, though the authority be in fact insufficient or void.—*Sweet v. State*, (Tex.) 12 S. W. 590.

### Former Jeopardy.

See *Criminal Law*, 5-7.

### FORNICATION.

#### Evidence.

On an indictment for fornication, alleging that the parties "lived together" in fornication, evidence that the male defendant was a porter on a train from M. to T.; that he lived in M., where he rented a room, kept his clothes, and had his washing done, boarded at a hotel, and paid a street tax; but that he staid in T. during the time his train laid over there, which was from 9:20 P. M. to 6 A. M. every night; and that defendants had habitual carnal intercourse with each other at T., without living together,—is not sufficient to sustain the charge.—*Thomas v. State*, (Tex.) 12 S. W. 1098.

### Franchise.

See *Railroad Companies*, 1-4.

### Fraud.

See *Decett; Fraudulent Conveyances*.

Evidence of, see *Negotiable Instruments*, 2, 8.

### FRAUDS, STATUTE OF.

Parol partition of land, see *Partition*, 1.

#### Agreements relating to land.

1. The rule that land belonging to a partnership is, under some circumstances, treated in equity as personal property, applies only to the administration and adjustment of partnership affairs, and in no way abrogates the law requiring transfers of land to be in writing.—*Carothers v. Alexander*, (Tex.) 12 S. W. 4.

2. Where conveyances, absolute on their face, are only intended as security for a debt which is also secured by chattel mortgages, but the latter are released on the parol agreement of the debtor to release his interest in the land, and it appears that the consideration for the promise is an adequate one, that the price of the land was fixed by arbitration, and that the transaction is in all respects fair, the debtor will not be allowed to invoke the statute of frauds in an action to cancel the deeds, but they will be left to carry the estate in fee as they purport to do.—*Bazemore v. Mullins*, (Ark.) 12 S. W. 474.

3. J. and K. entered into an agreement with B. and wife to establish title in the wife to certain land, and to receive half of the land for their services. They performed their part of the contract, but B. and wife died without conveying any land to them, except such conveyance as was contained in the contract. Held that the contract having been executed by J. and K., they were authorized by it to convey their interest, and such conveyance was sufficient to pass title.—*Carothers v. Alexander*, (Tex.) 12 S. W. 4.

4. J. and K., composing the partnership firm of J. & Co., owned together a one-half interest in the land. They divided their interest into twelfths, each claiming three-twelfths of the undivided whole. Soon after they took into the firm two other partners, with the verbal agreement that the new firm under the old name should own one-half of their joint interest, or three-twelfths of the whole. Subsequently a corporation was formed of all the old firm except K., who withdrew with his interest. By verbal agreement it was understood that the corporation succeeded to all the interest of the partnership. The corporation be-

coming insolvent, assigned, and the assignee sold and conveyed its interest in the land to K. and plaintiff. K. then also deeded to plaintiff. Some time after this J., as president of the corporation, deeded the corporate interest to defendants, and also deeded to them his individual interest. Held, that the corporation acquired nothing under its verbal conveyance, and conveyed nothing by its transfers; that the deed of its assignee to plaintiff was void.—*Carothers v. Alexander*, (Tex.) 12 S. W. 4.

5. An alleged extension of a lease of two sections of land did not refer to the former lease, nor depend upon it. New lessees were introduced, and only one of the sections of land was included. The terms were changed, and longer time and new privileges granted. Held, in an action by the lessor to recover the land, that it was not an extension, but a new contract, and, being within the statute of frauds, was not binding, unless signed by the lessor.—*Bullis v. Noyes*, (Tex.) 12 S. W. 397.

#### Promise to answer for debt of another.

6. Under Gen. St. Ky. c. 22, § 1, which provides that "no action shall be brought to charge any person" upon a promise to answer for the debt of another, unless the promise, "or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or by his authorized agent," a surety is not liable on a note to which his name was written by another, upon mere verbal authority.—*Simpson v. Commonwealth*, (Ky.) 12 S. W. 630.

7. An oral promise by defendants made to secure the payment of a draft which represents an undisputed debt due them from the acceptors, to pay plaintiff for work done for the drawer, is without consideration, and void as a collateral undertaking, within the statute of frauds.—*Kilgough v. Payne*, (Ark.) 12 S. W. 837.

#### Pleading

8. The statute of frauds is available as a defense in trespass to try title though not pleaded, under Rev. St. Tex. art. 4793, providing that under the plea of not guilty the defendant may give in evidence any lawful defense, except that of limitation.—*Johnson v. Flint*, (Tex.) 12 S. W. 1120.

### FRAUDULENT CONVEYANCES.

#### Who are creditors.

1. In determining whether a gift of land was void as against creditors, on the ground that, at the time of making the conveyance, the grantor did not retain sufficient property to pay his liabilities, he will not be considered to have been a debtor to a person who at that time was his judgment debtor, but who afterwards sued him, and recovered judgment for money paid under false representations.—*Sanders v. Logue*, (Tenn.) 12 S. W. 722.

#### Conveyance of exempt property.

2. A conveyance of a homestead, which is not subject to a lien of a judgment, nor to sale under execution, though made with a bad motive, is not fraudulent as to creditors.—*Bogan v. Cleveland*, (Ark.) 12 S. W. 159.

3. Where a man conveys to his wife property in which he is entitled to a homestead, and the value of the property conveyed is less than the amount he is entitled to hold under the homestead law, such conveyance, even though made with fraudulent intent, is no injury to the grantor's creditors, and will not be set aside at their instance.—*Wayne's Ex'r v. Morgan*, (Ky.) 12 S. W. 128.

#### What constitutes.

4. In an action to set aside a sale of goods as in fraud of creditors, it appeared that the debtor was insolvent; that he was indebted to defendant; and that he sold the goods to defendant for their fair price, the excess over the amount which he owed defendant being paid to a third person for distribution among certain creditors other than plaintiffs. It was found as a fact that the debtor intended to hinder payment of plaintiffs' debts, and that defendant knew or ought to have known of the in-

tent. *Held*, that the sale would be set aside as fraudulent.—*Willis v. Yates*, (Tex.) 12 S. W. 232.

5. Testimony of a grantee of an insolvent that he had never been in possession of or seen the land granted, and knew nothing of its condition, and that the grantor continued to collect the rents, in connection with evidence that grantor and grantee were related, and that the conveyance was made shortly before the grantor's failure, justifies a finding that the conveyance was fraudulent, and creditors of the grantor may hold one to whom the grantee has conveyed the land, and who still owes therefor, as garnishee.—*Bryan & Brown Shoe Co. v. Block*, (Ark.) 12 S. W. 1073.

6. In an action by the beneficiary in a trust-deed to recover the proceeds of the property, which has been sold on attachment against the grantor in the deed, an instruction that a deed of trust is void as against other creditors, if any part of the debt, to secure which it is given, is fictitious, is erroneous where the pleadings do not allege that the deed conveyed all the debtor's property.—*Blair v. Finlay*, (Tex.) 12 S. W. 983.

#### — Instructions.

7. On the question whether a transfer of property was voluntary, and therefore in fraud of creditors, a charge that "if the jury believe that P. [the debtor] transferred the property to F. without a valuable consideration, and that P. was then in debt, and did not have property besides that transferred to F. sufficient to pay his debts then outstanding, and that F. had knowledge of such debts at the time said purchase was made, and that said purchase was without consideration valuable in law, you will find for the plaintiff," is misleading.—*Pan Handle Nat. Bank v. Foster*, (Tex.) 12 S. W. 223.

#### — Consideration.

8. In an action by a creditor to set aside, for fraud, a bill of sale executed by the debtor to a relative, an instruction that, if the consideration, or any part of it, alleged to have been paid by the vendee for the goods was unreal and fictitious, the transfer would be fraudulent, was properly given.—*Brasher v. Jemison*, (Tex.) 12 S. W. 509.

9. Instructions that, if the consideration really existed to the amount alleged, and the goods were transferred upon that consideration, the transfer would be valid, unless the value of the goods was greater than that amount, and that, if any portion of the debt alleged by the vendee to constitute the consideration of the sale did not exist, or, having once existed, had been paid in whole or in part, the conveyance would be fraudulent, were properly given.—*Brasher v. Jemison*, (Tex.) 12 S. W. 509.

#### — Change of possession.

10. Invoices made by an insolvent, covering his entire stock, and attached to bills of sale which were accepted as payment by an attorney of alleged creditors, will not defeat a subsequent attachment, where it does not appear that the goods were so described or separated as to identify those sold each creditor.—*Moss v. Sanger*, (Tex.) 12 S. W. 616; *Freiberg v. Same*, *Id.* 1136; *Golden v. Same*, *Id.*

11. A finding that the goods were not so separated and described will not be disturbed, on appeal, where it appears that the goods were left as usually arranged in the store, without marks to distinguish those of each purchaser, the several purchasers frequently having goods of the same kind, and the evidence not being wholly consistent.—*Moss v. Sanger*, (Tex.) 12 S. W. 616; *Freiberg v. Same*, *Id.* 1136; *Golden v. Same*, *Id.*

#### — Knowledge of grantee.

12. Purchasing property from an insolvent debtor, and paying for it with a negotiable note, is not fraudulent as to creditors unless the purchaser had notice of the fraudulent intent of the debtor, or knew of such facts as would put a man of ordinary prudence on inquiry, and unless such inquiry would have resulted in finding out that

the transfer was fraudulent.—*Haddock v. Hill*, (Tex.) 12 S. W. 974.

#### — Rights of creditors.

13. Attaching creditors cannot contest the payment of judgments against the debtor where they have consented to an order of distribution specifying those judgments as among those to be paid.—*Bryan & Brown Shoe Co. v. Block*, (Ark.) 12 S. W. 1073.

14. Attaching creditors cannot complain of a previous sale of a portion of the debtor's property, under executions on judgments by confession, obtained by other creditors, the proceeds of such sale being prorated among the latter, on the ground that one of them held a mortgage to secure her claim on the property sold, unless the sale resulted in injury to the attaching creditors, as it lightened the burden on the attached property.—*Bryan & Brown Shoe Co. v. Block*, (Ark.) 12 S. W. 1073.

#### Rights of purchasers.

15. Where a judgment debtor conveys land to his wife and children for a recited consideration, a part of which is paid, and the vendees are in actual possession for seven years, such possession is presumed to be with the legal title, and the conveyance cannot be attacked for fraud.—*Welcker v. Staples*, (Tenn.) 12 S. W. 840.

#### — Action to set aside.

16. Where a creditors' bill is brought to subject land to the debts of a husband, an answer which, though claiming a homestead, does not allege occupation, or intent to occupy, as such, is good on demurrer, where it shows that the wife, at marriage, owned certain land which was sold on promise of her husband to convey to her other land, and that accordingly he purchased the land in question and had the same conveyed to her, without fraud, before plaintiff's execution issued.—*Head v. Strauss*, (Ky.) 12 S. W. 670.

17. On attachment of certain property as that of plaintiffs' judgment debtor, defendant claimed it under a conveyance from the debtor, which plaintiffs alleged was fraudulent. The conveyance was of a stock of goods, and accounts, made at a time when defendant knew the debtor to be insolvent, gave defendant power to carry on the business in his discretion, and was made to secure certain debts of the grantor mentioned in it, and the grantor supposed that the property conveyed was largely in excess of such debts. *Held*, that the question of fraud in such conveyance should have been submitted to the jury.—*Haas v. Kraus*, (Tex.) 12 S. W. 394.

18. But it was proper to refuse to declare such conveyance void in law.—*Haas v. Kraus*, (Tex.) 12 S. W. 394.

19. Where a petition alleges that one of the defendants bought certain real estate, and had the same conveyed to his wife for the purpose of defrauding his creditors, and the evidence shows that the land was purchased by such defendant's father, who conveyed it to the wife, the plaintiff, who had purchased the land under a judgment against such defendant, is not entitled to a decree avoiding the conveyance, though the money paid for the land may have been the proceeds of defendant's labor, and the petition concluded with an allegation that the land in fact belonged to him.—*Reed v. Bott*, (Mo.) 12 S. W. 847.

#### Evidence.

20. In an action by the beneficiary in a trust-deed to recover the proceeds of the property which had been sold by defendant on attachment against the grantor of the deed, a corporation, statements by the manager of the corporation, as to all of its debts, making no mention of the one due plaintiff, the manager's wife, to secure which the trust-deed was given, are inadmissible on the question of the existence of the debt to the wife, the statements having been made after defendant's debt accrued.—*Blair v. Finlay*, (Tex.) 12 S. W. 983.

21. Plaintiff sued defendants for money due by defendant J., and sought to compel payment by defendant B. of the value of goods sold by J. to him,

alleging that the sale was not consummated, and that it was fraudulent as to J.'s creditors. Defendants were partners, and owed debts; J. being insolvent, while B. was solvent. They dissolved, J. taking the assets and assuming the debts, giving his note to B. for his interest. Afterwards J. borrowed money of plaintiff, and, about three weeks after the dissolution, J. sold, or feigned to sell, the goods to B. again, in payment of the note, B. agreeing to take the goods at their cost, and, after paying his note and the unpaid firm debts, to pay J. the residue of the value of the goods, and it was these transactions that were attacked as fraudulent; plaintiff also claiming to have levied an attachment on the goods before they were delivered to B. Plaintiff offered to prove that the money loaned by him to J. was advanced to pay firm debts, which J. had agreed to pay, and was used for that purpose, and that B. had never refunded it. *Held*, that the evidence was admissible, as bearing on the *bona fides* of the sale by J. to B., and tending to support plaintiff's allegation that the transaction was intended to allow B. to retain the goods, and to relieve him from liability for the firm debts.—*Bradford v. Taylor*, (Tex.) 12 S. W. 20.

22. The testimony of J., given on a former trial, in which he stated that he had told a third person, in B.'s absence, two days before the sale to the latter, that he would have to sell out or turn the property over to B., and detailed the terms of the contract with the latter, and what was done pursuant thereto, with reference to invoicing and executing a bill of sale, is inadmissible; as such testimony was only the declaration of a vendor after parting with his property, and could not bind B.—*Bradford v. Taylor*, (Tex.) 12 S. W. 20.

23. Even as to J. himself, the testimony is irrelevant, as his liability for the debt was not questioned.—*Bradford v. Taylor*, (Tex.) 12 S. W. 20.

24. After admitting such evidence, defendants were entitled to introduce the balance of J.'s evidence given on the former trial relative to the same subject.—*Bradford v. Taylor*, (Tex.) 12 S. W. 20.

## GAMING.

### Criminal prosecution—Gaming tables.

1. The evidence showed that defendants had paid the tax and secured license to keep pool and billiard tables, and had posted notices forbidding betting; that a game of pool was played by several persons, with the understanding among themselves, to which defendants were not parties, that the loser should pay to the proprietors the sum of five cents for each cue used in the game. Defendants did not in any way participate in the game. *Held* insufficient to support a conviction for exhibiting a gaming table.—*Smith v. State*, (Tex.) 12 S. W. 412.

2. Defendants were entitled to an instruction that if they owned a pool table on which games were sometimes played for the table fees, but did not keep or exhibit the table for gaming purposes, and did not know, and could not by reasonable diligence have known, that the table was used for gaming purposes, they should be acquitted.—*Smith v. State*, (Tex.) 12 S. W. 412.

### Gaming-house.

3. An instruction, on a trial for playing cards at a gaming-house, defining a "gaming-house" as "a house or part of a house where gaming is carried on as a business," is correct.—*Anderson v. State*, (Tex.) 12 S. W. 868; *Parks v. Same*, *Id.* 869.

4. Evidence that a person who played with defendant was a professional gambler is incompetent, in a trial for playing cards at a gaming-house, where it does not appear that he was interested in keeping the house, or that the object of the evidence was to show the character of the house.—*Anderson v. State*, (Tex.) 12 S. W. 868; *Parks v. Same*, *Id.* 869.

5. A conviction for playing cards at a gaming-house is not warranted by evidence that at intervals several games had been played at the house in question.—*Anderson v. State*, (Tex.) 12 S. W. 868; *Parks v. Same*, *Id.* 869.

### Criminal prosecution—Punishment.

6. Under Gen. St. Ky. c. 47, art. 1, § 6, articles seized by an officer, and found by a jury in a summary proceeding to have been used for gaming purposes, may be condemned and destroyed.—*Debo v. Commonwealth*, (Ky.) 12 S. W. 266.

7. Act March 25, 1886, § 692, while it amends Gen. St. c. 47, art. 1, relating to gaming, does not, either expressly or by implication, repeal or modify the provision of section 6 as to such forfeiture and condemnation.—*Debo v. Commonwealth*, (Ky.) 12 S. W. 266.

## GARNISHMENT.

### Who subject to.

1. In Texas, a debtor who gives his own negotiable note in payment of a debt is not chargeable before its maturity under garnishment, though the note was given with knowledge of the purpose of the payee to place the fund beyond the reach of his creditors.—*Willis v. Heath*, (Tex.) 12 S. W. 971.

### What subject to.

2. Stock held as collateral security is property and effects subject to garnishment under Rev. St. Tex. art. 203, which provides that where the garnishee is an incorporated company, and the defendant is, or was when the writ of garnishment was served, the owner of any shares of stock in such company, or any interest therein, the court shall render a decree ordering the sale, under execution in favor of the plaintiff against the defendant, of such shares.—*Smith v. Traders' Nat. Bank*, (Tex.) 12 S. W. 118.

### Exemption of wages.

3. Under Mansf. Dig. Ark. § 3244, in relation to the exemption of laborers' wages from seizure by garnishment, which requires of defendant a sworn statement that the wages claimed as exempt are less than the value of the personal property exempt to him under the constitution, as only residents are entitled to the privilege, the sworn statement of defendant in garnishment proceedings is defective which fails to state that he is a resident of the state.—*Porter v. Navin*, (Ark.) 12 S. W. 705.

### Procedure.

4. An order to pay money made by the court on a garnishee after his failure to appear in the garnishment proceeding is not a judgment against him, so as to preclude him from setting up any defense to a suit by the attaching creditor for the garnished debt that he might have made before garnishment.—*Playan v. Berry*, (Ark.) 12 S. W. 241.

5. Plaintiff, in a suit to restrain a sale under a judgment against him as garnishee, alleged that he requested one of the judgment creditors to write his answer to the garnishee summons, as he would be absent from the term of court at which it was returnable, but he refused to do so; that he then employed a justice of the peace, stating all the facts, under which a sufficient answer could have been made, who drew an insufficient answer; that judgment was rendered against him during his absence from court, of which he had no notice for about five months. *Held*, that the failure to make a good defense as shown by the petition was due to plaintiff's negligence, or that of his agents, and could not be made a ground for injunction.—*Melton v. Lewis*, (Tex.) 12 S. W. 93.

6. Where third persons are not interested, the absence of citation to a garnishee, and return thereon, is not fatal to the judgment, as the appearance may have been voluntary.—*Selman v. Orr*, (Tex.) 12 S. W. 697.

7. Judgment by default is proper against a garnishee who, instead of answering questions propounded in the commission, makes a general denial of indebtedness; and it is not necessary, in such case, that the officer should certify failure to answer as required by Rev. St. Tex. arts. 203, 204.—*Selman v. Orr*, (Tex.) 12 S. W. 697.

8. On discharging the garnishee on his answer, it is proper to allow an attorney's fee to the garnishee for preparing the answer.—*Willis v. Heath*, (Tex.) 12 S. W. 971.

**Pleading.**

9. In an action against the widow and daughter of decedent, to garnish a debt he owed B., and to enforce a lien on land for the security of the debt, the petition alleged that B. sold the decedent certain land therein described, and took his note for the price; that decedent died the owner of the land, and still owing said note, which was a purchase-price note; and that a lien for the payment of the note was upon the land. *Held*, that these allegations were sufficient.—*Cockrill v. Mize*, (Ky.) 12 S. W. 1040.

10. An answer by a garnishee that he was not indebted to either of the debtors, and did not know any one who was, is insufficient, and a judgment against the garnishee is properly rendered.—*Melton v. Lewis*, (Tex.) 12 S. W. 93.

**GIFTS.****Advancement.**

In an action by a son against his father to recover possession of certain land it appeared that the father had purchased the land, and had it conveyed to the son, then an infant, declaring at the time that he intended it as a present to the son. The father kept possession of the land for a time, exceeding the period prescribed as a bar by the statute of limitations, at one time renting it out, and at another cultivating it together with the son, alleging as his reason for not giving possession of the land to his son that the other children might object. It also appeared that the father had declared in the presence of the son, and without objection from him, that the son held the land as trustee in order to aid him in defending the title, and that the son had paid rent for the land. *Held*, that the evidence did not overcome the presumption that the land was intended as an advancement to the son.—*White v. White*, (Ark.) 12 S. W. 201.

**GUARDIAN AND WARD.**

Appointment of administrator for deceased ward, see *Executors and Administrators*, 1.  
Seduction of ward, see *Seduction*, 2-4.

**Goods furnished to wards.**

1. The judgment of a probate court against a guardian for goods furnished to the mother of his wards for their benefit is void, and will be set aside on certiorari.—*Cresswell v. Mathews*, (Ark.) 12 S. W. 153.

**Sale of ward's realty.**

2. After the death of a minor under guardianship, the county court cannot order a sale of property of the estate to pay the debts, and has only jurisdiction, in the matter of guardianship, to receive and act on the guardian's final account, and order the estate turned over to the person entitled to receive it.—*Alford v. Halbert*, (Tex.) 12 S. W. 75.

**HABEAS CORPUS.****Right of appeal.**

1. Act Tenn. c. 157, entitled "An act giving to parties in habeas corpus cases the right of appeal to the supreme court," gives to either the relator or defendant the right of appeal in any habeas corpus case, but contains the following proviso: "Provided, this act shall not apply to parties held in custody in criminal cases." *Held*, that the proviso applies only to persons held in custody in a pending case, and that one in custody on a judgment of conviction is not held in custody in a criminal case, within the meaning of the proviso.—*In re Vanvaver*, (Tenn.) 12 S. W. 786.

**Jurisdiction.**

2. Code Crim. Proc. Tex. art. 137, providing that after indictment found a writ of habeas corpus must be made returnable in the county where the offense has been committed, does not prevent a writ issued from one district court of a county which is divided into two districts from being returned to the judge of the other district, when the

judge of the former has requested the latter to hear the case for him, and has absented himself from the district.—*In re Angus*, (Tex.) 12 S. W. 1099.

**Hearsay Evidence.**

See *Evidence*, 5, 6.

**HIGHWAYS.****Establishment of procedure.**

1. Where the report of road-viewers gives the names of all the owners of the land over which the proposed road runs, the fact that the name of a tenant under the control of an owner, or cropping on shares, does not appear, will not vitiate the proceeding.—*Taliaferro v. Roach*, (Ky.) 12 S. W. 1039.

**Repairs—Notice.**

2. Under Mansf. Dig. Ark. § 5905, requiring notice to work the road to be given three days before the time appointed, notice on Saturday to work on the following Tuesday, Wednesday, and Thursday is bad as to Tuesday, but good as to the other days.—*Moore v. State*, (Ark.) 12 S. W. 562.

3. That a conversation regarding the question whether defendant was subject to road duty, had between him and the road overseer, may constitute notice, it must appear to have occurred more than three days before the time fixed for the work.—*Lowery v. State*, (Ark.) 12 S. W. 563.

4. Under Mansf. Dig. Ark. § 5905, providing that the warning required to be given by the road overseer to every person in the district of his appointment to work on the public highways "may be given personally, or by leaving a written notice at the usual place of abode of the person warned, in some conspicuous place, \* \* \* at least three days previous to the time appointed to work by such overseer," service cannot be had by leaving the notice with the wife of the person to be warned.—*Lowery v. State*, (Ark.) 12 S. W. 563.

**Compensation.**

5. In an action to recover on a contract with a county to keep its roads in repair, it appeared that the contract was let under a law providing that the contractor should report his work for inspection to the surveyor of each road-district, and, when the latter certified to the county judge that the work was properly performed, the latter was authorized to draw a warrant on the treasurer for its payment. *Held*, that adverse reports by the surveyor constituted no defense to the action, which was the only remedy left to the contractor when the differences arose with the surveyors.—*Campbell County v. Youtsey*, (Ky.) 12 S. W. 305.

**HOMESTEAD.****In what claimed.**

1. A vendor held the land under a verbal contract for its purchase from W., and made a small payment thereon, but, being unable to pay the balance, contracted to convey the land to the vendee as soon as he should receive a deed from W. The vendee paid him enough money to enable him to pay W. the amount due on the land, W. then giving the vendor a deed, and the latter at the same time deeded the land to the vendee. *Held*, that the vendee, by furnishing the money to be paid to W., became subrogated to whatever rights W. had in the land, and that no homestead right could be set up by the vendor's wife to defeat his title.—*Roy v. Clark*, (Tex.) 12 S. W. 845.

2. Where a deed to decedent conveyed an undivided interest in land, the widow and children can hold it to that extent under an order of the probate court setting apart a homestead to them, though they have no title to the remainder, and their right is not disturbed by a subsequent administrator's sale of the land under order of court, unless such order was obtained in a direct proceeding to vacate the order designating the homestead.—*Fossett v. McMahan*, (Tex.) 12 S. W. 824.

3. Defendant owned two adjoining store buildings, connected by archways through the partition

wall. The east building was occupied by him as a law-office, and also for his court-room, as mayor of the town. A portion of it was used for a post-office, defendant acting sometimes as deputy postmaster. The west building was rented to defendant's brother for a store, he paying defendant for the use of the building, and for such services as defendant might render him. Defendant was also a notary public, and had a desk in the back part of the west room, where he kept the papers pertaining to that branch of his business. *Held*, that defendant could not, by dividing his business between the two buildings, hold them both as a business homestead, but his exemption should be held to be limited to the east building.—*Pfeiffer v. Mo-Natt*, (Tex.) 12 S. W. 821.

4. Under the Tennessee homestead law, (Const. art. 11, § 11, Mill. & V. Code, § 2935,) exempting to each head of a family land of the value of \$1,000, the right attaches upon the marriage of a debtor to his lands theretofore acquired, as against his debts which were not liens on the land. Such construction does not impair the obligation of any contract.—*Dye v. Cook*, (Tenn.) 12 S. W. 631.

5. Defendant's undivided interest in his father's estate and the right of redemption were sold on execution. Shortly afterwards, by partition of such estate, a house and lot were allotted to him, into which he moved with his family within four months after his father's death, and ten days after partition. *Held*, that there was no unreasonable delay in asserting his claim, and he was entitled to claim the property as his homestead, having no other, as he was not required to notify the purchaser of the undivided interest that he would claim a homestead.—*Miller v. Bennett*, (Ky.) 12 S. W. 194.

#### Protection of homestead.

6. Land in the actual occupancy of plaintiff, as his homestead, was sold under an attachment based upon no property found. It was alleged that plaintiff was permitting a third party to hold the title to the land, to prevent its being subjected to the payment of plaintiff's debts. *Held* that, the land being plaintiff's homestead, it was his duty to have made that defense, and that, having failed to do so, he could not, after confirmation of the sale, maintain an action to have his homestead set apart to him.—*Kirk v. Cassidy*, (Ky.) 12 S. W. 1089.

#### Rights of wife and children.

7. Gen. St. Ky. c. 38, art. 18, § 18, providing that the homestead "exemption in favor of an execution debtor, or one against whom judgment has been rendered, shall continue after his death for the benefit of his widow and children," extends to claims of creditors proved in an action for the settlement of estates of deceased persons under provisions of the Civil Code.—*Myers' Guardian v. Myers' Adm'r*, (Ky.) 12 S. W. 938.

8. Under Gen. St. Ky. c. 38, art. 18, § 14, providing that "the homestead shall be for the use of the widow so long as she occupies the same, and the unmarried infant children of the husband shall be entitled to a joint occupancy with her until the youngest unmarried child arrives at full age, but the termination of the widow's occupancy shall not affect the rights of the children," the failure of the widow of the owner of a homestead to take under his will devising her his real estate cannot prejudice his infant children.—*Myers' Guardian v. Myers' Adm'r*, (Ky.) 12 S. W. 938.

9. The owner of a homestead not exceeding \$1,000 in value has power under the Kentucky statute to pass title to the property to his widow and children by will.—*Myers' Guardian v. Myers' Adm'r*, (Ky.) 12 S. W. 938.

10. Where a testator gives to his wife all his property, as long as she remains his widow, and the property consists only of a homestead and such personal property as would pass to her on his death, under the statute of distributions, she takes under the law, though she acts under the will, a formal renunciation being unnecessary in such case.—*Burgess v. Bowles*, (Mo.) 12 S. W. 841.

11. Defendant exchanged his homestead with B. for 1,600 acres of land, with the understanding that

defendant would divide the lands conveyed to him among his children, and would then cancel B.'s deed to him, and have B. make deeds to the children. Defendant, after making the division among his children, canceled B.'s deed to him, and B. conveyed 1,440 acres of the land to the children, they paying nothing therefor, and 160 acres to defendant. *Held*, that no title vested in the children, and, the 160 acres being all that was allowed defendant as a homestead under the constitution and laws of Arkansas, the portion conveyed to them was liable for defendant's debts.—*Campbell v. Jones*, (Ark.) 12 S. W. 1016.

#### Conveyances and mortgages.

12. Rev. St. Tex. art. 2824, provides that an officer who has collected money on execution shall pay the same over to the party entitled thereto at the earliest convenience. Article 2825 provides a penalty for failure to do so. A sheriff had collected money due a husband and wife on an execution for the sale of land under a vendor's lien, and refused to pay it over, alleging that he had applied it in payment of an execution against the husband. The land sold under the vendor's lien was the homestead of the parties, the proceeds of which they had intended to apply to the purchase of another homestead. *Held*, that the sale of the homestead, in the absence of a law authorizing an exchange or transfer of homestead, was a voluntary conversion of the exempt property into money, which at once became subject to execution.—*Mann v. Kelsey*, (Tex.) 12 S. W. 43.

13. Where a wife joins with her husband in the execution of a deed of trust of their homestead, which is foreclosed, and sale made thereunder, a quitclaim deed of the property, executed by her after her husband's death, will not pass any title thereto.—*Grimes v. Portman*, (Mo.) 12 S. W. 792.

14. Under 1 Rev. St. Mo. 1879, § 2639, the owner of a homestead and his wife may lawfully mortgage the same, and the mortgage would be valid as against them, and all parties claiming under them.—*Grimes v. Portman*, (Mo.) 12 S. W. 792.

15. A debtor conveyed his land to one C. to delay his creditors. Under a power of attorney from C., he afterwards conveyed the land to one of his creditors, taking an agreement for a reconveyance to C. The debtor remained in possession of the land until his death. *Held* that, as the title of the land always remained in C., the deed to the creditor was not a mortgage of the debtor's homestead, and void under the constitution.—*Gay v. Halton*, 12 S. W. 847.

16. In Texas the homestead of the husband and wife may be alienated under a power of attorney duly executed.—*Jones v. Robbins*, (Tex.) 12 S. W. 824.

17. A bond executed by a husband to convey at a future time the homestead of himself and wife is not void; and, should his wife refuse to join him in such conveyance, the vendee may recover for such breach of the condition of the bond the amount he has in good faith expended under the contract of sale.—*Eberling v. Deutscher Verein*, (Tex.) 12 S. W. 205.

18. Const. Tex. art. 16, § 50, protects the homestead from forced sale for the payment of all debts, and provides: "Nor shall the owner, if a married man, sell the homestead without the consent of the wife. \* \* \* No mortgage, trust-deed, or other lien on the homestead shall ever be valid," whether "created by the husband alone, or together with his wife." *Held*, that this does not render void a deed of trust executed by an unmarried man on his homestead.—*Lacy v. Rollins*, (Tex.) 12 S. W. 314.

19. The sale under mortgage foreclosure of a homestead, the wife not having waived her homestead right, cannot, for that reason, be contested after her death by one of her heirs, as her homestead interest ceased at her death.—*Thompson v. Jones*, (Tex.) 12 S. W. 77.

#### Abandonment.

20. When a husband and wife leave their homestead, and go to another state, for the declared purpose of a mere visit, rendered necessary because of ill health of the husband, and during their sojourn in such state repeatedly declare their inten-

tion to return, even though their absence extends over several years, it is not such an absence as would constitute an abandonment of the homestead.—*Jones v. Robbins*, (Tex.) 12 S. W. 824.

21. Decedent removed from his town house to a farm about seven miles distant, in which his wife had an interest, and died there about a year afterwards. Several witnesses testified that decedent stated before, during, and after his removal that it was temporary, and that he intended to return to his town house. The widow testified that decedent would shortly have moved back if he had not died, and that some of his personalty was never moved from the town house. *Held*, that there was no abandonment by decedent of the homestead in his town house.—*Black v. Black's Adm'r*, (Ky.) 12 S. W. 147.

22. In trespass to try title to land formerly occupied by defendants, husband and wife, as their homestead, a request to instruct that if the husband, after leaving the state, and prior to the sale of the homestead on execution, formed an intention to, and did, become a citizen of another state, his homestead rights are lost, and that if his wife voluntarily accompanied and remained with him, then her homestead rights are also lost, and plaintiff is entitled to a verdict; that a party cannot be a citizen of more than one state at the same time; and that if defendants were citizens of another state at the time of the execution sale, they cannot claim homestead rights in this state,—was properly refused, as it did not inform the jury what facts would make the husband a citizen of another state so as to preclude his retaining said homestead.—*Graves v. Campbell*, (Tex.) 12 S. W. 238.

23. In trespass to try title to land formerly occupied by defendants as their homestead, testimony that it had been defendants' intention to return and again occupy the homestead is merely the expression of witnesses' opinions, and although the facts on which such opinions are based are fully stated, their admission in evidence is prejudicial error.—*Graves v. Campbell*, (Tex.) 12 S. W. 238.

24. Where, in trespass to try title to land, there is no controversy that such land was at one time the homestead of defendant and family, and the preponderance of evidence shows that defendant was absent from the state under treatment for a dangerous disease, but intended to return as soon as his condition would permit, plaintiff is not prejudiced by an instruction that if defendant and his wife intended to return and occupy said homestead, and that if neither has acquired any other homestead since their departure, then such property was not subject to forced sale, and defendant is entitled to a verdict.—*Graves v. Campbell*, (Tex.) 12 S. W. 238.

25. Defendant left his homestead for several years, doing business in other places part of the time. The homestead property was rented from month to month, and was at one time vacated by the tenant; and defendant then intended to return to it, but was prevented by his business. There was evidence that defendant's residence elsewhere was temporary, and that he intended to return. He acquired no new home elsewhere. *Held*, that a finding that he had not abandoned his homestead was warranted.—*Duffey v. Willis*, (Mo.) 12 S. W. 520.

26. Plaintiff was the owner of land in a city, which he claimed as a homestead. He moved from his own house in the middle of the land to a house which he built on the west end of it, and rented the old house as a boarding-house. He afterwards built a third house on the east end of the lot, which he rented for the purposes of income. The property had never been subdivided by survey, but fences had been built between the houses. Plaintiff reserved no rights in the rented property, but used a cistern on the line of the fence between the middle and the eastern houses, crossing the middle lot for that purpose. *Held*, that plaintiff still had a homestead in the middle lot, but the east lot, having been abandoned as a homestead, was no longer exempt from execution.—*Langston v. Maxey*, (Tex.) 12 S. W. 27.

## HOMICIDE.

### Murder.

1. Where it appears that accused and other lawless men, inflamed or drunken with whisky, began an indiscriminate firing, and that deceased fell from his horse when accused fired, a verdict of guilty of murder, under favorable instructions, will not be disturbed.—*Guinn v. Commonwealth*, (Ky.) 12 S. W. 672.

2. Where there is evidence that deceased applied a vulgar epithet to defendant, and made a contemptuous remark about him, an instruction that if "defendant voluntarily engaged in a combat with deceased, with deadly weapons, knowing that it might, or probably would, produce the death of deceased or himself, \* \* \* the killing will be murder in one of its degrees," is insufficient, as it does not state that if defendant voluntarily engaged in the combat, under the influence of sudden passion arising from adequate cause, the killing would not be murder, but manslaughter.—*Gonzales v. State*, (Tex.) 12 S. W. 733.

3. Defendant's brother was stabbed by one of three brothers, with whose murder defendant was charged. While the deceased persons were being conducted to the county-seat to be tried, they were taken from the custody of the officers in charge by defendant, who was an officer, and others, on the ground that they should be tried where the offense was committed. The deceased persons were guarded until information was received of the death of defendant's brother, when they were shot by those in charge of them. Defendant, at the time of the shooting, was two or three hundred yards distant from the place of the crime. Afterwards, defendant administered an oath to the participants in the shooting never to reveal the acts of any one connected with the affair. *Held*, that defendant was sufficiently connected with the crime to be convicted as principal, and there was sufficient evidence of criminal intent.—*Hatfield v. Commonwealth*, (Ky.) 12 S. W. 809.

4. Where there is evidence that the quarrel between deceased and defendant preceding the killing began by defendant's insinuation that deceased had stolen some cattle, it is improper to instruct that "if, by his own wrongful act, defendant brought about the necessity of taking the life of deceased, to prevent being killed himself, such killing will be murder in one of its degrees." If the wrongful act was unaccompanied by any intent on defendant's part to kill or inflict serious bodily injury on deceased, or to commit any felony, such wrongful act would not deprive defendant entirely of the right of self-defense, and would not necessarily render the homicide murder.—*Gonzales v. State*, (Tex.) 12 S. W. 733.

5. Defendant confessed that he, together with an accomplice, went to a railroad depot, at night, for shelter, and found deceased the only person there; that after a while his accomplice said that he had seen deceased have some money, and suggested that they hold him up, and secure it; that defendant objected, but finally acceded, and they went out on the platform, and consulted how to execute their design; that his accomplice finally got a coupling-pin, and told defendant merely to stun deceased with it, while he got the money; that defendant at first refused, but, upon being accused of cowardice, and being in a frenzy, struck deceased two blows on the head. Similar confessions were made to others, and there was evidence to corroborate the same, and to identify defendant, and establish his proximity to the scene of the murder on the night in question. *Held*, that a conviction of murder in the first degree was sustained.—*State v. Meyers*, (Mo.) 12 S. W. 516.

6. On a trial for murder a woman testified that a few hours before the murder she saw defendant and a companion on the street; that they asked deceased to lend them money; that on his refusal defendant said, "I will lay your body down and have all your money by morning;" that defendant afterwards was in a retired place, apparently trying to open a knife, and asked her where deceased had gone; and that two hours later she saw deceased, lying face down, near by. She also iden-



tified a knife in evidence as one which she had borrowed of defendant before the killing. A witness testified that the knife in evidence belonged to him; that defendant had borrowed it, in the presence of four others; and that it had been returned to his pocket while he was abed. Four witnesses testified that they were present at the time defendant was said to have borrowed the knife, and that he did not then borrow it. A physician testified that he examined the knife, and found dried blood on it. *Held*, that the evidence was insufficient to convict of murder.—*Pullen v. State*, (Tex.) 12 S. W. 502.

### Manslaughter.

7. It was proper to modify an instruction that if defendant, without malice, in sudden heat and passion, but not in necessary self-defense, killed deceased, he was guilty of voluntary manslaughter, "but mere words, however opprobrious or insulting, are not sufficient provocation to reduce a killing from murder to manslaughter," by striking out the words quoted.—*Commonwealth v. Hourigan*, (Ky.) 12 S. W. 550.

8. Any condition or circumstance which is capable of creating sudden passion sufficient to render the mind of a person of ordinary temper incapable of cool reflection may constitute "adequate cause" for an assault; and, when the evidence shows a number of conditions or circumstances, tending either singly or collectively to constitute what a jury might consider adequate cause, the court's charge should leave the jury at liberty to consider them all in determining the question of adequate cause.—*Hawthorne v. State*, (Tex.) 12 S. W. 608.

9. Manslaughter being predicated upon "adequate cause," and it being impossible for facts unknown to defendant to constitute any part of "adequate cause," uncommunicated threats can have no weight in establishing manslaughter, or in mitigating its punishment.—*Levy v. State*, (Tex.) 12 S. W. 598.

10. It appeared on a trial for murder that on the day previous to the homicide the deceased had twice assaulted, beat, and abused the defendant, and defendant testified that a moment before the killing the deceased again insulted and threatened him with violence. *Held*, that this evidence warranted an instruction upon the issue of manslaughter.—*Lienpo v. State*, (Tex.) 12 S. W. 588.

11. Where the entire evidence shows a previously formed purpose to kill deceased, and there is no evidence that it was the result of a sudden passion, no instruction as to manslaughter is necessary.—*O'Brien v. Commonwealth*, (Ky.) 12 S. W. 471.

12. On an indictment for involuntary manslaughter, the defendant should be convicted if he had reasonable grounds to believe, and did believe, that there was no danger in handling the gun as he did, and he did so with no intent to harm, but the killing, to the exclusion of a reasonable doubt, resulted from the careless use of the gun; but should be acquitted if the killing was accidental, and without carelessness.—*Commonwealth v. Matthews*, (Ky.) 12 S. W. 838.

13. It being apparent from the evidence that, if manslaughter entered into the case at all, it rested solely, for adequate cause, upon insulting language used by deceased about defendant's female relative, the court, in its charge upon manslaughter, properly restricted "adequate cause" to such insulting language used by deceased.—*Levy v. State*, (Tex.) 12 S. W. 596.

14. On trial for murder, where there is no evidence tending to reduce the offense charged to involuntary manslaughter, an instruction relative to involuntary manslaughter is properly refused.—*McClelland v. Commonwealth*, (Ky.) 12 S. W. 148.

15. On a trial for murder it appeared that defendant and his brother were within the inclosure surrounding the dinner tables at a barbecue under the direction of the deceased; that the brother was cursing and using indecent language; that deceased several times asked him to be quiet, and in a quiet and kindly manner led him outside the inclosure: that defendant at the same time drew

his pistol, and told deceased that if he took his brother out he would kill him; that deceased immediately returned to the table opposite defendant, stretched out his arms toward the latter, and, calling him an offensive name, with an oath told him in effect to shoot if he was ready; and that defendant then shot deceased. There was testimony that deceased after he was shot fired at defendant, and also wounded him with a knife. There existed a grudge between the parties; and during the evening, after the shooting, defendant remarked repeatedly that he had done what he came to the barbecue to do, did not regret it, and, if it were to be done over, would do it again. *Held*, that a verdict of manslaughter was authorized.—*Colley v. Commonwealth*, (Ky.) 12 S. W. 182.

16. Evidence that defendant asked deceased if he had used certain insulting language concerning himself and family, and that deceased repeated the insulting language, which was such as was calculated to inflame the mind to such a degree of passion as to render it incapable of cool reflection, and that defendant, under the immediate influence of the sudden passion, slew him, raises the issue of manslaughter, and demands an instruction presenting the law on that subject.—*Richardson v. State*, (Tex.) 12 S. W. 870.

17. On a trial for murder, defendant testified that he and deceased, his partner, got into an altercation, and called each other liars; that deceased advanced on him, and, just as he stooped to pass under a beam to where defendant was, defendant seized a stick, and struck him over the head, knocking him down. Seeing that he had struck deceased much harder than he intended, he went to his aid and called for help. He testified that he did not intend to strike so hard, and did not intend to kill him. Other witnesses testified that immediately after the blow defendant said that he did not intend to strike so hard. *Held*, that the evidence presented the issue of manslaughter, and that instructions should have been given on that grade of homicide.—*Boyd v. State*, (Tex.) 12 S. W. 737.

18. In view of the evidence as to whether the blow was inflicted with intent to kill, the court should have charged the law as declared in Pen. Code Tex. art. 612, which provides that the instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending; if the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless, from the manner in which it was used, such intention evidently appears; and article 614, which provides that where a homicide occurs under the influence of sudden passion, but by the use of means not in their nature calculated to produce death, the person killing is not deemed guilty of the homicide, unless it appear that there was an intention to kill, but the party from whose act the death resulted may be prosecuted for and convicted of any grade of assault and battery.—*Boyd v. State*, (Tex.) 12 S. W. 737.

### Justifiable homicide.

19. An instruction that to justify the killing it must have taken place after some act by deceased showing "evidently" an intention to commit murder or mayhem is good, as the word "evidently" is used in Pen. Code Tex. art. 570, subd. 2, defining justifiable homicide.—*Gonzales v. State*, (Tex.) 12 S. W. 783.

20. An instruction that defendant was not bound to retreat to avoid the necessity of killing his assailant should be made applicable to all phases of the law of self-defense, and it is improper to restrict it to the law of threats.—*Gonzales v. State*, (Tex.) 12 S. W. 783.

21. A charge that an officer has no right to use a deadly weapon upon an arrested party in his custody, except in the necessary defense of his own person from serious bodily injury about to be inflicted upon him by such prisoner, is not obnoxious to the objection that it based the right of self-defense upon the actual existence of danger, and not upon its reasonable appearance.—*Giebel v. State*, (Tex.) 12 S. W. 591.

22. Danger to defendant from deceased, incurred by defendant's own wrongful act, and rendered excusable on the part of deceased thereby, is no excuse for killing deceased. — *Commonwealth v. Hourigan*, (Ky.) 12 S. W. 550.

23. An instruction that "previous threats made by the deceased against defendant will not of themselves excuse the defendant in killing the deceased, but there must be some overt act or words, at the time, clearly indicative of a present purpose to do the threatened injury," was proper, especially as the defense was self-defense, and the theory of the prosecution was that defendants were lying in wait. — *Barnard v. State*, (Tenn.) 12 S. W. 431.

24. The clause, "unless you shall believe from the evidence beyond a reasonable doubt that the defendant voluntarily sought and brought on the difficulty for the purpose of inflicting loss of life or great bodily harm on deceased," in an instruction authorizing an acquittal of defendant on the ground of self-defense, is erroneous when there is no evidence of a hostile intent or purpose to bring on a conflict on the part of the accused. — *Hamlin v. Commonwealth*, (Ky.) 12 S. W. 146.

25. There being evidence that defendant provoked the quarrel in which deceased was killed, the court instructed that to one who brings on an affray, intending to wreak his malice, the plea of self-defense is not available, though his own life is imperiled; and, if defendant provoked a contest, "with the apparent intention of killing, or doing some serious bodily injury," he is guilty of murder, though he may have done the killing suddenly, without deliberation, and to save his own life; but if the slayer provoked the contest "without any intention to kill or inflict serious bodily injury," and did the killing suddenly, without deliberation, it would be manslaughter. *Held*, that the instruction was correct, and it was proper for the court to underscore the quoted portion, so as to direct the jury's attention specially to the intent with which defendant provoked the difficulty, and the law as controlled by such intent. — *Jackson v. State*, (Tex.) 12 S. W. 501.

26. An instruction that, to constitute a justification of the killing by reason of threats previously made, the deceased, at the time of the homicide, must have manifested an intent then and there, by words or gesture, to execute the threat so made, is insufficient. If the deceased did some act which was reasonably calculated to produce a belief in defendant's mind that the deceased was about to execute the threat, defendant would be justified in acting on such appearance of danger. — *Gonzalez v. State*, (Tex.) 12 S. W. 733.

27. The court charged: "Self-defense \* \* \* rests upon necessity, actual or apparent. A common assault, not actually or apparently endangering life or great bodily harm, will not excuse a homicide. \* \* \* But \* \* \* the danger \* \* \* must be real, or honestly believed to be so, and on reasonable grounds. The danger must be apparent and imminent and existing, \* \* \* or honestly believed to be so, and on reasonable grounds. The belief or apprehension of danger must be founded on sufficient circumstances to authorize the opinion that the purpose to kill or do great bodily harm then exists." *Held*, that the jury could not have been led to believe that self-defense could be established only by showing the actual existence of real danger of death or great bodily harm, though they were also charged that defendants were not guilty if the killing was done "under a well-founded belief and apprehension" of death or great bodily harm, but were guilty if the killing was done "from any other feeling than a well-grounded fear or apprehension" of such danger, especially where it is manifest that, if defendants had any such apprehension at all, it was "well founded." — *Barnard v. State*, (Tenn.) 12 S. W. 431.

28. On a trial for murder, it appeared that the five defendants were relatives, and that some of them and deceased had been on unfriendly terms for weeks. Deceased was shot from his horse as he was passing along a road, along which it was his known habit to pass at that time in the week. Defendants knew of this custom, and one defend-

ant inquired about it a few days before, and was informed that such was the fact. Defendants had passed the day on hills from which parts of this road were in easy view, without dinner, and in winter, within a half mile of their uncle's house, where they testified they were going. A witness, who was riding with deceased, testified that he heard a gun-shot, saw deceased falling from his horse, and then looked ahead, and saw smoke by a log, and defendant J. emerging from behind the log, and crossing the road to a bank on the right. Another witness, who had passed the log shortly before, and was 200 to 300 yards away, testified to substantially the same thing. Both witnesses testified that the firing was renewed from the bank. It appeared that there were four fresh signs of men having been behind the log, and what seemed to be a "rest" was found under it. A cartridge shell corresponding with the ball cut from deceased's body, and of the same kind used in defendant J.'s rifle, was found behind the log. Defendants admitted their presence at the killing, and that J. shot deceased, but testified that the shooting was done in self-defense. The testimony of defendants was corroborated by one witness only, and he was their kinsman, and had been arrested for complicity in the murder, and the evidence showed that it was improbable that he could have seen what he testified to. Four of the defendants were armed, and they testified that they were all in sight of deceased when the firing began. *Held*, that the evidence showed that defendants were lying in wait for the purpose of killing deceased, and warranted a conviction, regardless of the condition or position of deceased's gun when he was shot. — *Barnard v. State*, (Tenn.) 12 S. W. 431.

#### Assault with intent to kill.

29. A pitchfork is a deadly weapon, within the meaning of Gen. St. Ky. c. 29, art. 6, § 2, prescribing the punishment for willful and malicious striking with a deadly weapon, with intent to kill. — *Evans v. Commonwealth*, (Ky.) 12 S. W. 787.

30. On the trial of an indictment for an assault with intent to kill, an instruction that if defendant was so assaulted as to give him reasonable cause to believe there was a design to do him great bodily injury, and struck his assailant, with a knife, to prevent such injury, he was justified, is rightly refused, as not limiting the right of self-defense to the use of such violence only as appeared necessary. — *State v. Brooks*, (Mo.) 12 S. W. 633.

31. *Manuf. Dig. Ark. § 1562*, defines an "assault" as an unlawful attempt coupled with present ability to commit a violent injury on the person of another. *Held*, that, in an indictment for assault with intent to kill, it is sufficient to allege that the assault was committed in the manner and with the intent necessary to constitute the offense, without expressly alleging "present ability," the word "assault" in such connection meaning all that the statute defines an assault to be. — *Russell v. State*, (Ark.) 12 S. W. 564.

#### Indictment.

32. An indictment which alleges that the murder was committed with "malice aforethought" is sufficient, without an allegation that the killing was "unlawful;" the latter being included in the former. — *Hall v. State*, (Tex.) 12 S. W. 739.

33. An indictment sufficiently charges murder that alleges the killing upon "malice aforethought;" it need not allege express malice. — *Giebel v. State*, (Tex.) 12 S. W. 591.

34. An indictment for murder need not allege the particular part of the body where the mortal wound was inflicted. — *Giebel v. State*, (Tex.) 12 S. W. 591.

35. An indictment charging that defendant with a certain knife did stab, etc., in and upon the left side of the body of deceased one mortal wound, omitting before "one mortal wound" the expression "giving him then and there," etc., is sufficient after verdict. — *State v. Burns*, (Mo.) 12 S. W. 801.

36. Where an indictment charges that the murder was committed by the use of a pistol and a knife, it is sufficient to prove that either was used. — *Gallagher v. State*, (Tex.) 12 S. W. 1087.

87. The words "acted together," in an indictment charging that defendant and B. acted together in murdering deceased, are surplusage, and not descriptive of the offense; and it is not error to charge that defendant would be guilty if he, "acting by himself or with" B., killed the deceased.—*Watson v. State*, (Tex.) 12 S. W. 404.

88. Under Rev. St. Mo. § 1292, which provides that murder committed in the perpetration of robbery, etc., shall be deemed murder in the first degree, the usual form of indictment is sufficient, irrespective of the manner in which the crime was committed; and so much of an indictment as charges the murder to have been committed in the perpetration of robbery is surplusage.—*State v. Meyers*, (Mo.) 12 S. W. 516.

89. In the absence of demurrer or motion to quash, an indictment sufficiently charges a killing feloniously and by defendant which states that he, in and upon deceased, "feloniously \* \* \* did make an assault with certain deadly weapons \* \* \* which he \* \* \* then and there had and held in his hands, him, the said (deceased) feloniously \* \* \* did strike," etc.—*State v. Thomas*, (Mo.) 12 S. W. 648.

90. An indictment which charges that defendant "on or about August 26, 1888, and anterior to the presentment of this indictment, in the county and state aforesaid, did then and there, unlawfully, and with malice aforethought kill and murder \* \* \* by cutting and stabbing him, the said \* \* \*, with a knife, against the peace and dignity of the state," is sufficient, and implies that deceased died on the day named; and the addition of the words that he "inflicted upon him, the said \* \* \*, one mortal wound, from which said mortal wound he, said \* \* \*, died," is surplusage.—*Cudd v. State*, (Tex.) 12 S. W. 1010.

### Insanity as defense.

41. It is proper to charge that to establish the defense of insanity it must be clearly proved that at the time of committing the act the defendant was laboring under such defect of reason as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know it was wrong.—*Giebel v. State*, (Tex.) 12 S. W. 591.

42. The defense interposed the plea of general and not partial insanity. A witness for the defense having testified to facts upon which he based his opinion that the defendant was insane, the state, on cross-examination, asked him whether in his opinion the defendant knew right from wrong. Defendant's objection that the question was too general, and that it should have been restricted to the defendant's mental capacity and knowledge as to the right and wrong of the particular act charged, was overruled. *Held*, that while the restriction would be proper, whether general or partial insanity be the plea, the ruling of the court was not reversible error, as it was not shown that defendant was injured, or that he was not permitted to examine the witness with reference to the particular act charged.—*Giebel v. State*, (Tex.) 12 S. W. 591.

### Continuance.

48. Where due diligence has been used, a continuance should be granted to procure the attendance of witnesses by whose testimony defendant expects to prove that the killing was accidental, and that he and deceased were on friendly terms.—*Embry v. Commonwealth*, (Ky.) 12 S. W. 888.

### Evidence.

44. The clothing worn by deceased at the time of the homicide was properly admitted in evidence.—*Levy v. State*, (Tex.) 12 S. W. 596.

45. It is not improper to show defendant's business at the time of the killing.—*O'Brien v. Commonwealth*, (Ky.) 12 S. W. 471.

46. On a trial for murder, where it appears that deceased was defendant's wife, but that their marriage had not been made public, and that deceased was *en route* by defendant, letters from defendant to deceased are admissible in evidence to show the relations between them.—*O'Brien v. Commonwealth*, (Ky.) 12 S. W. 471.

47. Letters from defendant to two other women, showing his relations to them, he being engaged to be married to one, and intimate with the other, who was a prostitute, are admissible to show motive for desiring to be rid of his wife.—*O'Brien v. Commonwealth*, (Ky.) 12 S. W. 471.

48. In a trial for manslaughter, evidence that defendant, some two weeks before the homicide, said that his father had killed his man, and he intended to soon, is incompetent to show malice.—*Commonwealth v. Matthews*, (Ky.) 12 S. W. 333.

49. Evidence of a former attack on defendant by deceased, with a knife, is competent, as tending to support evidence given on the trial that deceased was a violent and dangerous man, that he had made threats against defendant, and provoked the difficulty which resulted in his death.—*Jackson v. State*, (Tex.) 12 S. W. 501.

50. On a trial for murder a witness may use a diagram of the place where the killing occurred, which he has verified by observation and measurement.—*Commonwealth v. Hourigan*, (Ky.) 12 S. W. 550.

51. On a trial for murder, where it was shown that the conduct of the accused and the deceased towards each other had been rough and irritating during the day in the afternoon of which the homicide was committed, evidence of bruises found on the body of deceased shortly after his burial is admissible, as tending to show who had been the aggressor during the day.—*Billings v. State*, (Ark.) 12 S. W. 574.

52. Evidence concerning a difficulty between defendant and deceased, which occurred two and a half years before the homicide, is irrelevant, where no connection is shown between the two events, and, being prejudicial to defendant, its admission is reversible error.—*Billings v. State*, (Ark.) 12 S. W. 574.

53. On trial for murder, evidence that accused, about two hours after the killing, wiped some blood off deceased's body, smelt it, and then gave his finger a jerk, in order to throw the blood off, is admissible, and it is not necessary to instruct the jury to consider it only on the question of malice.—*Duncan v. Commonwealth*, (Ky.) 12 S. W. 678.

Defendant testified that, about a year before the killing, deceased had applied to him as a physician; told him that he had seduced a certain girl, and had given her medicine, from which she was suffering, and wanted defendant to relieve her; that, on defendant's refusing, deceased became angry, and threatened him. *Held*, that it was competent for the state to show, as tending to contradict this testimony, that at the time indicated there was nothing the matter with the girl.—*Commonwealth v. Hourigan*, (Ky.) 12 S. W. 550.

55. The defense proved that, shortly before the homicide, the deceased declared that he had sustained illicit relations with defendant's former wife, which was the reason for the hostility existing between him and the defendant. *Held*, that it was proper to permit the state, in rebuttal, to prove, by the defendant's divorced wife, that she had never had improper relations with deceased, and that defendant had never charged her with nor suspected her of such relations.—*Giebel v. State*, (Tex.) 12 S. W. 591.

56. On a trial for murder, it appeared that at a barbecue under the direction of the deceased the latter put defendant's brother off the grounds where the barbecue was being held, for improper conduct of the brother, and that defendant shot deceased in pursuance of a threat to do so if deceased should molest the brother. Everything that was said or done by either brother was in the presence and hearing of the other. *Held*, that they were acting in concert, and that evidence of the acts or words of either was admissible as part of the *res gestae*.—*Colay v. Commonwealth*, (Ky.) 12 S. W. 132.

57. Where defendant has been jointly indicted with others, it is not necessary, to sustain a conviction, to show a conspiracy between defendants, or any of them, to attack or injure deceased, where the indictment contains no such charge.—*Von Gundy v. Commonwealth*, (Ky.) 12 S. W. 886.

58. Evidence of the finding, at short distances from defendant's house, of a bloody handkerchief, a week after the murder, and some rotten drawers and overalls about two years thereafter, is irrelevant and harmful, without evidence to connect them with defendant.—*State v. Thomas*, (Mo.) 12 S. W. 643.

59. Where the depositions of physicians who had treated defendant professionally, to the effect that his mind had been seriously impaired by masturbation, are first read to or by experts, they may answer questions as to the mental condition of a person so afflicted; whether such insanity is permanent, and easy or hard to cure; and whether a person insane from such cause one year before would remain so down to the time of the trial.—*State v. Meyers*, (Mo.) 12 S. W. 516.

60. On a trial for murder committed by defendant when deceased and others were attempting his arrest on a charge of unlawfully carrying arms, upon the question of motive, and to explain the conduct of the deceased and posse in attempting to arrest the defendant, the court properly admitted in evidence the records of the district court of another county, to show that an indictment for murder was pending in said court against the defendant.—*Jacobs v. State*, (Tex.) 12 S. W. 408.

61. Upon the same issue, and to show that the attempted arrest was legal, the court properly admitted the sheriff to testify that about a week before the homicide he received a letter from the sheriff of another county, stating that defendant was in the county, armed with rifles and pistols.—*Jacobs v. State*, (Tex.) 12 S. W. 408.

62. For the purpose of showing an absence of motive on the part of defendant to commit the murder, he offered to prove, by a witness who had been his counsel in a land suit with the deceased, that witness had advised him that he had a perfect title, and that the judge and deceased's counsel had advised her to accept a compromise offered her by the accused. *Held*, that it was incompetent.—*Gallagher v. State*, (Tex.) 12 S. W. 1087.

63. Statements made by defendant three hours before the homicide were not admissible in his behalf as part of the *res gestæ*.—*Glebel v. State*, (Tex.) 12 S. W. 591.

64. Where the accused becomes a witness, it is not necessary, in order to make his written statement before a coroner admissible against him, to call his attention particularly to it.—*State v. Young*, (Mo.) 12 S. W. 879.

65. On a trial of defendant for aiding and abetting a husband in the murder of his wife, where it appeared that they armed themselves, and together went to the home where the wife lived after separation from her husband, with the purpose of capturing her and carrying her away for an unlawful purpose, evidence that the husband, during such pursuit, offered to surrender the virtue of his wife to others, if they would give him information as to where she was, is admissible, whether or not defendant heard such offer.—*Allen v. Commonwealth*, (Ky.) 12 S. W. 583.

66. Evidence of a witness that he had told defendant, shortly before the killing, that deceased had used insulting language concerning defendant's family, is material, as showing that the killing was on account of the insulting language, though between that time and the killing defendant asked deceased if he had used the language.—*Richardson v. State*, (Tex.) 12 S. W. 870.

#### Character.

67. On a trial for an assault with intent to commit murder, evidence of the good or bad character of the prosecuting witness for chastity is irrelevant, though the alleged cause of the assault was insulting words or conduct of the prosecuting witness to the wife or daughter of defendant.—*Green v. State*, (Tex.) 12 S. W. 872.

68. Under a plea of self-defense to an indictment for murder, where defendant was convicted on testimony of positive nature, the admission of evidence of general good character of deceased, though irrelevant, was harmless error.—*Webb v. Commonwealth*, (Ky.) 12 S. W. 769.

#### Evidence—Dying declarations.

69. The admission of a dying declaration that deceased "was shot for nothing," though it is incompetent, is not prejudicial to defendant, where the fact is otherwise satisfactorily proved, and where, according to defendant's own testimony, he could have avoided the homicide.—*Pace v. Commonwealth*, (Ky.) 12 S. W. 271.

70. In a murder trial, proof that deceased could not live, and that he said he could not live, and had given up all hope of recovery, is sufficient foundation for the admission of dying declarations.—*Pace v. Commonwealth*, (Ky.) 12 S. W. 271.

71. Evidence that deceased, about 15 minutes after he was shot, while lying on the ground, said he hoped he would live long enough to take a gun home, and that he died in 20 minutes, sufficiently shows a consciousness of impending death to render the statement of deceased competent as a dying declaration.—*Commonwealth v. Matthews*, (Ky.) 12 S. W. 833.

72. It being impossible for the deceased to see who fired the shot which killed him, a mere expression of opinion by him, some hours after the shooting, as to who shot him, is inadmissible as a dying declaration.—*Jones v. State*, (Ark.) 12 S. W. 704.

73. Declarations of deceased that he and the accused were playing, and that the shooting, from which the death of deceased resulted, was an accident, were statements of facts, and not matters of opinion, and were competent as dying declarations.—*Commonwealth v. Matthews*, (Ky.) 12 S. W. 833.

#### Threats.

74. Where it is in doubt, in a murder trial, as to whether the attack was commenced by the defendant or the deceased, uncommunicated threats by the latter may be put in evidence by the former, to show that in all probability deceased made such attack, and his motive in doing so.—*Levy v. State*, (Tex.) 12 S. W. 596.

#### Variance.

75. Evidence that deceased died on a day subsequent to that named in the indictment is admissible, and the variance is immaterial as long as the death occurred before the bringing of the indictment.—*Cudd v. State*, (Tex.) 12 S. W. 1010.

#### Instructions.

76. Under Pen. Code Tex. art. 574, providing that the attack upon the person of an individual, in order to justify homicide, must be such as produces a reasonable expectation or fear of death, or some serious bodily harm, an instruction on the law of self-defense is not required, where the evidence fails to show that such an attack was made.—*Boyd v. State*, (Tex.) 12 S. W. 727.

77. On a trial for murder, an instruction defining "express malice" as "when a man with a cool and sedate mind, in pursuance of a formed design to kill another, or to inflict on him some serious bodily injury which would probably end in depriving him of life, does kill such person," is insufficient, as it embraces excusable and justifiable homicide. Following *Crook v. State*, 11 S. W. 444; *Cahn v. State*, Id. 723.—*Gonzales v. State*, (Tex.) 12 S. W. 738.

78. On a trial for murder, where the evidence tends to show that the killing, though caused by defendant's recklessness, was accidental, it is error not to include in the charge an instruction as to involuntary manslaughter.—*Embry v. Commonwealth*, (Ky.) 12 S. W. 853.

79. On a trial for murder, the omission of the court to tell the jury that defendant had the right to defend his family against any attack of the deceased is not improper, where there is no evidence to show that the deceased had any such purpose.—*Hilton v. Commonwealth*, (Ky.) 12 S. W. 1062.

80. The court need not instruct separately on two counts of an indictment for murder, the only difference between which is that one states the implements with which the killing was done, while the other states that they were unknown.—*State v. Thomas*, (Mo.) 12 S. W. 643.

81. Where, on a trial for murder, the evidence establishes conclusively and solely that deceased was assassinated, at night, by his fireside, by some one, who fired through a crack from without, it is not error for the court to confine its charge to the law applicable to murder in the first degree.—*Jones v. State*, (Ark.) 12 S. W. 704.

82. A charge that the jury are to judge whether defendant, if present at the killing, acted as principal, "from the surrounding circumstances in proof, such as companionship of the parties and the conduct of defendant at, before, and after the commission of the offense," is not an expression of opinion on the weight of the evidence.—*Watson v. State*, (Tex.) 12 S. W. 404.

83. On a trial for murder, where defendant has been jointly indicted with others, and it appears that deceased was killed by a blow on the head, in a difficulty with him and others, brought on by defendant, in which the co-defendants participated, an instruction that if defendant struck deceased, not in necessary self-defense, and deceased did not die therefrom, defendant was guilty of assault and battery only, is properly refused.—*Von Gundy v. Commonwealth*, (Ky.) 12 S. W. 886.

84. On a trial for murder, committed as the result of a quarrel, where there is evidence that defendant had in good faith abandoned the original difficulty, and that deceased and his wife renewed, provoked, and pressed the conflict, defendant is entitled to an instruction as to the law in case of abandonment of the difficulty by defendant.—*Jackson v. State*, (Tex.) 12 S. W. 501.

85. On a trial for murder, where it appears that defendant and two others, while carrying a keg of beer at night, were met by a man who, after some words, struck defendant in the face with his lantern, and ran away, after which deceased came along and struck defendant, whereupon defendant cut him with his knife, instructions should be given as to the lower grades of homicide.—*State v. Young*, (Mo.) 12 S. W. 879.

86. Where the court has charged that, if defendant willfully and maliciously struck and wounded the prosecutor with a pitchfork, with intent to kill, and the jury believed said pitchfork was a deadly weapon, they should find him guilty of a felony, it is proper to refuse to charge that, before they could find defendant guilty as set forth in the instruction, "they must believe from the evidence, beyond a reasonable doubt, that the defendant struck with intent to kill, and they must further believe that said pitchfork, at the time in the hands of defendant, used in the manner he used it, if he did so use it, was a deadly weapon."—*Evans v. Commonwealth*, (Ky.) 12 S. W. 767.

87. An instruction that the jury should acquit defendant, if they believed that the latter believed, and had reasonable grounds to believe, that the killing of deceased was necessary to avert great bodily harm, unless the wrongful act of defendant made the anticipated harm from deceased excusable, is not objectionable, where the following instruction applies the reasonable doubt in favor of defendant to the entire case, for failing to state that before the jury could act on the qualification they must believe, to the exclusion of a reasonable doubt, that some wrongful act of defendant made the harm excusable on the part of deceased.—*Pace v. Commonwealth*, (Ky.) 12 S. W. 271.

88. Defendant requested an instruction that "where the intent was not to take life, but only to do great bodily harm, it is murder in the second degree, if death results." The court instructed as follows: "According to the evidence as adduced in this case, if you fail to find that defendant intended to kill deceased, \* \* \* you will find him not guilty." *Held*, that defendant could not complain, and the error, if any, came within Rev. St. Mo. 1879, § 1821, providing that no criminal proceedings shall be invalidated "for any error committed at the instance or in favor of the defendant."—*State v. Mitchell*, (Mo.) 12 S. W. 879.

89. Where the evidence does not raise the issue of self-defense, it is error to charge upon that issue; but, the error being in favor of defendant, he cannot object thereto, though the charge be im-

perfect and erroneous.—*Hawthorne v. State*, (Tex.) 12 S. W. 608.

90. On a trial for murder an instruction, as to temporary insanity, which assumes that the accused did the killing, when he had pleaded "Not guilty," cannot have prejudiced him, when he himself testified that he did it.—*Brewer v. Commonwealth*, (Ky.) 12 S. W. 672.

91. Where the evidence shows, without conflict, that the assault was premeditated, deliberate, and with a formed design to kill, the giving of an instruction on the law of manslaughter is an error of which defendant cannot complain.—*Green v. State*, (Tex.) 12 S. W. 872.

#### Instructions—Accomplice testimony.

92. In a murder case a witness for the state testified, in regard to a piece of quilt and a sack found together the morning after the murder, on the road between the house of the murdered persons and that of defendant, that he thought the quilt belonged to defendant, but was positive that the sack belonged to the principal witness for the state, who had testified that defendant confessed to him that he committed the murder. The principal witness had said nothing about this confession until after he knew that he himself was suspected of the crime, and had then lied about his knowledge of the murder before telling of the confession. *Held*, that the evidence called for a charge on the testimony of an accomplice.—*Shulze v. State*, (Tex.) 12 S. W. 1084.

#### Reasonable doubt.

93. An instruction that if the jury find defendant guilty beyond a reasonable doubt, but doubt whether it was murder or manslaughter, they must convict of the lesser offense, is correct.—*Pace v. Commonwealth*, (Ky.) 12 S. W. 271.

94. A charge is not objectionable for failure to instruct that reasonable doubt should be applied as between the several degrees of homicide charged upon, where the court applies the reasonable doubt to the whole case, and no additional instructions on the subject were requested.—*Hall v. State*, (Tex.) 12 S. W. 739.

95. Where defendant has been jointly indicted with others, it is proper to refuse instructions based on the idea that where one of several co-defendants is shown to be guilty, but it is not shown beyond a reasonable doubt which one, the jury must acquit, where the jury are instructed that before they can convict they must believe beyond a reasonable doubt that defendant struck the fatal blow, or that one or more of his co-defendants did it, and he advised, aided, or assisted.—*Von Gundy v. Commonwealth*, (Ky.) 12 S. W. 386.

96. Where the jury are charged that they must believe beyond a reasonable doubt that the blow was struck with an instrument capable of producing death, an instruction on involuntary manslaughter is properly refused.—*Von Gundy v. Commonwealth*, (Ky.) 12 S. W. 386.

97. One of the defendants admitted that he fired six or seven shots at deceased. A witness testified that he saw another of the defendants fire once. Two other defendants admitted that they were at the place of the killing at the time, armed with rifles, and the remaining defendant was very near by. It appeared that they had been together all day, within easy reach of the place of killing; that they came there together; and that after the killing they met near the body, and, after consulting, departed together. The defendant not actually present at the killing had, several days before, inquired if it was not deceased's habit to pass the place at the time in the week when the killing occurred; he voluntarily joined the other defendants the night before; suggested that they go out on the hills overlooking the place of the killing, on the morning of the day thereof; and stopped on a side of the hill commanding a view of the road on which deceased was traveling when killed, from whence he could signal the other defendants, who, there was evidence to show, had been watching various parts of the road all day, and were lying in wait behind a log. The court properly instructed the jury on the question of conspiracy and reasonable doubt in relation thereto. *Held*, that an in-

struction on the question of reasonable doubt, as applicable to a case of purely circumstantial evidence, was not required. — *Barnard v. State*, (Tenn.) 12 S. W. 431.

#### — Malice.

98. Under Pen. Code Tex. arts. 593, 595, defining "manslaughter" and "adequate cause,"—the former being voluntary homicide committed under the immediate influence of sudden passion arising from an adequate cause, the latter being such as would commonly produce a degree of anger or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection,—an explanation of implied malice is erroneous which requires, in order to reduce the homicide to a lower grade than murder in the second degree, that the homicide should have been committed under such circumstances as fail to show that it was committed under the immediate influence of sudden passion arising from a sudden and powerful provocation, as a violent blow on the head, etc.—*Boyd v. State*, (Tex.) 12 S. W. 737.

99. A definition of "malice aforethought" is essential in the charge in a murder case, and a definition of "express" and "implied" malice does not cure the omission. Following *Crook v. State*, 11 S. W. 444.—*Boyd v. State*, (Tex.) 12 S. W. 737.

100. A charge in a trial for murder which fails to define "malice" is fatally defective.—*Richardson v. State*, (Tex.) 12 S. W. 870.

101. A charge, upon the subject of implied malice, that "when a homicide is committed without any, or without considerable, provocation, the law implies malice," is correct; the words "considerable provocation" being equivalent to the words "adequate cause."—*Jacobs v. State*, (Tex.) 12 S. W. 403.

102. A charge, in a murder case, that "malice" is "the intentional doing of a wrongful act to an other, without legal justification or excuse," is substantially correct, and sufficient, especially where it is followed by a definition of "express malice," which of itself fully expresses the legal meaning of malice.—*Gallaher v. State*, (Tex.) 12 S. W. 1087.

103. A portion of a charge on express malice, which states that "a sedate and deliberate mind and formed design is evidenced by external circumstances discovering that inward intention, as lying in wait," etc., is not open to the objection that it is on the weight of evidence, and virtually says that express malice is proved when any of the conditions enumerated in the charge are shown to have existed.—*Gallaher v. State*, (Tex.) 12 S. W. 1087.

#### — Want of clearness.

104. An instruction that murder in the second degree embraces all cases of murder at common law in which there was no specific intent to kill, but in which the law presumes an intent to kill, and which are not made manslaughter or murder in the first degree by statute, is too abstract a statement of law, and would befog rather than enlighten a jury.—*State v. Mitchell*, (Mo.) 12 S. W. 379.

105. An instruction that if the jury believe "that deceased was attacking defendant at the time, and that said attack produced in defendant a reasonable expectation or fear of death, or some serious bodily injury, then defendant would be justifiable in the killing; and it would make no difference whether such danger was real or imaginary, if it have the appearance of being real, and if he acted upon such belief of apparent danger,"—is defective, as it does not distinctly direct the jury that the danger must be considered from defendant's standpoint, and no other, and from all the circumstances proved.—*Gonzales v. State*, (Tex.) 12 S. W. 733.

#### — Alibi.

106. Defendant cannot complain of a charge that if the jury did not believe the defendant was present at the time of the killing, they should acquit him, where the defense of *alibi* has not been interposed by him.—*Watson v. State*, (Tex.) 12 S. W. 404.

#### — Assumption of facts.

107. Deceased, when shot by defendant, was engaged in a quarrel with one D. The court in-

structed the jury that they should acquit on the ground of self-defense and apparent necessity, if they believed that when defendant shot, if he did so, he believed, and had reasonable ground to believe, that he or D. was in immediate danger of great bodily harm from deceased, and that, in the exercise of a reasonable judgment, it was necessary to shoot him to avert such danger, real or apparent, "unless his own wrongful act, or the wrongful act of said D., made the harm to himself or D., or both, necessary or excusable on the part of said" deceased. *Held*, that the instruction did not assume that any act of defendant or D. was wrongful, and stated, in substance, that defendant had no right to shoot deceased to protect D. if the latter was in fault, which was correct.—*Pace v. Commonwealth*, (Ky.) 12 S. W. 271.

#### Verdict.

108. Under Rev. St. Mo. § 1284, which provides that the jury must ascertain the degree of murder of which the defendant was guilty, a verdict that "we, the jury, find the defendant guilty of murder in the first degree, as charged in the second count in the indictment," is sufficient.—*State v. Meyers*, (Mo.) 12 S. W. 516.

109. Under Rev. St. Mo. 1879, § 1234, providing that, on trial of an indictment for murder in the first degree, the jury must inquire, and by their verdict ascertain, whether the defendant be guilty in the first or second degree, a general verdict of guilty, without specifying the degree, is void. Following *State v. Montgomery*, 11 S. W. 1012.—*State v. Jackson*, (Mo.) 12 S. W. 387.

#### New trial.

110. It is no ground for a new trial that the jury convicted defendant of manslaughter instead of murder.—*Allen v. Commonwealth*, (Ky.) 12 S. W. 582.

#### Appeal—Review.

111. On a trial for murder, objections that the jury were allowed to separate during the trial, or that after they were sworn they visited the locality of the alleged murder without any order of court, and in the absence of the prisoner and his counsel, where made for the first time after verdict, cannot, under Carroll's Code Ky. § 281, be considered by the court of appeals.—*Hunt v. Commonwealth*, (Ky.) 12 S. W. 127.

## HORSE AND STREET RAILROADS.

### Liability for injuries.

1. Where plaintiff's evidence tends to show that the gripman saw deceased crossing the track when at such distance that he could have avoided collision by using promptly the appliances at his command for checking the train, the case is properly submitted to the jury.—*Pope v. Kansas City Cable Ry. Co.*, (Mo.) 12 S. W. 891.

2. Where it appears that the gripman on a cable-car saw, as he was about to pass around a curve at the intersection of two streets, a young child near the lamp-post, but, seeing that the track was clear, went on, looking to neither side until within about a foot of the child, who had, according to other witnesses, toddled, at a child's rate, to the track, when he was unable to stop the car to avoid running over the child, there is evidence to sustain a verdict against the company.—*Winters v. Kansas City Cable Ry. Co.*, (Mo.) 12 S. W. 652.

### — Pleading.

3. A petition alleging that deceased, in the exercise of due care, was crossing defendant's track, "when the defendant, by its agents and servants, negligently, carelessly, and wrongfully ran its car against the wagon of [deceased,] overturned the same, and killed him," is sufficient when first objected to on appeal.—*Pope v. Kansas City Cable Ry. Co.*, (Mo.) 12 S. W. 891.

4. Where plaintiff's evidence, in an action against a cable-road company, shows that defendant was operating the railway in the month previous to



the accident, and defendant does not stand on its demurrer to plaintiff's evidence, but gives evidence tending indirectly to show that it was operating the road at the time of the accident, and conducts the case as if that fact were conceded, the overruling of the demurrer is not error.—*Pope v. Kansas City Cable Ry. Co.*, (Mo.) 12 S. W. 891.

#### Liability for injuries—Instructions.

5. An instruction requiring a vigilant watch of the "track ahead" is not confusing, though there were several parallel tracks.—*Pope v. Kansas City Cable Ry. Co.*, (Mo.) 12 S. W. 891.

6. An instruction requiring the gripman to exercise ordinary care to prevent the injury is not erroneous as requiring him to stop his train without regard to the safety of the train or its passengers.—*Pope v. Kansas City Cable Ry. Co.*, (Mo.) 12 S. W. 891.

7. An instruction assuming that defendant's servants were operating the cars is not erroneous, where plaintiff's evidence tends to show that fact, and it is not denied by defendant, but is treated as conceded by both parties.—*Pope v. Kansas City Cable Ry. Co.*, (Mo.) 12 S. W. 891.

### HUSBAND AND WIFE.

See, also, *Divorce*; *Dower*; *Homestead*; *Marriage*.

As witnesses, see *Witness*, 2, 3.

#### Property rights.

1. Though the wife on whose land notes of her husband are secured is a surety for him, a compromise by the husband on account of the fraud through which the notes were procured will not estop her from setting up the fraud, especially where there is no evidence as to the nature of her estate in the land.—*Henry v. Sneed*, (Mo.) 12 S. W. 668.

2. Money paid to a husband's creditor by a debtor of the wife cannot be applied to the debt due the wife for her individual money, though it was paid on the express agreement of the husband that it should be so applied, where no authority of the wife is shown for such transaction.—*Arnett v. Glenn*, (Ark.) 12 S. W. 497.

3. Land was purchased jointly by the husband and wife, and the deed provided that when a stated sum should be paid the wife should be entitled to half the land, and, if it should be sold at any time, she should, "at her option, be entitled to the aforesaid sum of money, or one-half of the proceeds of such sale." *Held*, that the creditors of the husband, whose debts were contracted after the specified sum had been paid, were not entitled to have the wife's interest subjected to the payment of a vendor's lien.—*Sawyer v. Goodpastor's Assignee*, (Ky.) 12 S. W. 470.

4. Where grantors attempt to convey land to a husband and wife jointly, the entire price being paid by the husband, but the deed is acknowledged out of the state, and never recorded therein, and afterwards a deed is made to the wife alone, the husband consenting thereto while sick and probably not mentally competent, and himself recording the deed, and it appears that the wife's heirs influenced her not to reinvest the husband with title to one-half the land, as she desired to do, they cannot, after her death, claim more than the interest which she derived under the first deed.—*Newbert v. Zedder*, (Ky.) 12 S. W. 382.

#### Wife's separate estate.

5. Debts incurred by a married woman in improving and cultivating her farm and raising crops, though her husband acts as her agent, are contracted in carrying on "business," within the meaning of *Manst. Dig. Ark. §§ 4624-4626, 4630*, which authorize a married woman to "carry on any trade or business, and perform any labor or services on her sole and separate account," and provide that her earnings therefrom "shall be her sole and separate property;" that she may sue alone in respect thereto; and that judgments against her may be enforced against such separate property the same as against that of a *feme sole*.—*Hickey v. Thompson*, (Ark.) 12 S. W. 475.

6. The fact that property is purchased with money arising from land limited to a wife for life, and to her children after her death, does not affect her right thereto for life, nor to the possession thereof.—*Millikin v. Smoot*, (Tex.) 12 S. W. 59.

7. A husband, having become indebted to his wife, invested about \$2,000 in land, and took the deed in her name, but the deed failed to specify that the land was the wife's separate property. The land was then conveyed to one T., to be by him sold for the wife. T. sold the land, the price to be paid in cash, and executed and left at the clerk's office a deed which was recorded and delivered to the vendee before any of the purchase price was paid. In the meanwhile a creditor procured a sale of the land under a judgment against the husband, and purchased it at the sale for five dollars. After the wife had brought suit against T.'s vendee for the land, the creditor procured for \$200 a deed from T.'s vendee, who had never made any payment, and then intervened in the action. *Held*, that the wife was entitled to recover.—*Evans v. Welborne*, (Tex.) 12 S. W. 230.

8. In an action by a wife to recover property purchased by her with money arising from the sale of land limited to her for life, with remainder to her children, the children are not necessary parties.—*Millikin v. Smoot*, (Tex.) 12 S. W. 59.

#### Conveyances.

9. In Texas, a power of attorney executed by the wife alone, and properly acknowledged, confers no authority on her husband to sell her separate estate.—*Cardwell v. Rogers*, (Tex.) 12 S. W. 1006.

#### Actions.

10. A note given by a husband to his wife is an equitable claim against him, and the error in bringing an action at law upon it is waived by defendant's failure to move a transfer to the proper docket.—*Munday v. Collier*, (Ark.) 12 S. W. 240.

11. *Mill. & V. Code Tenn. § 3505*, provides that, "where a husband has deserted his family, the wife may prosecute or defend in his name any action which he might have prosecuted or defended. She may also sue and be sued in her own name for any cause of action accruing subsequently to such desertion." A declaration alleged that defendant agreed, if plaintiff would dismiss a suit for breach of promise and seduction against his son, and marry the latter, that he (defendant) would support them; that plaintiff did this, when defendant, by slandering her, persuaded her husband to sue her for divorce, and abandon her; that defendant then induced her husband to have her arrested, and prosecute her for murder, and assisted in the prosecution; but that plaintiff was acquitted. *Held*, that a demurrer to the whole declaration, on the ground that plaintiff should have joined her husband in the action, was too broad, as the declaration showed desertion, and that some of the causes of action accrued thereafter, for which plaintiff could sue alone.—*Hester v. Hester*, (Tenn.) 12 S. W. 446.

12. In an action against a city for loss of property by an overflow alleged to have resulted from the city's negligence in constructing a bridge, plaintiff alleged that he owned the goods, etc., described in an exhibit made part of the petition; also that the water destroyed all the goods, etc., mentioned in the exhibit. The exhibit contained an item, "\$269, money of Mrs. E." Plaintiff testified that the money was his own, but he had listed it as belonging to his wife, as he had set it aside to expend for her. *Held*, that evidence of the loss of the money was not inadmissible on the ground that the pleadings showed that it belonged to plaintiff, while the evidence showed that it belonged to his wife, as, even if the latter were true, the husband is authorized by *Rev. St. Tex. art. 1204*, to sue for his wife's property.—*City of Austin v. Emanuel*, (Tex.) 12 S. W. 318.

#### Deed of wife—Acknowledgment.

13. Under *Rev. St. Tex. art. 4313*, requiring the certificate of acknowledgment to a married woman's deed to recite that she was privily examined apart from her husband, that the deed was



explained to her, and that she declared that she had willingly signed it, and did not wish to retract it, a certificate which merely recites that "the grantors appeared before me in person, and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act, for the use and purposes therein set forth, including the release and waiver of the rights of homestead," is defective, and, in the absence of evidence that the wife was examined according to the statute, the heirs of the wife are not estopped to deny title in one who holds by purchase of the grantee.—*Williams v. Ellingsworth*, (Tex.) 12 S. W. 746.

14. Under Rev. St. Tex. art. 4818, relating to certificates of acknowledgment of a married woman, a certificate of acknowledgment which does not state substantially all the facts prescribed is not sufficient to give validity to the instrument.—*Jones v. Robbins*, (Tex.) 12 S. W. 824.

15. Rev. St. Tex. art. 4818, provides that the certificate of acknowledgment of a married woman must show that the person making the acknowledgment is personally known to the officer or is proved on oath to be the person who signed the instrument; that she was examined privily and apart from her husband, and, the instrument being fully explained to her, she acknowledged it to be her act and deed, and declared she had willingly signed the same for the purpose and consideration therein expressed, and that she did not wish to retract it. *Held*, that a certificate is insufficient which states that a deed executed by husband and wife "was produced to [the officer,] \* \* \* and was acknowledged by the grantors to be their act and deed, and, said instrument of writing being shown and explained to [the wife] separate and apart from her husband, she acknowledged the same freely and willingly, without fear or undue influence of her said husband, and desired the same certified and recorded."—*Hayden v. Moffat*, (Tex.) 12 S. W. 820.

#### Community property.

16. Where the pleadings of both parties treat the land sued for as plaintiff's community property, it is not error to charge that it is his community property.—*Bullis v. Noyes*, (Tex.) 12 S. W. 397.

17. Under Rev. St. Tex. art. 1845, providing that "where any person having title to any estate of inheritance \* \* \* shall die intestate, \* \* \* and shall leave no surviving husband or wife, it shall descend and pass in parcenary \* \* \* to his children and their descendants," community property of a deceased husband and wife is properly divided equally between their children and children of their deceased children, though such deceased children died before the death of one of their parents.—*McKenzie v. Rose*, (Tex.) 12 S. W. 817.

18. A husband devised community property of himself and wife to his wife for life, remainder to his son. The wife survived him, and devised the entire property as her own, one-half being devised to the only child of the son, he being dead. In trespass to try title to another portion of the land, by persons claiming under the wife's will against persons claiming under the husband's will, *held*, that a charge that if the wife did not receive under the will any benefit inconsistent with her claim to one-half of the community property, and if by her claiming such half the son did not receive less than he would have received had the father made no will, the verdict should be for plaintiffs, was not error prejudicial to defendants.—*Mayo v. Tudor's Heirs*, (Tex.) 12 S. W. 117.

19. A charge that the fact that the wife permitted the husband's property, other than the community property, to be divided among his legatees and devisees, would not itself show that she elected to take under the will, was erroneous, as being on the weight of the evidence, as the question whether she elected to surrender her right to the community property was for the jury.—*Mayo v. Tudor's Heirs*, (Tex.) 12 S. W. 117.

20. A charge that, to render the husband's will effective, the wife must have elected to take under it, and that such election must be shown by evidence that she accepted some benefit under the

will inconsistent with her claim to one-half the estate, was proper, as a husband cannot devise his wife's interest in community property.—*Mayo v. Tudor's Heirs*, (Tex.) 12 S. W. 117.

21. Where a deed is executed more than four years after the marriage of the grantee to a third wife, the presumption is that it is the community property of that marital union, and, to establish a trust in the land in favor of the heirs of the second wife, it must appear that the land was paid for with the funds belonging in common to the husband and the heirs of the second wife.—*Kimberlin v. Westerman*, (Tex.) 12 S. W. 978.

22. Community property is subject to the separate debts of the husband under the old law of Texas relating to husband and wife, which is substantially re-enacted by Rev. St. Tex. tit. 50, (3 Sayles, Civil St. 728.)—*Lee v. Henderson*, (Tex.) 12 S. W. 981.

#### Idem Sonans.

See *Judgment*, 7.

#### Illegitimacy.

See *Descent and Distribution*, 1-8.

#### Impeachment.

Of witnesses, see *Witness*, 14-21.

#### Imputed Negligence.

See *Negligence*, 4, 5.

#### Incorporation.

See *Corporations*, 1, 2.

### INDICTMENT AND INFORMATION.

Particular crimes, see *Arson*, 1; *Assault and Battery*, 2; *Conspiracy*, 1; *Embezzlement*; *Forgery*, 2-6; *Homicide*, 32-40; *Larceny*, 4-7; *Perjury*, 2-4; *Rape*; *Receiving Stolen Goods*, 8, 4; *Robbery*, 1.

#### Finding.

1. Mansf. Dig. Ark. § 2102, requiring the foreman of the grand jury to sign the indorsement "A true bill," is directory, and where he does not sign it the objection to the irregularity is waived, unless made before pleading.—*State v. Agnew*, (Ark.) 12 S. W. 563.

2. An indictment which recites that it was found by the grand jury of Lincoln county at the August term, 1888, of the Lincoln circuit court, without specifying in which of the two districts it was found, will be presumed to have been returned by a grand jury legally impaneled in the Star City district, where it appears from the term at which it was found, and from the clerk's indorsement thereon, that it was returned at a time when that district of the court could alone have been legally in session, and where the proof shows that the offense was committed, and the defendant tried and convicted, there.—*Helt v. State*, (Ark.) 12 S. W. 566.

#### Form.

3. Under the Missouri Bill of Rights, § 22, which declares that in criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation, the conclusion of an indictment, which does not show that the grand jurors charge the murder, is insufficient, and not cured by Rev. St. Mo. § 1821, which provides that no indictment is invalid for omitting to allege that the grand jurors were impaneled, sworn, or charged, etc.—*State v. Meyers*, (Mo.) 12 S. W. 516.

4. Const. Tex. art. 5, § 1, provides that the criminal district court of Galveston and Harris counties shall continue until otherwise provided by law. Act July 23, 1870, creating the court, was entitled "An act to organize and define the powers of the criminal district court in and for the counties of Galveston and Harris, and to prescribe the duties

thereof," and in section 3 it was provided that the court in each county should have a seal, with the words, "Criminal District Court of ——— county." *Held*, that an indictment presented in the court sitting in Galveston county was properly entitled "In the Criminal District Court of Galveston County." —Giebel v. State, (Tex.) 12 S. W. 591.

#### Description of offense.

5. An indictment for the misapplication of county funds which describes the property as "five thousand five hundred dollars in money, the same being then and there current money of the United States, and of the value of five thousand five hundred dollars, which said money was then and there the property of Palo Pinto county," is sufficient under Code Crim. Proc. Tex. art. 437, which provides that in an indictment a general description of property by name, kind, quantity, number, and ownership shall be sufficient. —Lewis v. State, (Tex.) 12 S. W. 736.

#### Joinder of counts.

6. In Kentucky a count for receiving stolen goods may be joined with a count for larceny. —Sanderson v. Commonwealth, (Ky.) 12 S. W. 136.

#### Time and place.

7. In order to support a conviction, it must clearly appear from the evidence that the offense charged was committed anterior to the presentment of the indictment. —Arcia v. State, (Tex.) 12 S. W. 599.

8. The error of the court in giving, as its main charge, an instruction authorizing conviction upon evidence that the crime was committed at a date after the presentment of the indictment, is not cured by giving, upon special request, a conflicting instruction, conforming as to time with the indictment, without withdrawing the main charge. —Arcia v. State, (Tex.) 12 S. W. 599.

9. Under Rev. St. Mo. § 1831, which provides that no indictment shall be deemed invalid, nor shall the trial judgment or other proceedings thereon be stayed, arrested, or in any manner affected, for stating the time imperfectly, or for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or day that never happened, an indictment is not fatally defective in that it charges the crime to have been committed on a day subsequent to that on which the trial occurred. —State v. Crawford, (Mo.) 12 S. W. 354.

### INFANCY.

#### Sale of infant's property.

1. Where unproductive land devised for life, remainder over to the issue of the life-tenants, is sold for reinvestment, in proceedings instituted under Civil Code Ky. (Carroll's) § 491, which provides that, in an equitable action by the owner of a particular estate of freehold, in possession, against the owner of the reversion or remainder, though he be an infant, real property may be sold for investment of the proceeds in other real property, it is proper for the chancellor to permit the life-tenants to bid therefor. —Blankenbaker v. Blankenbaker, (Ky.) 12 S. W. 708.

#### Removal of disabilities.

2. 2 Sayles' St. Tex. art. 3361a, § 2, provides a procedure for the removal of the disabilities of a minor by filing a petition which may be heard by the court in term-time or vacation, and, if it shall appear to the court that it is advisable, or will be advantageous to the minor, to have his disabilities removed, the court shall enter a decree removing the same. *Held* that, as the proceeding is an *ex parte* one, and acts only on the *status* of the minor, it cannot be deemed a judicial proceeding, but merely as the act of the judge, and hence there are no presumptions to be indulged in favor of the final order. —Brown v. Wheelock, (Tex.) 12 S. W. 111.

3. 2 Sayles' St. Tex. art. 3361a, § 4, relating to the removal of the disabilities of an infant, provides that "if the father of the minor be not living, a copy of the petition shall be served upon the county judge of the county in which the proceed-

ing is instituted, and in all such cases the court hearing the application shall appoint a special guardian, whose duty it shall be, in connection with the county judge, to represent the true interests of the minor, as they shall understand it, in aiding or resisting the application of the minor." *Held*, that a copy of the petition should be served upon the county judge, but he may accept service and waive the copy; nor is it essential that he should appear upon the hearing, that being a matter within his own discretion. —Brown v. Wheelock, (Tex.) 12 S. W. 111.

#### Judgment against.

4. The appointment, as guardian *ad litem* of infants in a tax-suit, of an attorney employed by the collector does not invalidate a judgment against them where he was not employed by the collector in that case, and the removal of the general guardian from the suit was not occasioned by fraud. —Walters v. Hermann, (Mo.) 12 S. W. 890.

#### Avoidance of contract.

5. A daughter, having brought suit within seven months after her majority, is not estopped to deny the validity of an exchange of her property for that on which she has lived with her father during minority, and which she has not offered to reconvey. —Cardwell v. Rogers, (Tex.) 12 S. W. 1006.

6. Where it is ordered that an injunction issue on petitioner executing a bond, and the record fails to show that any bond was given, a motion to dissolve the injunction on the ground that no sufficient bond was executed will be granted. —Ricker v. Douglas, (Tex.) 12 S. W. 975.

### INJUNCTION.

#### Jurisdiction.

Rev. St. Mo. § 2723, which declares that the remedy by injunction shall exist in all cases to prevent a legal wrong, when an adequate remedy at law cannot be afforded by an action for damages, does not enlarge the equity jurisdiction. —Neiser v. Thomas, (Mo.) 12 S. W. 725.

2. A court of equity has no jurisdiction to enjoin the issuing of a certificate of election to, and the assumption of office by, a newly-elected city marshal, on petition of the present marshal, alleging disqualification of the newly-elected officer under the city charter. —Neiser v. Thomas, (Mo.) 12 S. W. 725.

#### Wrongs prevented.

3. One who has been in adverse possession as against a trust-deed for the period of limitation may enjoin a sale under the deed, as such sale would cast a cloud on his title. —Gardner v. Terry, (Mo.) 12 S. W. 838.

#### Mandatory injunction.

4. An injunction is not mandatory which prohibits the meeting of a municipal board unless it gives complainant notice, and permits him to meet with it, but does not command his admission. —Lawrence v. Ingersoll, (Tenn.) 12 S. W. 423.

#### Dissolution.

5. An injunction preventing the sale on execution of particular property does not prevent the execution of the judgment, within the meaning of Mansf. Dig. § 8765, which authorizes an assessment of damages on dissolution of an injunction where the proceedings upon a judgment have been stayed. —Stanley v. Bonham, (Ark.) 12 S. W. 706.

#### Injunction bond.

6. The only liability on a bond given in a suit to enjoin the sale of land under a decree is for such damages as were caused by the delay in the execution of the decree. —Staples v. Handley, (Tenn.) 12 S. W. 339.

7. Counsel fees paid for procuring the dissolution of an injunction cannot be recovered in a suit on the injunction bond. Following Railway Co. v. Ware, 11 S. W. 418. —Jones v. Rosedale St. Ry. Co., (Tex.) 12 S. W. 998; Davis v. Same, *Id.* 999.

**INNKEEPERS.****Liability for loss of baggage.**

1. Where a person surrenders his room and pays his bill at an inn, the extraordinary liability of an innkeeper to his guest does not arise as to baggage subsequently delivered to the innkeeper. —*Wear v. Gleason*, (Ark.) 12 S. W. 756.

2. The delivery of baggage by an innkeeper to an apparent stranger without an effort to verify his claim to the property, and without inquiry as to its ownership, is an act of gross negligence for which the owner may recover, though the innkeeper was merely a gratuitous bailee of the baggage. —*Wear v. Gleason*, (Ark.) 12 S. W. 756.

**Insanity.**

As defense in criminal prosecution, see *Homicide*, 41, 42.

**INSOLVENCY.**

See, also, *Assignment for Benefit of Creditors; Bankruptcy*.

Of corporations, see *Corporations*, 18-15.

**Assets.**

1. The right of a person to use his name as a brand on manufactures, the words used in connection with his name being words of common use, is a personal right, and does not pass to his assignee in bankruptcy. —*Mattingly v. Stone*, (Ky.) 12 S. W. 467.

**Proof of claims.**

2. Gen. St. Ky. c. 44, art. 2, § 1, provides that every sale, mortgage, or assignment, made by debtors in contemplation of insolvency, and with the design to prefer creditors, shall operate as an assignment for the benefit of all the creditors. Section 3 provides that an action to declare such acts an assignment shall be conducted as one for the settlement of a decedent's estate. Civil Code Ky. § 432, provides that a creditor of a decedent, by proving his claim before the master, becomes a party to the action. An insolvent, having sold part of his property, and paid some of his debts, conveyed the residue of his property to a trustee for payment of his debts. An action by a creditor to have the conveyance to the trustee and the sales declared acts of insolvency was consolidated with an action by the trustee for a settlement of the estate, and a reference ordered to hear proofs of claims and any acts of insolvency. *Held*, that creditors who proved their claims before the master became parties to the proceedings, and may appeal from a dismissal thereof, though their claims had not been acted on by the court. —*Heidrich v. Silva*, (Ky.) 12 S. W. 770.

**Payment of claims.**

3. Gen. St. Ky. c. 89, art. 2, § 33, providing for the payment in full out of an insolvent decedent's estate of funds held by him of a dead person, ward, or one of unsound mind, is not applicable to an action by the committee of one to settle his insolvent estate, in which is involved the liability of the estate for trust funds, though the insolvent dies pending the suit. —*Stephens v. Stephens' Adm'r*, (Ky.) 12 S. W. 192.

**Instructions.**

See *Criminal Law*, 55-63; *Trial*, 9-20.

**INSURANCE.****The contract.**

1. A recital in an insurance policy that it is "subject to the three-fourths value clause," there being nothing in the policy to enlarge or explain it, furnishes no such intelligible agreement as can be construed by a court. —*Parks v. Hartford Fire Ins. Co.*, (Mo.) 12 S. W. 1058.

2. Recovery on a policy for \$15,000, taken out by plaintiff on the life of his brother, who was indebted to him in the sum of \$1,200, cannot be de-

feated on the ground that it was a wagering policy. —*Equitable Life Assur. Soc. v. Hazlewood*, (Tex.) 12 S. W. 621.

3. A policy issued by defendant contained a clause permitting other insurance, and providing for an apportionment of the loss, "without reference to the solvency or liability of other insurers." Before the destruction of the property an agent of defendant told the insured that his policy was canceled, which was not true; whereupon he took out a policy in another company, representing the property as uninsured, and this company, after the property was destroyed, refused to pay any part of the loss. *Held*, that the policy in the last-named company must be excluded in estimating the amount of insurance for which defendant is liable. —*Parks v. Hartford Fire Ins. Co.*, (Mo.) 12 S. W. 1058.

**Insurable interest.**

4. Under Const. Tex. art. 16, §§50, 51, providing that no mortgage or other lien on the homestead shall be valid except for the purchase money or improvements thereon, a lien on a homestead is only voidable at the instance of a person interested in the homestead, and the holder of such voidable lien has an insurable interest in the property. —*Parks v. Hartford Fire Ins. Co.*, (Mo.) 12 S. W. 1058.

**Rescission.**

5. In an action on a note, executed in payment of premium on an insurance policy, it appeared that after the execution of the note, and the acceptance of the policy to take effect *in futuro*, it was returned to the company by its agent for correction; that thereafter defendant instructed the company to rescind the policy, and return his note; that the company refused, and forwarded the corrected policy, which defendant immediately returned; and that the company retained the policy before the risk began, without explanation. *Held*, that a verdict for defendant was warranted. —*German Ins. Co. v. Davis*, (Ark.) 12 S. W. 155.

**Application.**

6. Representations as to the value of the property insured will not avoid the policy where they are made in good faith, and the evidence in an action thereon as to value is conflicting. —*Kenton Ins. Co. v. Wigginton*, (Ky.) 12 S. W. 668.

7. A warranty in an application for insurance of the truth of answers made to the company's medical examiner will not avoid the policy for untruth in the answers as "written," in the absence of express stipulations, or of suspicion or knowledge of the applicant that the answers are incorrectly written. —*Equitable Life Assur. Soc. v. Hazlewood*, (Tex.) 12 S. W. 621.

8. Where it appears that an applicant, who had answered that no policy had been applied for in any other company which had been refused, had been rejected by the Legion of Honor, it may be shown that the agent told him that the Legion of Honor was not regarded as a life insurance company. —*Equitable Life Assur. Soc. v. Hazlewood*, (Tex.) 12 S. W. 621.

9. The building insured stood on a large tract which insured stated he owned unconditionally. He owned an undivided fourth in fee, and a life interest in the remainder; but at the time the extent of his interest in the remainder, whether for life, or in fee, was in litigation. The building was his dwelling, built at his expense. *Held* that, as in a partition the building would be assigned to him with his fourth, his representation did not avoid the policy. —*Kenton Ins. Co. v. Wigginton*, (Ky.) 12 S. W. 668.

**Conditions of policy.**

10. Where the insured has been guilty of willful fraud or false swearing he cannot recover on a policy, the clauses of which provide that "any fraud, or attempt at fraud, or any false swearing on the part of the assured, shall cause a forfeiture of all claim under this policy." —*Lion Fire Ins. Co. v. Starr*, (Tex.) 12 S. W. 45.

11. It is necessary for defendant to show that the fraud, or attempted fraud, or false swearing, was willful, and not the result of inadvertence or mistake; but it is error to charge that before the

plaintiff's right to recover was forfeited it must appear that not only his own testimony, but also that of "other witnesses produced by him, was false and corrupt."—*Lion Fire Ins. Co. v. Starr*, (Tex.) 12 S. W. 45.

12. A policy of insurance on a dwelling-house and a house to let, which stood close together, provided that "if the above premises shall become vacant or unoccupied, \* \* \* this policy shall cease," etc. The insurance was for separate sums, but the consideration paid was a gross sum. The buildings were destroyed when the dwelling-house alone was occupied. *Held*, that the contract was indivisible, and that the premises were not vacant, within the policy, so as to discharge the company from liability for loss of the unoccupied house.—*McQueaney v. Phoenix Ins. Co.*, (Ark.) 12 S. W. 498.

13. An insurance policy, containing a clause requiring the assured to produce account books and vouchers in case of loss by fire, is not avoided by failure or refusal to produce them, unless the policy provides in express terms for such forfeiture; but the failure or refusal may be proven, and is a proper subject of comment before the jury as to the extent of the loss.—*Lion Fire Ins. Co. v. Starr*, (Tex.) 12 S. W. 45.

#### Conditions of policy—Waiver.

14. The delivery by an agent, who has been informed by the assured that the building is on leased land, of a policy in which that fact is not noted in writing, amounts, in the absence of collusion, to a waiver of the condition requiring it, though the policy provides that "the use of general terms, or anything less than a distinct agreement indorsed on the policy, shall not be construed as a waiver of any restriction therein."—*Home Ins. Co. v. Stone River Nat. Bank*, (Tenn.) 12 S. W. 915.

#### Notice of loss.

15. If the local agent of an insurance company, on being requested by the owner of insured property to notify the company of the loss, which occurred the night before the request, informs the owner that he has already sent notice, which is true, and the notice is received in due course of mail, a requirement of the policy that the insured shall give immediate notice of loss is sufficiently complied with, though the notice did not purport to be given on behalf of the insured.—*Loeb v. American Cent. Ins. Co.*, (Mo.) 12 S. W. 374.

16. A provision in the policy that no agent has power to waive any of its conditions does not refer to a stipulation printed on the back of the policy requiring prompt notice of loss. Such provision only affects matters prior to the loss.—*Loeb v. American Cent. Ins. Co.*, (Mo.) 12 S. W. 374.

#### Proof of loss.

17. That the assured applied for \$3,000 insurance, and was allowed \$2,000, and the loss was total, is not sufficient to show cash value at the time of loss, several months later.—*Home Ins. Co. v. Stone River Nat. Bank*, (Tenn.) 12 S. W. 915.

18. Where the company is to pay the cash value of the property at the time of loss, not exceeding the sum named, recovery cannot be had without proof of the value of the property destroyed, and this is not waived by an agreement that preliminary proof of loss had been duly made.—*Home Ins. Co. v. Stone River Nat. Bank*, (Tenn.) 12 S. W. 915.

19. The evidence, in an action for loss by fire, on behalf of plaintiffs, showed that they were told by the local agent of defendant that they need not send proofs of loss, as an adjuster would soon call to settle the business. An ineffectual attempt to arbitrate was made by plaintiffs and other companies who had also written policies on the property, and defendant's general adjuster then stated that he was not going into the arbitration, but that he would settle the loss when the arbitration was ended. The proofs were made and furnished after the stipulated time, and when they were handed to defendant's secretary he said that it was unnecessary to furnish proofs; that the company knew all about plaintiffs' loss. The local agent did not deny making the statement attributed to him,

but the secretary testified that he made no such statements as to the necessity for proofs, but, on the contrary, told plaintiffs that they had forfeited their rights. It was not disputed that the proofs were retained without objection, and given to the general adjuster. *Held* evidence sufficient to justify a finding that defendant induced plaintiffs to believe that it intended to waive the delay.—*Loeb v. American Cent. Ins. Co.*, (Mo.) 12 S. W. 374.

20. Failure to make preliminary proof of loss is excused where it appears that the insured applied for blanks to the local agent, who said he would write for some, which he did, but, receiving none, went to the home office, and was told some one would be sent to see about it, and so reported to the insured.—*Kenton Ins. Co. v. Wigginton*, (Ky.) 12 S. W. 668.

#### Agents.

21. Money was sent to insurance agents, with the instruction that if they could not give the sender a good company to return his money. They insured him in a company that had not complied with the requirements of Mill. & V. Code Tenn. § 2666, making it unlawful for any company not organized or incorporated by the laws of Tennessee to transact any business in the state unless possessed of at least \$200,000 paid-up capital. *Held* that, the company being insolvent, they were liable for the loss.—*Morton v. Hart*, (Tenn.) 12 S. W. 1026.

22. A charge "that, if defendants knowingly insured plaintiff in a company which had not complied with the law of the state, this fact might be considered by the jury in determining defendants' negligence," is error.—*Morton v. Hart*, (Tenn.) 12 S. W. 1026.

#### Action on policy—Evidence.

23. Where defendant alleges that the policy was taken out by plaintiff as a wagering policy, its agent may testify that he urged the parties to apply, and that the insured paid the premium, and thought at first of making plaintiff's minor children the beneficiaries, but concluded to make plaintiff the beneficiary, in order that in the event of his marriage it might be changed more easily.—*Equitable Life Assur. Soc. v. Hazlewood*, (Tex.) 12 S. W. 631.

24. Where a policy provides that in no event shall the claim be for a greater sum than the actual damage to or cash value of the property at the time of the fire, the amount of the policy is not even *prima facie* evidence of the loss.—*Lion Fire Ins. Co. v. Starr*, (Tex.) 12 S. W. 45.

#### Mutual benefit insurance.

25. A divorced wife is entitled to no share of a benefit fund which by the rules of the association goes to the member's heirs, no beneficiary having been appointed by him.—*Schonfield v. Turner*, (Tex.) 12 S. W. 626.

26. In the absence of a statute making a distinction between a mutual insurance company and a mutual benefit society, the rights of one claiming insurance must be ascertained by the terms of the contract of insurance, regardless of the character of the company.—*Block v. Valley Mut. Ins. Ass'n*, (Ark.) 12 S. W. 477.

27. A provision in the insurance certificate of a mutual benefit society that "this certificate may be assigned, transferred, or set over, by and with the consent of the association, granted by its president or secretary," does not authorize an assignment by the insured, but by the beneficiary only.—*Block v. Valley Mut. Ins. Ass'n*, (Ark.) 12 S. W. 477.

28. Assignment of a benefit certificate in a benevolent association to one not related to the member, but who has merely advanced him \$50, is against public policy, and the fund goes to the heirs, after deducting dues and advancements paid by the assignee; and it is immaterial that by the rules of the order the fund was to be paid to the member's "family, or as he may direct," and that the certificate was surrendered, and a new one issued to the assignee, according to the constitution.—*Schonfield v. Turner*, (Tex.) 12 S. W. 626.

29. Where the laws of a mutual association require the payment of all assessments within 30

days after the date of the notice thereof, on penalty of suspension, the time of which is to be fixed by vote of the association, an order of an officer of the association, suspending a member for non-payment of an assessment, but without the required vote, is inoperative.—*Knights of Honor v. Wickser*, (Tex.) 12 S. W. 175.

80. Where the suspension of a member of a mutual association for non-payment of an assessment is illegal, the refusal of the association to credit the insured with assessments paid thereafter, or to give to the proper officers the required notice of his death, does not prejudice the right of the beneficiaries under his certificate to recover thereon, they having done everything required of them, and there being funds subject to such payment.—*Knights of Honor v. Wickser*, (Tex.) 12 S. W. 175.

81. The entry of an order upon the minutes of a mutual association, suspending a member for non-payment of an assessment, being only *prima facie* evidence of its legality, parol evidence is admissible to show that it was by order of an officer alone.—*Knights of Honor v. Wickser*, (Tex.) 12 S. W. 175.

#### Insurance companies—License.

82. Mill. & V. Code Tenn. § 2575, provides that whenever any insurance company shall have fully complied with all of the requirements of the statute, and the commissioner is satisfied that the affairs of such company are in a sound condition, he shall issue certificates of authority to such persons as the company may designate to transact business for the company in the state. *Held*, that the action of the commissioner is judicial, and no liability will attach to him for such action unless it is corrupt.—*State v. Thomas*, (Tenn.) 10 S. W. 1084.

83. An allegation of a bill that an insurance commissioner knowingly issued a license to an insurance company in violation of law is not equivalent to a charge that he willfully and maliciously violated the law.—*State v. Thomas*, (Tenn.) 12 S. W. 1084.

#### Interest.

Right to interest, see *Eminent Domain*, 12

#### Interstate Commerce.

See *Constitutional Law*, 8, 9.

#### Intervention.

In attachment, see *Attachment*, 13, 14.

### INTOXICATING LIQUORS.

#### Constitutionality of acts.

1. Act Ky. April 30, 1888, amending the law regarding the retail sale of ardent spirits, and providing that sale may be made at the distiller's residence only when the same is on the distillery premises, which is made to apply to one county only, is not unconstitutional, but a proper exercise of the power to make public police regulations.—*Creekmore v. Commonwealth*, (Ky.) 12 S. W. 628.

2. The Texas act prohibiting the selling of malt liquors without having posted in a conspicuous place in the house wherein the occupation is pursued a license issued by the county clerk, is not in conflict with Const. Tex. art. 16, § 20, conferring upon counties, cities, towns, and justice's precincts the right of prohibiting the sale of intoxicating liquors.—*Bell v. State*, (Tex.) 12 S. W. 410.

3. The Texas act, by requiring a bond as a condition precedent to license to sell malt liquors, conditioned that the dealer shall not sell to a husband after he has been notified by the wife, does not abridge the privileges and immunities guaranteed a citizen by the constitution of the United States.—*Bell v. State*, (Tex.) 12 S. W. 410.

#### Illegal sales.

4. Gen. St. Ky. 1878, c. 106, art. 2, § 3, and acts amendatory, allowing distillers to sell spirits at their own residence, provided the residence is "located upon the distillery premises or premises ad-

acent," does not protect sales by a distiller who leases, at a nominal rent, two or three narrow strips of land connecting his residence with the distillery, a mile and a half distant.—*Creekmore v. Commonwealth*, (Ky.) 12 S. W. 628.

#### Physicians' prescriptions.

5. A special act of Kentucky makes it "unlawful for any person or persons to sell spirituous, vinous, or malt liquors in any quantity within the county of Fleming," with certain exceptions, one of which applies to "a regular practicing physician, who in good faith prescribes the same as medicine to his patient." *Held*, that under such act it is lawful for a druggist in that county to sell whisky upon a physician's prescription, to be used as medicine.—*Commonwealth v. Reynolds*, (Ky.) 12 S. W. 182.

6. Where, under a local act prohibiting the sale of spirituous liquors in a certain county, it is provided that physicians may prescribe liquor as a medicine, and have it administered to a patient, the law is not violated when a physician goes to a drug-store with the husband of a woman, whose condition requires whisky, writes a prescription with several ingredients including whisky, which the husband has filled and administers to his wife.—*Parker v. Commonwealth*, (Ky.) 12 S. W. 276.

#### By agent.

7. A conviction is warranted for selling liquor as the agent of one who has no license.—*Baird v. State*, (Ark.) 12 S. W. 566.

#### Licenses.

8. Revenue Act Ark. 1883, imposing a license on the business of a liquor seller, amended by implication the general license law and became a part thereof; and one carrying on such business in a prohibition district is liable to the penalty of the revenue act, by virtue of the "Drag-Net Proviso" of Act Ark. March 26, 1883, which authorizes a conviction for violation of the license law in prohibition districts. Following *Mazzia v. State*, (Ark.) 10 S. W. 257.—*Baird v. State*, (Ark.) 12 S. W. 566.

9. Independent of such proviso, a conviction for selling liquor without a license in a prohibition district is warranted under the license provision of the revenue act of 1883, which prevails in all parts of Arkansas, irrespective of local option laws.—*Baird v. State*, (Ark.) 12 S. W. 566.

10. Act Ark. March 8, 1879, § 15, prohibiting the sale of liquor, and the keeping of a dram-shop without a license, but providing that "this act shall not be held to apply to one who manufactures and sells wines, \* \* \* and who sells no other liquors," exempts such manufacturer from the penalty for keeping a drinking saloon or dram-shop without license, as well as from the penalty for selling without license.—*Jeffries v. State*, (Ark.) 12 S. W. 1015.

11. Under such act, the manufacturer may sell by agents.—*Jeffries v. State*, (Ark.) 12 S. W. 1015.

#### Criminal prosecution—Indictment.

12. An indictment which charges that defendant, "on the 1st day of May, 1889, \* \* \* unlawfully did keep open his dram shops on Sunday," is good, though the 1st day of May, 1889, came on Wednesday; the gist of the offense being that defendant sold spirituous liquor on Sunday.—*Marquardt v. State*, (Ark.) 12 S. W. 562.

#### Joinder.

See *Parties*, 6, 7.

Of counts, see *Indictment and Information*, 6.

#### JUDGE.

See, also, *Justices of the Peace*.

#### Compensation.

1. Rev. St. Tex. tit. 42, art. 2421, provides that "if any of the officers named in this title shall demand and receive any higher fees than are prescribed to them in this title, or any fees that are not allowed by this title, such officers shall be lia-

ble to the party aggrieved for fourfold the fees so unlawfully demanded and received by him, to be recovered in any court of competent jurisdiction." County judges are among the officers named in this title. *Held*, that the penalty prescribed by this section is not applicable to the case where a county judge demands and receives a greater amount than is allowed by law for the disbursement of the school-fund; compensation for such service not being allowed by such title, but by Rev. St. tit. 78, art. 3745.—*Wood County v. Cate*, (Tex.) 12 S. W. 585; id. 586.

#### Authority.

2. Rev. St. Tex. art. 1124, providing that any judge of the district court may hold court for any other district judge, gives a district judge authority to hear a *habeas corpus* case for, and at the request of, the judge of another district, who has absented himself from the district after issuing the writ.—*In re Angus*, (Tex.) 12 S. W. 1099.

#### Holding court in another district.

3. Act Ky. March 9, 1888, authorizing a circuit judge other than the one regularly elected to preside for the latter when he is absent, or, if in attendance, cannot properly preside in any cause, and when the bar fails to elect a special judge, or shall so request, is authorized by Const. Ky. art. 4, § 28, authorizing the general assembly to provide by law for holding circuit courts, when from any cause the judge shall fail to attend, or, if in attendance, cannot properly preside.—*Hughes v. Commonwealth*, (Ky.) 12 S. W. 269.

4. An order entered of record stated that S., judge of the district, and G., of another district, having temporarily changed districts by authority of an act of the legislature, S. vacated the bench, and G., having been invited by the unanimous voice of the members of the bar to preside, took the bench. *Held*, that the recital sufficiently showed that the regular judge could not properly preside.—*Hughes v. Commonwealth*, (Ky.) 12 S. W. 269.

#### Disqualification.

5. A judge is disqualified to render judgment upon a note which has been assigned as collateral to secure a debt, owed by a firm of which he is a member; and such a judgment is absolutely void. *Templeton v. Giddings*, (Tex.) 12 S. W. 851.

#### Special judge.

6. After the case had been closed on both sides, and the instructions had been given to the jury, counsel for the accused and for the commonwealth agreed that one F., a lawyer, might preside during the balance of the trial, and receive the verdict, which he did. He also discharged the jury, and ordered defendant into the custody of the jailer after a verdict of guilty, but had no further connection with the case. It did not appear that the regular judge was beyond easy call, that any objection was made to the special judge, or that he made any ruling affecting defendant's rights in any way. *Held*, a mere irregularity, and not an error for which judgment would be reversed.—*Fuson v. Commonwealth*, (Ky.) 12 S. W. 265.

7. Act Ky. Feb. 7, 1884, providing for the election of special judges to preside when the judge of the Jefferson court of common pleas fails to attend, and for transfer of causes from that court to the vice-chancellor of the Louisville chancery court, when the judge thereof cannot properly preside, does not authorize the election of a special judge in the common pleas in a case which the regular judge is disqualified to try, but only when he fails to attend.—*Royal Ins. Co. v. Ruter's Adm'r*, (Ky.) 12 S. W. 1043.

### JUDGMENT.

See, also, *Replevin*, 10, 11; *Trespass to Try Title*, 36-38.

#### By confession.

1. Mansf. Dig. Ark. § 5185, provides that any person indebted, or against whom a cause of action exists, may personally appear in a court of competent jurisdiction and confess judgment therefor. *Held*, that a judgment confessed before a justice,

the record of which fails to show, except by inference, that defendant personally appeared, is void.—*Smith v. Finley*, (Ark.) 12 S. W. 782.

#### By default.

2. Upon an appeal it was held that a cause had been improperly dismissed, and that plaintiff was entitled to judgment by default. Upon the first day of the next term of the trial court, plaintiff demanded judgment by default, and the case was taken under advisement. On the next day defendant's attorney filed an answer, demanded a jury, and deposited the jury fee. *Held*, that it was error to thereafter render a judgment by default.—*City of Jefferson v. Jones*, (Tex.) 12 S. W. 749.

3. Under a plea stating that defendants hold under a warranty deed, and asking that the warrantors be cited to appear and answer, and, in case plaintiff recovers, for such judgment over against "them as the law authorizes in such cases," a judgment by default against the warrantors for a sum certain cannot be sustained.—*Kimmarle v. Houston & T. C. Ry. Co.*, (Tex.) 12 S. W. 698.

#### Non obstante veredicto.

4. A motion for judgment *non obstante veredicto* must be made before the entering of judgment.—*Scheible v. Hart*, (Ky.) 12 S. W. 623.

#### Rendered and entry.

5. Where the plaintiff sues for herself and for the minor children of the deceased, and claims certain specified sums as damages for each of them, the verdict and judgment must follow the pleadings, and a judgment for an amount in excess of that claimed for any one of them cannot be sustained.—*International & G. N. R. Co. v. McDonald*, (Tex.) 12 S. W. 860.

6. A judgment rendered in favor of a deceased party is void.—*Jacobson v. Campbell*, (Ark.) 12 S. W. 784.

#### Idem sonans.

7. "Lindsley" and "Lindsey" are not *idem sonans*, and a judgment in the latter name in garnishment proceedings conducted in the former cannot be sustained.—*Selman v. Orr*, (Tex.) 12 S. W. 697.

#### Res adjudicata.

8. Where an executor's expense account, having been presented as a part of his final exhibit, is acted upon by the court on the same day with such exhibit, the action of the court in approving the expense account and the final exhibit is substantially one and the same judgment, and, as an appeal from the approval of the exhibit carried the whole case into the district court, it is not error to overrule the executor's plea of former recovery as to the expense account.—*Richardson v. Kennedy*, (Tex.) 12 S. W. 819.

9. Certain trustees appointed by a will bought land of the father of one of the *cestuis que trustent*, and received a conveyance, with a reservation of a lien for the residue of the purchase money. Under a decree to which the beneficiaries were not parties the land was sold for much less than its cost, and purchased by the grantor, who agreed to pay the beneficiaries, who were his daughter and her husband, for what interest they had therein; but before doing so he died. Pending a suit to partition the grantor's land, to which the *cestuis que trustent* were parties, some of the heirs agreed to reimburse them, but others refused to do so, upon which said *cestuis que trustent* tendered a cross-petition, asking compensation for their interest in the land, but it was held to be offered too late, and rejected, and thereupon one of them brought suit for such compensation. *Held*, that plaintiff was not estopped from maintaining such a suit by the partition proceedings, since the heirs had falsely led him to expect compensation without litigation until too late to successfully make his claim therein.—*Benton v. Ragan's Adm'r*, (Ky.) 12 S. W. 155.

10. The doctrine of *res adjudicata*, in the absence of a new state of facts, applies to a discharge on *habeas corpus*, even when used to obtain custody of children.—*Weir v. Marley*, (Mo.) 12 S. W. 798.

11. A judgment in ejectment, sustaining defendants' equitable title to the land, is a bar to a subsequent suit in equity, by the same plaintiffs against the same defendants, to remove defendants' claim as a cloud on plaintiffs' title.—*Emmel v. Hayes*, (Mo.) 12 S. W. 531.

12. A plaintiff in ejectment, who claims under an execution sale on a judgment against the common source of title, cannot avail himself of a decree, in a suit to which he was not a party, adjudging that the deed from which defendant derives his title was a fraud upon the rights of creditors.—*Bell v. Wilson*, (Ark.) 12 S. W. 823.

13. A judgment charging land with a lien, on the ground that a former conveyance of the same land, duly recorded, was made in fraud of creditors and subsequent purchasers, is final, and cannot be questioned in a suit between the same parties, though it has been partially overruled by a holding that a deed duly recorded, though made to defraud creditors, is not void as to subsequent purchasers; nor can plaintiffs, in a suit to redeem from such lien, question its validity, where it has been admitted in their petition.—*Stevenson v. Edwards*, (Mo.) 12 S. W. 255.

14. Where defendant in ejectment fails to show performance of conditions precedent in the deed under which it holds, a judgment for plaintiff is no bar to defendant's recovery of the same land, by proving such performance in a subsequent action against the plaintiff's grantees.—*City of St. Louis v. Schulenburg-Boeckler Lumber Co.*, (Mo.) 12 S. W. 248.

15. Testator devised his estate to his wife for 21 years, after which it was to be owned by his children; but if the wife should die without children by him, it was to go to plaintiffs. Upon the death of testator's children, the wife was to have the property for life. After testator's death, the widow had the will set aside, making an only child of testator and the executor parties defendant in the suit. *Held*, that as the child, who was entitled to the first estate of inheritance, and the widow, who was a tenant for life and for years, were both parties to the suit, plaintiffs became parties by the rule of virtual representation, and were bound by the judgment, though not actual parties.—*Miller v. Foster*, (Tex.) 12 S. W. 119.

16. A decree of partition of the land of a testatrix, and confirmation of the commissioner's report, made by a court of probate in Texas, do not estop a devisee, who is a party to the proceedings, to set up a claim to the land otherwise derived, as the probate court has no authority to determine title to land.—*Mayo v. Tudor's Heirs*, (Tex.) 12 S. W. 117.

17. An action against an administrator to recover the value of lands sold by him as such under letters alleged to have been fraudulently procured cannot be maintained after a judgment revoking said letters of administration has been previously reversed on appeal in an action for that purpose.—*Halbert v. Alford*, (Tex.) 12 S. W. 77.

18. An action to recover horses wrongfully sold under an execution is not a bar to a second action between the same parties to recover other horses sold at the same time under the same execution, but seized at a different time and place, although both claims might have been included in the one suit.—*Millikin v. Smoot*, (Tex.) 12 S. W. 59.

19. A matter which determines the right to a second suit as to the title to land cannot be set up in the second suit as *res adjudicata* by virtue of the former suit.—*Cassidy v. Kluge*, (Tex.) 12 S. W. 12.

#### Lien.

20. As the homestead of a judgment debtor is not subject to levy and sale under the judgment, no lien attaches to the land thereunder.—*Grimes v. Portman*, (Mo.) 12 S. W. 792.

21. The lien of a judgment is superior to that of an unrecorded mortgage. Following *Hawkins v. Files*, 11 S. W. 681.—*Cleveland v. Shannon*, (Ark.) 12 S. W. 497.

#### Amendment.

22. Where a judgment, revived after the debtor's death, directs execution against his executors, v. 12s. w.—76

instead of against his estate in their hands, and executions issue accordingly, and sales thereunder are made, it is too late to amend the judgment and executions.—*McKay v. Paris Exch. Bank*, (Tex.) 12 S. W. 529

#### Opening and vacating.

23. Where there has been no ratification of the unauthorized act of an attorney in entering appearance for defendants, a domestic judgment entered thereon, without the service of summons on defendants, will be set aside on direct proceedings timely instituted, without regard to the question whether or not the attorney is responsible.—*Bradley v. Welch*, (Mo.) 12 S. W. 911.

24. In an action to foreclose a vendor's lien on land, plaintiff alleged that some of the defendants who were non-residents had obtained judgment against the vendee, and had sold the land under execution, but failed to allege who became the purchaser, or what interest these defendants had in the land. The record shows no warning order against these defendants, and no appearance by them except through an attorney *ad litem* appointed by the court. *Held*, that the judgment will be vacated and the complaint dismissed as to them.—*Hill v. Bates*, (Ark.) 12 S. W. 874.

25. Under Mansf. Dig. Ark. §§ 3909, 3911, providing that after the expiration of the term the proceedings in the circuit court to vacate or modify a judgment shall be by complaint, verified by affidavit, setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party was defendant, a petition to vacate a judgment, when presented by way of objection to the confirmation of a report of sale, will be rejected.—*Johnson v. Campbell*, (Ark.) 12 S. W. 578.

26. District courts in Texas have authority, either with or without a motion, to set aside any order, judgment, or decree in a civil case during the term at which the same is granted.—*Aycock v. Kimbrough*, (Tex.) 12 S. W. 71.

#### Title by judgment.

27. In an action of replevin by the owner to recover possession of property, for the injury of which he has recovered damages from a railroad company as for a total loss, an interplea by the railroad company, on the theory that the original action was for the conversion of the property, is bad if it does not allege satisfaction of the judgment recovered for the conversion.—*Dow v. King*, (Ark.) 12 S. W. 577.

28. The recovery of a judgment against a railroad company for negligent injury to property gives the company no claim on the property.—*Dow v. King*, (Ark.) 12 S. W. 577.

#### Collateral attack.

29. A judgment that has been standing for 10 years cannot be attacked collaterally, where no motion has ever been made to vacate or modify it, and no good reason is shown for the failure to do so.—*Campbell v. Jones*, (Ark.) 12 S. W. 1016.

#### Equitable relief—Pleading.

30. In a suit to enjoin the sale of property under execution, the complaint alleged that complainant confessed the judgments upon which such executions were issued, upon defendants' assurance that the amounts were just balances due them, but that he afterwards learned that these amounts included the price of certain machinery, for which he was not chargeable; and that defendants, who were in possession of all the accounts when he confessed the judgments, had led him to believe that the value of the machinery was not included. *Held*, that the complaint did not show fraud or mistake, and was properly dismissed.—*Ramsour v. Brownell*, (Ark.) 12 S. W. 200.

31. Where a bill to enjoin a judgment alleges no defense to the claim upon which such judgment was rendered, it states no cause of action.—*Rotan's Heirs v. Springer*, (Ark.) 12 S. W. 156.

#### Injunction.

32. Rev. St. Tex. art. 2874, provides that no injunction shall be granted to stay any judgment



except so much of the recovery as complainant shall in his petition show himself entitled to be relieved against, and so much as will cover the costs. Defendants, as sureties on a treasurer's bond, prayed relief from a judgment and execution against them on such bond, on the ground that their attorneys had failed to show that they signed the bond on condition that two other responsible persons should sign it, whose signatures the principal and one of the county commissioners promised but failed to procure, and that the bond was accepted by the county commissioners' court without their knowledge that such signatures had not been obtained. *Held* that, as the defense would have been unavailable in the suit on the bond, the proceedings on the judgment will not be enjoined.—*Ballow v. Wichita County*, (Tex.) 12 S. W. 48.

88. A surety cannot enjoin an assignee from enforcing a judgment recovered by the principal against the surety on the ground that he, as surety, has paid a portion of a smaller judgment against his principal, who is now insolvent, without offering to pay the excess of that judgment over his claim.—*Smith v. Smith*, (Tex.) 12 S. W. 878.

#### Action on judgment.

34. In an action on a foreign judgment, the answer alleged that the foreign court had no jurisdiction to render such judgment, but that it was rendered on a complaint which on its face disclosed that no cause of action existed, and that said court had no jurisdiction to render said judgment, or any judgment whatever. *Held*, that the answer did not allege want of jurisdiction, but only error in its exercise, and a demurrer was rightly sustained.—*Williams v. Renwick*, (Ark.) 12 S. W. 881.

### JUDICIAL SALES.

On execution, see *Execution*, 7-18; *Executors and Administrators*, 18-27.  
foreclosure, see *Mortgages*, 18.

#### Rights of purchaser.

1. Where plaintiff, as commissioner, sells a tract of land, giving a bond conditioned, among other things, that the purchaser should be put in full possession of the land, and it appears that a portion of the tract is in the adverse possession of another person, the purchaser is entitled to have the value of that portion deducted from the purchase price of the tract.—*Aiken v. Underwood*, (Ky.) 12 S. W. 1061.

#### Terms of sale.

2. Where a sale is confirmed after decision, on appeal, reversing the judgment, and directing that appellant's interest be protected in the sale, and the sale has been made, without securing appellant's rights, on 6 months' credit, instead of 12, as directed by the judgment, the order of confirmation will be set aside.—*Musgrave v. Parrish*, (Ky.) 12 S. W. 709.

3. The confirmation of a sale under a decree will not be disturbed, where it appears that there has been due and legal notice of time, terms, and place of sale, though it was made on a credit of three months, instead of four, as the decree directed; the defendant showing no injury resulting from the departure from the direction, and the trial court being satisfied that none had resulted therefrom.—*Johnson v. Campbell*, (Ark.) 12 S. W. 578.

#### Setting aside.

4. Where land sold under a judgment could have been sold in parcels, a sale of the whole tract, without an attempt to make less of the land pay the debt, is erroneous, and will be set aside on appeal from the order confirming the commissioners' report of the sale.—*McLaughlin v. Schmieid*, (Ky.) 12 S. W. 1061.

### Jurisdiction.

See *Courts; Injunction*, 1, 2; *Justices of the Peace*, 1, 2.

Criminal jurisdiction, see *Criminal Law*, 2, 8.  
Equity jurisdiction, see *Equity*, 1-15.

### JURY.

Custody and conduct, see *Criminal Law*, 69-71.

#### Competency of jurors—Bias.

1. A juror, in a prosecution for rape, stated on his *voir dire* that he did not know the defendant or the prosecutrix, but remembered reading of the case when it occurred, and thought it a hard case, and could not say that he had no opinion, but that his opinion would not prejudice him as a juror. On cross-examination he said that the newspaper report produced an opinion in his mind, which could be only removed by evidence, and that the defendant would have to prove his innocence. On re-examination he said that if the newspaper report were shown to be true he would retain his opinion, but that if the facts were shown to be different he would arrive at a different conclusion. If sworn as a juror, he would be governed only by the evidence, and would pay no attention to what he had read; that his attention would be drawn from the newspaper account; and that he could give defendant a fair trial. *Held*, construing his whole examination together, he was qualified. It being a question of fact, all doubts should be resolved favorably to the finding of the trial court, and as it did not clearly appear that the juror had such an opinion as to bias his mind, the decision favorable to his competency should be sustained.—*State v. Cunningham*, (Mo.) 12 S. W. 876.

#### Summoning and impaneling.

2. Under Code Crim. Proc. Tex. art. 605, defining a "special venire" as a writ issued by order of the court for any number of not less than 50 nor more than 60, in the discretion of the court, to serve as a jury in the particular case, the fact that only 59 names instead of 60, as asked for by defendant, were upon the list attached to the original writ, neither invalidates the writ, nor the venire summoned under it.—*Hall v. State*, (Tex.) 12 S. W. 789.

3. Until a special venire has been exhausted or discharged with defendant's consent, it is error for the court to order the issuance and execution of another venire. Following *Sharpe v. State*, 17 Tex. App. 487.—*Hall v. State*, (Tex.) 12 S. W. 789.

Where, during the impaneling of the jury, the judge ascertains that the sheriff is related to the accused, it is proper, without motion or affidavit, to appoint an elisor to act in the sheriff's stead.—*Allen v. Commonwealth*, (Ky.) 12 S. W. 582.

5. Rev. St. Tex. art. 8032, requires that the district court shall, at each term, appoint jury commissioners, who shall select jurors to serve during the several weeks of the succeeding term, and that the said commissioners shall certify the several lists of names to be the lists drawn by them for the said several weeks, which lists shall be sealed in separate envelopes, indorsed, "Lists of Petit Jurors for the \_\_\_\_\_ Week of the \_\_\_\_\_ Term of the \_\_\_\_\_ Court of \_\_\_\_\_ County." Defendant's motion to quash the special venire was based upon the fact that the several lists were headed "Lists of Jurors for the April Term," instead of properly, the May term. The bill of exceptions did not show, nor did it otherwise appear, that the envelopes inclosing said lists were not properly indorsed. *Held* that, as the statute does not require the "headings of the lists" to be indorsed in like manner as the envelopes, the presumption obtained in favor of the proper return of the lists.—*Glebel v. State*, (Tex.) 12 S. W. 591.

6. Gen. St. Ky. c. 62, art. 5, § 4, provides that in criminal cases, where the accused is entitled to more than three peremptory challenges, the clerk shall draw from his box twelve names, who shall compose the jury, unless some of them are challenged, in which event he shall draw as many more names as may be required, until a jury be obtained, or the panel exhausted, when the deficiency shall be made up from by-standers. *Held*, that when the court has furnished all the unoccupied jurors of the regular panel, it should be regarded as exhausted, and by-standers may then be summoned.—*McClernand v. Commonwealth*, (Ky.) 12 S. W. 148.

7. Gen. St. Ky. c. 62, art. 5, § 5, provides that in selecting jurors in civil cases 18 names shall be drawn from the jury-box, and each side shall strike 8 names from the list, and the remaining 10 shall constitute the jury. *Held*, that where the court asks the panel all questions desired by counsel, who announce themselves satisfied, and it appears that the jurors were competent, a refusal by the court to permit counsel to examine each individual juror to ascertain his bias, after the 18 names have been drawn and no challenge for cause is made, is proper.—*London & Lancashire Fire Ins. Co. v. Rufer's Adm'r*, (Ky.) 12 S. W. 948.

#### Waiver of objections.

8. An objection to the prejudice of a juror is too late after verdict, where the party has failed to examine him on the *voir dire*, and was not misled or deceived in reference thereto.—*Brown v. St. Louis, L. M. & S. Ry. Co.*, (Ark.) 12 S. W. 203.

#### Challenges.

9. Refusal to allow defendant and intervenors, in trespass to try title, the full number of peremptory challenges, if error, is harmless, when it does not appear that after exhausting the challenges allowed, there was any juror they desired to challenge.—*Snow v. Starr*, (Tex.) 12 S. W. 678.

10. A proposed juror stated on his *voir dire* that he was prejudiced in favor of defendant, but that he could find a verdict upon the evidence alone. *Held*, that the court properly sustained the state's challenge for cause.—*Glebel v. State*, (Tex.) 12 S. W. 591.

### JUSTICES OF THE PEACE.

#### Jurisdiction.

1. A justice of the peace has jurisdiction of a suit to ascertain and fix the amount justly due, for which there is a lien upon land, and to reform the contract as to the amount secured by the lien.—*Crawford v. Sandidge*, (Tex.) 12 S. W. 858.

2. After a trial on the merits in a justice's court, the defendant is precluded, on appeal, from raising the question of jurisdiction on the ground that the complaint did not affirmatively show that the premises in question were situated in the justice's precinct.—*Cahill v. Texas Mex. Ry. Co.*, (Tex.) 12 S. W. 1123.

#### Judgment by.

3. The failure of a justice to make a docket entry of the filing of an information does not invalidate the judgment.—*State v. Hockaday*, 12 S. W. 246, 98 Mo. 590.

#### Revivor.

4. As Mansf. Dig. Ark. § 4108, expressly prohibits the issue of execution on the judgment of a justice of the peace after five years from the date of its rendition, the power to issue it cannot be revived by *scire facias*, or other proceeding peculiar to courts of superior jurisdiction.—*Trammell v. Anderson*, (Ark.) 12 S. W. 828.

### Justifiable Homicide.

See *Homicide*, 19-28.

### LANDLORD AND TENANT.

#### Sale of tenant's interest.

1. Under Rev. St. Mo. 1899, § 6868, providing that no tenant for a term not exceeding two years shall assign or transfer his term or interest, or any part thereof, to another without the written consent of the landlord, such interest cannot be passed by sale under legal process.—*Holliday v. Aehle*, (Mo.) 12 S. W. 797.

#### Rent.

2. Where a tenant is authorized by his landlord to make a sale of his crop for the purpose of paying a debt for which the landlord is surety, the failure on the part of the tenant to devote the excess of the proceeds of the sale to the payment of the rent is not a ground for attachment.—*Webb v. Arnold*, (Ark.) 12 S. W. 707.

3. A demand for and statement of less rent than is due is not fatal to an action for rent in arrear and possession of the premises, brought under Rev. St. Mo. § 3098 et seq., which provide that "whenever any rent has become due and payable, and payment has been demanded by the landlord, \* \* \* and payment thereof has not been made, the landlord, or his agent, may file a statement, verified by affidavit, \* \* \* setting forth the terms on which the said property was rented, and the amount of rent actually due," and that payment has been demanded and not made, and providing for the procedure in such cases.—*Moore v. Martin*, (Mo.) 12 S. W. 522.

#### Landlord's lien.

4. In an action to enforce a landlord's lien on some cotton, defendants testified that they bought it without knowledge that the seller owed plaintiff rent, or was plaintiff's tenant. Plaintiff's witness testified that he told defendants that he thought plaintiff had a mortgage on the cotton, but did not tell them that he had a rent claim thereon. *Held*, that the evidence did not warrant a decree for plaintiff, as it failed to show notice to defendants of the lien.—*Bledsoe v. Mitchell*, (Ark.) 12 S. W. 390.

5. Where a landlord purchases the cotton crop of his tenant, though he thereby extinguishes his lien, he acquires, as against a prior mortgagee, an absolute title to an undivided interest in such cotton, equal to the amount of his lien.—*Titworth v. Frauenthal*, (Ark.) 12 S. W. 498.

#### Recovery of possession.

6. In an action by a lessor to recover the premises leased, a charge that if the land included in the original lease, but omitted in an alleged extension of the lease, was found worthless for the purposes for which leased, and was abandoned by the lessees, with plaintiff's knowledge and consent, and he led the lessees to believe that it was eliminated from the contract, it should be considered as so eliminated, is proper.—*Bullis v. Noyes*, (Tex.) 12 S. W. 397.

7. A charge that representations by the lessor that he would extend the time for performance of the conditions of the original lease, made before or after its expiration, on which defendants relied, would estop him to take advantage of their non-performance by defendants, is immaterial error, where all the evidence as to such representations relates to a time before the expiration of the original lease.—*Bullis v. Noyes*, (Tex.) 12 S. W. 397.

8. But a charge that plaintiff would be estopped by such representations to take advantage of non-performance of conditions of the original contract, "by the express terms thereof," is reversible error, where such contract contains no such terms, and the verdict shows that the jury may have considered the alleged extension contract as part of the original, in order to find such terms.—*Bullis v. Noyes*, (Tex.) 12 S. W. 397.

#### Notice to quit.

9. Where a vendee sends to one occupying the land under an unrecorded lease a notice to quit, which is irregular in respect of the time for its expiration, the lessee waives the irregularity by replying that he holds a lease from the grantor, and intends to retain possession until its termination.—*Drey v. Doyle*, (Mo.) 12 S. W. 287.

#### Renting on shares.

10. A cropper, under an agreement by which the land-owner is to furnish teams, utensils, and supplies to make the crop, which is to remain the land-owner's, the cropper to have what remains after deducting half of the crop for the use of the land, and enough to pay for the supplies furnished him, has no title to any part of the crop until his share is set apart to him. *Hammock v. Creekmore*, 45 Ark. 264, 8 S. W. 180, followed.—*Hendricks v. Smith*, (Ark.) 12 S. W. 781.

### Lapsed Legacies.

See *Wills*, 28, 24.

## LARCENY.

### Venue of trial.

1. The venue of a prosecution for theft from the person is confined to the county wherein the offense was committed.—*Nichols v. State*, (Tex.) 12 S. W. 500.

### What constitutes.

2. Pen. Code Tex. art. 737, provides that if the property came into the possession of a person accused of theft, by lawful means, the subsequent appropriation of it is not theft; but if the taking, though lawful, was obtained by any false pretext, or with any intent to deprive the owner of the value, and appropriate the property, and the same is so appropriated, the theft is complete. Defendant was indicted for general theft, and the evidence showed that the stolen property was handed to him by the owner, and that the theft might have been committed by his retaining it. *Held*, that the court should have instructed that, in order to convict, the jury must find that the intent to deprive the owner of the value of the property existed at the very time of acquisition.—*Nichols v. State*, (Tex.) 12 S. W. 500.

### — Owner's possession.

3. A horse on its accustomed range is, in contemplation of law, in the possession of its owner.—*Huffman v. State*, (Tex.) 12 S. W. 588.

### Indictment.

4. A conviction for the theft of a cow cannot be had, under an indictment which alleges the ownership in B, and the possession in A. and W., where the evidence shows that the possession was not in A. and W. jointly, but in B. alone.—*Owens v. State*, (Tex.) 12 S. W. 506.

5. Since Pen. Code Tex. arts. 744, 745, define theft from the person as a distinct offense, and essentially different from ordinary theft, one cannot be convicted thereof, under an indictment for ordinary theft.—*Nichols v. State*, (Tex.) 12 S. W. 500.

6. An information charging theft must allege that the property was fraudulently taken.—*Doxey v. State*, (Tex.) 12 S. W. 412.

7. A count in an indictment for larceny, which charges that defendant was an accessory before the fact,—that is, that he procured certain others to commit the larceny for his benefit,—is not prejudicial to defendant, as such charge is embraced in a count for larceny.—*Sanderson v. Commonwealth*, (Ky.) 12 S. W. 186.

### Evidence.

8. On indictment for stealing an animal, evidence that the brand on the animal had been changed, so as to make it resemble a brand claimed by defendant, without any evidence to show that defendant was concerned in altering the brand, or that he was connected in any way with the stolen animal, is insufficient to justify a conviction.—*Schnaubert v. State*, (Tex.) 12 S. W. 732.

9. On indictment for stealing a calf from one M., there was evidence that the calf was running with a cow belonging to M., and that, on being separated, the cow and calf made efforts to remain together. There was also evidence that motherless calves would take up with strange cows, and that the cows would act as mothers to them. Defendant took the calf openly, declaring it to be his, and his claim of ownership was not disproved. The brands of the calf and the cow were different. *Held*, that the evidence did not justify a conviction.—*Schnaubert v. State*, (Tex.) 12 S. W. 732.

10. Evidence that the whisky charged in the indictment to have been stolen was found near defendant's house; that it had been opened in defendant's house; that, when charged with the larceny, defendant said to one B., from whom he insisted that he received the whisky, "We will have to give it up," and that both went to the spot where it was concealed, with one L., who returned with the whisky,—is sufficient to sustain a conviction of larceny, and does not show that defendant was only guilty of receiving stolen goods.—*Mullins v. Commonwealth*, (Ky.) 12 S. W. 187.

11. On the trial of a defendant for the theft of a bull, all the evidence for the prosecution was that the bull, with other cattle, passed along a certain road, at a certain time; that the track of a certain horse was made along said road on the night the cattle were driven; and that defendant rode the horse in the direction the cattle were driven. *Held* insufficient to support a conviction.—*Hankins v. State*, (Tex.) 12 S. W. 490.

12. On the trial of an indictment for the theft of a bull, the evidence showed that the bull disappeared from its accustomed range without the knowledge of the owner; that a day or two after the alleged theft defendant was seen in possession of a bull which corresponded with the description of the alleged stolen animal. Witnesses for the defense testified to facts which established the defendant's presence at a remote place on the night of the theft, and identified the animal in defendant's possession as another than the alleged stolen animal. *Held*, that the evidence was insufficient to support a conviction.—*Cranch v. State*, (Tex.) 12 S. W. 491.

13. On the trial of an indictment for theft of a steer a witness testified that he saw defendant kill the alleged stolen animal; that defendant then said that he had bought the animal of the alleged owner, but a few days afterwards admitted to witness that it belonged to the alleged owner. The witness, who was defendant's brother-in-law, said nothing of the matter for two years, and until after he and defendant had quarreled. *Held*, that the evidence was insufficient to sustain conviction, as the witness was in effect an accomplice, and his testimony was uncorroborated.—*Norton v. State*, (Tex.) 12 S. W. 407.

14. On the trial for the theft of a mare branded H O F, the theory of the state being that defendant and M. acted together in the theft, it is proper to permit a witness to testify that defendant and M. told him that they were jointly interested in the H O F brand.—*Huffman v. State*, (Tex.) 12 S. W. 588.

15. Testimony that one night, soon after the cow alleged to have been stolen was recovered by the prosecuting witness, two men came to his premises, and attempted to drive her out; and that on that day defendant was seen in the town of M. near by, in company with two men, and that he then wore a straw hat; and that on said night three men, one of whom was wearing a straw hat, were seen lying in a fence corner, near the house of the prosecuting witness, was properly admitted.—*Owens v. State*, (Tex.) 12 S. W. 506.

### Instructions.

16. On a trial for theft, where there is evidence that defendant, in explanation of his ownership and possession of the alleged stolen animal, claimed that he had won it at a game with cards, a refusal by the trial judge to submit this as an issue to be passed upon by the jury is error.—*Carter v. State*, (Tex.) 12 S. W. 740.

17. Though, on a trial for the theft of a cow, there are strong circumstances to show that the stolen animal was the one which witness saw defendant drive into his field within a week before the stolen cow was missed, and its beef and hide found at defendant's house, yet, as the witness did not see and identify the hide as of the cow he had seen defendant drive into his field, a failure to instruct on the law of circumstantial evidence is error.—*Smith v. State*, (Tex.) 12 S. W. 569.

18. An assumption in the charge that defendant took the property alleged to have been stolen, instead of presenting that issue hypothetically to the jury, is error.—*Owens v. State*, (Tex.) 12 S. W. 506.

19. On an indictment charging defendant with stealing goods of the value of more than \$10, it is error to charge as to grand larceny, and to refuse to charge as to the lesser offense.—*Wilhelm v. Commonwealth*, (Ky.) 12 S. W. 371.

20. A charge with respect to theft of property of less value than \$20, upon the trial of an indictment for theft of a larger amount, where no issue is raised as to the amount though it is favorable

to the accused if excepted to, is cause for reversal.—*White v. State*, (Tex.) 12 S. W. 406.

21. On the trial of an indictment for larceny of money defendant requested a special instruction as follows: "If you find that when defendant was called on for an explanation of his possession of the money charged to have been stolen, that he said he had found it, and that he had intended to give it back to the owner, but that he had not seen him since he found it, and that he thought he would bet the money on a horse-race and win some money for himself, and then give it back, and you believe said explanation was reasonable, natural, and probably true, then you cannot convict defendant, unless the state has shown such explanation to be false; and the state must so show beyond a reasonable doubt." *Held*, that the court erred in refusing to give the instruction, where the issue was plainly raised by the evidence.—*White v. State*, (Tex.) 12 S. W. 406.

#### New trial.

22. It is error to refuse defendant's motion for a new trial, after conviction for the theft of a cow, where he shows, by newly-discovered evidence, that since the beginning of the prosecution, and since his trial and conviction, different persons have seen the alleged stolen cow alive, and in her accustomed range; which showing the state does not controvert, as it might, under Code Crim. Proc. Tex. art. 781.—*Lyons v. State*, (Tex.) 12 S. W. 740.\*

### Legislative Power.

See *Constitutional Law*, 1.

#### Levy.

Of attachment, see *Attachment*, 3.  
taxes, see *Taxation*, 5.

### LIBEL AND SLANDER.

#### What actionable.

1. To recover special damages for the utterance of words not actionable *per se*, such words need not, of themselves, convey the meaning of injurious imputation, but it is sufficient if they were intended to, and did in fact, convey such imputation, and reasonably had some connection with the damages claimed to have been caused by them.—*Hardin v. Harshfield*, (Ky.) 12 S. W. 779.

2. Such words need not be uttered by defendant in the presence of the person alleged to have been influenced by them, but it is sufficient if they are brought to his knowledge by others, either with or without the authority of defendant.—*Hardin v. Harshfield*, (Ky.) 12 S. W. 779.

#### Evidence.

3. Evidence that defendant's friend had said that defendant and the female alleged to have been slandered had been carnally intimate and that defendant made the alleged slanderous statement, in corroboration of his friend's statement, to save him from threatened violence, is inadmissible, as it has no tendency to rebut the inference of malice in defendant, or that he made the imputation wantonly.—*Shaw v. State*, (Tex.) 12 S. W. 741.

#### Instructions.

4. On a prosecution for slander by imputing want of chastity to a female, where there is evidence that the general reputation for chastity of the female alleged to have been slandered is bad, it is error, under Pen. Code Tex. art. 646, which provides that "the general reputation for chastity of the female alleged to have been slandered may be inquired into," to refuse an instruction that if the jury believed this evidence they should acquit.—*Shaw v. State*, (Tex.) 12 S. W. 741.

#### License.

Of drummers, see *Municipal Corporations*, 1.  
To run ferry, see *Ferry*, 1.  
sell liquor, see *Intoxicating Liquors*, 8-11.

### Liens.

Of attachment, see *Attachment*, 4-7.

attorneys, see *Attorney and Client*, 2-5.

judgment, see *Judgment*, 20, 21.

landlord, see *Landlord and Tenant*, 4, 5.

vendor, see *Sale*, 5; *Vendor and Vendee*, 31-30.

### LIMITATION OF ACTIONS.

See, also, *Adverse Possession*.

What law governs, see *Conflict of Laws*, 4.

#### When statute is applicable.

1. Plaintiff in trespass to try title claimed under a duly-recorded writing, dated more than 10 years before suit. Defendant pleaded stale demand and the statute of limitations, which pleas plaintiff sought to avoid by showing that after the death of defendant's predecessor in title, which occurred more than 10 years before suit, the administrator set up no hostile claim to plaintiff, and that he (plaintiff) could not ascertain who were decedent's heirs. *Held*, under Rev. St. Tex. art. 8209, providing that "any action for the specific performance of a contract for the conveyance of real estate shall be commenced within 10 years next after the cause of action shall have accrued," that plaintiff's claim was barred; matters which before the adoption of article 8209 would have avoided the defense of stale demand not being applicable to the statutory defense of limitation.—*Chamberlain v. Boon*, (Tex.) 12 S. W. 727.

2. Rev. St. Mo. 1879, §§ 8225, 8226, relating to limitations in cases of certain equitable titles, have no application to ordinary actions of ejectment, where the contest is between two purely legal titles.—*Charles v. Morrow*, (Mo.) 12 S. W. 908.

3. Rev. St. Tex. art. 3203, § 5, provides that "actions upon stated or open accounts other than such mutual and current accounts as concern the trade of merchandise between merchant and merchant, their factors or agents," must be commenced in two years. *Held*, that such statute was not a bar to an action upon an open account commenced more than two years after the date of the last article charged, where the undisputed evidence showed that the parties dealt in the same character of goods, and that the accounts were mutual and current between them, though the trial court did not expressly find the latter fact.—*San Antonio Water-Works Co. v. Maury*, (Tex.) 12 S. W. 166.

4. An action on a promissory note payable in six months, and "given in part payment for a tract of land, to become due when a proper chain of title from the state" was recorded, brought more than 10 years after the making thereof, but within 10 days after a proper chain of title was recorded, is not barred by the statute of limitations, where it appears from the petition that it was the intention of the parties that the note was not to become due until the chain of title was recorded, and that the delay in recording was with the consent and acquiescence of the defendant.—*Robertson v. Cates*, (Tex.) 12 S. W. 54.

#### Running of statute.

5. When a school warrant has been destroyed by fire, and the school board issues a duplicate, as of the date of the original, with the word "Duplicate" written across the face, the statute of limitations begins to run from the date of the original, and not from date of the issue of the duplicate.—*School-District v. Cromer*, (Ark.) 12 S. W. 873.

6. Gen. St. Ky. c. 71, art. 1, §§ 1, 2, and 4, provide that an action to recover real estate can only be brought within 15 years from the time the cause accrued, except when the person to whom the right accrued is an infant, married woman, or person of unsound mind, and then it may be brought within 8 years after removal of disability, but in no case shall the period be extended beyond 30 years from the time the action first accrued. *Held*, that these provisions have no application to an action by a widow, on the death of her husband, to recover dower in lands the title to which her husband lost, during coverture, by adverse possession, as her

right of action does not accrue until his death.—*Williams v. Williams*, (Ky.) 12 S. W. 760.

7. Where a railway company constructs its road-bed so that at times it causes the overflow of adjoining lands, there may be as many recoveries as there are successive injuries, and the statute of limitations begins to run on the happening of the injury complained of, and not from the construction of the railway.—*St. Louis, I. M. & S. Ry. Co. v. Biggs*, (Ark.) 12 S. W. 831.

#### Exceptions.

8. Where a trust has resulted in favor of plaintiff as to lands, the title of which is in defendant, the statute of limitations does not begin to run until, on plaintiff's request to convey, defendant repudiates the trust.—*Cooper v. Lee*, (Tex.) 12 S. W. 438.

9. The relation of attorney and client does not excuse the client's neglect for more than two years to make any inquiries as to the condition of the title to land obtained from the attorney, or its situation and value, he having the deed therefor in his possession; and his action to rescind the contract for fraud is barred by the four-year statute of limitations, where the use of these precautions would have resulted in a discovery of the fraud more than four years before its institution.—*Cooper v. Lee*, (Tex.) 12 S. W. 438.

10. Where an action is barred by the statute of limitations, unless plaintiffs became of age within 8 years before the commencement thereof, plaintiffs must show affirmatively their infancy, to entitle them to the exception to the statute.—*French v. Watson*, (Ark.) 12 S. W. 838.

11. The minority of parties claiming land under an ancestor is no protection against the statute of limitations, where the right of action accrued and the statute began to run in the life-time of their ancestor.—*Bender v. Bean*, (Ark.) 12 S. W. 180.

12. Where the statute begins to run against a married woman, it is not suspended at her death in favor of her minor daughter, who marries before attaining majority.—*Hall v. Ditto*, (Ky.) 12 S. W. 941.

13. In Missouri, the statute limiting the time within which actions for the recovery of real estate must be brought applies to actions to establish resulting trusts, the statute beginning to run on the discovery of the facts constituting the trust.—*Burdette v. May*, (Mo.) 12 S. W. 1056.

14. Under Rev. St. Mo. § 8223, providing that, if any person entitled to commence an action for the recovery of land shall be under disability, the action may be commenced within three years from the time the disability is removed, provided no action shall be brought after 24 years from the time the cause of action accrued, where the statute once begins to run against a person who dies, it continues to run against his heirs, notwithstanding they may be under disability.—*Burdette v. May*, (Mo.) 12 S. W. 1056.

15. Where the character of defendant's possession of land was such as to set the statute of limitations in operation against a tenant in common of the land, the subsequent acquisition of such tenant's interest by plaintiff, a co-tenant, did not interrupt the running of the statute, notwithstanding plaintiff's coverture.—*Johnson v. Schumacher*, (Tex.) 12 S. W. 207.

#### New promise.

16. Where defendant owes plaintiff on several distinct obligations, a letter from him to plaintiff saying, "Don't push us, as yours is the only claim for goods on the shop, and I shall work it off as soon as possible," without designating which obligation he promises to "work off," is not a sufficient new promise to remove the bar of the statute of limitations.—*Opp v. Wack*, (Ark.) 12 S. W. 565.\*

17. A letter stating that defendant had tried to raise some money for plaintiff, and promising to send some, but not all, "because we must live first," and to pay whatever he can every year, and saying that he had not signed a note sent him because it was just as good without, as they knew how they stood, is not sufficient to remove a barred note from the statute of limitations.—*Krueger v. Krueger*, (Tex.) 12 S. W. 1004.

#### Pleading.

18. In an action for seduction and breach of promise of marriage, an issue on the statute of limitations is not raised by an allegation in the declaration that plaintiff was 21 years of age on a certain date, and a plea by defendant that she had attained her majority more than 12 months before suit was brought, and defendant, in addition to such plea, can plead the statute directly.—*Graham v. McKeynolds*, (Tenn.) 12 S. W. 547.

### LIS PENDENS.

#### In general.

1. In a suit concerning the title to real estate, where the defense is that complainant acquired his interest after the property had become involved in litigation, it is necessary to show, in order to charge complainant with constructive notice of *lis pendens*, that the subpoena in the case had been served upon the defendants before complainant took title, but it is not necessary to allege such fact in the answer.—*Staples v. Handley*, (Tenn.) 12 S. W. 839.

2. A purchaser of land sold under deeds of trust, pending a suit to redeem therefrom, takes the land subject to the result of such suit.—*Stevens v. Edwards*, (Mo.) 12 S. W. 255.

3. The doctrine of *lis pendens* applies in Texas, where citation has been published for the time required by law, and the officer has made his return, and the petition affecting land is filed, though defendant has till the next term of court to answer.—*Cassidy v. Kluge*, (Tex.) 12 S. W. 12.

### Live-Stock.

Accidental killing, see *Railroad Companies*, 42-46.

### Local and Special Laws.

See *Constitutional Law*, 6.

### MALICIOUS PROSECUTION.

#### Probable cause.

1. Plaintiff cannot recover if defendant has reasonable or probable cause for causing the arrest, even though he had malice, and though the charge on which plaintiff was arrested was untrue.—*Redman v. Stowers*, (Ky.) 12 S. W. 270.

2. The presumption of probable cause, which ordinarily prevails when it appears on the face of a petition for malicious prosecution that plaintiff was convicted in the trial court, but judgment reversed on appeal, is rebutted by further allegations that the conviction was procured by fraud in depriving plaintiff of the testimony of his principal witness by joining him as co-indictee.—*Boogher v. Hough*, (Mo.) 12 S. W. 524.

3. In view of the allegation that plaintiff was deprived of the testimony of his principal witness by defendants' acts, it is unnecessary to allege that he was thereby prevented from making a defense.—*Boogher v. Hough*, (Mo.) 12 S. W. 524.

4. Where the evidence shows that there was frequent opportunity to serve the writ for the arrest of one indicted with plaintiff in the alleged malicious prosecution, and that the officer once informed him that he had the same, and the officer's testimony, that he was informed by defendants' attorney that they did not care about the co-indictee, but were after plaintiff, is not directly contradicted, and the co-indictee testifies that he executed the libelous instrument for which they were prosecuted for other persons than plaintiff, the question of probable cause is for the jury.—*Boogher v. Hough*, (Mo.) 12 S. W. 524.

#### Evidence.

5. An alleged malicious prosecution was for kluksing defendant by whipping him in the night. It appeared that at the time of the whipping plaintiff occupied another room in the same house, and on cross-examination he stated that he heard the licks, and knew that defendant was being whipped,

and heard a person who lodged in an adjoining room call to him, but that he made no response. On re-examination he was asked why he did not respond, and the question was disallowed. *Held* that, though the jury might have inferred that the reason was that he was engaged in whipping defendant, yet the ruling will not be held prejudicial, as it cannot be said that he would have given any explanation which would be competent or material evidence.—*Redman v. Stowers*, (Ky.) 12 S. W. 270.

6. For the same reason, a refusal of the court to permit a witness to state a conversation between those engaged in whipping and defendant will not be held prejudicial.—*Redman v. Stowers*, (Ky.) 12 S. W. 270.

7. In an action for malicious prosecution, the petition alleged that defendant had maliciously procured and prosecuted an indictment against plaintiff. The evidence showed that defendant was a member of the grand jury which had found the indictment, but failed to show that plaintiff was prosecuted under it, although it did show that defendant had employed an attorney to help prosecute another person who had been indicted jointly with plaintiff, and who had been tried separately and acquitted, a *nolle prosequi* being afterwards entered in the case against plaintiff. *Held*, that defendant's demurrer to the evidence should have been sustained.—*Engelke v. Chouteau*, (Mo.) 12 S. W. 858.

### Pleading.

8. The petition, in an action for malicious prosecution, alleged that defendant maliciously, and without probable cause, procured a warrant, etc., and also that plaintiff was tried and acquitted. The answer admitted that defendant caused the arrest, but denied that it was done maliciously, and without probable cause, and also denied that plaintiff was tried and acquitted. *Held*, that the answer made an issue of fact involving a trial on the merits, and a demurrer was properly overruled.—*Redman v. Stowers*, (Ky.) 12 S. W. 270.

## MANDAMUS.

### To judge.

1. The supreme court will not compel by *mandamus* the signing by a trial judge of a particular bill of exceptions presented to him by counsel to be signed, without additions or alterations, where the affidavits of the judge and counsel are conflicting as to the correctness of such bill on many material matters.—*In re Vanvaver*, (Tenn.) 12 S. W. 788.

### To determine election contest.

2. The charter of a city provided for the election of a member of the board of education by the mayor and aldermen by ballot; but no other official was directed to declare or certify it, and no provision was made for a contest. *Held*, that the validity of such an election could be inquired into and determined by *mandamus*.—*Lawrence v. Ingersoll*, (Tenn.) 12 S. W. 422.

## Manslaughter.

See *Homicide*, 7-18.

## MARRIAGE.

### Validity—Duress.

Marriage cannot be avoided on the ground of duress, where a man is lawfully arrested on process for seduction, and marries the woman to procure his discharge. The fact that he subsequently discovers that he could not have been convicted will not alter the case, if the prosecution was on probable cause, and not from malice merely.—*Marvin v. Marvin*, (Ark.) 12 S. W. 875.

## MASTER AND SERVANT.

### The relation.

1. The complaint alleged that plaintiff was employed by the general yard-master of two or

more railroad companies, and placed at work in the yard for defendant; that there was an agreement between defendant and another company by which the other company was to furnish laborers for defendant; that plaintiff and the yard-master received their pay from the other company, but that he was injured through defendant's negligence while working for it. *Held* sufficient to establish the relation of master and servant, and to show defendant's liability for the injury.—*Missouri Pac. Ry. Co. v. Jones*, (Tex.) 12 S. W. 972.

2. There was evidence that plaintiff had been at work for defendant several months, and was working for it when he received his injury; that he was employed by the general yard-master of two railroad companies, and that his duties were to make up trains in the yard; that defendant had control of the yard; and that the track on which the injury occurred was kept in repair by it, but that he received his pay from another company. There was also evidence that the yard-master performed services for defendant, and some evidence of an arrangement between defendant and the company from which plaintiff received pay for his work, by which plaintiff was to work in the yard for defendant. *Held*, that plaintiff was the special servant of defendant at the time of receiving the injury.—*Missouri Pac. Ry. Co. v. Jones*, (Tex.) 12 S. W. 972.

### Discharge of servant.

8. A wrongful discharge, under a contract providing for the monthly payment of wages, gives rise to only a single cause of action, not for the wages, but for damages for the breach of contract, and may be prosecuted immediately or after the expiration of the period contracted for.—*Lichtenstein v. Brooks*, (Tex.) 12 S. W. 975.

### Master's liability to third persons.

4. The fact that at the time when a vicious horse kicked a colt the owners' servant had, without their knowledge or consent, temporarily placed the horse in charge of another person, does not relieve the owners from liability.—*Campbell v. Trimble*, (Tex.) 12 S. W. 863.

5. An instruction that if the jury find that defendants' horse was vicious, and that their servant knew or by reasonable diligence could have known it, "then leading the horse so close to plaintiff's colt that he kicked the colt would constitute such negligence on the part of the servant as would make the defendants liable," is erroneous, as withdrawing from the jury the question, what constitutes negligence?—*Campbell v. Trimble*, (Tex.) 12 S. W. 863.

### Injuries to servants — Negligence of master.

6. Plaintiff was employed by a firm to load cars, the use of which was offered by the railroad company, if the firm would have them moved down from the next station where they were standing, by allowing them to run down the grade. He, with other employees of the firm, went after the cars, under the firm's orders, and, in attempting to run them down the grade, his associates failed to apply the brakes properly, whereby he was injured. *Held*, that the railroad company was not liable for his injuries, as he was not in its employ.—*Hanna v. Chattanooga & N. Ry. Co.*, (Tenn.) 12 S. W. 718.

7. In an action by an engineer of a train engaged in hauling coal from defendant's mine for personal injuries sustained by reason of his engine striking an ore chute, arranged to be raised or lowered to allow trains to pass, where it appears that the conductor of plaintiff's train had told the agent in charge of the chute that the train was not going to be run that far, and signaled the engineer to stop, but the engineer did not see the signal because of the smoke from his engine, there is not sufficient evidence of negligence on the part of defendant to support a verdict for plaintiff.—*Slate Creek Iron Co. v. Hall*, (Ky.) 12 S. W. 579.

8. In an action by an engineer against a railroad company for personal injuries received by the derailment of his engine, the complaint charged that the derailment was caused by the failure of defendant to keep the track in proper repair, and

by neglecting to properly inspect and guard it; that at the point where the accident occurred the ties were old and rotten, and the rails insufficiently fastened, so that they spread. *Held*, that evidence as to whether a low joint was calculated to cause derailment of the engine was admissible under the allegations.—*Fort Worth & Denver C. R. Co. v. Thompson*, (Tex.) 12 S. W. 742.

9. It was reversible error to permit plaintiff to ask his own witness if he did not observe a low joint where the accident occurred, and if he did not call the road-master's attention to it at the time of the accident as the cause of the derailment, and make a certain remark to him, though the road-master had testified, on cross-examination, that he did not remember that the witness called his attention to the joint, or what was said, as the question was leading, and no proper predicate was laid for impeaching the road-master.—*Fort Worth & Denver C. R. Co. v. Thompson*, (Tex.) 12 S. W. 742.

10. When the rules of a railroad company require baggage-masters not to leave their car except when necessary, and then only for as short a time as possible, and forbid their riding on the engine, the company is not liable for injuries sustained by a baggage-master while riding on the engine, though the injury was caused by the negligence of an employee of the company.—*Louisville & N. R. Co. v. Wilson*, (Tenn.) 12 S. W. 720.

11. Where a switchman was killed by the defects in an engine; and the company operating the road knew of such defects, or might have known of them by the use of such care as a person of ordinary prudence would have used under similar circumstances; and deceased did not know of them, and could not have known of them by the use of that degree of care that a person of ordinary care and prudence would have used in this situation, the company is liable.—*Missouri Pac. Ry. Co. v. Henry*, (Tex.) 12 S. W. 838.

12. In an action against a railroad company to recover for the death of a track repairer run over by a switch-engine, evidence that another man, who was working by the side of deceased, came so near being run over that the engine struck his foot, is admissible, as tending to show that the peril of deceased was not brought about by his own negligence.—*Missouri Pac. Ry. Co. v. Lehmberg*, (Tex.) 12 S. W. 838.

13. The testimony showing that the engine in question would have been safer if it had had a sloping tank instead of a square one, evidence that the company used an engine with a sloping tank in one of its yards is admissible, as indicating that it had knowledge of that fact.—*Missouri Pac. Ry. Co. v. Lehmberg*, (Tex.) 12 S. W. 838.

14. An instruction that if the jury believed that the injury was caused both by the defective construction or unfitness of the engine for the purposes for which it was then used, and the negligence of the engineer and yard foreman, combined with the defect in the engine, the company would be liable, is not obnoxious to the objections that it assumed as a fact that the engine was defective and unsuitable, and was a charge upon the weight of the evidence.—*Missouri Pac. Ry. Co. v. Lehmberg*, (Tex.) 12 S. W. 838.

15. A charge requested by defendant that if there were any patent defects in the engine or tank, and deceased knew, or might by ordinary diligence have known, of the same, and said defects caused or contributed to the injuries, the jury should find for defendant, is properly refused, the evidence failing to show that deceased understood the danger to himself from the use of the square tank.—*Missouri Pac. Ry. Co. v. Lehmberg*, (Tex.) 12 S. W. 838.

16. In an action against a railroad company for injuries received by an employee the court charged as follows: "(2) Railways are not bound to their employees to provide the best possible appliances but they are bound only to supply such appliances as are in common use by well-managed railways, and which they have skillfully constructed and carefully maintained in repair. They are bound to furnish such appliances as are reasonably safe and suitable, such as a prudent man would furnish if his own life were exposed to the danger that

would result from unsuitable or unsafe appliances;" and "(12) If the track, switch, and guard at the place of the injury were in ordinarily good condition as to safety and fitness, as defined in section No. 2 of this charge, then the plaintiff cannot recover." *Held*, that such instructions were erroneous, as leading the jury to believe that more than ordinary care was required of a railroad company in regard to appliances for the use of its employees.—*International & G. N. R. Co. v. Bell*, (Tex.) 12 S. W. 831.

17. The evidence showed that plaintiff was employed by defendant to couple cars; that defendant had caused the dirt to be thrown out between the cross-ties, leaving deep holes; and that the road-master had been informed of the danger, but failed to fill up the holes. There was no evidence that plaintiff had any knowledge of the existence of the holes, but it was shown that he could not have seen them while at work. There was a conflict of testimony as to whether it was the duty of plaintiff to remain between the cars in case he failed to effect a coupling at first, or to come out and signal the engineer. *Held*, that the evidence sustained a finding that defendant was guilty of negligence.—*Missouri Pac. Ry. Co. v. Jones*, (Tex.) 12 S. W. 972.

### Injuries to servants—Negligence of vice-principal.

18. In an action against a railroad company for personal injuries sustained by plaintiff while repairing a car, where plaintiff testified that, before he went under the car, H., his foreman, promised to see that he was not injured, defendant requested an instruction that if H. "abandoned the watch with plaintiff's knowledge," and then plaintiff continued the work relying on the promises of two of his fellow-servants to keep a lookout, and was hurt by their failure to do so, then the jury must find for defendant. The court of his own motion added, by interlineation, after the word "knowledge," the following: "And that plaintiff knew, or ought to have known, that H. would not, by himself or others, protect him." *Held* not error, for, even if H. had abandoned the watch with plaintiff's knowledge, the jury might reasonably have concluded that plaintiff still relied upon him to take other steps for his protection.—*Missouri Pac. R. Co. v. Williams*, (Tex.) 12 S. W. 835.

19. A charge that, if plaintiff relied on the assurances of protection made by a yard-master and a switchman, and the former was not in a common employment with plaintiff, but promised to look out for plaintiff, at his request, the jury must find for defendant, was rightly refused; for, if the foreman promised to protect plaintiff, and plaintiff relied on his promise, and the foreman failed to keep it, it was no excuse for his failure that plaintiff asked others to watch, also.—*Missouri Pac. R. Co. v. Williams*, (Tex.) 12 S. W. 835.

### Who are fellow-servants.

20. A foreman in the repair department of the shops of a railroad company, with power to employ and discharge hands, is not the fellow-servant of those under his control, but the representative of the company.—*Missouri Pac. R. Co. v. Williams*, (Tex.) 12 S. W. 835.

21. One employed by a cable-car company to watch at a curve in the track, and signal trains to stop or to continue on, so that they will not meet at the curve, is a fellow-servant with the gripman of a motor car, so as to exempt the company from liability for the death of the watchman, caused by the negligence of the gripman.—*Murray v. St. Louis, C. & W. Ry. Co.*, (Mo.) 12 S. W. 253.

### Assumption of risks.

22. In an action for personal injuries sustained by a railroad employee by reason of a hand-car jumping the track, plaintiff testified that the car jumped the track because it was too light, which fact was unknown to him before the accident occurred; and that he had never seen the kind of car in question until two weeks before the accident, but was familiar with hand-cars, having worked on railroads for seven or eight years. His co-laborers testified to the lightness of the car, one of them saying that any one could see that it was too light. As to the safety of the car the testi-



mony was conflicting, but there was no evidence of any defect other than its being light. *Held*, that the lightness of the car, and the dangers, if any, arising therefrom, were such as plaintiff should have known, and a verdict for him was unwarranted.—*Gulf, C. & S. F. Ry. Co. v. Williams*, (Tex.) 12 S. W. 172.

#### Contributory negligence—Instructions.

23. In an action for the death of a locomotive engineer defendant requested an instruction that if the jury found that deceased, with notice of the condition of the track, ran his train at a rate of speed forbidden by his instructions, and that by reason of the increased speed he contributed directly to the accident, then they must find for defendant. *Held*, that it was rightly refused, as it ignored the precautions shown to have been taken by deceased to regulate the speed of the train.—*Texas & P. Ry. Co. v. Lester*, (Tex.) 12 S. W. 955.

### MECHANICS' LIENS.

#### Proceedings to perfect.

1. Under Rev. St. Tex. art. 8165, providing that in order to secure a mechanic's lien the person claiming it must record his contract within six months after the debt becomes due; and article 8166, providing for the recording of "a sworn account" when there is no written contract,—the recording of a note from the owner of a house, which recites that it is "in settlement for account for lumber," is not a sufficient compliance with the statute to preserve the lien.—*Lyon v. Elser*, (Tex.) 12 S. W. 177.

2. Rev. St. Tex. art. 8165. (Sayles, Laws 1885,) requiring every person, in order to obtain the benefit of the mechanic's lien law, to file an itemized statement of his claim with the county clerk within 90 days, is sufficiently complied with where a material-man delivers such a statement to the clerk on the thirtieth day after such indebtedness accrues, but the clerk does not record it until the next day.—*Bassett v. Bowers*, (Tex.) 12 S. W. 229.

3. Where a material-man files an affidavit of the amount due, substantially in the form prescribed by Rev. St. Tex. art. 8166, which article provides what shall be done to comply with the provisions of article 8165, it is sufficient, though it does not contain the words used in article 8165, that "all just and lawful offsets and credits have been allowed."—*Bassett v. Bowers*, (Tex.) 12 S. W. 229.

#### Who may claim.

4. The word "laborer," as used in Sayles' Civil St. Tex. art. 8179a, giving a lien to "mechanics, laborers, and operatives who have performed labor or worked, with tools, teams, or otherwise, in the construction, operation, or repair of any railroad, locomotive, car, or other equipment of a railroad, and to whom wages are due and owing for such work," means one who performs manual services in construction, repair, or operation contemplated by the statute, and does not embrace one who may work in preparing materials to be used in the construction of the road.—*St. Louis, A. & T. Ry. Co. v. Matthews*, (Tex.) 12 S. W. 976.

#### Priority.

5. Const. Tex. art. 16, § 37, which provides that "mechanics \* \* \* shall have a lien, \* \* \* and the legislature shall provide for \* \* \* enforcement of said liens," creates the lien, and only leaves it for the legislature to provide the means of its enforcement; and a mechanic's lien, filed for record within the time allowed by the statute, relates back to the time the work was done or the material was furnished, and takes precedence of any other lien acquired since that time.—*Keating Implement & Machine Co. v. Marshall Electric Light & Power Co.*, (Tex.) 12 S. W. 489.

#### Loss and discharge.

6. When the lien has been lost by failure to comply with the statute, it will not be made valid by an expression of willingness to that effect by the owner of the property.—*Lyon v. Elser*, (Tex.) 12 S. W. 177.

7. In the absence of an express agreement the taking of drafts for a debt for materials furnished to build a house is not a relinquishment of the right to a material-man's lien.—*Jones v. White*, (Tex.) 12 S. W. 179.

### Minor.

See *Guardian and Ward*; *Infancy*; *Parent and Child*.

### MORTGAGES.

See, also, *Chattel Mortgages*.

By railroad companies, see *Railroad Companies*, 6-9.

#### Validity—Consideration.

1. The desire to indemnify a surety against loss is a sufficient consideration for the execution of a mortgage to him, after the execution of the note upon which he is bound.—*Williams v. Stillman*, (Tex.) 12 S. W. 534.

#### Effect.

2. Costs of collection, as being an incident of the debt, are embraced in and secured by a mortgage given to indemnify a surety.—*Williams v. Stillman*, (Tex.) 12 S. W. 534.

#### Lien—Priorities.

3. Where a husband receives \$1,000 from his wife to invest in certain lands, for her benefit, purchases other lands, in his own name, and mortgages the same to secure debts contracted prior to the purchase, in the absence of any notice of the wife's claim to the mortgagee, she is not entitled by any equity to have the sum advanced by her allowed to her from the proceeds of the sale of the mortgaged premises.—*Hall v. Hall*, (Ky.) 12 S. W. 945.

#### Assignment of debt and mortgage.

4. Where a note secured by a trust-deed is offered for sale, and the maker bids it in, but it is paid for by a third person, to whom the maker is already indebted, and to whom it is assigned with the trust-deed, it cannot be said the note was sold to the maker; nor will the subsequent execution of a mortgage by the maker to the assignee before sale, under the trust-deed, be construed as payment of the note, or as in fraud of creditors, so as to invalidate such sale.—*Wilson v. Schoenlaub*, (Mo.) 12 S. W. 861.

#### Transfer of mortgaged property.

5. Where one buys property subject to a mortgage, his promise to pay the note for which the mortgage was given is a promise to pay to the holder of the note, and not to the maker, and, when the mortgaged property is sold and the note paid from the proceeds, the vendor acquires no right of action against the vendee.—*Gunst v. Pelham*, (Tex.) 12 S. W. 283.

#### Foreclosure—Parties.

6. The holder of a prior mortgage on the same land is not a necessary party.—*Hague v. Jackson*, (Tex.) 12 S. W. 63.

7. Where two joint tenants mortgage their land, and one sells his interest to the other joint tenant's wife, she need not be made a party to a suit for foreclosure of the mortgage, though it was not recorded, as the only purpose of recording is to give notice to subsequent purchasers in good faith; and a judgment against the husband, affecting his separate estate and the community property, is binding on the wife.—*Thompson v. Jones*, (Tex.) 12 S. W. 77.

8. Under Gen. St. Mo. 1865, § 4, p. 618, providing that in case of the death of a mortgagor, whether before or after action brought, his personal representative shall be made defendant, where the mortgagor is dead, his personal representative is the only necessary party defendant to the foreclosure suit.—*Hall v. Klepzig*, (Mo.) 12 S. W. 872.

#### Judgment.

9. A judgment for foreclosure of a mortgage recited its date and the date of the note for security of which it was given as of May 4, 1885, when

the date of both was April 4, 1885. The petition alleged the proper date. The mortgage was attached to and made a part of the petition, and the note was introduced in evidence. *Held*, that the recital of the date of the note and mortgage was not a necessary part of the judgment, and should be treated as clerical error, it appearing from the whole record, with reasonable certainty, that the judgment was rendered in the cause of action set up in the petition.—*Hague v. Jackson*, (Tex.) 12 S. W. 68.

10. A judgment on foreclosure, which designates an entire tract of land by name, giving the number of acres, the county in which it is situated, the adjoining survey, and the beginning corner, is not void for want of description.—*Thompson v. Jones*, (Tex.) 12 S. W. 77.

11. When a judgment of mortgage foreclosure is on appeal affirmed as to the sum found due, but reversed in so far as it directs the sale of certain land, the effect, as to such land, is to destroy the title of the mortgagee, acquired at a sale before the reversal under process issued on the judgment and directing the sale of the land decreed to be covered by the mortgage, including the land in question.—*Adams v. Odom*, (Tex.) 12 S. W. 84.

12. A petition was filed to reform certain deeds and a mortgage, and to foreclose the mortgage. The judgment found the facts necessary to the relief sought, and, after providing for the reformation, and the recovery of the debt secured by the mortgage, directed "that the equity of redemption in said real estate first aforesaid be sold," and that special execution issue. *Held* that, while there was an omission of words usual to a judgment of foreclosure, it was apparent that a foreclosure was intended by the judgment, and a special execution was properly directed; and therefore, in a collateral action, a sale of the land under such special execution will be upheld.—*McDonald v. Frost*, (Mo.) 12 S. W. 383.

#### Foreclosure—Sale.

13. A sale of land, to satisfy a judgment on foreclosure, though made under an execution issued after the death of the mortgagor, cannot be avoided in a collateral proceeding, where there has been no administration on the estate.—*Thompson v. Jones*, (Tex.) 12 S. W. 77.

#### Redemption.

14. Persons who have a remainder under a deed which has been declared void as to creditors and purchasers, such deed being valid as between the parties thereto, may bring suit to redeem the land from the lien of deeds of trust executed by the life-tenant, though the land has been sold thereunder.—*Stevenson v. Edwards*, (Mo.) 12 S. W. 255.

15. In a suit to redeem land from the lien of deeds of trust executed by a life-tenant, brought by the remainder-men, a purchaser under the deeds of trust should be credited with his expenditures for necessary repairs, and must account for all rents actually received by him.—*Stevenson v. Edwards*, (Mo.) 12 S. W. 255.

#### Power of sale.

16. The trustee in a deed of trust executed for the benefit of certain creditors of the grantor may purchase the property at his own sale, made at public auction, under a power contained in the deed.—*Bohn v. Davis*, (Tex.) 12 S. W. 887.

17. Under a deed of trust providing for a sale at the east door of the court-house, a sale at the south door is valid in the absence of proof of injury thereby.—*Hickey v. Behrens*, (Tex.) 12 S. W. 679.

### MUNICIPAL CORPORATIONS.

See, also, *Bridges; Schools and School-Districts.*

#### Licenses of drummers.

1. Mansf. Dig. Ark. § 751, authorizes municipal corporations to regulate drumming or soliciting persons, who arrive on trains or otherwise, for hotels, boarding-houses, bath-houses, or doctors, and to license drummers, and to punish by fine any violation of such provision. *Held*, that the amount of the fee charged for such license must

depend upon the expense of the municipal supervision made necessary by the business licensed, and the discretion of the council in fixing it is not to be interfered with, unless such amount is plainly unreasonable; a fee of \$12.50 not being so, in the absence of any evidence upon the subject.—*City of Fayetteville v. Carter*, (Ark.) 12 S. W. 573.

#### Ordinances.

2. A city ordinance instructing a committee "to have a map made" authorizes payment, not only for making the map, but also for the necessary surveying.—*City of Corsicana v. Carr*, (Tex.) 12 S. W. 982.

#### Contracts.

3. An ordinance of a city gave to a company, for 25 years, the exclusive privilege of "using any or all of the streets \* \* \* of the city for the purpose of laying pipes to convey and supply gas to said city of Newport and others." It also provided that the company might adopt "any other mode equal to gas for supplying light to the city and its inhabitants," etc. The only use of the streets named in the entire ordinance was for gas apparatus and fixtures. *Held* that, in case of a light other than gas, requiring a different use of the streets, such as the erection of poles upon which to stretch wires for electric illuminating purposes, a consent on the part of the city was necessary.—*City of Newport v. Newport Light Co.*, (Ky.) 12 S. W. 1040.

4. An electric light company, chartered by an act of the state legislature, was authorized to "furnish any city \* \* \* with gas or other light for such time, and upon such terms, as may be agreed upon by the parties." The charter of defendant city gave it power to contract, and provided that its board of councilmen should have power "to construct, maintain, and operate gas and water works, and to pass all ordinances necessary to regulate the same." *Held*, that the charters authorized a contract between the company and the city as to lighting the city by gas, electricity, or any other mode.—*City of Newport v. Newport Light Co.*, (Ky.) 12 S. W. 1040.

#### Officers and agents—Qualifications.

5. The charter of the city of St. Louis (article 4, § 10) provides that all elected and appointed officers must have been citizens of the city for at least two years previous to their election or appointment, and shall not, at the time of their election, be in arrears to the city for taxes, or indebted to the city in any way. The relator had received a majority of the votes cast at an election for city marshal held April 2, 1889. It appeared, however, that he had left the city in October, 1885, abandoning his family, leaving his business without making any inquiry or provision for it for nearly two years, returning to the city in September, 1887. *Held*, that this was such an abandonment of his citizenship as would disqualify him for the office of marshal.—*State v. Williams*, (Mo.) 12 S. W. 905.

6. Where relator had been carrying on a saloon in the city, but had not paid his saloon license, though the same had often been demanded of him, this indebtedness to the city is a disqualification for office, and relator is estopped from pleading, in order to avoid the disqualification, that no license was ever issued to him.—*State v. Williams*, (Mo.) 12 S. W. 905.

7. Where, at the date of the election, relator was in arrears for taxes due the city, and the books of delinquent taxes were in the collector's office for the inspection of the public; and relator had personal property subject to taxation, but on his own admission he had paid no taxes for five years prior to the election,—he cannot avoid disqualification for office on the ground that he did not know there were any taxes assessed against him.—*State v. Williams*, (Mo.) 12 S. W. 905.

#### Election by council.

8. Under a regulation adopted by a city council, providing that "a majority of the members elected and voting shall be necessary to choose any officer elected by the board," a candidate who receives six votes of the twelve members present,

three not voting, is legally elected.—*Morton v. Jungerman*, (Ky.) 12 S. W. 644.

9. Under the charter of the city of Knoxville, § 3, the board of mayor and aldermen is composed of nine aldermen. By section 4 the mayor cannot vote, except in case of a tie. Section 5 provides that a majority of the board shall form a quorum. An ordinance provides that any vacancy on the board of education shall be filled by an election by the mayor and aldermen. At such an election eight of the aldermen and the mayor were present. Complainant received 4 votes, there were 8 scattering votes, and 1 blank. The mayor did not vote, but declared complainant elected. *Held*, that a majority of the eight aldermen present was necessary to elect complainant, and the blank vote must be counted to show that he did not receive such majority.—*Lawrence v. Ingersoll*, (Tenn.) 12 S. W. 422.

10. The action of the mayor, declaring complainant elected, was not equivalent to a vote for him.—*Lawrence v. Ingersoll*, (Tenn.) 12 S. W. 422.

11. The board of aldermen having no power to elect except by ballot no action by them ratifying their previous action could make such election valid.—*Lawrence v. Ingersoll*, (Tenn.) 12 S. W. 422.

12. A certificate issued by the recorder of the board of aldermen, which is not authorized by law, notifying complainant of his election, and signed "by order of the board" is no evidence of ratification.—*Lawrence v. Ingersoll*, (Tenn.) 12 S. W. 422.

### Vacating streets.

13. The charter of the city of Louisville provides for the closing up of any of its streets dividing any of the squares or lots thereof, by an action by the city against all the owners of ground on the square or lot, and authorizes the court to decree the closing if all such shall consent, or if satisfied that it will be beneficial to the city, and not injurious to any of such land-owners not consenting. In an action to close up the eastern end of a street, in a square on which appellants owned land and lived, it appeared that in order to go east, where the center of trade lay, they would first have to go west to the next street, then north or south to another street, thence east. *Held*, that the court had no authority to close the street without the owners' consent, as it would be depriving them of their property without due process of law.—*Gargan v. Louisville, N. A. & C. Ry. Co.*, (Ky.) 12 S. W. 266.

### Negligence—Defective streets and sidewalks.

14. A city incorporated under the general laws of Texas is liable for injuries caused by the omission or negligence of its street commissioner to perform his duties in keeping the public sidewalks in a safe condition.—*Bauguss v. City of Atlanta*, (Tex.) 12 S. W. 750.

15. Though it is the duty of municipal corporations in Arkansas to keep their streets in repair, yet, in the absence of a statute, they are not liable to persons injured by failure to repair. Following *City of Arkadelphia v. Windham*, 4 S. W. 450.—*City of Fort Smith v. York*, (Ark.) 12 S. W. 157.

### Defective bridge.

16. A city which opens a bridge for public travel is liable for injuries caused by the defective condition of one side of the bridge, though the other side is perfectly safe for travel. Overruling *Tritz v. City of Kansas*, 84 Mo. 632.—*Walker v. City of Kansas*, (Mo.) 12 S. W. 894.

### Of officers.

17. As Gen. St. Ky. c. 1, § 5, making a city liable for damages to property by riotous assemblages of people, is expressly limited to injuries to property, it does not modify the rule that a city is not liable for injuries to the person resulting from malfeasance or negligence of its police officers.—*Jolly's Adm'x v. City of Hawesville*, (Ky.) 12 S. W. 818.

### Of contractor.

18. A contract for the construction of a sewer in Kansas City provided that the contractor should be responsible for all damages to persons or property from negligence, and indemnify the city

against all claims for damage on account of such neglect; and the sureties agreed that he should faithfully perform the contract. *Held* that, as the charter of Kansas City (Acts Mo. 1875, art. 3, § 9) requires that such contracts shall contain a covenant for the payment of laborers, to be guaranteed by sureties, and gives laborers the right to an action thereon, the bond, apart from the covenant for the benefit of laborers, was for the benefit of the city only, and an action against the sureties on their contract for damages for injuries sustained by the carelessness of the contractor or his employes cannot be maintained by a third person.—*Kansas City v. O'Connell*, (Mo.) 12 S. W. 791.

### Public improvements—Assessments.

19. Const. Mo. art. 9, § 16, provides that a city of more than 100,000 inhabitants may frame a charter for its own government, and prescribes the manner of its adoption. Act Mo. March 10, 1887, repeats the provisions of the constitution, and provides, further, that, upon the expiration of 30 days after a ratification and adoption of such charter, "it shall be and constitute the entire organic law of such city, and shall supersede all laws of this state then in force in terms governing or appertaining to cities having one hundred thousand inhabitants or more." *Held*, that the provisions of a city charter adopted under the constitution and enabling act, regarding the assessment of damages and benefits caused by grading the streets of that city, supersede the provisions of Act Mo. March 26, 1885, as amended by Act March 31, 1887, relating to assessment of damages and benefits arising from the grading of streets in cities.—*State v. Field*, (Mo.) 12 S. W. 802.

20. Where a street is improved under a contract with the city, by the terms of which the contractor is to look for pay to assessments on the abutting property, and the charter of the city gives no power to improve the street at the cost of the property owners, they cannot be made liable for such improvement by subsequent legislation, validating the contract between the city and the contractor and giving a lien on the property for the work.—*Town of Bellevue v. Peacock*, (Ky.) 12 S. W. 1042.

21. Mansf. Dig. Ark. § 896, provides that when 10 resident owners of land shall petition the city council to take steps towards making a local improvement the council shall lay off the whole city, if the whole of the desired improvement be general and local in its nature, or the portion mentioned in the petition, if it be limited to a part of the city, into one or more improvement districts, designating the boundaries of such districts, etc. *Held*, that the action of the council in including property in an improvement district is conclusive of the fact that it is "adjoining the locality to be affected," within the above constitutional provision, except when attacked for fraud or demonstrable mistake.—*City of Little Rock v. Katzenstein*, (Ark.) 12 S. W. 198.

22. Const. Ark. art. 19, § 27, provides that nothing in the constitution shall be construed to prohibit the general assembly from authorizing assessments on land for local improvements in towns and cities, "to be based upon the consent of a majority in value of the property holders owning property adjoining the locality to be affected." *Held*, that "property adjoining the locality to be affected" is any property adjoining or near the improvement which is physically affected, or the value of which is commercially affected, directly by the improvement, to a degree in excess of the effect on the property in the town or city generally.—*City of Little Rock v. Katzenstein*, (Ark.) 12 S. W. 198.

### Contracts.

23. To make a gutter three feet wide instead of four feet wide, as required by a contract with a city, is not non-performance of the contract, but only defective performance, and acceptance of it by the city council is conclusive on the abutting owners, in an action by the contractor to enforce his lien for the street improvement.—*Whitefield v. Hipple*, (Ky.) 12 S. W. 150.

24. Where an owner of property abutting on a street constructs a gutter in front of his lot, in pur-

suance of a city ordinance, and the work so done is accepted by the council before a contract to construct gutters on that street is closed, the fact that the gutter, as made by the owner, is defective is not available as a defense by other owners in an action by the contractor to enforce his lien.—*Whitefield v. Hipple*, (Ky.) 12 S. W. 150.

### Water-works.

25. As the charter of the city of Nashville (Acts Tenn. 1883, c. 114, § 17, subd. 8) authorizes the mayor and council "to provide the city with water by water-works, \* \* \* and to provide for the prevention and extinguishment of fires," the city, in operating water-works used to supply its citizens with water, and to extinguish fires and sprinkle streets, is not engaged in a private enterprise, nor performing a municipal function for a private end, though it imposes water-rates which are used to defray the expense of operating the water-works, and to keep down the interest on the indebtedness incurred in their construction.—*Smith v. City of Nashville*, (Tenn.) 12 S. W. 924.

26. In a litigation as to the validity of a tax imposed on a city for "exercising the privilege of running a water company" within its limits, under a statute (Acts Tenn. 1887, c. 1, § 4, pp. 20, 21) providing for the assessment of taxes against water companies doing business "in cities, taxing districts, or towns," the question whether the city can be taxed for furnishing water to individuals and factories beyond its corporate limits cannot be adjudged, because not put in issue; there being also nothing to show whether such individuals and factories were within any "city, taxing district, or town."—*Smith v. City of Nashville*, (Tenn.) 12 S. W. 924.

### Taxation.

27. Article 8, § 6, of the charter of the city of Mt. Sterling, providing that "all property not exempt from taxation under the general laws of this state shall be subject to taxation, as herein mentioned, for city purposes," embraces choses in action.—*Trimble v. City of Mt. Sterling*, (Ky.) 12 S. W. 1068.

### Actions.

28. In an action against a city for damages for personal injuries caused by the negligent construction of a set of public scales, owned and operated by the city, the petition must show that the city was a corporation, and that it was within the scope of its powers to construct and maintain such scale.—*Mitchell v. City of Clinton*, (Mo.) 12 S. W. 793.

### Murder.

See *Homicide*, 1-6.

### Mutual Benefit Insurance.

See *Insurance*, 25-31.

### NAME.

#### Idem sonans.

In a suit on two promissory notes the petition alleged that they were signed "DILLAHUNTY" by defendant. One of the notes produced in evidence was signed "DILLAUNTY," and the other "DILLAHINTY." *Held*, that the names came under the rule of *idem sonans*, and there was no variance.—*Dillahunty v. Davis*, (Tex.) 12 S. W. 55.

### NAVIGABLE WATERS.

#### What are.

Under Code Tenn. §§ 1489, 1524, providing for the erection of mill-dams across waters not navigable in the proper, legal, or ordinary sense, a stream is not navigable which is not of sufficient depth naturally for valuable floatage, such as rafts, flat-boats, and small vessels of lighter draft than ordinary.—*Irwin v. Brown*, (Tenn.) 12 S. W. 840.

### NEGLIGENCE.

See, also, *Master and Servant*, 6-19.

Contributory, see *Carriers*, 16, 17; *Master and Servant*, 23.

Liability for, see *Municipal Corporations*, 14-18; *Railroad Companies*, 18-54; *Telegraph Companies*; *Water Companies*.

Of contractor, see *Municipal Corporations*, 15.

#### What constitutes.

1. The discharge of fire-works from a veranda in front of the second story of a building in the center of a public square, from troughs so arranged that the fire-works would pass over the assembled people, who were there for the purpose of witnessing the display, is not of itself an unlawful act, in the absence of a statute or ordinance making it so.—*Dowell v. Guthrie*, (Mo.) 12 S. W. 900.

#### Care required.

2. Plaintiff, who was 18 years of age at the time of the accident, was bound to use that degree of care which an ordinarily prudent person would use in like circumstances to avoid the injury.—*Shelley v. City of Austin*, (Tex.) 12 S. W. 753.

#### Contributory negligence.

3. The mere presence of plaintiff at a display of fire-works as a spectator, it appearing that he had nothing whatever to do with the discharge of the fire-works by which he was injured, does not make him a joint wrong-doer, or render him guilty of contributory negligence.—*Dowell v. Guthrie*, (Mo.) 12 S. W. 900.

#### Imputed negligence.

4. In an action by a child for personal injuries, negligence of its mother in allowing it to go upon the street accompanied only by its young sister is no defense.—*Winters v. Kansas City Cable Ry. Co.*, (Mo.) 12 S. W. 652.

5. Negligence of his sister, 10 years old, in allowing plaintiff, 3 years old, whom she was accompanying, to get in front of defendant's cable-car, will not defeat his action.—*Winters v. Kansas City Cable Ry. Co.*, (Mo.) 12 S. W. 652.

#### Comparative negligence.

6. In an action for damages for injuries suffered on defendant's railway, a charge drawing the attention of the jury to the comparative negligence of plaintiff and defendant, and directing them to find for plaintiff if they found the injury was caused by the greater negligence of defendant, is error.—*East Tennessee, V. & G. Ry. Co. v. Hull* (Tenn.) 12 S. W. 419.

#### Pleading.

7. It is not necessary that petition in a suit to recover for personal injuries should specifically state the nature of the injuries sustained by plaintiff.—*Mitchell v. City of Clinton*, (Mo.) 12 S. W. 793.

#### Evidence.

8. In an action for personal injuries caused by the alleged negligent discharge of fire-works, evidence that the fire-works were highly dangerous, that they were discharged by defendants, and that plaintiff was injured thereby, raises a presumption of negligence; and it is error to instruct that these facts alone are not sufficient to entitle plaintiff to recover.—*Dowell v. Guthrie*, (Mo.) 12 S. W. 900.

9. Where there is evidence that a large quantity of fire-works was placed on the floor of a narrow veranda; that defendants, who had charge of the display, smoked cigars during the entire performance; that towards its close loose Roman candles were discovered on fire on the floor of the veranda, throwing out balls of fire in every direction; that these balls came in contact with the sky-rocket, one of which hit plaintiff, causing the injuries complained of,—it is error to instruct that, "unless the evidence proves to the reasonable satisfaction of the jury what caused it to be so ignited and discharged, \* \* \* plaintiff cannot recover." It is enough to show that the rocket which caused the injury was put in motion by defendants' carelessness in handling or shooting off the fireworks, without pointing out the particular negligent act

that caused the conflagration.—*Dowell v. Guthrie*, (Mo.) 12 S. W. 900.

#### —Burden of proof.

10. One who seeks to recover for personal injuries, unintentionally inflicted by defendants while engaged in a lawful business, has the burden of proving negligence throughout the trial.—*Dowell v. Guthrie*, (Mo.) 12 S. W. 900.

11. It is not necessary that plaintiff should show that he was not guilty of contributory negligence, that being a matter of defense.—*Mitchell v. City of Clinton*, (Mo.) 12 S. W. 798.

## NEGOTIABLE INSTRUMENTS.

### Negotiability.

1. Under Rev. St. Ohio 1836, § 8171, providing that "all bonds, promissory notes, bills of exchange, foreign and inland, and checks for a sum certain and payable to any person or order, or to any person or assigns, shall be negotiable by indorsement thereon," a promissory note payable "to the order of" a person is a negotiable instrument.—*Stevens v. Gregg*, (Ky.) 12 S. W. 775.

### Validity.

2. Plaintiff loaned defendant, his step-son, money to become a member of a firm, and also made a loan to the firm. Just before bankruptcy proceedings against the firm, defendant executed to plaintiff two notes, one for his individual debt, and the other for the firm debt, secured by a mortgage on his wife's real estate. Plaintiff proved the firm note in the bankruptcy proceedings, and accepted a composition. Subsequently the note for defendant's individual debt was renewed by notes maturing after the period fixed for the maturity of the composition notes. In an action on these renewal notes it was claimed that the original note was executed to plaintiff in advance of the composition, and in consideration of his promise to assent to and assist it, and that this was a fraud which violated the note, and all renewals thereof. Defendant failed to testify to any promise of plaintiff, or that a word was ever said between them about the composition. Plaintiff testified that he never paid any attention to the bankruptcy proceedings, and only accepted the composition at defendant's instance. *Held*, that a judgment in favor of defendant would be set aside.—*Rosenfeld v. Goldsmith*, (Ky.) 12 S. W. 928.

3. The mere fact of taking a note for the debt, secured by a mortgage upon the wife's property, when the firm was insolvent, and contemplating a composition, does not evidence a corrupt agreement.—*Rosenfeld v. Goldsmith*, (Ky.) 12 S. W. 928.

### Liability of indorser.

4. Failure of the indorsee of a note to bring suit within 9 or 10 days after maturity, when, by statute, the court is always open to litigants and the cause may be placed on the trial docket within 80 days after summons, will release the indorser.—*Stafford v. Bruce*, (Ky.) 12 S. W. 280.

5. If the holder of a note omits to bring suit because so requested by an indorser, and the latter agrees to pay the note without suit, the indorser is liable if he made the agreement before his liability was barred by the laches of the holder; otherwise he is not liable.—*Stafford v. Bruce*, (Ky.) 12 S. W. 280.

6. A letter from the attorney of the indorser to the holder, inviting him to aid in an equitable suit to foreclose a mortgage given by the maker of the note to the indorser to secure him thereon, by which suit the claims of other creditors might be made subordinate to that of the holder of the note, does not deprive the holder of the benefit of the waiver of his failure to bring suit within a proper time.—*Stafford v. Bruce*, (Ky.) 12 S. W. 280.

### Bona fide purchasers.

7. Where notes of the husband, procured through fraud, are secured by a recorded deed of trust on the wife's land, knowledge by an indorsee that the husband had executed a compromise of his claim of fraud will not make him an innocent

purchaser as to the wife.—*Henry v. Sneed*, (Mo.) 12 S. W. 668.

8. It clearly appearing, in an action to enjoin the enforcement of a deed of trust given to secure certain notes, that the notes were tainted with fraud, and the answer having alleged purchase in good faith, the burden is on defendant to show a *bona fide* transfer before maturity, which is not sustained by evidence from which the date of transfer does not appear except by inference.—*Henry v. Sneed*, (Mo.) 12 S. W. 668.

9. Knowledge of an agent that "there was some trouble about the trade" in which certain notes were given, charges his principal for whom he purchases such notes with knowledge of the fraud.—*Henry v. Sneed*, (Mo.) 12 S. W. 668.

### Checks.

10. The assurance by the drawee bank that a check is good, and will be paid, is not such a certification of the check as will release from liability the payee, where the holder cashes the check on his indorsement and presents it for payment in the due course of business.—*Farmers' & Traders' Bank v. Bank of Allen County*, (Tenn.) 12 S. W. 545.

### Actions on—Pleading and proof.

11. In an action on a note alleged in the petition to have been executed and delivered to plaintiffs by defendants, a note shown to have been executed and delivered by defendants to a third person, and by him indorsed to plaintiffs, is inadmissible in evidence.—*Sweetzer v. Clafin*, (Tex.) 12 S. W. 895.

12. An allegation in a supplemental petition that plaintiffs purchased the note is not inconsistent with the former allegation, and does not render the note admissible.—*Sweetzer v. Clafin*, (Tex.) 12 S. W. 895.

### —Evidence.

13. Sworn pleas by one of the defendants, denying the execution of the note, and setting up a failure of consideration, which are withdrawn, are not admissible in evidence.—*Sweetzer v. Clafin*, (Tex.) 12 S. W. 895.

14. Where, in an action on a note, defendants' goods are sold under attachment, and the proceeds paid into the hands of the clerk, an affidavit and bond for a writ of garnishment and the writ of garnishment, in a suit by third persons against defendants, are not admissible, as the fund, being in the custody of the law, is not subject to garnishment.—*Sweetzer v. Clafin*, (Tex.) 12 S. W. 895.

15. It is proper to refuse to permit interrogatories asked by intervenors of one who is not made a party to the suit to be read in evidence, and to take them as confessed on the certificate of the notary that he refused to answer them.—*Sweetzer v. Clafin*, (Tex.) 12 S. W. 895.

### —Burden of proof.

16. Where defendants admit the execution of the notes sued on, and set up affirmative matters to defeat a recovery, the burden of proof as to these matters is on them.—*Davis v. Read*, (Ark.) 12 S. W. 558.

### —Practice.

17. It is not error, as against intervenors, to allow defendant to withdraw his pleas and retract a cross-action in reconvention, as intervenors are not thereby precluded from proving the same facts.—*Sweetzer v. Clafin*, (Tex.) 12 S. W. 895.

18. The objection that a note sued on was not due when the suit was commenced cannot be raised for the first time after trial.—*Hickey v. Thompson*, (Ark.) 12 S. W. 475.

### —Defenses.

19. The answer in an action on a note alleged failure of consideration, that plaintiff had notice thereof, and that it took the note as collateral security for a pre-existing debt. Plaintiff then filed an amended original petition, alleging that it became the owner of the note by indorsement before maturity for a valuable consideration, and without notice of any defense thereto. Defendant, to secure the right to open and conclude on the trial, then admitted on the record "that the plaintiff had

a good cause of action, as set forth in the petition, except in so far as it might be defeated in whole or in part by the facts of the answer constituting a good defense, which might be established on the trial." *Held*, not such an admission that plaintiff was a *bona fide* holder of the note as would preclude defendant from urging the defense of failure of consideration.—*Smith v. Traders' Nat. Bank*, (Tex.) 12 S. W. 221.

#### **Actions on—Instructions.**

20. An instruction that the maker of a note may plead illegality of consideration as to one joint promisee, against the other, is error, where there is no evidence that the consideration was illegal.—*Smith v. Gillen*, (Ark.) 12 S. W. 1078.

#### **Judgment.**

21. Where the petition on a note sets out the note fully, alleges the sum paid for protest fees, and prays judgment for the amount of the note, interest, and attorney's fees as agreed on, it is proper to render judgment for plaintiff for \$4,192.88, the amount of such items, though the petition only alleges \$4,000 damages for non-payment.—*Sanders v. City Nat. Bank*, (Tex.) 12 S. W. 110.

22. A judgment rendered by default in *assumpsit* on a note, upon a petition which asserts a claim for protest fees, and citations, unaccompanied with certified copies of such petition, which informed defendants of the fact that protest had been made, is not erroneous.—*Sanders v. City Nat. Bank*, (Tex.) 12 S. W. 110.

### **Newly-Discovered Evidence.**

As ground for new trial, see *Criminal Law*, 100-104; *New Trial*, 9-11.

### **New Promise.**

See *Limitation of Actions*, 16, 17.

### **NEW TRIAL.**

See, also, *Attachment*, 14; *Homicide*, 110.

#### **Time of granting.**

1. Under Rev. St. Tex. art. 1622, authorizing a justice, at any time within 10 days after rendering judgment, to grant a new trial on motion in writing, he cannot grant a new trial at the next term of his court, held after the expiration of the 10 days, though the motion is filed in time, and an order is made continuing it to the next term.—*Carter v. Commissioners of Van Zandt County*, (Tex.) 12 S. W. 985.

#### **Misconduct of counsel.**

2. In his closing argument counsel was allowed to say: "This is a deliberate scheme to swindle and defraud, gotten up by a Jew, a Dutchman, and a lawyer," describing one party as "the old he-Jew of all, who, no doubt, planned the whole thing. All Jews, or Dutch Jews, and that is worse." *Held*, that the verdict should be reversed, it appearing from the evidence that the language might have prejudiced the jury.—*Moss v. Sanger*, (Tex.) 12 S. W. 619.

3. Language of counsel, provoked by that used by the attorney of the opposite party, and which does not appear to have influenced the verdict, affords no ground for a new trial.—*Willis v. McNatt*, (Tex.) 12 S. W. 478.

#### **Objections to verdict.**

4. Where, in an action to recover for services rendered under a contract providing for compensation in a certain contingency, it appears that the contingency never happened, a nominal verdict for plaintiff is not such an inconsistency as will entitle him to a new trial.—*Simrall v. Morton*, (Ky.) 12 S. W. 185.

#### **Inadequate or excessive damages.**

5. Where it may be determined by fixed rules and principles of law how much a verdict is excessive, a *remittitur* of the excess may be received in answer to a motion for a new trial on the ground

of excessive damages.—*Gulf, C. & S. F. Ry. Co. v. Redeker*, (Tex.) 12 S. W. 855.

6. Civil Code Ky. § 841, providing that a new trial shall not be granted on account of the smallness of damages in an action for injury to the person or reputation, nor in any other action in which the damages equal the actual pecuniary injury sustained, does not apply where special damages are pleaded and proven.—*Jesse v. Shuck*, (Ky.) 12 S. W. 804.

#### **Surprise.**

7. The fact that a witness testifies differently on the trial from what he had previously told the defeated party he would testify is not cause for new trial on the ground of surprise, where the legal effect of his testimony is the same.—*Wolf v. Brass*, (Tex.) 12 S. W. 159.

8. Where a suit is brought by the state to cancel the sale of certain lands, and the complaint alleging a sale to defendant and a forfeiture, is subsequently amended, changing the suit to an action of trespass to try title, making it necessary for defendant to prove such sale, he may demand a continuance on the ground of surprise, but it is too late to raise the question of surprise on a motion for a new trial.—*Cunningham v. State*, (Tex.) 12 S. W. 217; *Caswell v. State*, *Id.* 219.

#### **Newly-discovered evidence.**

9. Newly-discovered evidence is no ground for a new trial where it is cumulative only.—*Brown v. St. Louis, I. M. & S. Ry. Co.*, (Ark.) 12 S. W. 208.

10. In trespass to try title, a motion by plaintiff for a new trial on the ground of newly-discovered evidence, consisting of a deed of release affecting the land, stated that the existence of the deed was unknown to plaintiff at the time of the trial, and that he had examined the records for instruments affecting the land in question without discovering it, but stated no reason for his failure to discover it, although the deed had been recorded in the court several years before the suit was brought. *Held*, that proper diligence to discover it was not shown.—*Johnson v. Flint*, (Tex.) 12 S. W. 1120.

11. From an instrument offered on plaintiff's motion for a new trial on the ground of newly-discovered evidence, it appeared that plaintiff, a minor, had inherited the land in question; that it had been sold by order of court on a credit, and the purchase money secured by lien on the land, the instrument being the release given by the guardian on the payment of the purchase money. *Held* that, though this would have proved that plaintiff once owned the land, it would also have shown that it had been transferred, and the proceeds paid to her estate, and was therefore not sufficiently material.—*Johnson v. Flint*, (Tex.) 12 S. W. 1120.

12. Newly-discovered facts in respect to matters occurring subsequent to the shipment and loss of the goods, and in no wise connected therewith, afford no ground for a new trial of an action against a railroad company for their destruction by fire.—*Louisville & N. R. Co. v. Gilbert*, (Tenn.) 12 S. W. 1018.

### **Non Obstante Veredicto.**

See *Judgment*, 4.

### **NUISANCE.**

#### **What constitutes.**

1. It cannot be held as a matter of law that the erection of hitching racks on the sides of a public square in a city is the creation of a nuisance.—*Harrison County Court v. Wall*, (Ky.) 12 S. W. 180.

2. The owner of a spring of water is entitled to recover damages for its pollution by oil stored in large quantities on the land of his neighbor, which, leaking from the casks containing it, saturates the ground, and penetrates to the hidden or unknown veins of water feeding the spring.—*Kinnaird v. Standard Oil Co.*, (Ky.) 12 S. W. 987.

#### **Who liable.**

3. Where a city has ample power to remove a nuisance, which it creates or permits to remain, it

is liable for all the injuries resulting therefrom.—*City of Fort Worth v. Crawford*, (Tex.) 12 S. W. 52.

4. To render a city liable for the noxious smells arising from garbage deposited by it near plaintiff's home, they must be such as to produce physical discomfort such as would interfere with the enjoyment of the property, but need not be hurtful or unwholesome.—*City of Fort Worth v. Crawford*, (Tex.) 12 S. W. 52.

5. Evidence of a city ordinance designating the lot adjacent to plaintiff's home for the place of deposit of garbage, etc., and that the city took possession of the lot and prohibited its use by others, and directed the city scavenger to deposit filth on the lot, unmistakably establishes such control and possession of the lot by the city as make it liable for any nuisance committed by it, or which it could prevent.—*City of Fort Worth v. Crawford*, (Tex.) 12 S. W. 52.

#### Remedies—Pleading.

6. The petition in a suit against a city for damages for injuries caused by the deposit of garbage, etc., on lands adjacent to plaintiff's home, alleged the incorporation of the city; the ownership for many years of certain land by plaintiff as his home; that it was free from noxious odors, and healthy; that defendant was in possession of land adjoining plaintiff on which it placed garbage, dead animals, and various kinds of filth; that defendant failed to prevent the deposits from poisoning the air; and that thereby the health of plaintiff's family was injured and his premises ruined. *Held*, that the petition sufficiently alleged that the injuries were caused by the acts of defendant; and it was not necessary to set out that the city took possession under an ordinance, that being a matter of proof.—*City of Fort Worth v. Crawford*, (Tex.) 12 S. W. 52.

#### — Instructions.

7. An instruction that the jury must find for the defendant unless they found the injuries complained of were the direct "cause of the negligence of" defendant was properly refused; the evidence being that the negligence was the cause of the injuries, and not the injuries the cause of the negligence.—*City of Fort Worth v. Crawford*, (Tex.) 12 S. W. 52.

### OBSTRUCTING JUSTICE.

#### Resisting arrest.

1. Under *Crim. Code Ky.* § 43, providing that no unnecessary force or violence shall be used in making an arrest; and section 89, providing that the person making the arrest shall inform the person about to be arrested of the intention to arrest him, and of the offense charged against him, and, if acting under a warrant of arrest, shall give information thereof,—a constable, who attempts to arrest a person by wounding him, and without informing him of the offense charged against him, or that there was a warrant for his arrest, may be lawfully resisted.—*Hamlin v. Commonwealth*, (Ky.) 12 S. W. 146.

2. A person not duly summoned to aid in making an arrest may be lawfully resisted.—*Hamlin v. Commonwealth*, (Ky.) 12 S. W. 146.

### OFFICE AND OFFICER.

See, also, *Clerk of Court; District and Prosecuting Attorneys; Judge; Justices of the Peace; Sheriffs and Constables.*

Of bank, see *Banks and Banking*, 5.  
municipalities, see *Municipal Corporations*, 5-12.

reform school, see *Reformatories.*

schools, see *Schools and School-Districts*, 1, 2.

#### Tenure.

1. *Rev. St. Mo. 1879*, § 5883, providing for the appointment by the governor of an inspector of oils in certain cities, prescribes that such inspector shall hold his office for two years, or until his suc-

cessor is appointed and qualified. *Held*, that the date of the beginning of the term of office of the first inspector appointed under the statute determined the limits of the terms of all subsequent appointments.—*State v. Stonestreet*, (Mo.) 12 S. W. 895.

2. It appeared that relator's predecessor in office had been appointed for two years from June 18, 1885; that no appointment was made at the expiration of his term of office until September 26, 1888, when relator was appointed. *Held* that, under the provisions of *Rev. St. Mo. 1879*, § 5852, providing that when a vacancy occurs in the office of oil inspector by reason of death, resignation, or otherwise, the governor may appoint a successor for the remainder of the term of office, relator's term expired in two years from June 18, 1887.—*State v. Stonestreet*, (Mo.) 12 S. W. 895.

#### Officers de facto.

3. An assessor who fails to take the general oath of office required by the law is an officer *de facto*, and his acts are valid when questioned collaterally. *Stell v. Watson*, 11 S. W. 823, followed.—*Murphy v. Sheppard*, (Ark.) 12 S. W. 707.

#### Disqualification of officer.

4. Under *Const. Tex.* art. 16, §§ 1, 5, which provide that every officer, before assuming the duties of his office, shall take an oath that he has not given or offered any inducement to procure votes at his election, and that every person shall be disqualified from holding office upon conviction for such offense, merely holding out a promise, in case of his election, to serve for less compensation than the lawful fees, does not disqualify one from holding office, unless he had been actually convicted for such offense.—*State v. Humphreys*, (Tex.) 12 S. W. 99.

5. Nor does such promise disqualify him at common law, unless the number of voters influenced thereby is sufficient to change the result of the election.—*State v. Humphreys*, (Tex.) 12 S. W. 99.

### Opinion Evidence.

See *Evidence*, 13-19.

### PARENT AND CHILD.

See, also, *Guardian and Ward; Infancy.*

#### Custody of child.

1. Where the good of the child will apparently be as well promoted in one family as the other, it will not be taken from its father, and placed with its grandparents, with whom it has lived since the death of its mother, on the ground that the father had by parol given it to them.—*Weir v. Marley*, (Mo.) 12 S. W. 798.

#### Employment of child.

2. Where the parents of a minor child are living together, the consent of the father to the employment of the minor is necessary to relieve the employer from liability to the father for loss to him of the child's services, arising from injuries received in the employment. The mother's consent is not sufficient.—*Gulf, C. & S. F. Ry. Co. v. Redeker*, (Tex.) 12 S. W. 855.

3. The facts that the father had given a general permission to the minor to engage in railroad-ing, and had consented to his employment as a fireman, do not affect his right to recover for injuries received while he was employed, without the father's actual consent, as brakeman; nor is the father bound to notify the company that he does not consent.—*Gulf, C. & S. F. Ry. Co. v. Redeker*, (Tex.) 12 S. W. 855.

### PARTIES.

See, also, *Death by Wrongful Act*, 2-7; *Trespass to Try Title*, 1, 2.

Necessary, see *Husband and Wife*, 8.

To suit for foreclosure, see *Mortgages*, 6-8.



**Necessary parties.**

1. In an action by grantors in a deed against their grantees to set the deed aside, a vendee of the grantees is not a necessary party defendant.—*Silberberg v. Pearson*, (Tex.) 12 S. W. 850.

2. An action for damages for injuries to personality belonging jointly to two must be brought in the names of both, though after the injuries an arrangement is made between the owners whereby one becomes sole owner.—*Gallatin & N. Turnpike Co. v. Fry*, (Tenn.) 12 S. W. 720.

3. In a suit to set aside as fraudulent a deed from a man to his wife, conveying property to her with power to mortgage or sell during his lifetime, but, if not so mortgaged or sold, to go, after the death of both, to his children, such children are necessary parties.—*Whayne's Ex'r v. Morgan*, (Ky.) 12 S. W. 128.

**Real party in interest.**

4. Where a county seems to be the real party in interest in a suit brought for its use, and no issue was raised as to the authority for bringing the suit, it is not a ground for dismissal that it was brought in the name of the county judge to the use of the county.—*Smith v. Moseley*, (Tex.) 12 S. W. 748.

5. Where the contract of a water company with a city declares that it is made for the benefit of the inhabitants, and, *inter alia*, for the protection of private property against destruction by fire, the owner of property which is taxed for water-rent, and is destroyed by fire through the company's failure to supply a sufficient quantity of water to extinguish the same, may, in his own name, sue the company on its contract with the city, under Civil Code Ky. § 18, which requires that every action must be prosecuted in the name of the real party in interest.—*Paducah Lumber Co. v. Paducah Water Supply Co.*, (Ky.) 12 S. W. 554; *Duncan v. Owensboro Water Co.*, Id. 557.

**Joinder.**

6. An agent who makes a contract for his principal, in the principal's name, is not a person with whom the contract is made, within *Manuf. Dig. Ark. § 4936*, providing that a person with whom, or in whose name, a contract is made, for the benefit of another, may bring an action without joining with him the person for whose benefit it is prosecuted.—*Ferguson v. McMahon*, (Ark.) 12 S. W. 1070.

7. Defendant, directed by a will to convey certain land to M., conveyed two-thirds of the land to persons who would have taken one-third as heirs of M., one-third belonging to defendant as an heir of M. Held, that the heirs of M., who were entitled to the remaining one-third, could maintain an action against defendant to compel the conveyance of that one-third, without joining with them those persons who obtained the two-thirds.—*McQuerry v. Gilleland*, (Ky.) 12 S. W. 1087.

**Defect of parties.**

8. Under Civil Code Ky. § 92, providing that defect of parties is waived unless distinctly specified by a demurrer thereto, failure to make a party to a suit for the specific performance of a contract for the sale of land, one who has a purchase-money lien on the land, and to whom, by the terms of the deed tendered under the contract, the consideration was assigned, though the notes were to be made directly to the vendors, is waived by failure to demur, where the defect appears by the filing of the tendered deed as an exhibit.—*Gaither v. O'Doherty*, (Ky.) 12 S. W. 306.

**Intervention.**

9. A petition for intervention in trespass to try title by a purchaser at execution sale alleged title in intervenor under foreclosure of a mortgage against the execution debtor, and prayed to have intervenor's title quieted as against plaintiff's claims, but failed to show that plaintiff had notice of intervenor's lien at the time his title vested. Held, that it was demurrable, as intervenor showed no such interest as would have entitled him to recover had he brought the action originally against plaintiff, or to defeat recovery had it been brought against him.—*King v. Olds*, (Tex.) 12 S. W. 65.

**PARTITION.****Parol partition.**

1. A partition of lands among joint tenants or tenants in common, made by parol agreement, is not within the statute of frauds, nor the statute regulating conveyances of land by married women, and is not affected by the registration law.—*Aycock v. Kimbrough*, (Tex.) 12 S. W. 71.

**Jurisdiction.**

2. Since in Missouri a partition proceeding is but a civil action, the circuit court has jurisdiction of an answer seeking to charge the interests of some of the parties with advancements made to them by the ancestor's executrix, under an agreement that they should be so charged, under Rev. St. Mo. § 3521, providing that an answer shall contain a general or specific denial of each material allegation of the petition, or a statement of any new matter constituting a defense.—*Green v. Walker*, (Mo.) 12 S. W. 353.

**Pleading and parties.**

3. Where children of the grantee of a life-estate in land take the land after the death of the father as tenants in common, a petition which joins all those living, and the heir of one deceased, as parties defendant in a suit for partition, is not multifarious, though some of the tenants have purchased the interests of the others; such purchase not conferring an exclusive right to any portion of the land.—*Waddell v. Waddell*, (Mo.) 12 S. W. 349.

4. Where, in a suit for partition, the general right to the whole land is being litigated, the fact that the parties to the suit rely upon distinct and independent rights does not make the petition therein multifarious.—*Waddell v. Waddell*, (Mo.) 12 S. W. 349.

**Evidence.**

5. In a suit by heirs against the executors and devisees for partition, in which the executors seek to be reimbursed out of the estate for payments made on behalf thereof, one of the items being for payment of taxes on lands, a part of which had been adjudged to be the separate property of the widow, the burden is on plaintiffs to show how much, if any, of such item is for taxes on the widow's separate property.—*Haley v. Gatewood*, (Tex.) 12 S. W. 25.

**Rents and profits.**

6. Where there is long delay in bringing a suit for partition of lands in possession of defendants, and all the parties thought that plaintiff had no rights in the property, and she has made no objection to its use and disposition by defendants, though cognizant thereof, interest on rents and profits will not be allowed before commencement of the suit.—*Clark v. Hershey*, (Ark.) 12 S. W. 1077.

7. Plaintiff in a partition suit has no lien on defendants' shares in the land to secure payment of rents and profits.—*Clark v. Hershey*, (Ark.) 12 S. W. 1077.

**PARTNERSHIP.****Rights of partners inter se.**

1. In a suit for a partnership accounting, it appeared that defendant was to furnish the necessary money for mining coal, and that the profits were to extinguish the advancement made by him, and that he was to have one-half cent advantage in profit on each bushel of coal until the advances were paid, and then the profits were to be equally divided. Held, that, on the business resulting in a loss, defendant was not entitled to contribution from plaintiff, the other partner.—*McCormick v. Stofor*, (Ky.) 12 S. W. 151.

**Retiring partner.**

2. Defendants, as partners, leased certain land of plaintiff for three years, and made cash payments thereon at different times. Some three months thereafter one of the partners (W.) retired, and the two remaining partners assumed all liabilities, and notice thereof was duly published. At the end of the first year a balance of \$1,896 was due on the rent, for which the new firm gave their

note, but nothing was said about W., and no release given as to him by plaintiff. At the end of the second year the new firm gave up the land, being unable to pay the rent, and plaintiff rented it to a third person. *Held*, that W. was not discharged from his liability for the rent by the acceptance of the note of the new firm until the surrender of the land by plaintiff's consent.—*White v. Boone*, (Tex.) 12 S. W. 51.

**Action against.**

8. Plaintiff, to commence his action, filed a due-bill signed by defendants. One of defendants made default, and the other, in his own behalf, answered, denying the execution of the due-bill by him, and denying that any one had authority to sign it for him. Plaintiff replied that defendants were partners, and the due-bill was given by one of them for a partnership debt. Defendant by amendment struck out all of his answer except the denial. *Held*, that plaintiff could introduce evidence of the partnership without amending his pleadings.—*Vaughan v. McGannon*, (Ark.) 12 S. W. 557.

**PAYMENT.**

Of taxes, see *Taxation*, 11.

**Evidence.**

1. Possession by a bank of an unindorsed check drawn on it in favor of complainant or his order, coupled with evidence that it was not its custom to require a payee to indorse the check when paid to him in person, is not sufficient to show payment to him, when denied by him.—*Pickle v. People's Nat. Bank*, (Tenn.) 12 S. W. 919.

2. An indorsement on a note, "June 22, 1881, credit, \$200," shows that the credit was not allowed for the delivery of 140 bushels of wheat of the crop of 1881, valued at \$140.—*Barnes v. Green's Adm'r*, (Ky.) 12 S. W. 277.

**Presumption of payment.**

8. In an action upon certain notes, defendant cannot claim to be credited by the amount due him for services rendered the payee, where such services were rendered before the giving of one of the notes, and the execution of a lien to secure the same and previous notes, as they must be presumed to have been paid for.—*Barnes v. Green's Adm'r*, (Ky.) 12 S. W. 277.

**Voluntary payment.**

4. Where the widow of a deceased owner of cotton delivers the cotton to one having a verbal lien thereon, for supplies furnished in raising the crop, in payment therefor, she cannot, by an order to another lienholder, divest the first of his title.—*Morrison v. Hammer*, (Tex.) 12 S. W. 848.

**Penalties.**

For non-payment of taxes, see *Taxation*, 18.

**PERJURY.**

**What constitutes.**

1. Perjury may be predicated on a false answer of a witness that he had never been convicted of a felony, as such answer affects his credibility, and is therefore material to the issue, within Pen. Code Tex. art. 198.—*Williams v. State*, (Tex.) 12 S. W. 1108.

**Indictment.**

2. Gen. St. Ky. c. 29, art. 8, § 2, provides that if any person after being sworn by a person authorized to administer oaths, upon a matter whereon he can be legally sworn, shall swear falsely, he shall be confined in the penitentiary, etc. Crim. Code, § 32, provides that a magistrate may examine any person on oath concerning the commission of a public offense. *Held*, that an indictment for false swearing upon an investigation before a police judge as to whether whisky had been sold in a certain town, alleging that an ordinance of the town prohibited such sale therein, does not sufficiently charge that the accused was sworn upon a matter whereon he could be legally

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sworn, for the violation of such an ordinance is not shown to be a public offense without setting out the authority by which it was enacted, as Gen. St. c. 107, art. 8, § 1, providing that town trustees may make such regulations for the government thereof as are not inconsistent with the laws of the state, does not confer upon them power to prohibit the sale of liquor, that being regulated by general laws.—*Kerfoot v. Commonwealth*, (Ky.) 12 S. W. 189.

8. Under Rev. St. Mo. 1879, § 1418, providing that "every person who shall willfully and corruptly swear," etc., the omission of the word "willfully" is fatal to an indictment.—*State v. Day*, (Mo.) 12 S. W. 365.

**— Variance.**

4. An indictment for perjury averred that defendant took his "corporal oath, and was then duly sworn" in the mode common to the courts. The evidence showed that he was sworn with uplifted right hand. *Held*, that there was no variance.—*Commonwealth v. Jarboe*, (Ky.) 12 S. W. 188.

**Evidence.**

5. On a prosecution for perjury by one who swore on a trial for rape that he witnessed the act, and that the prosecutrix voluntarily yielded, it appeared that the prosecutrix was examined by physicians, at the instance of her father, to determine whether she had been in the habit of having sexual intercourse. *Held*, that evidence that the prosecutrix appeared to understand the nature of the examination, and that she made no objection, was objectionable as hearsay.—*State v. Day*, (Mo.) 12 S. W. 365.

**Instructions.**

6. On a prosecution for perjury alleged to have been committed on a trial for rape, the indictment charged that defendant swore that he was on the road; that M. asked him to wait and see what took place; that M. then made indecent proposals to the prosecutrix in the rape case; that she objected, and said, if he would go home with her, she would consent; and that they then had sexual intercourse,—each of which statements the indictment alleged to be untrue, etc. *Held*, that an instruction that if an assault was committed, and defendant swore an assault was not committed, yet he could not be convicted, unless defendant also swore to every fact as alleged, was properly refused, as requiring the state to prove too much.—*State v. Day*, (Mo.) 12 S. W. 365.

**PHYSICIANS AND SURGEONS.**

Privileged communications, see *Witness*, 11.

**Dentists—Certificate.**

Act Ark. April 4, 1887, providing that dentists practising within the state shall within three months after the passage of the act obtain a certificate from the board of examiners, is a proper exercise of the police power of the state, and is constitutional.—*Gosnell v. State*, (Ark.) 12 S. W. 392.

**PLEADING.**

See, also, *ChamPERTY and Maintenance*.

Answer, see *Ejectment*, 8.

In actions for injuries, see *Carriers*, 9, 10; *Hoove and Street Railroads*, 3, 4.

— negligence, see *Negligence*, 7.

particular actions, see *Trespass to Try Title*, 8-8; *Trover and Conversion*, 2.

Pleading damages, see *Damages*, 13, 14.

— statute, see *Frauds, Statute of*, 8; *Statutes*, 8.

Surplusage, see *Death by Wrongful Act*, 8.

**Complaint.**

1. Where the allegations of a complaint are ambiguous and uncertain as to some of the material facts necessary to sustain it, but the inference may be drawn by a fair intendment from the allegations that a cause of action exists, defendant's remedy is by motion to make more certain, and not by demurrer.—*Bush v. Cella*, (Ark.) 12 S. W. 788.

2. In an action for damages for removal of a fence, originally brought in justice's court, the following account, viz., "To actual damages for removing a certain fence from around a certain growing crop, etc., and to exemplary damages for the wrongful and malicious removal of the aforesaid fence," is sufficient to support a judgment for the value of the fence that was removed.—*Long v. Cude*, (Tex.) 12 S. W. 827.

#### Answer.

3. An answer alleging purchase in good faith supplies the omission of such issue in a petition to enjoin sale of securities.—*Henry v. Sneed*, (Mo.) 12 S. W. 663.

#### Demurrer.

4. In an action to enjoin a county from erecting hitching racks for horses around a public square in a city, on the ground that the city has control of the streets and squares, it is error to sustain a demurrer to an answer which avers that the city council gave the county permission to erect the racks at the places where they were proceeding to erect them, though the manner in which the permit was given was not alleged, as the fact was admitted by the demurrer.—*Harrison County Court v. Wall*, (Ky.) 12 S. W. 180.

#### Plea in abatement.

5. A plea in abatement in an action for damages for injury to property, and personal wrongs, that plaintiff had no interest in the suit, but that it was agreed between him and his attorneys that they should bring the suit and prosecute it in plaintiff's name, and pay all costs, and have the whole amount recovered, is not sufficient, as the claim for damages to the person cannot be assigned.—*Jones v. Matthews*, (Tex.) 12 S. W. 828.

#### Verification.

6. Under the practice act of Missouri, pleadings need not be verified.—*Hilton v. City of St. Louis*, (Mo.) 12 S. W. 657.

#### Amendment.

7. Where the amount claimed in an amended petition brings it within the jurisdiction of the court, it should not be dismissed on the ground that it sets up a new cause of action.—*Wood County v. Cate*, (Tex.) 12 S. W. 535.

8. Plaintiff's original petition alleged that defendant agreed and promised that it would, when plaintiff should ask for and accept service and employment from it as a locomotive engineer on its road, give him such employment "for whatever length of time plaintiff should desire to retain it." His amended petition alleged as the contract "that defendant promised to give plaintiff employment on its road as a locomotive engineer for the period and term of the natural life of plaintiff." Held, that the amendment set up a new cause of action.—*East Line & R. R. Co. v. Scott*, (Tex.) 12 S. W. 995.

#### Pleading and proof—Variance.

9. In an action on an open account, where the petition alleges that the goods were sold on August 4, 1888, and the account shows another item of a subsequent date, a verdict for plaintiffs, which includes the latter item, is not excessive, as the plaintiffs are not confined to the proof of the time alleged in the petition.—*Pearce v. Tootle*, (Tex.) 12 S. W. 536.

#### Harmless error.

10. Where a demurrer to the petition is sustained and the petition is amended and a verdict is subsequently rendered in favor of plaintiff, as prayed for, the ruling of the court upon the demurrer, if error, becomes thereby immaterial.—*National Bank v. Texas Investment Co.*, (Tex.) 12 S. W. 101.

11. A false allegation as to the legal effect of an instrument annexed to a pleading is cured by the writing itself.—*Behan v. Ghio*, (Tex.) 12 S. W. 996.

#### Pleas.

In criminal cases, see *Criminal Law*, 4-7.

## PLEDGE.

### Rights of pledgee.

1. Where a creditor holds collaterals in pledge to secure its claim, it is properly required to account therefor before sharing in the proceeds of a receiver's sale of the debtor's property.—*Bryan & Brown Shoe Co. v. Block*, (Ark.) 12 S. W. 1073.

2. Plaintiff's intestate executed his note to defendant H., and deposited with him the note of defendant L. as collateral security; and H. sold the former note and assigned the latter, as collateral, to defendant S. Plaintiff sued for the amount of L.'s note. Held, that defendant S. held L.'s note in trust for the estate of plaintiff's intestate, subject to the payment to S. of the note of plaintiff's intestate to H., and was entitled to judgment against L. for the amount of the note, without first establishing his claim against intestate's estate, and without joining in plaintiff's action, or filing a cross-bill, and having L. further cited.—*Williams' Adm'r v. Lumpkin*, (Tex.) 12 S. W. 488.

## Police Power.

See *Physicians and Surgeons*.

## POWERS.

### Construction.

A power of attorney authorizing the attorneys "to buy, sell, or exchange property, to receive and receipt for money, to sell and dispose of property, to give bills of sale thereto, or to sell and transfer real estate, and execute deeds thereto, or to do and perform any lawful act in or about or concerning my [the principal's] business, as fully and completely as if I were personally present," does not authorize the attorneys to execute an assignment of the principal's property for the benefit of his creditors.—*Gouldy v. Metcalf*, (Tex.) 12 S. W. 880.

## PRACTICE IN CIVIL CASES.

See, also, *Appeal; Certiorari; Costs; Deposition; Error; Writ of; Exceptions, Bill of; Judgment; Jury; New Trial; Parties; Pleading; Trial; Venue in Civil Cases; Writs*.

### Dismissal.

1. Where the separate demurrer of one of several defendants is sustained, and the action dismissed, it is dismissed as to him, and left pending as to the defendants not demurring.—*Dyal v. Hays*, (Ark.) 12 S. W. 874.

#### — By plaintiff.

2. Plaintiff cannot dismiss an action of trespass to try title where defendant has set up title, and alleged that plaintiff's claim was a cloud thereon, and prayed for removal of the cloud, as the answer was a plea in reconviction, by which affirmative relief was sought.—*Schmidt v. Talbert*, (Tex.) 12 S. W. 284.

### Stipulations.

3. A stipulation between the parties to an action of trespass to try title, that the "only issue is one of boundary and identification of plaintiff's and defendant's real estate," eliminates the question of the statute of limitations from the case.—*Cushing v. Smith*, (Tex.) 12 S. W. 19.

4. Where an action is in form trespass to try title, and defendants plead title and limitation, and evidence is introduced on these points at the trial, without objection, and these defenses are urged on appeal, it will be held to be in fact what it is in form; and a stipulation between the parties that the suit did not involve title, but was for the purpose of establishing a boundary line, will be considered merely an admission of paper title.—*Carley v. Parton*, (Tex.) 12 S. W. 950.

### Judgment against co-defendant.

5. It is competent for one of two railroad companies joined in an action for collision to ask for judgment over against its co-defendant in case

judgment shall be rendered against it.—*Gulf, C. & St. F. Ry. Co. v. Hathaway*, (Tex.) 12 S. W. 999.

### Compelling appearance of party.

6. Defendant's application for an order to compel plaintiff to appear personally at the trial, so that he might cross-examine her, was properly refused, where such application was made before the trial, and before any attempt had been made to take her testimony by deposition or otherwise.—*Graham v. McReynolds*, (Tenn.) 12 S. W. 547.

### Presumption.

Of payment, see *Payment*, 3.  
On appeal, see *Appeal*, 46, 47.

## PRINCIPAL AND AGENT.

See, also, *Attorney and Client*.  
Action by agent, see *Parties*, 6, 7.  
Insurance agents, see *Insurance*, 21, 22.

### Ratification.

1. When an agent has exceeded his powers in executing a conveyance, a verbal assent by the principal, without receiving any benefit from the transaction, is not a sufficient ratification.—*Zimpelman v. Keating*, (Tex.) 12 S. W. 177.

### Authority of agent.

2. A person employed to purchase cattle with money furnished in advance is not authorized to pledge his employer's credit, where it appears that he received half the profits, and conducted the business entirely in his own name, with the knowledge of his employer, and it does not appear that he was ever authorized to make any purchase on credit, or borrow money, or incur any debt, or that his employer knew of his ever having done so.—*First Nat. Bank v. Pennington*, (Tex.) 12 S. W. 1114.

### Liabilities of agent.

3. Defendant, being indebted to plaintiffs, empowered a third person to carry on his business, and, in case of necessity, to sell his stock, notes, and accounts, and from the proceeds pay plaintiffs whatever might be owing them. *Held*, that plaintiffs, in the absence of fraud on their part, could be charged only with the amount paid them from the proceeds, without regard to the value of the stock, as the manager was not their agent.—*Norwood v. Sanger*, (Tex.) 12 S. W. 1115.

4. The agreement further provided that, if the manager should fail to fully execute the agency, then plaintiffs might execute the same, or appoint any other person to execute it. *Held*, that the taking of the notes and accounts, and suing on them in their own name, made plaintiffs liable only for a faithful execution of the power, and not for their full face value.—*Norwood v. Sanger*, (Tex.) 12 S. W. 1115.

## PRINCIPAL AND SURETY.

### Release of surety.

1. Plaintiff, holding an overdue note given by S., on which defendant was surety, was induced by the false representations of S., and with knowledge that he was about to make an assignment, to surrender and cancel the note, and accept a new one, signed by S. alone, embracing the amount of the old note and other debts of S., payable in five years, and secured by an insufficient mortgage. Defendant was informed that the note on which he was surety had been canceled, and new security obtained from S. The next day S. assigned, and plaintiff then learned that the mortgage was not adequate security, whereupon it compelled the assignee to accept a release of the mortgage, but for nearly five months it did not notify defendant of the fraud, nor offer to transfer the mortgage to him. All the parties lived in the same city, and the mortgaged property and records were situated there. *Held*, that plaintiff's conduct discharged

defendant from liability as surety.—*Struss v. Masonic Sav. Bank*, (Ky.) 12 S. W. 266.

2. One of three partners bought out the others, giving them notes with sureties for their shares, the purchaser agreeing to pay all the debts of the firm, and acquiring all the assets. The outgoing partners gave the other a bond conditioned to convey to him the firm real estate. The purchaser failed to pay the firm debts, and the outgoing partners agreed to repurchase the realty for a fixed sum, which was to be applied on the firm debts. *Held*, that no right which the sureties on the notes had in the real estate was prejudiced by the performance of such agreement, and their liability on the notes was not affected thereby.—*Bryan v. Henderson*, (Tenn.) 12 S. W. 333.

3. A pleading, alleging an application for discharge as surety upon a public administrator's bond, made "after due notice as required by law," and setting out the record of the proceedings, which recites the presence of the principal on the hearing of the application, shows proper notice to the principal.—*State v. Nolan*, (Mo.) 12 S. W. 1047.

### Remedies of surety against principal.

4. A claim against the estate of his principal, by a surety, for payment of a bond which is not assigned to him, is on an account, and not on the bond.—*Mudd v. Mullican*, (Ky.) 12 S. W. 885.

5. In an action by a surety against the maker of a note which stipulates that, in case of suit by payee, a certain per cent. shall be allowed as attorney's fees, the surety, having paid such note, is subrogated to the rights of the payee, and his affidavit for attachment, averring the indebtedness to be the amount of the principal, interest, and attorney's fees, is not at variance with the petition setting out such note.—*Carpenter v. Minter*, (Tex.) 12 S. W. 180.

6. A mortgage given to sureties on the general bond of a county treasurer does not inure to the benefit of his sureties on the special bond required to be given for the safe-keeping and disbursement of the school fund.—*Lacy v. Rollins*, (Tex.) 12 S. W. 314.

## Privileged Communication.

See *Witness*, 11.

## Process.

See *Writs*.

## PROHIBITION, WRIT OF.

### When lies.

Const. Mo. art. 6, § 8, providing that the supreme court shall have control over the courts of appeal by *mandamus*, prohibition, and *certiorari*, only authorizes the writ of prohibition when the court of appeals has no jurisdiction over the matter which it is proceeding to determine.—*State v. Rombauer*, (Mo.) 12 S. W. 661.

## Probable Cause.

See *Malicious Prosecution*, 1-4.

## Probate.

Of wills, see *Wills*, 11-14.  
Practice, see *Executors and Administrators*, 30.

## Promissory Notes.

See *Negotiable Instruments*.

## Publication.

Service by, see *Writs*, 3-6.

## Public Improvements.

See *Municipal Corporations*, 19-24.

## PUBLIC LANDS.

Title to school lands, see *Trespass to Try Title*, 2.

## Conflicting rights of patentees.

1. In an action of trespass to try title to two tracts of land, it appeared that S., under whom plaintiff claimed, held an interest of  $378\frac{1}{4}$  acres, and B. and M., under whom defendants claimed, an undivided interest of  $756\frac{1}{2}$  acres jointly, under a certificate granted to their common grantor; that in March, 1854, the widow of S. conveyed her interest of  $378\frac{1}{4}$  acres to F., (plaintiff's husband,) who, in July, 1854, located the certificate upon the 804-acre tract in dispute in his own name as assignee, and also upon the  $452\frac{1}{2}$ -acre tract in April, 1855, in like manner; but the field-notes of this last survey, as filed in the general land-office in May, 1855, showed that the words "F., as assignee of" had been crossed out. In April, 1857, the transfer of B. and M.'s interest in the certificate was filed in the land-office with the field-notes, and in June, 1871, patents to both the tracts in controversy were issued to them as assignees of the common grantor. *Held*, that defendants were entitled to the possession of the  $452\frac{1}{2}$ -acre tract under the patent, in the absence of clear and convincing proof of plaintiff's equitable right thereto. —Fuller v. Coddington, (Tex.) 12 S. W. 47.

## Cancellation of patent.

2. Gantt's Dig. Ark. § 5570, provided that every purchaser of common-school lands should be entitled to a patent from the state after payment of the price, and section 5571 made it the duty of the secretary of state to make out patents to be countersigned by the governor, with the state seal affixed. *Held*, that the decision of the officers issuing a patent, as to whether the necessary antecedent acts had been done, was conclusive against the state in a collateral attack on the patent by ejectment; but, as the complaint alleged that defendant obtained the patent by falsely representing that he had purchased the land, it showed a right to have the patent canceled, and the cause should have been transferred to equity. —State v. Morgan, (Ark.) 12 S. W. 243.

## School lands.

3. Gould's Dig. Ark. c. 154, § 53, provides for sales of school lands on credit, and also that "any person may pay the amount in cash for which said land was sold." Act April 12, 1869, § 14, provided a mode by which persons, who had purchased lands according to law, might acquire a patent. Gantt's Dig. §§ 5564, 5565, enlarged the authority to sell such lands, elsewhere conferred on the county collector. *Held*, that the first statute was not intended to allow persons other than the purchasers to acquire land sold, by paying in cash the amount for which someone else had purchased it on credit, and that neither of the statutes conferred upon the board of commissioners of the common-school fund authority to sell such land. —State v. Morgan, (Ark.) 12 S. W. 243.

4. The terms for sale of school lands, fixed by the county court, under Const. Tex. art. 7, § 6, providing for the protection of settlers on school lands in the prior right of purchasing the same to the extent of their settlement, were on nine years' time in ten equal payments, first to be made at the time of sale of one-tenth of the whole amount, balance payable annually. Defendant, an actual settler on school lands, tendered the first payment upon 160 acres, but the purchase was not closed, owing to a dispute as to the acreage of the tract he had settled upon. Plaintiff held title to school land embracing the land defendant had settled on under mesne conveyances from the county subsequent to defendant's residence thereon. *Held*, that in an action to try title defendant had a paramount claim as against plaintiff, and was entitled to possession on paying the amount accrued since the first tender, and securing the amount not yet due, his residence being notice to plaintiff and its grantors of his claim. —Clay County Land & Cattle Co. v. Earle, (Tex.) 12 S. W. 66.

5. In view of the provisions in the constitution for grants to railroads, for pre-emption of home-

steads, for grants to counties for educational purposes, etc., it cannot be said that the reservation of "half of the public domain of the state" as a perpetual school fund was an appropriation of half of all the then existing public domain. Such reservation was intended to reach and hold beyond legislative control whatever portion of the public domain might remain after the execution of the enumerated purposes. —Galveston, H. & S. A. Ry. Co. v. State, (Tex.) 12 S. W. 983.

6. Acts Tex. 1854 and of March 18, 1873, providing for grants of public land to railroads, require surveys to be made in sections, and numbered from one upwards, the even numbers to be reserved to the state, and the odd numbers to be granted to the railroad. Const. Tex. 1876, art. 7, § 2, provides that all lands theretofore set apart for the support of public schools, "all the alternate sections of land reserved by the state out of grants heretofore made, or that may hereafter be made, to railroads," etc., shall constitute a perpetual school fund. *Held*, that the reservation for the school fund of "half of the public domain," as well as the "alternate sections," does not entitle the state to half of the sections to be granted to the railroads, in addition to the sections reserved to the state. —Galveston, H. & S. A. Ry. Co. v. State, (Tex.) 12 S. W. 983.

## Actual settlers.

7. Cutting a few logs and making a small clearing on vacant and unappropriated land do not constitute one an "actual settler" thereon, so as to entitle him to the notice which Gen. St. Ky. c. 109, § 2, requires to be given "actual settlers" on such land of an intention by another to locate the same. —McQuady v. Mattingly, (Ky.) 12 S. W. 768.

## Texas colonial titles.

8. That all of the lands contained in the concessions were not in controversy is no ground for excluding the records of the concessions in a contest over a Texas title. —Texas Mex. Ry. Co. v. Locke, (Tex.) 12 S. W. 80; Same v. Carr, Id. 90.

9. Mexican decree, March 26, 1834, No. 272, repealing all former instructions inconsistent with it, and declaring that no further colonization contracts should be made, did not divest the governor of authority to complete the titles where there had been concessions already made under the law of 1825. —Texas Mex. Ry. Co. v. Locke, (Tex.) 12 S. W. 80; Same v. Carr, Id. 90.

10. Where concessions confer the right to purchase lands, and the commissioner has power to issue title, the lands conveyed by him are "titled lands," within the meaning of Const. Tex. art. 14, § 2, providing that land certificates shall not be located on "any land titled or equitably owned under color of title from" the state, and locations of grants made on such lands do not constitute "titled lands" nor "color of title." —Texas Mex. Ry. Co. v. Locke, (Tex.) 12 S. W. 80; Same v. Carr, Id. 90.

11. Persons locating grants on lands acquired under Mexican concessions cannot raise the question whether the conditions of the concessions were complied with, nor as to the proper location of the lands under them. —Texas Mex. Ry. Co. v. Locke, (Tex.) 12 S. W. 80; Same v. Carr, Id. 90.

12. A report made by the secretary of state of the state of Coahuila and Texas to the political chief of Bexar, in 1833, giving a statement of a number of colonial contracts made under decrees of 1825 and 1832 with B. and G., and a report of the same date by the same officer to the same chief, showing concessions to purchase lands to the same persons, certified to by the Spanish translator and commissioner of the general land-office of Texas in 1833, are admissible in evidence in a suit to establish title under those concessions, to show that the concessions and contracts were made before the date of the report, and that the concessions and colonies were within the territorial jurisdiction of the political chief of Bexar. —Texas Mex. Ry. Co. v. Locke, (Tex.) 12 S. W. 80; Same v. Carr, Id. 90.

13. In a contest over a Texas colonial title, when the titles under which defendants claim purport to have been issued by the commissioner appointed to extend titles in a colony, a certified copy

of the application for a colonization contract to the person who acted as commissioner in a colony in which the lands were situated is admissible.—*Texas Mex. Ry. Co. v. Locke*, (Tex.) 12 S. W. 90; *Same v. Carr*, *Id.* 90.

14. Where the copy appears to be that of the original *testimonio* of application for and grant of a colonial contract, duly certified by the legal custodian of the protocol, and delivered to the *empresarios* as evidence of their right, it is admissible.—*Texas Mex. Ry. Co. v. Locke*, (Tex.) 12 S. W. 80; *Same v. Carr*, *Id.* 90.

15. Such papers pertain to the archives of the respective colonies, and were properly filed in and certified from the general land-office.—*Texas Mex. Ry. Co. v. Locke*, (Tex.) 12 S. W. 80; *Same v. Carr*, *Id.* 90.

16. While the concessions authorizing a purchase of colonial lands from the Texas government did not give title to land, they did give the consent of the government to its purchase, and are properly introduced in evidence to establish such right, and to show what officer could give the final title.—*Texas Mex. Ry. Co. v. Locke*, (Tex.) 12 S. W. 80; *Same v. Carr*, *Id.* 90.

17. *Testimonios* of title, which have been in existence 40 years, and which were filed in the general land-office of Texas, in 1845, and remained there until 1875, when they were withdrawn under a power of attorney from the grantees, will be received in evidence as ancient instruments, where there is no question as to the genuineness of the signatures, and the *testimonios* contain the essentials of final title, though their form is unusual.—*Texas Mex. Ry. Co. v. Locke*, (Tex.) 12 S. W. 80; *Same v. Carr*, *Id.* 90.

18. Though the protocols ought properly to be attached to the final titles, in their absence they will be presumed to be in the proper archives.—*Texas Mex. Ry. Co. v. Locke*, (Tex.) 12 S. W. 80; *Same v. Carr*, *Id.* 90.

19. Titles valid against the state of Coahuila and Texas on March 2, 1836, originally titled to Mexicans, and belonging to them on July 4, 1848, were protected in them by article 8 of the treaty of Guadalupe Hidalgo, and documents showing title under the Mexican law against said state, and conferring title subject to protection under said treaty, are admissible in evidence.—*Texas Mex. Ry. Co. v. Locke*, (Tex.) 12 S. W. 80; *Same v. Carr*, *Id.* 90.

## QUIETING TITLE.

### Who may sue.

An action to quiet title by one out of possession will not lie against one in occupancy of the land in dispute, who has been asserting his right for many years.—*Moses v. Gatliff*, (Ky.) 12 S. W. 139.

## QUO WARRANTO.

### Against corporations.

1. Immunity from taxation is not a corporate franchise or "right and privilege," within the meaning of the Texas statute authorizing proceedings by *quo warranto* "in case any person shall usurp \* \* \* or unlawfully hold \* \* \* any office or franchise, \* \* \* or any incorporation does or omits any act which amounts to a surrender or forfeiture of its rights and privileges as a corporation," and an appeal from a decree withdrawing such exemption, in such a proceeding seeking forfeiture of charter and such withdrawal, need not be prosecuted within the time required in *quo warranto* proceedings.—*International & G. N. Ry. Co. v. State*, (Tex.) 12 S. W. 685.

2. Defendant having appealed from a decree forfeiting its exemption, the refusal of a decree forfeiting the charter cannot be reviewed, though both parties assigned errors, where the appeal is not prosecuted "to the term of court in session, at either branch, or the first term to be held," as is prescribed in *quo warranto* proceedings.—*International & G. N. Ry. Co. v. State*, (Tex.) 12 S. W. 685.

### Procedure.

3. An affidavit in an information in the nature of *quo warranto* to try title to an office, which is as direct and positive as the nature of the case permits in stating the facts on which the information is based, is not objectionable because not stating that those facts are true within the knowledge of the affiant, as the object of such an affidavit is simply to inform the judge by whose permission the information is filed, that the facts exist which make its filing proper and not for use on the trial.—*Hunnicut v. State*, (Tex.) 12 S. W. 106.

4. Where an affidavit in the nature of *quo warranto* to try title to an office is first made before one officer, a second affidavit, made before another officer, and stating no new facts, and made because there might be a question as to authority of the first officer to administer the oath, is not objectionable as amended swearing.—*Hunnicut v. State*, (Tex.) 12 S. W. 106.

5. The filing of the supplemental information does not operate as an abandonment of the original, on the ground that the original was filed on relation, while the other was not.—*Hunnicut v. State*, (Tex.) 12 S. W. 106.

6. Refusal to strike out a supplemental information, filed by the county attorney without the concurrence of the relator in the original information, which sets up no new cause of action, but simply makes the prayer for relief broader and more specific, is not reversible error, where it is not shown that it prejudiced defendant.—*Hunnicut v. State*, (Tex.) 12 S. W. 106.

7. In view of the evident intent of the statute that actions to try title to offices shall be speedily tried, it is not an abuse of discretion to advance such a cause on the docket where there is no application to postpone it, and an application for continuance, based on the absence of witnesses, is not such as the law requires.—*Hunnicut v. State*, (Tex.) 12 S. W. 106.

8. An allegation in an information to contest an election that the office is reasonably worth \$2,000 is sufficient without specifying the term, as such allegation is only to show that the court has jurisdiction.—*Little v. State*, (Tex.) 12 S. W. 965.

9. Where respondent has been declared elected, has qualified, and entered into the office, relator need not show that he offered to qualify.—*Little v. State*, (Tex.) 12 S. W. 965.

10. Where an information to contest an election is not verified, the court may permit the filing of an amended information, duly verified.—*Little v. State*, (Tex.) 12 S. W. 965.

11. The Texas statutes providing for election contests by information declare that citation shall issue "in like form as in civil actions," and that the respondent shall be entitled to all the rights in the trial "as in cases of trials in civil causes." *Held*, that the proceeding must be treated as a civil action, and that an amendment to the information setting up grounds essentially different from those alleged in the original should not be allowed.—*Davis v. State*, (Tex.) 12 S. W. 957.

12. An information to oust a sheriff from office, alleging that certain persons, named, illegally voted at certain specified boxes for the respondent, that their votes were counted, and that eight legal votes cast for relator in a certain precinct specified were not counted for him by the managers of election, is not subject to general demurrer, and cannot be demurred to specially as too vague or general in its allegations.—*Davis v. State*, (Tex.) 12 S. W. 957.

## RAILROAD COMPANIES.

See, also, *Carriers; Horse and Street Railroads*. Improper construction of road, see *Surface Water*. Injuries to employes, see *Master and Servant*, 6-19.

### Franchises.

1. The fact that a railroad company, empowered by its charter "to join stock or consolidate with any other railway company running in the same general direction," is forbidden to "rent, sell, lease, or consolidate with any parallel or competing rail-

road," does not impliedly authorize it to sell its road and franchises to a company whose road, though not a parallel or competing line, does not run in the same general direction.—*East Line & R. R. Co. v. State*, (Tex.) 12 S. W. 690.

2. A railway company authorized "to purchase, sell, lease, join stocks, unite, or consolidate with any connecting railroad company" has no power to purchase a road which does not connect with that the company is authorized to construct, though it may have built or purchased a line connecting therewith.—*East Line & R. R. Co. v. State*, (Tex.) 12 S. W. 690.

3. Under Const. Tex. art. 10, § 8, providing that no railroad company in existence at its adoption "shall have the benefit of any future legislation, except on condition of complete acceptance of all the provisions of this constitution," an admission by a company in pleading, that it is subject to the general laws and constitution now in force, is an admission of the acceptance of the benefits of subsequent legislation, such as subjects it to the provision (article 10, § 6) forbidding a sale to a railroad company organized in another state.—*East Line & R. R. Co. v. State*, (Tex.) 12 S. W. 690.

### Franchises—Forfeiture.

4. As Rev. St. Tex. art. 2805, makes it the duty of the attorney general, unless otherwise expressly directed by law, to seek the forfeiture of the charter of a corporation which has, by any act or omission, misuser or non-user, forfeited the same, the right of the state to demand a forfeiture of the charter of a railroad company which has sold its road and franchises to a foreign company in violation of the constitution, failed to keep up its organization, and allowed its road to become unsafe, is not waived by the provisions of Sayles, Civil St. Tex. art. 4247a, § 2, which provides for *quo warranto* against a corporation carrying on business in violation of Const. Tex. art. 10, §§ 5, 6, (forbidding sale to or consolidation with a competing or foreign company,) to enforce the penalties therefor, and an injunction against future violation, and appointment of a receiver.—*East Line & R. R. Co. v. State*, (Tex.) 12 S. W. 690.

### Stations.

5. It is not an unreasonable regulation for a railway company to refuse to designate as a flag station for through trains an unincorporated town, situate within three miles of a regular station, and containing only a few houses.—*St. Louis, I. M. & S. Ry. Co. v. Adcox*, (Ark.) 12 S. W. 874.

### Municipal aid—Subscription.

6. Act Ky. March 17, 1870, prohibiting more than one question of taxation from being submitted to the voters at any one election, is not repealed by Gen. St. Ky. art. 17, c. 28, § 2, providing for the manner in which a proposition to take stock in a company is to be submitted, as such statute, by its terms, has no retrospective operation.—*Christian County Court v. Smith*, (Ky.) 12 S. W. 134.

7. Act Ky. March 17, 1870, prohibits more than one question of taxation to be submitted to the voters at any one election, and declares that, if more than one such question is voted upon at any one election, such tax shall be null and void. *Held*, that an election at which the questions of subscribing to the capital stock of two different railroad companies was submitted, was null and void.—*Christian County Court v. Smith*, (Ky.) 12 S. W. 134.

8. The fact that the election is void as to one of the subscriptions voted on, does not validate the other.—*Christian County Court v. Smith*, (Ky.) 12 S. W. 134.

### Exemption from taxation.

9. Where the legislature divides a railroad company into two distinct companies, by consent of all the stockholders, the equity which the old company had, to exemption from taxation to pay the subscription of a county to it, passes to the new company.—*Louisville & N. R. Co. v. Commonwealth*, (Ky.) 12 S. W. 1064.

10. A railroad cannot be taxed by a county to pay the subscription of the county to aid in its con-

struction, though the county issued bonds in payment of the subscription, and the tax is to pay the bonds.—*Louisville & N. R. Co. v. Commonwealth*, (Ky.) 12 S. W. 1064.

11. Exemption from taxation by act of legislature for good consideration, of property owned or to be owned by a railroad company or its successors, attaches to the property, and cannot be withdrawn for failure to faithfully exercise corporate powers, in the absence of provision for forfeiture.—*International & G. N. Ry. Co. v. State*, (Tex.) 12 S. W. 685.

### Lease and consolidation.

12. Acts Mo. 1869, p. 75, § 1, authorizes railroad companies whose lines connect with any company organized under the laws of an adjoining state to consolidate the stock, making one company of the two. Section 2 requires that the agreement be approved by the holders of a majority of the stock in each of the companies. Section 3 authorizes a new corporate name, and an exchange of the certificates of stock for stock in the new company, and requires a copy of the agreement and resolutions of consolidation to be filed with the state. Section 4 provides that the new company shall be subject to all the liabilities, and bound by all the obligations, of the company within the state, and entitled to the same franchises and privileges. *Held*, that the former corporation was dissolved, when consolidation was effected under the act, and a new one was formed; and since Const. Mo. 1865, art. 11, § 16, providing that no property should be exempt from taxation, with certain exceptions, not including that of railroad companies, took effect before the consolidation, the consolidated company could not avail itself within the state of an exemption granted by the charter of the former corporation before the constitutional provision was passed.—*State v. Keokuk & W. R. Co.*, (Mo.) 12 S. W. 290.

13. A railroad, by its relations to other roads, may be a competing line with a road with which it is not parallel, and does not connect, within the meaning of an act forbidding it to consolidate with a competing road.—*East Line & R. R. Co. v. State*, (Tex.) 12 S. W. 690.

### Bonds and mortgages.

14. Act Tenn. March 15, 1881, conferring the power to mortgage in very broad terms, and extending such power to all railroad companies then existing, or which might thereafter be created, did not repeal the limitation upon the power contained in Act March 24, 1877, there being no repealing provision in the act, and no such repugnancy between the two acts as to imply a repeal.—*Frazier v. East Tennessee, V. & G. R. Co.*, (Tenn.) 12 S. W. 537.

15. Complainant, an engineer, who had been injured, entered into a contract with the company for the settlement of his claim for damages, whereby the company was to pay him \$90 per month for five years, complainant to do such work in the company's shops as he should be called upon to do, and which he might be physically able to do; his ability to be determined by a certain physician. *Held*, that the sum agreed to be paid complainant was in liquidation of his claim for damages for personal injuries, and his claim therefor was a lien superior to a mortgage executed by the company, under Act Tenn. March 24, 1877, prohibiting railroad companies from making any mortgages creating liens superior to judgments for injury to persons or property, incurred in the operation of the road.—*Frazier v. East Tennessee, V. & G. R. Co.*, (Tenn.) 12 S. W. 537.

16. The charter of the E. T. & V. R. Co. (Acts Tenn. 1847-48, p. 195) which conferred on the company power to mortgage, for the purpose of completing its road and equipping it with everything necessary to give it full operation, did not authorize the execution of bonds and mortgage for any other purpose than that of completing and equipping the original lines authorized by the charter, and a mortgage executed more than 25 years after such completion and equipment, and not purporting or shown to be for any such purpose, or to secure the renewal of bonds originally for such purpose, will not be presumed to have been ex-



ecuted for such purpose.—*Fraser v. East Tennessee, V. & G. R. Co.*, (Tenn.) 12 S. W. 537.

#### — Foreclosure sale.

17. On foreclosure sale of a railroad, the property was purchased by a committee of the holders of the bonds, duly authorized to purchase as trustees for the creditors. The committee bid in the corporate property; a small part of the price being paid in cash, the remainder in bonds of the company, under a scheme agreed upon by the bondholders. The title was by deed and decree conveyed to the purchasers, who organized as defendant corporation. After the organization the property was regularly conveyed to the new corporation by the holders of the legal title. *Held*, that defendant, the new corporation, was not an innocent purchaser, as against complainant's claim under a contract entered into with the old company.—*Fraser v. East Tennessee, V. & G. R. Co.*, (Tenn.) 12 S. W. 587.

#### Liability for negligence.

18. Under Rev. St. Mo. 1879, § 121, awarding a penalty for the death of any person from the negligence of "any officer, agent, servant, or employee whilst running or managing any locomotive, car, or train of cars," the negligence need not be that of the superior in charge.—*Rine v. Chicago & A. R. Co.*, (Mo.) 12 S. W. 640.

19. Mill & V. Code Tenn. § 1298, subsec. 8, regulating railroad signals, provides that "on approaching a city or town the bell or whistle shall be sounded when the train is at the distance of one mile, and, at short intervals, until it reaches the depot or station; and on leaving a town or city the bell or whistle shall be sounded when the train starts, and, at intervals, until it has left the corporate limits." *Held*, that the word "town" in the first part of the section includes only incorporated towns.—*Webb v. East Tennessee, V. & G. R. Co.*, (Tenn.) 12 S. W. 428.

20. As plaintiff was about to drive across defendant's tracks, after having exercised due care to ascertain the approach of trains, the sudden approach of a train which she had not noticed frightened her horse, in consequence of which she was thrown from the buggy. *Held*, that an instruction that, "if the train was running at a rate of speed greater than that limited by an ordinance of the city, and in excess of what an ordinarily skillful and prudent man engaged in the business would employ, in view of the probable danger at the crossing, and if, in consequence of this speed, the train came so close to plaintiff's horse that plaintiff was thrown from the buggy in consequence of the horse becoming frightened, and plaintiff did not contribute directly to her injury, then defendant is liable," is correct.—*Gulf, C. & S. F. Ry. Co. v. Breitling*, (Tex.) 12 S. W. 1121.

21. In an action against a railroad company for the killing of plaintiff's son, where, under the law, recovery could be had only in case of gross negligence, a charge which authorizes the jury to believe that the injury was caused by the gross negligence of the company's employees, if they could have avoided it by the use of "ordinary care and caution," is fatally defective.—*Missouri Pac. Ry. Co. v. Brown*, (Tex.) 12 S. W. 1117.

22. One who voluntarily and unnecessarily halts his team near a railroad track, on which a freight train is standing, with knowledge that they are easily frightened at the noise of trains, cannot recover for personal injuries sustained by reason of the team's becoming unmanageable when the customary signals for starting the train were given.—*Hargis v. St. Louis, A. & T. Ry. Co.*, (Tex.) 12 S. W. 955.

#### — Defective crossings.

23. Where the evidence shows that an obstruction on the north side of one approach to a railroad crossing made it necessary to drive close to the south side, and that on the south side of the other approach, which was not in line with the former, but swung to the north, the planks extended over the embankment about 18 inches, the traveled track being only about a foot from the brink over which plaintiff was precipitated, the issue as to

defective crossing is properly left to the jury, in an action for the injuries caused thereby.—*Brown v. Hannibal & St. J. R. Co.*, (Mo.) 12 S. W. 655.

24. An instruction that it was defendant's duty to maintain a crossing which would be "reasonably safe and convenient" is not erroneous, nor a departure from a petition alleging failure to maintain "a good and sufficient crossing."—*Brown v. Hannibal & St. J. R. Co.*, (Mo.) 12 S. W. 655.

25. An instruction that "it is not sufficient that the crossing is so constructed that it is possible to safely pass over it, but it should be so constructed and maintained in such condition as to be reasonably safe and convenient for public travel by persons exercising ordinary care," is correct, and not argumentative.—*Brown v. Hannibal & St. J. R. Co.*, (Mo.) 12 S. W. 655.

26. An instruction that the crossing should be "reasonably safe and convenient" is not inconsistent with one that it should be "reasonably safe."—*Brown v. Hannibal & St. J. R. Co.*, (Mo.) 12 S. W. 655.

27. Where a railroad company maintains a road crossing, knowing that such road is in common use by the public, it is liable for injuries caused by defective construction of the crossing, though the road has not been made public by law.—*Missouri Pac. Ry. Co. v. Bridges*, (Tex.) 12 S. W. 210.

#### — Evidence.

28. Evidence that a railway company, after an accident, put a light at the place of the accident, is inadmissible to show former negligence.—*Missouri Pac. Ry. Co. v. Hennessey*, (Tex.) 12 S. W. 608.

29. In an action against a railway company for personal injuries, where the facts alleged as constituting negligence are failure to ring the bell, to whistle, to give signals to stop the train, and running too fast, failure of defendant to have a light at the place of the accident when it occurred cannot be proven to show the company's negligence, as the facts constituting the cause of action must be clearly stated, and the evidence confined to the allegations.—*Missouri Pac. Ry. Co. v. Hennessey*, (Tex.) 12 S. W. 608.

#### — Accidents at crossings.

30. The fact that plaintiff knew of the defective condition of a highway crossing over defendant's railroad track, which was not necessarily dangerous, and attempted to drive across it with a loaded wagon, when he was injured, is not of itself conclusive proof of contributory negligence; but it is for the jury to determine, under all the circumstances, whether plaintiff was justified in attempting to cross the roadway notwithstanding the defect, and whether in doing so he used due care.—*St. Louis, I. M. & S. Ry. Co. v. Box*, (Ark.) 12 S. W. 757.

31. Deceased, who was driving four unhitched horses, riding one of them, approached a railway crossing along a road where the view of the railway was at different points more or less obstructed, and about 115 feet from the crossing stopped to talk with some men, when a passing train frightened the horses, and caused them to run away, whereby deceased was killed. The men with whom he was talking testified that they heard no whistle. Other witnesses within hearing distance heard no whistle, or were not positive that it was at the crossing. *Held*, in an action against the railway company for causing deceased's death, that contributory negligence was not to be presumed, so as to justify the case being taken from the jury.—*Eskridge's Ex'r v. Cincinnati, N. O. & T. P. Ry. Co.*, (Ky.) 12 S. W. 580.

32. The petition stated that the injury was caused by defendant's accommodation train, but, before answer, was amended by changing the allegation to the express train, which passed before the accommodation. *Held*, that it was proper to refuse to allow the petition to be amended, after the jury had been sworn and witnesses had testified, so as to state as at first that the accommodation train caused the injury.—*Eskridge's Ex'r v. Cincinnati, N. O. & T. P. Ry. Co.*, (Ky.) 12 S. W. 580.

33. In an action for injuries received at a railroad crossing, where it is charged that the train

causing the injuries did not whistle, testimony of a witness that she watched the trains after the accident, and only a few out of a large number whistled, and that trains did not usually whistle there, is inadmissible.—*Eskridge's Ex'r v. Cincinnati, N. O. & T. P. Ry. Co., (Ky.)* 12 S. W. 580.

84. Rev. St. Tex. 1879, art. 4232, imposes a penalty on a railroad company for the failure to ring the bell or blow the whistle at road and street crossings, and provides that the company shall be liable for all damages sustained by reason of such neglect. *Held*, that a charge to the effect that the failure to comply with these requirements at a crossing at which plaintiff was injured was *prima facie* evidence of negligence, making the company liable for the injury if it occurred without any fault of plaintiff, is correct.—*Gulf, C. & S. F. Ry. Co. v. Breitting, (Tex.)* 12 S. W. 1121.

#### Liability for negligence—Injuries to persons on track.

85. As defendant's train was coming towards a small town, the houses of which were on either side of the track, and while some distance from the depot, part of the train was detached, the engine and some of the cars running on ahead and passing the depot, while the detached portion was allowed to come on more slowly down the grade, with no lights in front, no bell or other signal to announce its approach, and no one to look out for persons on the track. The night was dark, and plaintiff's intestate, after having seen the engine with cars attached to it pass by, started across the track, though not at a public crossing, and was run over by the rear portion of the train and killed. *Held*, that the detaching of part of the train, and allowing it to run into the town in such a manner, was such a departure from defendant's duty to the public as to entitle plaintiff to recover, though his intestate was a technical trespasser.—*Conley v. Cincinnati, N. O. & T. P. Ry. Co., (Ky.)* 12 S. W. 764.

86. The court charged that "if the jury find the employees on the train failed to ring the bell and blow the whistle, and that the train was running at a high rate of speed, and that deceased knew, or by the reasonable use of his eyes might have known, of the approaching train, and its danger, and did step upon the track in front of the approaching train, and so near to it that it was impossible, by the use of any effort, to stop the train, and prevent it running upon him, the jury will find for defendant." *Held*, that the instruction was erroneous, as it required the defendant's employees to exercise a degree of care greater than ordinary.—*International & G. N. R. Co. v. McDonald, (Tex.)* 12 S. W. 860.

87. In an action for killing plaintiff's son the complaint alleged that deceased was thrown from a freight train by defendant's servants and sustained injuries from which he died. *Held*, that plaintiff must prove that deceased was thrown from defendant's train; and there can be no recovery for his having been run over by another train, without an amendment stating that as a cause of action.—*Brown v. St. Louis, I. M. & S. Ry. Co., (Ark.)* 12 S. W. 203.

88. In an action for killing plaintiff's son, the complaint alleged that deceased was thrown from a freight train, by defendant's servants, and sustained injuries from which he died. It appeared that deceased fell upon the track and was struck by a passenger train. The court refused to charge that the jury should find for plaintiff if they believed that defendant's agents in charge of such passenger train, by reasonable care and watchfulness, might have discovered the perilous position of deceased in time to avoid the accident, although he were a trespasser. *Held*, that such refusal is proper, as a railroad company is not liable to a trespasser for its agents' negligence in failing to discover him, and as the instruction was not responsive to the cause of action stated in the complaint.—*Brown v. St. Louis, I. M. & S. Ry. Co., (Ark.)* 12 S. W. 203.

89. Deceased, going from the street towards a depot 500 feet distant, walked on the main track 50 feet to a switch, and then on a side track, on which,

some distance ahead, some cars were standing. An engine returning, cab foremost, from a coal shaft was then from 90 to 150 feet away. The engineer could have seen deceased while on the main track, and the fireman, being on top of the tender breaking coal, could have seen him at any time. The switch was open, and deceased was run over about 100 feet from it. *Held* that, as employees would naturally be watchful near a depot, and as the fireman would naturally be on the watch not to collide with cars which had shortly before been left on the side track, there was evidence tending to show that the engineer and fireman, who were not called as witnesses, knew that deceased was on the track in time to have avoided the accident.—*Rine v. Chicago & A. R. Co., (Mo.)* 12 S. W. 640.

40. A person cannot recover for injuries received by being struck by an engine while walking on the ends of the ties on a railroad track on a stormy night, with his hat pulled over his eyes, and "looking straight down."—*Gulf, C. & S. F. Ry. Co. v. York, (Tex.)* 12 S. W. 68.\*

41. Where there is no evidence that the engineer saw plaintiff in time to avoid the injury, an instruction that if the engineer made no effort to stop the engine, and gave no warning, the defendant was liable, is error.—*Gulf, C. & S. F. Ry. Co. v. York, (Tex.)* 12 S. W. 68.

#### —Stock-killing cases.

42. Where a railroad company permits cotton seed to accumulate on or about its track, it is under obligation to maintain reasonable care to prevent injury to stock attracted thereby.—*Little Rock & F. S. Ry. Co. v. Dick, (Ark.)* 12 S. W. 785.

43. Where stock is killed by a train while eating such seed, scattered near the track, the burden is upon the railroad company to overcome the *prima facie* case of negligence made by the killing, by showing that its servants had used reasonable care to avert the injury.—*Little Rock & F. S. Ry. Co. v. Dick, (Ark.)* 12 S. W. 785.

44. Gen. St. Ky. c. 57, § 2, providing that if cattle shall be killed on the track of a railroad company adjoining lands belonging to or in the occupation of the owner of the cattle, who has not received compensation for fencing the land, the loss shall be divided between the railroad and the owner of the cattle, is not unconstitutional as depriving defendant of its property by fixing upon it liabilities not imposed on other citizens, as the same liability is imposed upon all such corporations for the protection of person and property, in consideration of the exclusive or extraordinary privileges granted them.—*Louisville & N. R. Co. v. Belcher, (Ky.)* 12 S. W. 195.

45. The extent of the duty of a railroad company as to stock on its track is that the engineer shall use reasonable care, after the stock is discovered by him, to prevent injury to it, and it is error to charge that it is negligence for a railroad company to fail to keep a lookout for stock.—*Memphis & L. Ry. Co. v. Kerr, (Ark.)* 12 S. W. 329.

46. Gen. St. Ky. c. 57, § 2, provides that if cattle shall be killed on the track of a railroad company "adjoining lands belonging to or in the occupation of the owner of the cattle, who has not received compensation for fencing the land along said road," the loss shall be divided between the railroad and the owner of the cattle. *Held*, that the occupant of lands can recover, under this statute, only when neither he nor the owner has been compensated for fencing, and his complaint must allege failure to compensate either.—*Louisville & N. R. Co. v. Belcher, (Ky.)* 12 S. W. 195.

#### —Fires.

47. In an action for the destruction of grass on plaintiff's land by fire, evidence that plaintiff's husband bought the land and received a deed therefor; that part of the purchase money was paid before and the balance by plaintiff after his death; and that, by the husband's will, duly probated, whatever title he had passed to her,—shows a sufficient title in plaintiff to maintain the action, in the absence of rebutting evidence; and the failure of the court to submit an issue as to title is not prejudicial, especially where defendant does not

request a charge thereon.—*Ft. Worth & N. O. R. Co. v. Wallace*, (Tex.) 12 S. W. 227.

43. In an action against a railway company for negligently allowing fire to escape from its train, whereby certain posts of plaintiff were burned, which he had placed on defendant's right of way without the authority of defendant, but where it was the custom to place freight for shipment over defendant's railway on the right of way with "a acquiescence, plaintiff was not guilty of contributory negligence.—*Gulf, C. & S. F. Ry. Co. v. McLean*, (Tex.) 12 S. W. 843.

49. Where the court finds that the fire escaped from defendant's train, which had stopped opposite the posts, by reason of defendant's negligence, and that by defendant's negligence a large quantity of bark had been allowed to accumulate in that place, by which the fire was communicated to the posts, and that plaintiff was not guilty of negligence in placing the posts on the right of way, it is the province of the court to say that plaintiff is not guilty of contributory negligence.—*Gulf, C. & S. F. Ry. Co. v. McLean*, (Tex.) 12 S. W. 843.

50. In an action for setting a fire by a railroad company, a charge as to diligence in keeping the right of way "free from combustible grass and weeds" is not erroneous, as omitting other material shown to be near the track, where another part of the charge instructs that it is the duty of railroad companies to "prevent the accumulation of combustible material along the right of way."—*Rost v. Missouri Pac. Ry. Co.*, (Tex.) 12 S. W. 1131.

51. A charge that railroad companies are to use such diligence in keeping the right of way free from combustible material as prudent and cautious "persons" would under like circumstances, is not erroneous where negligence in a railroad company is defined to be the absence of such care as prudent, cautious, and skillful "railroad men" would use under similar circumstances.—*Rost v. Missouri Pac. Ry. Co.*, (Tex.) 12 S. W. 1131.

52. A charge that railroad companies are not insurers against loss by sparks, and that all that is required in attempts to prevent burning by sparks is that they use the best-known spark-arresters, is not erroneous, as omitting their duty to prevent burning from cinders, coals, and other kinds of fire, where the jury are also told that they are to use the best appliances "for lessening the damage from sparks, cinders, and coals."—*Rost v. Missouri Pac. Ry. Co.*, (Tex.) 12 S. W. 1131.

53. Omission to charge as to negligence of sectionmen in going to dinner without attempting to put out the fire, though seeing it soon after the train passed, is not error, where no such charge is requested, and the only negligence charged in the petition is failure to provide proper appliances, permitting accumulation of dry material, and inefficiency of the servants operating the engine.—*Rost v. Missouri Pac. Ry. Co.*, (Tex.) 12 S. W. 1131.

54. In an action for the destruction of grass by fire alleged to have been communicated from defendant's engines, an instruction that if defendant's engines emitted sparks which ignited the grass, if any, on defendant's right of way, and that, if any grass or fence on plaintiff's property was thereby burned, the jury shall find for plaintiff, without instructing as to due care, is not ground for reversal, where defendant has adduced no evidence of necessary care on its part, and there was evidence that the fire was caused by the sparks from defendant's engines, and that defendant had permitted inflammable material to accumulate on its right of way.—*Ft. Worth & N. O. R. Co. v. Wallace*, (Tex.) 12 S. W. 227.

## RAPE.

### Indictment.

1. It is proper to join in an indictment a count charging an assault with intent to rape and one charging an attempt to rape.—*Reagan v. State*, (Tex.) 12 S. W. 601.

2. Under Pen. Code Tex. art. 528, defining rape as "the carnal knowledge of a woman without her consent, obtained by force, threats, or fraud,"

where it is alleged that the attempt was made by threats only, it is not necessary to allege further that the threats were directed against the person of the prosecutrix.—*Reagan v. State*, (Tex.) 12 S. W. 601.

3. It is not necessary to a conviction for attempt to rape that the indictment be for rape.—*Reagan v. State*, (Tex.) 12 S. W. 601.

### Evidence.

4. The evidence showed that prosecutrix, while mentally weak, was not insane, but was able to attend to her household duties. About dark defendant entered her house, dragged her out, despite her resistance and protests, placed her in a wagon, which was driven by another man, lay down with her, and covered her and himself up with a tarpaulin. After driving for some time, they stopped at a saloon about two hours, prosecutrix remaining in the wagon in a state of apparent unconsciousness. Defendant then had intercourse with her. She appeared during all the time to be dazed, and she was in an advanced stage of pregnancy. After delivery she became insane, and hence unable to testify. *Held* that, though it did not appear that she resisted or that force was used when intercourse was effected, the evidence showed want of her consent; as resistance and force are only facts bearing on the question of consent, and, in case of mental weakness, less evidence of want of consent is necessary than where the female is of sound mind.—*State v. Cunningham*, (Mo.) 12 S. W. 376.

## Ratification.

Of agent's acts, see *Principal and Agent*, 1.

## RECEIVERS.

### Appointment.

1. Rev. St. Tex. art. 1198, § 21, provides that suits against railroad corporations may be brought in any county in which the railroad extends or is operated. Act April 2, 1887, provides that if the property sought to be put into the hands of a receiver is a corporation whose property lies within the state, the suit to "have a receiver appointed shall be brought in this state in the county where the principal office of said corporation is located." *Held*, that the district court of S. county, through which the road of a railroad corporation extended, had authority to appoint a receiver for such corporation, though the principal office of the corporation was in A. county.—*Bonner v. Hearne*, (Tex.) 12 S. W. 88.

2. G. brought an action in debt against a railroad corporation in S. county. A stockholder intervened, and asked the appointment of a receiver. Persons claiming to be creditors also intervened, and asked for a receiver. On the application of the stockholder a receiver was appointed. G. obtained judgment. The intervening stockholder withdrew its plea of intervention, and on motion of G. the receiver was continued. Pending this litigation an application for a receiver was made in the district court of another county. *Held*, that the jurisdiction of the court of S. county dated from the first application, and the receiver's authority was derived from his first appointment, and the withdrawal of the intervening stockholder did not vacate the receivership, but it continued on application of the plaintiff.—*Bonner v. Hearne*, (Tex.) 12 S. W. 88.

3. If such proceedings were erroneous, they were not void, and the possession of the receiver is legal, and he cannot be dispossessed at the suit of another receiver appointed afterwards by another court of co-ordinate jurisdiction.—*Bonner v. Hearne*, (Tex.) 12 S. W. 88.

4. Acts Tex. 1887, p. 120, § 3, providing for the appointment of a receiver where a corporation has been dissolved or has forfeited its corporate rights, is not unconstitutional, and the stockholders and lienholders need not be before the court.—*East Line & R. R. Co. v. State*, (Tex.) 12 S. W. 690.

**Liabilities.**

5. A receiver appointed in an attachment suit begun in the common pleas and transferred to the circuit court of another county, becomes an officer of the latter court, and for disobedience to its orders to account, is liable to be punished by it for contempt.—*In re Haley*, (Mo.) 12 S. W. 667.

**Sales.**

6. The court may correct a mistake in the computation of the amount of a receiver's sale, which is apparent on the record and papers.—*Bryan & Brown Shoe Co. v. Block*, (Ark.) 12 S. W. 1073.

**RECEIVING STOLEN GOODS.****What constitutes.**

1. Where one partner, without his copartner's knowledge, receives stolen goods, knowing them to be stolen, and his copartner, afterwards learning of the theft, takes charge of them, both are guilty of receiving stolen goods.—*Sanderson v. Commonwealth*, (Ky.) 12 S. W. 186.

2. An instruction that if the person who stole the property placed it in defendant's house for him, and defendant knowing it to be stolen, and placed there for him, took control of it to fraudulently deprive the owner of his property, this was in law a felonious receiving of the property, is correct.—*Sanderson v. Commonwealth*, (Ky.) 12 S. W. 186.

**Indictment.**

3. Pen. Code Tex. art. 724, defines "theft" as the fraudulent taking of property belonging to another from his possession, or from the possession of some one holding the same for him. Article 729 declares that "possession" is constituted "by the exercise of actual control, care, or management of the property, whether the same be lawful or not." *Held* that, in an indictment for receiving stolen property which belonged to an express company, it is sufficient to lay the possession in the agent who had, at the time it was taken, "the actual control, care, and management of it."—*Arcia v. State*, (Tex.) 12 S. W. 599.

4. An indictment charged that the accused "did then and there fraudulently receive from Had White, \* \* \* and did fraudulently conceal, certain property, to-wit, \$450 in money, \* \* \* the same being the property of Geo. Miller, which said property had been theretofore acquired by another, in such manner as that the acquisition thereof comes within the meaning of the term 'theft'; and the said John Moore then and there received and concealed the said property, well knowing the same to have been so acquired, against the peace and dignity," etc. *Held* sufficient to charge the offense of fraudulently receiving and concealing stolen property.—*Moore v. State*, (Tex.) 12 S. W. 407.

**Instructions.**

5. It is error for the court to submit the law with regard to theft of property under the value of \$20, where the proof raises no such issue.—*Moore v. State*, (Tex.) 12 S. W. 407.

**Reconviction.**

See *Set-Off and Counter-Claim*.

**RECORDS.**

On appeal, see *Appeal*, 23, 34.

Recording of deed, see *Deed*, 4.

—mortgages, see *Chattel Mortgages*, 6-9.

**What entitled to record.**

A writing, authenticated as a deed, which recites that "there is due E. Boon from me an interest in" certain lands, is entitled to record in Texas.—*Chamberlain v. Boon*, (Tex.) 12 S. W. 727.

**Redemption.**

From attachment sale, see *Attachment*, 10.  
liens, see *Mortgages*, 14, 15.  
tax-sale, see *Taxation*, 19, 20.

**Reformation of Contracts.**

See *Equity*, 13-14.

**REFORMATORIES.****Officers—Election.**

Act Ky. 1866, amending Act March 9, 1859, provided for the election by the general council of the city of Louisville of a board of nine managers for the Louisville Industrial School of Reform, who were to divide themselves into three classes, to hold, respectively, one, two, and three years. Three new managers were to be elected annually thereafter. The original act provided that on failure to elect at the regular time the managers should hold over "until a new election." The general council, as a condition of the grant of land to the institution, which is entirely supported by municipal taxation, was also given a supervisory power over it. *Held* that where, by reason of a failure to hold an election for four years, the terms of all the managers have expired, and all are holding over, the general council has the right to elect an entirely new board.—*Louisville Industrial School of Reform v. City of Louisville*, (Ky.) 12 S. W. 710.

**Rehearing.**

See *Appeal*, 35, 36.

**RELEASE AND DISCHARGE.****Evidence.**

In an action against a railroad company for personal injuries, defendant pleaded a release of damages. The replication denied the execution of the release, and a special answer averred that if plaintiff signed it he did so when under the influence of liquor furnished by defendant's agents. The testimony of the subscribing witness to the release, and others, was to the effect that plaintiff signed it after having been told to read it, and after having looked over it with the appearance of reading it; that he acknowledged having "signed it for the purpose therein stated;" and that he was not intoxicated when he signed it. Plaintiff testified that the signature looked like his, but that he had no recollection of having signed the instrument, or of having seen it until it was filed with the papers in the case. *Held*, that the evidence did not authorize an instruction that if plaintiff signed the release when he was so drunk that he did not know what he was doing, or without an opportunity to understand its terms, it would not bind him.—*Houston & T. C. R. Co. v. Tierney*, (Tex.) 12 S. W. 536.

**Rent.**

See *Landlord and Tenant*, 2, 3.

**Repeal.**

See *Statutes*, 3.

**REPLEVIN.****When lies.**

1. The owner of personal property seized under an attachment against the property of another may maintain replevin against the officer having such property in possession.—*Willis v. Reinhardt*, (Ark.) 12 S. W. 241.

2. A mortgagee of cotton cannot maintain replevin for any particular lot of such cotton, where he is only an owner in common with defendant, as replevin cannot be resorted to as a means of partitioning property held in common.—*Titworth v. Frauenthal*, (Ark.) 12 S. W. 493.

**Affidavit—Variance.**

3. Where an affidavit for the replevin of a mare describes her as a blazed faced, cream-colored mare eight or nine years old, while she is described in a mortgage of record to plaintiff as a

cream-colored mare seven years old, the variance is immaterial.—*King v. Connevey*, (Ark.) 12 S. W. 298.

### Defenses.

4. Defendant in replevin for cattle by the alleged purchasers from his judgment debtor having relied as a defense solely on his alleged right to subject the cattle to payment of his judgment against the company, he is not in a position to invoke the doctrines applicable to the right of creditors to share equally in the assets of an insolvent corporation.—*Lang v. Daugherty*, (Tex.) 12 S. W. 29.

### Practice.

5. Under Rev. St. Tex. arts. 4833, 4834, requiring that the issues in a suit to try the right to property shall be made in writing by direction of the court, and consist of a statement of the authority by which the plaintiff seeks to subject the property levied on to his writ, and of the nature of defendant's claim, it is error to submit questions of estoppel to the jury, where no facts constituting such a defense are set up in defendant's claim.—*Scarbrough v. Alcorn*, (Tex.) 12 S. W. 73.

### Evidence.

6. A cattle company executed a bill of sale to D. for an undivided interest of 563 cattle of a particular brand in its herd. R. was also entitled to receive a number of cattle, of no specified brand, from the company. D. and R. authorized B. to receive the cattle for them. He received 471 head without designating which were for D. and which were for R., intending to divide them afterwards. They were then seized under execution in favor of a creditor of the company, and the sheriff put with them other cattle belonging to the company, and levied on at the same time, making a total of 649 head. It was then agreed between the company and D. and R. that they should accept these 649 as part of the cattle contracted to them. Some of these were of the brand called for by the bill of sale, but some were of other brands. The execution levy was afterwards vacated. In an action by D. and R. to recover the 649 head, *held*, that the bill of sale to D. was admissible as a link in his title.—*Lang v. Daugherty*, (Tex.) 12 S. W. 29.

7. Plaintiffs' agreement to accept the 649 head levied on having been made with W., it was proper to admit in evidence a bill of sale made before the levy, by which the company sold all its cattle to W., with reservations in favor of plaintiffs.—*Lang v. Daugherty*, (Tex.) 12 S. W. 29.

8. Defendant in replevin, the execution creditor of plaintiffs' vendor, having alleged that the sales under which plaintiffs claimed were made as illegal preferences, and with intent to defraud other creditors of the company, testimony was properly admitted that at the time plaintiffs accepted cattle in payment of their claims an offer of settlement on the same terms was made to all other creditors, and particularly to defendant, and that he advised the other creditors to take as many cattle at that rate as they could get, but refused to accept anything but cash for his own claim.—*Lang v. Daugherty*, (Tex.) 12 S. W. 29.

9. In replevin, where defendant does not deny plaintiff's title to the property in dispute, but alleges that he entered into an agreement with plaintiff that defendant should sell it, and out of the proceeds pay the balance of an account which plaintiff owed him, the burden is on defendant to prove the agreement.—*Crenshaw v. Bradley*, (Ark.) 12 S. W. 573.

### Judgment.

10. Under Civil Code Ky. § 833, providing that, where property obtained by an order of delivery is adjudged to belong to defendant from whom taken by the order, the judgment shall be in the alternative, with the right on part of plaintiff to return the property or pay its value, a judgment in favor of a defendant for the value is erroneous.—*Reed v. King*, (Ky.) 12 S. W. 772.

11. In a suit for the recovery of cattle, a judgment for a sum of money equal to the number of

cattle, multiplied by their value per head as found by the evidence, and also providing for their return to plaintiffs, to be credited on the judgment at the same value per head, is in effect a judgment for the return of the cattle or their value.—*Lang v. Daugherty*, (Tex.) 12 S. W. 29.

### Bonds.

12. The solvency of plaintiff in replevin suit does not dispense with the necessity for one or more sureties on the bond.—*Wilson v. Williams*, (Ark.) 12 S. W. 780.

### — Judgment in actions on.

13. The court has no power, in a replevin suit, to render judgment on a bond given by one not then connected with the suit, but subsequently made a party defendant as a co-trespasser, conditioned for the return of the property "by the defendant,"—a form of bond not known to the law.—*Lang v. Daugherty*, (Tex.) 12 S. W. 29.

14. In an action to subject property in B.'s hands to the payment of J.'s debts, it appeared that goods, to the value of \$810, had been levied on and replevied by B., and converted by him. *Held* that, upon determining that they were subject to levy for J.'s debt, it was proper to render judgment against B. on his replevin bond for \$581, the amount of the debt against J.—*Bradford v. Taylor*, (Tex.) 12 S. W. 20.

## REPORT AND CASE MADE.

### Agreed case.

In Missouri, an agreed case occupies the same footing as a special verdict; and, unless the court correctly pronounces its conclusions of law upon the facts, the judgment will be reversed.—*Rannels v. Isgrigg*, (Mo.) 12 S. W. 843.

### Res Adjudicata.

See *Judgment*, 8-19.

### Rescission.

Of contracts, see *Contracts*, 10, 11; *Insurance*, 5, sale, see *Sale*, 4.

### Resulting Trusts.

See *Trusts*, 1-8.

### Return.

Of execution, see *Execution*, 14.

### Risk of Employment.

See *Master and Servant*, 22.

## ROBBERY.

### Indictment.

1. An indictment for robbery may properly charge in the same count the robbery of several persons of different articles, if the acts be all one transaction.—*Clark v. State*, (Tex.) 12 S. W. 729; *Gregg v. Same*, *Id.* 732.

### Evidence.

2. Testimony by a witness that, two days after the robbery, he examined certain foot-prints at the place of the robbery, which foot-prints he described, and that, upon inspecting the boots and shoes worn by defendant and his alleged co-conspirator at their examining trial, it was his opinion that the tracks at the place of the robbery were made by their said boots and shoes, is competent.—*Clark v. State*, (Tex.) 12 S. W. 729; *Gregg v. Same*, *Id.* 732.

3. Testimony of a witness that, three or four hours before the robbery, he paid to one of the parties robbed the sum of \$125, and that the co-conspirator of the defendant was within six or eight feet of him and could have seen the transaction

was admissible.—*Clark v. State*, (Tex.) 12 S. W. 729; *Gregg v. Same*, *Id.* 732.

### SALE.

See, also, *Fraudulent Conveyances; Judicial Sales; Vendor and Vendee.*

By receiver, see *Receivers*, 6.

For non-payment of taxes, see *Taxation*, 12.

Illegal sale of liquor, see *Intoxicating Liquors*, 4-7.

Of infant's property, see *Infancy*, 1.

Under attachment, see *Attachment*, 9, 10.

### Delivery.

1. In an action against J. and B., who had been partners, plaintiff sought to subject property held by B. to the payment of a debt from J., on the ground that after the dissolution of the partnership, and assumption of the debts by J., he fraudulently transferred the property to B. Plaintiff also claimed to have levied an attachment before delivery of the goods to B. The court charged that if J. delivered actual possession of the goods to B., who by himself or agents took exclusive possession or control against J., the delivery would then be complete. At defendant's request the court instructed that if J. was indebted to B. in a sum equal to the value of the goods, and before the levy of the attachment B., in good faith, agreed to buy at the invoice prices, and exclusive control of the goods was then taken by B., and nothing remained to be done but to take an inventory to ascertain the price, the title would pass to B., in the absence of fraud. *Held*, that these instructions sufficiently informed the jury that the possession of B.'s agents would be equivalent to his own possession.—*Bradford v. Taylor*, (Tex.) 12 S. W. 20.

### When title passes.

2. Where an unconditional bill of sale is given for a half interest in a lot of cattle, the seller guaranteeing to deliver to the buyer a certain number on a certain day, the title to that number passes at once, as against one who sold the cattle to the vendor by an absolute bill which he claims was in fact conditional, and who brings an action to try his title before the day set for delivery. A delivery before the day set is not an alteration of the contract, but performance, and operates as a partition of interests.—*Scarborough v. Alcorn*, (Tex.) 12 S. W. 72.

3. Where the vendor of property gives an unconditional bill of sale, he cannot, in an action against a purchaser from his vendee to try the title to the property, introduce evidence of a contemporaneous parol agreement by which the title was to remain in him until the price was paid.—*Scarborough v. Alcorn*, (Tex.) 12 S. W. 72.

### Rescission.

4. Sellers of goods cannot rescind the contract of sale because of the purchaser's fraudulent representations as to his solvency at the time thereof, where they have pressed their claim to judgment with knowledge of the purchaser's fraud.—*Bryan & Brown Shoe Co. v. Block*, (Ark.) 12 S. W. 1073.

### Vendor's lien.

5. Sellers of goods cannot seize them for the purchase money, under *Mansf. Dig. Ark. c. 96*, relating to liens, where the goods are in possession of the sheriff under execution before any claim of lien is asserted.—*Bryan & Brown Shoe Co. v. Block*, (Ark.) 12 S. W. 1073.

### Bona fide purchasers.

6. A *bona fide* purchaser of timber cut by a trespasser does not acquire title as against the owner.—*Reed v. King*, (Ky.) 12 S. W. 772.

### Conditional sales.

7. Where a mule is sold on condition that the title shall remain in the seller until the purchase money is paid, and, before payment, the purchaser trades it for a horse, the seller does not thereby become the owner of the horse.—*Deadman v. Earle*, (Ark.) 12 S. W. 330.

## SCHOOLS AND SCHOOL-DISTRICTS.

### Officers.

1. The duties and powers of the board of education of the Paris City school being prescribed, not by the general law relating to common schools, but by special statute, applicable to that city, under which the board has the power to remove a superintendent without the approval of the county superintendent, and the contract between the board and the superintendent reserving the right to each to terminate the relation of employer and employe at any time, the members of the board are not liable for discharging a superintendent, unless they act maliciously.—*Adams v. Thomas*, (Ky.) 12 S. W. 940.

### Action on commissioner's bond.

2. Gen. St. Ky. c. 18, art. 5, § 8, requires the superintendent of public instruction, upon the report of the county school commissioner, to certify the amount due for schools in that county to the auditor, who is to draw his warrant on the treasury in favor of the commissioner, who is required to collect the same as soon as possible, and pay over to the teachers the amount due them respectively. A commissioner who was also sheriff, having failed as sheriff to turn over to the treasurer the full amount due from him, adjusted the deficit by an arrangement with the auditor whereby the amount due him as commissioner was applied on this account. *Held*, that it was no defense to an action on his bond for the amount due the teachers, that the money was never in fact drawn from the treasury.—*Pryse v. Titus*, (Ky.) 12 S. W. 584.

### Incorporation.

3. Act Ky. April 15, 1884, (Acts 1883-84, vol. 1, p. 1292), enacted for the purpose of establishing a graded free school which all the children within the school age in the territory therein named and constituted a common-school district, might attend free of charge, provided that such school should be under the charge of trustees, who were to prescribe the course of study and the qualifications of the teachers, and to levy a tax, and draw the district's *pro rata* from the school fund; and vested all the property of the former school-district in the new one. *Held*, that it was not in conflict with Const. Ky. art. 11, § 1, providing that the capital of the common-school fund, together with any sum raised in the state for purposes of education, shall be held inviolate, to sustain a system of common schools; and the interest and dividend thereon, together with any sum raised for that purpose by taxation or otherwise, may not be appropriated otherwise than in aid of common schools.—*Williamstown Graded Free-School Dist. v. Webb*, (Ky.) 12 S. W. 298.

4. Acts Mo. 1863-64, p. 650, incorporating the "Bridgeton Academy," is not repealed by the various acts relative to boards of education and school-districts, as they relate only to such as are organized under general laws.—*State v. Vaughan*, (Mo.) 12 S. W. 507.

5. Gen. Laws 18th Assem. Tex., Sp. Sess., p. 43, providing for a system of free schools, provides (section 29) that "it shall be the duty of the county commissioners' court of all counties not exempt from this section to subdivide their respective counties into convenient school-districts." *Held*, that the word "subdivide" is used with reference to the existing division of the state into counties.—*Reynolds Land & Cattle Co. v. McCabe*, (Tex.) 12 S. W. 165.

### Taxation.

6. Acts Mo. 1863-64, p. 650, created the corporation, "The Trustees of the Bridgeton Academy." The trustees were authorized to receive all the school moneys that might be due and coming to the inhabitants of the town of Bridgeton, or to the residents of the commons thereto attached; the town and commons being then attached for school purposes. In addition to the branches taught in the common schools of the state, Latin and higher branches of mathematics should be taught in the academy. It was provided that the children of

the town and commons should be charged a small fee when it was absolutely necessary in order to continue the institution; but the children of those who were wholly unable to pay should be educated free of all charge. Acts 1870, p. 167, gave the trustees of the town power to levy a tax, not exceeding 1 per cent. a year, on all taxable property of the town and commons, for the support of the academy. *Held*, that it was a public corporation, and the tax was legal.—*State v. Vaughan*, (Mo.) 12 S. W. 507.

7. A notice that an election would be held on July 2, 1887, to determine whether a certain tax should be levied for the purpose of maintaining a graded school, is in substantial compliance with Act Ky. April 15, 1884, providing for the establishment of a graded free school in a certain district, and, by section 20, authorizing the opening of a poll "not oftener than once every year upon the question of establishing" such graded school-district.—*Williamstown Graded Free-School Dist. v. Webb*, (Ky.) 12 S. W. 293.

8. Under Gen. Laws 18th Assem. Tex., Sp. Sess., p. 43, § 81, and Const. Tex. art. 7, § 3, which authorize special elections within school-districts up on the application of qualified tax-paying voters thereof, for the purposes of supplementing the school fund, or for the erection of school buildings, but fail to prescribe the form of notice of such election, the notice is sufficient if it appears therefrom that the election is to determine whether a tax shall be imposed for school purposes.—*Reynolds Land & Cattle Co. v. McCabe*, (Tex.) 12 S. W. 165.

## SEDUCTION.

### Civil action—Evidence.

1. In an action for seduction and breach of promise of marriage, it was proper to allow defendant to ask plaintiff's mother, on cross-examination, if her husband did not say that if she did not swear plaintiff's child to defendant he would send her to hell, there being evidence that her husband was a violent and desperate man; that he was not on friendly terms with defendant; that his wife and daughter were afraid of him; that he had threatened to do plaintiff bodily harm if she did not swear her child to defendant; and that the witness had made statements out of court contradictory to her testimony.—*Graham v. McReynolds*, (Tenn.) 12 S. W. 547.

### — Seduction of ward.

2. Under Rev. St. Mo. 1879, § 1260, providing that "if any guardian of any female under the age of 18 years, or any other person to whose care or protection any such female shall have been confided, shall defile her by carnally knowing her while she remains in his care, custody, or employment," he shall be punished, a conviction may be had of one in whose family such female was employed as servant; there being evidence that he promised her father to see that she did not go out nights, and to treat her as one of the family.—*State v. Young*, (Mo.) 12 S. W. 642.

3. An instruction that it must appear "that defendant was her lawful guardian, or occupied a relation similar to a guardian to her, in which a peculiar and confidential trust was reposed," is rightly refused.—*State v. Young*, (Mo.) 12 S. W. 642.

4. Evidence of continuation of illicit intercourse after termination of the employment is admissible as tending to prove the offense charged.—*State v. Young*, (Mo.) 12 S. W. 642.

## SEQUESTRATION.

### Instructions.

Where, to obtain a writ of sequestration, plaintiff makes affidavit that he feared defendant would injure, waste, or destroy the property, or remove it out of the county, but testifies on the trial that he did not fear such things, the court, not having instructed the jury as to what would constitute a wrongful issuance of the writ, should give a requested instruction that the mere existence of the debt did not authorize a sequestration.—*Vela v. Guena*, (Tex.) 12 S. W. 1187.

## Service of Process.

### See Writs.

## SET-OFF AND COUNTER-CLAIM.

### When allowable.

1. A bank, when sued by the administrator of a deceased depositor for the amount of his deposit, may set off the amount of a note of the intestate held by it which was due at the time of his death.—*Traders' Nat. Bank v. Cresson*, (Tex.) 12 S. W. 819.

2. In an action on notes given for borrowed money, defendant is entitled to set off an amount due by plaintiff on an agreement made by him with defendant's father to pay a certain price per acre for land gained by him by straightening the division line between their lands, where, on partition of defendant's father's estate after his death, the tract allotted to defendant includes the land so gained by plaintiff, and which plaintiff thereafter continued to hold.—*Barnes v. Green's Adm'r*, (Ky.) 12 S. W. 277.

3. A note that has been transferred by the payee cannot be set off, in an action against him by the maker, though suit has been brought on the indorsement.—*Jenkins v. Neal*, (Ark.) 12 S. W. 1015.

### Unliquidated claims.

4. Where defendant had received certain money belonging to plaintiffs, and converted it to his own use, the amount which plaintiffs are entitled to recover is not "unliquidated or uncertain," within Rev. St. Tex. art. 649, which provides that, "if the plaintiff's cause of action be a claim for unliquidated or uncertain damages, founded on a tort or breach of covenant, the defendant shall not be permitted to set off any debt due him by plaintiff."—*Jones v. Hunt*, (Tex.) 12 S. W. 832.

### Pleading.

5. In an action by a mortgagee in a mortgage for future advances, in pursuance of a contract, for advances made by virtue of the same, an answer which sets up a breach of the contract by way of recoupment, but which alleges no facts upon which a recovery for more than nominal damages could be sustained, and which shows a probable excuse for the breach, is demurrable.—*Levy v. Sale*, (Ark.) 12 S. W. 474.

## SHERIFFS AND CONSTABLES.

### Unlawful seizure.

Under Mansf. Dig. § 5575, requiring an officer, before executing an order of delivery in replevin, to take a bond to defendant with one or more sureties, where he executes the order without such bond he becomes a trespasser, and is responsible to the party injured to the extent of the value of the property taken.—*Wilson v. Williams*, (Ark.) 12 S. W. 780.

### Slander.

### See Libel and Slander.

## SPECIFIC PERFORMANCE.

### Parties.

1. Specific performance of an entire contract for sale of land by three persons owning in severalty cannot be enforced at the instance of two of them, where the third has, since making the contract, and before action, sold his land to a third person, and the proof fails to show that the sale was procured by the person who had agreed to purchase in order to defeat the contract.—*Gaither v. O'Doherty*, (Ky.) 12 S. W. 806.

### Instructions.

2. An instruction that plaintiff must present a contract which is fair, for an adequate consideration, and free from fraud, and that if at the time the contract was made by defendant's intestate



tate the latter was an habitual drunkard, and had only recently had his disability of minority removed, and the price agreed upon was inadequate, and from these facts the intestate was not on equal footing at the said time said contract was made with plaintiff, but was overreached by plaintiff in making the contract, the verdict should be for defendant, if ever correct, is misleading where the issues relied on by defendant were mental incapacity of intestate, resulting from continued drunkenness, and inadequacy of price.—*Brown v. Wheelock*, (Tex.) 12 S. W. 841.

## STARE DECISIS.

### Commercial law.

Whether a check has been accepted by a bank so as to enable the payee to sue on it, is rather a question of weight of evidence than of commercial law, so that a state court need not follow a decision of the United States court for the sake of uniformity in commercial law.—*Pickle v. People's Nat. Bank*, (Tenn.) 12 S. W. 919.

## STATES AND STATE OFFICERS.

### Indebtedness.

1. Const. Mo. art. 10, § 19, provides "that no money shall ever be paid out of the treasury of this state except in pursuance of an appropriation by law, \* \* \* nor unless such payment be made, or a warrant shall have issued, within two years after the passage of such appropriation act, and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such sum or object." *Held*, that Sess. Acts 1889, p. 8, § 5, subd. 7, reappropriating a certain sum "to pay the balance due under the contract made for the enlargement of the capitol building," did not authorize a payment out of the state treasury for services performed in completing a retaining wall on the capitol grounds, which was necessary to secure the foundation of the new addition, under a contract made two years after the passage of the act, though such contract would have been authorized under the original appropriation act.—*State v. Seibert*, (Mo.) 12 S. W. 848.

### Bond of state treasurer.

2. The official bond of the state treasurer of Tennessee, who is *ex officio* insurance commissioner, does not cover his liability to individuals for his acts as commissioner.—*State v. Thomas*, (Tenn.) 12 S. W. 1034.

## STATUTES.

Amendment, see *Constitutional Law*, 8-5.

### Amendment.

1. Act Tex. April 19, 1879, which creates the office of public weigher, and is entire, and a substitute for the act of 1875, and contains 10 sections, each section complete in itself, is not in contravention of Const. Tex. art. 8, § 36, providing that "no law shall be revived or amended by reference to its title; but in such case the act revived or the section or sections amended, shall be re-enacted and published at length."—*Johnson v. Martin*, (Tex.) 12 S. W. 321.

### Repeal.

2. Act Tex. April 4, 1889, (Gen. Laws 21st Leg. p. 87.) entitled "An act to create articles 216a and 216b" of Code Crim. Proc. Tex. tit. 4, c. 2, merely added two articles to chapter 2, which prescribes the venue of offenses, and did not operate as a repeal thereof.—*Green v. State*, (Tex.) 12 S. W. 872.

### Pleading statutes.

3. The averment in a petition that under the statutes of another state complainants are sole heirs of an intestate is not a sufficient allegation of the statutes of such foreign state, and need not be denied.—*Temple v. Brittan*, (Ky.) 12 S. W. 806.

## Stipulation.

See *Appearance*, 1; *Practice in Civil Cases*, 3, 4.

## SUNDAY.

### Contracts.

The fact that a contract to furnish a court-house for a county, on the happening of a certain condition, was signed by one of the parties on Sunday did not make it void as to him.—*Behan v. Ghio*, (Tex.) 12 S. W. 996.

## SURFACE WATER.

### Obstruction.

1. In an action for damages from an overflow alleged to have been caused by improper construction of defendants' railroad, an instruction to consider whether the water on the land, including what fell as rain and what was there as overflow, would have run off in its natural course, is not erroneous as not confining the jury to the sources and character of overflow alleged in the petition.—*Sabine & E. T. Ry. Co. v. Broussard*, (Tex.) 12 S. W. 1126.

2. An instruction to consider whether, in such case, the damage would have occurred if the road-bed had been so constructed as properly to drain the country, is not erroneous on the ground that it is the duty of defendant only to construct its road so as not to impede the natural drainage.—*Sabine & E. T. Ry. Co. v. Broussard*, (Tex.) 12 S. W. 1126.

## SURVEYS AND SURVEYORS.

### Jurisdiction.

1. Jurisdiction, for surveying purposes, over land which is not within any county, but which was included in the land district of a county that has become disorganized, is conferred by an act attaching the disorganized county to an adjoining county for "judicial and other purposes."—*Kimmarie v. Houston & T. C. Ry. Co.*, (Tex.) 12 S. W. 698.

### Evidence.

2. Admission of a copy of a judgment in a contest over the office of surveyor, to show that the surveyor of the land in question was a *de facto* surveyor, is immaterial, where the only objection is that the land was not in the land district.—*Kimmarie v. Houston & T. C. Ry. Co.*, (Tex.) 12 S. W. 698.

3. Where there is evidence that a surveyor was mistaken as to where he was when he located a certain survey, it is proper to allow the survey to stand as he testifies he located it, without crediting his testimony as to where he was.—*Hume v. Hernstadt*, (Tex.) 12 S. W. 285.

## Tacking.

See *Adverse Possession*, 18.

## TAXATION.

See *Constitutional Law*, 12.

By city, see *Municipal Corporations*, 37.

Exemptions, see *Railroad Companies*, 9-11.

School taxes, see *Schools and School-Districts*, 6-8.

Subscription to railroad stock, see *Railroad Companies*, 6-8.

### Taxable property.

1. Rev. St. Tex. art. 4601, provides that "property held under a lease for a term of three years or more," belonging to the state, or exempt by law from taxation in the owner's hands, shall be considered, for all purposes of taxation, as the property of the lessee. *Held*, that school lands, leased from the state for terms of six and ten years, under act Tex. April 13, 1883, (Gen. Laws, 18th Leg. 85,) whereby the state reserved the right to termi-

nate the lease at any time by selling the lands, are not taxable against the tenant, as the contract under which he holds cannot be considered a "lease for a term of three years or more."—*Trammell v. Faught*, (Tex.) 12 S. W. 317.

2. Under Rev. St. Tex. art. 4691, providing that "property held under lease for a term of three years or more, \* \* \* belonging to this state, or that is exempt by law from taxation in the hands of the owner thereof, shall be considered, for all purposes of taxation, as the property of the person so holding the same, except as otherwise provided by law," water-works leased for a term of 25 years from a city cannot be assessed against the lessee at the value of the land, but only at the value of the leasehold, if at all. Following *Daugherty v. Thompson*, 9 S. W. 99.—*State v. Taylor*, (Tex.) 12 S. W. 176.

3. Credits are taxable at the place of residence of the owner, and not at the place where they may be deposited.—*Ferris v. Kemble*, (Tex.) 12 S. W. 689.

### Exemptions.

4. Gen. St. Ky. (Ed. 1883) c. 92, art. 1, § 3, exempting from taxation "the real estate and investments devoted to public schools, seminaries, universities, colleges," etc., was not intended to embrace school property in use for private gain merely, and entirely devoid of a public or charitable character.—*City of Henderson v. McCullagh*, (Ky.) 12 S. W. 932.

### Levy.

5. Where a tax is ordered for a specific purpose, it must appear that it was levied for that purpose.—*Louisville & N. R. Co. v. Commonwealth*, (Ky.) 12 S. W. 1064.

### Assessment.

6. An assessment is not invalidated by the fact that the property was added by the assessor to the inventory of the tax-payer's estate at the direction of the board of equalization.—*Ferris v. Kemble*, (Tex.) 12 S. W. 689.

### Equalization.

7. Acts of two members of a board of equalization are valid, without co-operation of the third.—*Ferris v. Kemble*, (Tex.) 12 S. W. 689.

8. Act Tenn. March 25, 1887, provides that the board of equalization shall examine and compare and equalize the assessments, etc., and hear and adjust complaints, when in their judgment justice demands, and their action as to valuation shall be final. It provides that all complaints shall be heard from the first to the third Monday in June. It also provides that if the complaint is based on excessive values the board shall have the right to summon before them witnesses, and the testimony of three will be sufficient evidence on which the board may act. *Held*, that no appeal would lie from the decision of the board in such case.—*Tomlinson v. Board of Equalization*, (Tenn.) 12 S. W. 414.

### Collection.

9. A suit for taxes cannot be brought against a water company in the absence of legislative provision for collecting the taxes by such method, especially where the legislature has made provision for such suit against railroad companies only.—*Louisville Water Co. v. Commonwealth*, (Ky.) 12 S. W. 800.

10. Where goods are sold by the person charged with the taxes, after the lien therefor has attached, they are liable to seizure in the hands of the vendee; and, if he sells them, the collector, if he cannot otherwise realize the taxes, may sue the vendee in equity to charge the proceeds of such sale with the taxes, under Mansf. Dig. Ark. § 5757, authorizing the collector to collect the personal property tax by "sale of property or otherwise."—*Worthen v. Quinn*, (Ark.) 12 S. W. 156.

### Payment—Recovery back.

11. Taxes voluntarily paid, under a mistake of law, cannot be recovered.—*Louisville & N. R. Co. v. Commonwealth*, (Ky.) 12 S. W. 1064.

### Sale for non-payment.

12. Laws Mo. 1873, § 223, relating to the forfeiture of lands for the non-payment of taxes, provides that at the tax-sale of 1875 lands previously forfeited and unsold, and unredeemed, should, after being offered for sale for the amount due thereon, and not sold, be then immediately offered for sale to the highest bidder, and that the forfeitures of such lands as would not sell should be complete. *Held*, that a private sale, made subsequent to the tax-sale of 1875, of lands forfeited prior to that date, was illegal and void.—*Bender v. Dungan*, (Mo.) 12 S. W. 795.

### Penalties.

13. Interest is not allowable on taxes, as a penalty for non-payment.—*Louisville & N. R. Co. v. Commonwealth*, (Ky.) 12 S. W. 1064.

### Tax-titles.

14. In an action to set aside a tax-deed and the deeds to subsequent purchasers, the latter are not shown to be connected with inadequacy of the price at the tax-sale, or affected with notice thereof, by an allegation that the considerations expressed in their deeds were "wholly false."—*Walters v. Hermann*, (Mo.) 12 S. W. 890.

15. Under Laws Mo. 1873, § 224, relating to the sale of lands forfeited to the state for the non-payment of taxes, and providing that when purchasers of such lands shall become entitled to a deed the same shall be made by the collector, as near as may be, in the form prescribed in the act, and that they shall have the same force and effect, and be governed by all the conditions, provided for tax-deeds, a deed so executed, which does not recite all the proceedings prescribed by law for the purchase of such forfeited lands, is void.—*Bender v. Dungan*, (Mo.) 12 S. W. 795.

16. In ejectment, where plaintiff's claim is based on a tax-title, and defendant pleads the general issue, and plaintiff's tax-deeds are excluded, it is proper to refuse an instruction that plaintiff, though defeated in this action for the recovery of the lands in suit, would nevertheless be entitled to judgment against defendant for the full amount of all taxes paid by plaintiff on said land, with the penalty and interest thereon.—*Bender v. Dungan*, (Mo.) 12 S. W. 795.

17. All inquiry as to the validity of a tax-title is cut off by a decree of confirmation of the tax-sale under which the title was acquired.—*Boehm v. Botsford*, (Ark.) 12 S. W. 786.

18. A purchaser under a judgment in a back-tax suit, to which the person appearing by the registry of deeds to be the true owner was made a party defendant, in the absence of notice that such person was not the true owner, cannot be protected against the true owner, whose deed was recorded on a record book which was destroyed by fire; but the contents of the book may be proved by secondary evidence, and must be taken notice of by him who claims title under the record.—*Crane v. Dameron*, (Mo.) 12 S. W. 251.

### Redemption—Rents and improvements.

19. Under Mansf. Dig. Ark. § 5792, providing that owners of land under tax-sales are entitled, upon redemption of the same, to the full cash value of improvements, made after two years from the date of sale, they are entitled thereto without deduction for rents received by them before such redemption.—*Bender v. Bean*, (Ark.) 12 S. W. 180.

20. A bill filed by minors to redeem land sold for taxes, as provided by law, implies an offer to pay such amounts as the law allows to the purchasers, and such tender, not being met by any objection to its terms, or to the fact that no money is actually tendered, terminates the estate of the tax purchasers, and they are liable for rents from the institution of the suit.—*Bender v. Bean*, (Ark.) 12 S. W. 241.

### Erroneous taxation.

21. In an action to restrain collection of taxes on national bank shares, as being higher than those on other moneyed capital, a custom to assess property at 50 per cent. of its value is not established by evidence of the assessment of a few parties at

that rate.—*Engelke v. Schlender*, (Tex.) 12 S. W. 999.

### Taxation of Costs.

See *Costs*, 10.

## TELEGRAPH COMPANIES.

### Liability for negligence.

1. A telegraph company is not relieved from liability for damages resulting from delay in the transmission and delivery of a message calling a sister to her dying brother by the fact that at the time it contracted to deliver the message it was not informed of the relation of the parties by its contents, or otherwise.—*Western Union Tel. Co. v. Adams*, (Tex.) 12 S. W. 857; *Same v. Feegles*, Id. 860.

2. Where a prompt delivery of the message was of the essence of the contract, a failure in that respect is such a breach as authorizes the recovery back of the consideration paid for it.—*Western Union Tel. Co. v. Adams*, (Tex.) 12 S. W. 857; *Same v. Feegles*, Id. 860.

3. Plaintiff, who had purchased a flock of sheep, which he wished to drive to his ranch, directed a telegram to a servant to meet him at a certain place and "bring Sheep," (meaning a sheep dog on the ranch.) The message was delivered so as to read "bring sheep." The servant accordingly drove plaintiff's sheep from the ranch to meet him. In an action for damages to the newly-purchased sheep, additional expense in keeping them, and for loss, exposure, and injury to both flocks, etc., plaintiff alleged that when he sent the dispatch he informed defendant's agent in charge of its office that he wanted the dog to assist in driving the sheep to his ranch. *Held*, that defendant had direct notice of the object of the dispatch, and was chargeable with notice of all attendant details.—*Western Union Tel. Co. v. Edsall*, (Tex.) 12 S. W. 41.

4. The evidence showed that plaintiff sent a messenger to the designated place to meet the servant, and give him further instructions, but that the servant was so delayed and impeded by the sheep from the ranch, which he was driving, that the messenger left before he arrived; and that the servant, on arriving and failing to find plaintiff, returned to the ranch, after a short stay, on account of lack of provender and shelter for flock in his charge, and injuries sustained by the sheep in the long journey. *Held*, that it was not error to instruct the jury that plaintiff might recover for loss to the flock purchased by him between the place at which the servant was to meet him and the ranch, there being no contributory negligence in the servant's failure to meet him.—*Western Union Tel. Co. v. Edsall*, (Tex.) 12 S. W. 41.

5. A message delivered for transmission to a telegraph company, containing the words, "Billie is very low; come at once,"—is sufficient to apprise the company that the message refers to a near relative of the person to whom it is addressed, and of the fact that mental suffering is likely to result from a failure to transmit the message with diligence and dispatch.—*Western Union Tel. Co. v. Moore*, (Tex.) 12 S. W. 949.

### Who may sue.

6. The husband of the person for whose benefit a message was sent, and who was injured by the delay, may sue, irrespective of the questions of agency and payment; and the fact that the company had no notice that she was plaintiff's wife, or that the contract was made for her, is immaterial.—*Western Union Tel. Co. v. Adams*, (Tex.) 12 S. W. 857; *Same v. Feegles*, Id. 860.

7. The saw in plaintiffs' mill having broken, they engaged S., of the firm of G. & S., to order them a new one from St. Louis by telegram. S. addressed a dispatch in his firm's name to a hardware company in St. Louis, directing them to ship a saw at once to plaintiffs, and delivered it to a traveling salesman of that company, with the money to pay the charges, and went with him to the telegraph office. The salesman wrote another

dispatch, signed by himself, ordering the saw to be sent to G. & S. Neither dispatch was delivered. The message did not show that it was for plaintiffs' benefit, and the agent of the telegraph company had no knowledge of that fact. *Held*, that plaintiffs had no right of action against the company, either for the money paid for the transmission of the message, or for damages by reason of their mill being idle for want of a saw.—*Elliott v. Western Union Tel. Co.*, (Tex.) 12 S. W. 954.

### Damages.

8. A general demurrer to the petition, in an action for damages against a telegraph company, is properly sustained, where the only damage alleged is the mental and physical suffering of plaintiff and his wife, resulting from defendant's failure to deliver a message relating to the health of plaintiff's mother-in-law.—*Rowell v. Western Union Tel. Co.*, (Tex.) 12 S. W. 534.\*

## TENANCY IN COMMON AND JOINT TENANCY.

### Rights of co-tenants against third persons.

1. Though plaintiff in trespass to try title and another owned the land in controversy as tenants in common, and plaintiff's coverture prevented the statute of limitations from running against her, yet, if the facts and character of defendants' possession are such as will amount to a bar against her co-tenant, plaintiff is protected to the extent of her own interest only, and cannot recover the interest of such co-tenant not suing.—*Johnson v. Schumacher*, (Tex.) 12 S. W. 207.

2. One tenant in common may recover in trespass to try title against a wrong-doer without joining his co-tenants as plaintiffs in the suit.—*Bounds v. Little*, (Tex.) 12 S. W. 1109.

### Actions—Trespass to try title.

3. Trespass to try title can be maintained by a tenant in common without joining his co-tenants.—*Carley v. Parton*, (Tex.) 12 S. W. 950.

4. A tenant in common who has been ousted of possession of the property by his co-tenant can recover his possession in trespass to try title.—*St. Louis, A. & T. Ry. Co. v. Prather*, (Tex.) 12 S. W. 999.

5. Pleas of not guilty and of the statutes of limitations will be deemed equivalent to an ouster of plaintiff, under Rev. St. Tex. art. 4794, providing that the plea of not guilty, or other answer to the merits, shall be an admission by defendant, for the purposes of the action, that he was in possession of the premises sued for.—*St. Louis, A. & T. Ry. Co. v. Prather*, (Tex.) 12 S. W. 999.

## Testamentary Capacity.

See *Wills*, 1-7.

### Threats.

Evidence of, see *Homicide*, 73.

### Title.

By judgment, see *Judgment*, 27, 28.  
Of laws, see *Constitutional Law*, 2.  
Tax-titles, see *Taxation*, 14-18.  
When passes, see *Sale*, 2, 8.

### Torts.

See *Death by Wrongful Act; Decet; Libel and Slander; Malicious Prosecution; Negligence; Nuisance; Replevin; Trespass; Trover and Conversion.*

Measure of damages, see *Damages*, 4-8.

## Transactions with Decedents.

See *Witness*, 7-10.

**TRESPASS.**

Jurisdiction, see *Venue in Civil Cases*, 2.

**What amounts to.**

1. In a prosecution under *Mansf. Dig. Ark. § 1669*, for hunting in the inclosed grounds of another without the consent of the owner previously obtained, where it appears that defendants had permission to hunt on land adjoining that on which the alleged offense was committed, an instruction that it was defendants' duty to ascertain, "by all means in their power," the boundaries of the inclosure they had permission to hunt upon is not prejudicial error, as requiring a greater degree of diligence than the law sanctions, in the absence of evidence showing that they used any diligence whatever.—*Wellington v. State*, (Ark.) 12 S. W. 562.

2. One who has paid the consideration for the land, and has exclusive control and possession, is the "owner," within the meaning of the statute, though his deed for it has not been executed.—*Wellington v. State*, (Ark.) 12 S. W. 562.

**TRESPASS TO TRY TITLE.****Parties.**

1. In trespass to try title by the sole heir of an intestate, the administrator is a proper party plaintiff.—*Cassidy v. Kluge*, (Tex.) 12 S. W. 12.

2. In trespass to try title by one claiming school lands under conveyances from a county as against a prior actual settler on part of the land, with tender of payment, who thereby obtained a right to purchase the tract settled on, the county is a necessary party, so that defendant may obtain a title to such tract by completing his purchase, and the plaintiff an abatement in the price paid by him.—*Clay County Land & Cattle Co. v. Earle*, (Tex.) 12 S. W. 66.

**Pleading.**

3. Rev. St. Tex. art. 4794 et seq., provides that in trespass to try title the petition shall allege that plaintiff was in possession or entitled to such possession, and that the plea of not guilty shall be an admission that defendant was in possession or claimed title at the commencement of the action, and that, when it is alleged and proved that one party is in possession, on a finding for the adverse party damages shall be assessed for use and occupation. *Held*, that a plea of not guilty is not sufficient to charge defendant with use and occupation from the institution of suit, without proof of his occupancy.—*O'Connor v. Luna*, (Tex.) 12 S. W. 1125.

4. An estoppel may be established under a plea of not guilty.—*Guest v. Guest*, (Tex.) 12 S. W. 831.

5. To a plea of homestead right, in trespass to try title, plaintiff pleaded as an estoppel that the deed to the land was taken in the husband's name as "attorney in fact for" F., and that before and at the time of the execution, by the husband and F., of the trust-deed under which plaintiff bought, defendants represented that they had no interest in the land, and that F. was the owner, which representations were communicated to and believed by plaintiff. *Held*, that a demurrer was properly overruled, since, if not a good plea of estoppel, it amounted to a denial of defendants' title.—*Hickey v. Behrens*, (Tex.) 12 S. W. 679.

6. Affirmative relief in an action of trespass to try title cannot be granted a defendant upon the plea of not guilty.—*St. Louis, A. & T. Ry. Co. v. Prather*, (Tex.) 12 S. W. 969.

**— Variance.**

7. In trespass to try title, a variance of three years between the alleged and proven date of a lost deed, it being immaterial which was the correct date, will not prevent proof of its execution and contents.—*Houston, E. & W. T. Ry. Co. v. Blagge*, (Tex.) 12 S. W. 616.

8. Under Rev. St. Tex. art. 4906, providing that where defendant, in trespass to try title, claims the whole premises, and plaintiff shows himself entitled to recover part, plaintiff shall recover such part, the latter may, though his pleadings describe

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the land as "190 acres off the south end of the south half of section No. 20," introduce in evidence a deed describing the land as an undivided half interest in the south half of the section.—*Schmidt v. Talbert*, (Tex.) 12 S. W. 284.

**Practice.**

9. In an action of trespass to try title to land, it devolves on the plaintiff to show title in himself, and, until he makes a *prima facie* case, the defendant is not required to offer any evidence at all.—*Brown v. Roberts*, (Tex.) 12 S. W. 807.

10. Rev. St. Tex. art. 1209, provides that before a case is called for trial additional parties, when necessary, may be brought in on such terms as the court may prescribe, but not in such manner as to unreasonably delay the trial. Article 4758 provides that when a party is sued for lands the real owner or warrantor may make himself, or may be made, a party defendant, and entitled to make such defense as if he had been the original defendant in the action. *Held* that, in an action of trespass to try title, defendants' vendor being in court, and having made separate answer, defendants were properly allowed to plead his covenants of warranty to them, and to ask judgment against him thereon, in the event of a judgment against them for the land.—*Kirby v. Estill*, (Tex.) 12 S. W. 807.

**Evidence.**

11. Where plaintiff in trespass to try title claims under a duly-recorded contract for the land in controversy, signed by defendant's predecessor in title, it is proper to permit him to testify as to the making of a former contract which was accidentally destroyed, and in lieu of which the contract in question was given.—*Chamberlain v. Boon*, (Tex.) 12 S. W. 727.

12. In trespass to try title to land located under a headright certificate by one claiming an interest in the land by virtue of a power of attorney to G. to obtain and locate the certificate in consideration of an interest therein, where it is not shown that G. ever obtained the certificate, caused any part of it to be located, or did anything towards executing the power, and it appears that plaintiff has held the power of attorney for 46 years, and nearly 80 years after the certificate was located by those under whom defendants claim, without asserting any rights, plaintiff cannot recover.—*Brown v. Roberts*, (Tex.) 12 S. W. 807.

13. The admission of testimony concerning transfers of land by partnerships and corporations, when the alleged transfers are not in writing, is error.—*Carothers v. Alexander*, (Tex.) 12 S. W. 4.

14. The facts that a person causes a certificate to be located on land, and a survey to be made in the name of the original grantee, and that this is returned to the general land-office, are not sufficient proof that the original grantee sold the land certificate to such person.—*Herndon v. Davenport*, (Tex.) 12 S. W. 1111.

15. Assertion of ownership, unaccompanied by possession long continued, is not admissible in support of a presumption that a conveyance once existed in favor of the party making the assertion.—*Herndon v. Davenport*, (Tex.) 12 S. W. 1111.

16. Proceedings in bankruptcy are admissible in evidence upon the question as to whether the bankrupt owned certain land at the time of filing his petition and inventory, but the subsequent issue of a patent to the heirs of the bankrupt, on the location of a land certificate not referred to in his schedule, cuts off all inquiry by persons who cannot show a transfer of the certificate to them.—*Herndon v. Davenport*, (Tex.) 12 S. W. 1111.

17. In trespass to try title, where plaintiffs claim through an administrator's sale, objection to the admission of the transcript of the probate court proceedings, on the ground that the order of sale, confirmation, and administrator's deed do not sufficiently describe the land, is untenable, where the land has been located, surveyed, and patented, and the description specifies the survey intended to be conveyed.—*Snow v. Starr*, (Tex.) 12 S. W. 673.

18. In trespass to try title by persons claiming an undivided interest in land through a conveyance from L. to their mother in their father's life-

time, against those claiming under a conveyance from the mother after the death of the father, defendants proved a regular chain of title, in which a conveyance to L. was not a link, from the sovereignty of the soil to one F., and a conveyance from her husband to one of them. It did not appear whether F. was living at the time her husband conveyed to one of the defendants, but she was dead at the time of the trial. *Held* that, if F. was living at the time her husband conveyed to one of the defendants, then title vested by that conveyance in that defendant, and in such of the other defendants as held under him. If she was dead at the time her husband conveyed, then one undivided half of the lot passed by the conveyance. If the title rested in F. in her separate right, then, as outstanding title, it was a good defense to plaintiffs' action.—*Finn v. Williamson*, (Tex.) 12 S. W. 852.

19. In trespass to try title, where it appears that plaintiffs' title to the land in controversy was based upon a certificate issued to their ancestor as a colonist, their right of recovery cannot be defeated by showing that they also received a certificate to other lands, not in controversy, and located in another county.—*Lemberg v. Cabanis*, (Tex.) 12 S. W. 844.

20. The fact that plaintiffs received a certificate for the land in controversy is sufficient to authorize a decree in their favor, in the absence of any showing that they had parted with the title, or that defendants had a better title.—*Lemberg v. Cabanis*, (Tex.) 12 S. W. 844.

21. The fact that there was a difference of one letter in the spelling of the name of their ancestor in two certificates to land introduced by heirs to show title, but which did not change the pronunciation of the name, is not sufficient to raise the question of identity.—*Lemberg v. Cabanis*, (Tex.) 12 S. W. 844.

22. The grantee in a deed being described as attorney in fact of F., declarations by him and his wife that they did not own the land, and a recital in a contract by the husband that F. bought the land, are admissible on trial of a right to homestead to show ownership.—*Hickey v. Behrens*, (Tex.) 12 S. W. 679.

23. In trespass to try title against a husband and wife, an instruction that declarations by the husband and F., at the time of the execution by them of the trust-deed under which plaintiff claims, that the land was owned by F., would estop defendants to claim a homestead, becomes harmless error, where the jury find that the land belonged to F.—*Hickey v. Behrens*, (Tex.) 12 S. W. 679.

24. In trespass to try title, where plaintiff claims under an executor's deed executed by defendant's father, declarations by plaintiff to defendant that he bid the land in at the executor's sale for defendant's father are admissible in evidence against him.—*Guest v. Guest*, (Tex.) 12 S. W. 831.

25. Plaintiff never paid any taxes on the land, and made no claim to it for over 10 years. *Held* that, under these circumstances, and in view of his declarations that he bid in the land for his grantor, the failure of plaintiff to testify that he paid for the land justified a finding that no consideration passed, although the deed expressed a consideration, and reserved a vendor's lien for its payment.—*Guest v. Guest*, (Tex.) 12 S. W. 831.

26. In trespass to try title by the purchaser at an administrator's sale, which sale was void as having been ordered after partition of the land, the unrecorded decree in partition may be read in evidence against plaintiff, who knew that the sale had been forbidden, as Rev. St. Tex. art. 4339, providing that no decree in partition or judgment in which title to land is recovered can be offered in evidence till it has been recorded in the county in which the land lies, is intended for the protection of *bona fide* purchasers without notice only.—*Henderson v. Lindley*, (Tex.) 12 S. W. 979.

27. In trespass to try title, where plaintiff claims under a sheriff's deed, evidence introduced by plaintiff that at the sale the defendant gave notice that he claimed the land by purchase from defendant in execution is of itself irrelevant, and in the absence of anything to show that the defendant's title had its origin after the acquisition of plain-

tiff's lien on the land is insufficient to support a judgment for plaintiff.—*Sebastian v. Martin Brown Co.*, (Tex.) 12 S. W. 986.

### Evidence—Deeds.

28. Admission of a deed of partition between an executor and one of the plaintiffs is immaterial, when defendants claim under a different source of title, and the interest of plaintiffs would merely remain undivided if the deed were invalid.—*Snow v. Starr*, (Tex.) 12 S. W. 678.

29. A deed executed by an attorney in fact is admissible in trespass to try title, though the authority of the attorney is not shown, where it is the common source of title, under which both parties claim.—*Glover v. Thomas*, (Tex.) 12 S. W. 684.

### Instructions.

30. An original headright certificate contained an indorsement that the grantee of the certificate thereby granted, bargained, and sold half the certificate, and the land due under it, to one R., through whom plaintiffs claimed. At the time the land in controversy was located, more than half the land called for in the certificate had been located for the joint benefit of the grantee and R.; and the conveyance from the heirs of the grantee to their vendee, and from their vendee to defendants' vendor, each expressly recited the transfer to R. of half the lands called for in the certificate, and the deeds were duly recorded. *Held*, that a charge that one of two joint owners of a certificate might have his interest located by separate survey, was not justified by the evidence, and had a tendency to mislead the jury.—*Kirby v. Estill*, (Tex.) 12 S. W. 807.

31. Where, in trespass to try title, there is some evidence that defendant's wife owned the property, she having paid for it with her separate means, an issue as to whether it was her separate estate is properly submitted to the jury, though there may be evidence from which the jury ought to find that plaintiff was an innocent purchaser; and, if plaintiff desires to have determined on what issue the cause is decided, he should ask for special issues.—*Graves v. Campbell*, (Tex.) 12 S. W. 238.

### Improvements.

32. To justify a charge on lands for improvements made in good faith it is not necessary that the purchaser show a complete chain of title.—*Thompson v. Jones*, (Tex.) 12 S. W. 77.

33. In trespass to try title, a verdict giving to each defendant the same amount for improvements made is unwarranted, where a certain witness testifies that the improvements of the respective defendants were of different values, and the court finds that defendants proved the values as stated by such witness.—*Johnson v. Schumacher*, (Tex.) 12 S. W. 207.

34. Allowance is properly made for improvements by defendant where plaintiffs have for more than 40 years failed to assert their title, and it does not appear that defendant knew that the possession of the one from whom he purchased was not adverse.—*Boothe v. Best*, (Tex.) 12 S. W. 1000.

35. The grantee of the husband under an invalid power of attorney from the wife is entitled to compensation for improvements, where the husband, as executor of the wife, with power to sell and invest in other land, retains the land given in exchange during the minority of plaintiff.—*Cardwell v. Rogers*, (Tex.) 12 S. W. 1006.

### Judgment.

36. Where, by agreement, two methods of locating a survey are presented to the jury, with instructions to find for the plaintiff or defendant, according to the reliability of the method contended for by each, and the verdict is in favor of locating the survey as plaintiff claims, and the court awards judgment thereon, the judgment will not be disturbed, unless defendant's method of locating the survey is certainly the most accurate.—*McFarlin v. Vaughn*, (Tex.) 12 S. W. 818.

37. Where a verdict has been rendered in favor of a plaintiff, who claims under a certain survey, a judgment may be rendered giving the calls of said survey with the bearings of a resurvey, and

also directing the mode of fixing the locality of the land to correspond with the verdict and plaintiff's claim, though the petition did not call for the bearings.—*McFarlin v. Vaughn*, (Tex.) 12 S. W. 818.

38. Upon disclaimer by a defendant in trespass to try title who was not in possession at the commencement of the action, judgment should be for plaintiff for the land, and for such defendant for costs.—*Johnson v. Schumacher*, 12 S. W. 207, 72 Tex. 384.

## TRIAL.

See, also, *Appeal*; *Certiorari*; *Continuance*; *Error*, *Writ of*; *Exceptions*, *Bill of*; *Judgment*; *Jury*; *New Trial*; *Practice in Civil Cases*; *Witness*.

In criminal cases, see *Criminal Law*, 31-30.

### Conduct of trial.

1. Under Rev. St. Tex. art. 1803, providing that the jury may take out "the charges and instructions in the cause, the pleadings, and any written evidence, except the deposition of witnesses," it is not error, in an action of trespass to try title, to refuse to send out a plat of the land in question, made by a witness, and attached to his deposition.—*Snow v. Starr*, (Tex.) 12 S. W. 673.

#### — Remarks by court.

2. A remark of the court, during the examination of a witness, that he thought the last half-hour had been unnecessarily consumed, and was not calculated to enlighten court or jury, not excepted to at the time, will not be considered on appeal, when the jury were charged that they were the judges of the weight of the testimony, and that it was not the province of the court to pass on that question, or to express an opinion as to its value.—*Sabine & E. T. Ry. Co. v. Broussard*, (Tex.) 12 S. W. 1126.

3. It is harmless error for the court, in excluding evidence of the professional standing of a physician before his testimony was in, to remark that his "character and standing as an eminent physician is part of the history of Missouri; and, if the courts and juries take notice of facts of history, the evidence is immaterial."—*Thompson v. Ish*, (Mo.) 12 S. W. 510.

4. Remarks by the court, in the hearing of the jury, upon refusal to allow respondent, in a contest over the office of county judge, to ask contestant whether he was well informed in the laws of the state, that "this question has never been passed upon by the higher courts, and this is as good a time as any for them to decide it," is not erroneous as intimating an opinion that respondent would be defeated in the suit.—*Little v. State*, (Tex.) 14 S. W. 965.

### Reception of evidence.

5. In trespass to try title, defendants' witnesses said that a house was built on the land in question by their grantor. A witness for plaintiffs, in reply, said it was built on adjoining land in 1853. Held, that the witnesses being numerous, and the court having warned the parties to introduce all testimony in chief except that strictly in rebuttal, it was proper to refuse to allow defendants to call a witness to show that the house was built in 1849 on the land claimed.—*Snow v. Starr*, (Tex.) 12 S. W. 673.

### Demurrer to evidence.

6. Defendant, by putting in evidence, does not waive a demurrer to plaintiff's evidence, when renewed at the close, but only takes the chance of aiding plaintiff's case.—*Weber v. Kansas City Cable Ry. Co.*, (Mo.) 12 S. W. 804.

### Arguments of counsel.

7. Defendant having taken title to land, in which he claims homestead, in his name as attorney in fact for another, in order, as he testified, to place his property beyond the reach of creditors, a reference to his "colossal rascality" by counsel will not necessitate a reversal.—*Hickey v. Behrens*, (Tex.) 12 S. W. 679.\*

8. In an attachment suit in which defendant counter-claims damages for wrongful attachment,

and exceptions to the cause of action attempted to be set up by a supplemental pleading have been sustained, and defendant admits the original cause of action, less the credit allowed by the supplemental pleading, the burden is on the defendant on the only issue to be tried, and he is entitled to the opening and closing.—*Parks v. Young*, (Tex.) 12 S. W. 986.

### Instructions.

9. To warrant the giving of an instruction in plaintiff's behalf, which selects some of the leading facts, and asks the court to declare that such facts constitute negligence, the necessary inference from all the other evidence, viewed in its most favorable light for defendants, must be that they were negligent.—*Dowell v. Guthrie*, (Mo.) 12 S. W. 900.

10. Where a charge, as a whole, conveys to the jury the correct rule of law on the given question, the judgment will not be reversed, though detached parts may be incomplete, vague, or erroneous.—*Harrington v. City of Sedalia*, 12 S. W. 842, 98 Mo. 588.

11. Where the court charges that, "to entitle plaintiff to recover for future damage, there must be a reasonable certainty as to such future damage,—a mere probability of its occurrence is not enough,"—it is not error to refuse to give, as part of the same charge, the following: "Future damages can only be awarded when it is rendered reasonably certain from the evidence that such damages will evidently and necessarily result from the original injury."—*Missouri Pac. Ry. Co. v. Mitchell*, (Tex.) 12 S. W. 810.

12. An expert, while testifying as to an injury received by plaintiff, testified without objection that plaintiff assured him he had never suffered with sore eyes or been injured in his eyes. Held, that it was proper to refuse a request to charge the jury not to consider evidence of symptoms of injury not testified to by plaintiff, but stated by him to his physician, as the objection to the evidence came too late.—*Missouri Pac. Ry. Co. v. Mitchell*, (Tex.) 12 S. W. 810.

13. When, in an action for damages to property, plaintiff has introduced evidence showing title, in the absence of conflicting evidence error cannot be predicated of a charge for assuming that the property belongs to plaintiff.—*Fort Worth & N. O. Ry. Co. v. Pearce*, (Tex.) 12 S. W. 864.

14. A refusal to charge the jury not to include in their estimate of actual damages any expense for attorney's fees, or expense incurred by plaintiff in attending court to prosecute his suit, is proper, where such damages are not alleged in the pleadings or included in the evidence.—*Missouri Pac. Ry. Co. v. Mitchell*, (Tex.) 12 S. W. 810.

15. Though the judge should give or refuse a charge asked in the very terms of the request, and, if he wishes to give it with a qualification, he should rewrite the instruction embodying the qualification, yet, when a modification is appended to a requested charge in such a manner as to show the precise charge asked, and the precise modification, and the whole is intelligible to the jury, no injury results to the party making the request.—*Missouri Pac. R. Co. v. Williams*, (Tex.) 12 S. W. 885.

16. Where a charge of the court is conceived to be insufficient, the party objecting to it should ask for a special charge upon the subject. If he does not do so, and the general law applicable to the case is given to the jury, there is no ground for complaint.—*Silberberg v. Pearson*, (Tex.) 12 S. W. 850.

17. It is not error to charge the jury to find in favor of both plaintiff and defendant, against third persons, who are cited and make default.—*Bullis v. Noyes*, (Tex.) 12 S. W. 897.

18. An instruction that, "on the evidence in this case, the statute of limitations is a bar to the suit," is properly refused, as an instruction should state hypothetically the facts of the case, so that it may be determined upon appeal whether the court applied correct principles of law.—*Krider v. Milner*, (Mo.) 12 S. W. 461.

19. On a trial for selling liquor to a minor, where the latter is a witness, it is error to charge

that, if the jury believe that he "has any bias or leaning to one side or the other, the law is that they should find that leaning or bias against the party in whose favor the witness leant," as this invades the province of the jury.—*Bing v. State*, (Ark.) 12 S. W. 559.

#### Verdict.

20. Where, in an action against two railroad companies for negligence, one demands judgment over against its co-defendant in case of judgment against it, a verdict reading, "We, the jury, find for the plaintiff against the G., C. & S. F. Rwy. Co., find for Southern Pacific Company, damages to the amount of \$4,000," is unintelligible, as without the pleadings it appears to be for the Southern Pacific, and by the pleadings both that company and plaintiff demand judgment.—*Gulf, C. & S. F. Ry. Co. v. Hathaway*, (Tex.) 12 S. W. 999.

#### Trial by court—Findings.

21. In an action against a city for loss of property by an overflow alleged to have resulted from the city's negligence in constructing a bridge, one of the findings of law was as follows: "The bridge being in part the cause of destruction of the house, etc., the city is responsible." Other findings showed that the bridge was the cause of the overflow, and that the overflow caused the loss of the property. It appeared that there was a building projecting into the water channel, but that the building had caused no injury to plaintiff till the bridge was constructed. *Held*, that the finding, if erroneous in the reason given, was not prejudicial.—*City of Austin v. Emanuel*, (Tex.) 12 S. W. 818.

22. Where the court hears a cause without a jury, and judgment is rendered on the last day of the term, and a request is made at 9 p. m. that the court file conclusions of fact and law, it is proper to decline the request for want of time.—*Davis v. State*, (Tex.) 12 S. W. 957.

## TROVER AND CONVERSION.

#### What constitutes conversion.

1. Plaintiffs' agent, intending to be absent on the arrival of a package of money belonging to plaintiffs, requested defendant to receive it from the express company, for the purpose of safely keeping it until his return, and defendant consented, and the money was delivered to him, on the written order of the agent. *Held*, that defendant's refusal to deliver it upon demand was a conversion of the money.—*Jones v. Hunt*, (Tex.) 12 S. W. 832.

#### Pleading.

2. Plaintiffs alleged that certain notes converted were worth \$619.50, and that they had sustained damage by the wrongful conversion in the sum of \$750. Defendant pleaded the insolvency of the makers of the notes, except as to the amounts he had collected on them, and plaintiffs replied that the notes could have been collected at the time they were received by defendant, though they became worthless. *Held*, that whatever allegations plaintiffs' pleadings may have required to authorize the admission of evidence of the solvency or insolvency of the makers of the notes were fully supplied by defendant's pleadings.—*Ramsey v. Hurley*, (Tex.) 12 S. W. 56.

#### Jurisdiction.

3. An action for the conversion of property may be brought in a court of law, though the custody of the property is in a chancery court, in a suit between the same parties.—*Garibaldi v. Wright*, (Ark.) 12 S. W. 875.

#### Damages.

4. The measure of damages for the wrongful conversion of a chose in action is the amount *prima facie* due on the face of the claim.—*Ramsey v. Hurley*, (Tex.) 12 S. W. 56.

### Trustee Process.

See *Garnishment*.

## TRUSTS.

#### Resulting trusts.

1. A husband verbally purchased land from his father-in-law, and had paid part of the price, when the father-in-law died intestate, leaving seven children. There was no administration, but all of the children, except the wife, conveyed their interest in the land to the husband; the wife being present and consenting. She died a few years after, and the husband continued in possession of the land as owner for 30 years. *Held* that, as there had been a complete reduction to possession and conversion by the husband of the six-sevenths conveyed to him, no trust therein resulted to the wife's heirs, though the land was estimated against the wife in the division of the father-in-law's estate.—*Russell v. Russell*, (Ky.) 12 S. W. 709.

2. Where the widow of a decedent purchases land belonging to his estate at judicial sale, paying therefor with funds in her hands as his administratrix, for which she never accounts, she holds in trust for his heirs, in the absence of evidence that the estate was indebted to her; especially where she retains possession during her life, and does not account for the price of part of the land sold by her.—*Clayton v. Clayton's Ex'r*, (Ky.) 12 S. W. 812.

3. In consideration of a conveyance of land, testator's two sons executed a note to him, binding themselves, jointly and severally, to pay interest thereon semi-annually, and the principal, when due, to specified beneficiaries. By his will, appointing his two sons executors, testator provided that the note should be held by his son N. in trust to pay over the semi-annual interest, the principal to be retained undiminished, and forbade "any other use or appropriation of said funds in any way whatsoever." N. became active executor, and released his brother from liability on the note in consideration of certain land conveyed to him individually, and the transfer of an interest in certain other notes. *Held*, that such release was invalid, and that the land conveyed in consideration thereof, and its proceeds in the hands of N.'s representative, were held in trust for his brother or the beneficiaries.—*Stephens v. Stephens' Adm'r*, (Ky.) 12 S. W. 192.

4. No trust resulted as to the proceeds of the notes received as part consideration for such release, and collected by N. and applied to his own use while acting executor.—*Stephens v. Stephens' Adm'r*, (Ky.) 12 S. W. 192.

5. Where a conveyance of land is made, because of the grantor's failing health, for a nominal consideration, and the grantor, and after his death his widow and heir, remain in possession, making improvements, and receiving the rents and profits, the grantee will be held to have taken it in trust.—*Clark v. Hershey*, (Ark.) 12 S. W. 1077.

6. In an action by children of a deceased person to have dower assigned in land held by their ancestor, the widow claimed the entire interest of the ancestor under an alleged agreement that the conveyance of the land was to be made to her. *Held*, though the evidence was conflicting as to the existence of the agreement, that, it appearing that the wife's money had paid for the land, and the rights of creditors not being involved, her equities were superior to those of the children.—*Allstott v. McCain*, (Ky.) 12 S. W. 1062.

7. A purchaser of land, with a full knowledge of an equitable title in another, becomes a trustee of the legal title, for the benefit of the equitable owner.—*Bailey v. Winn*, (Mo.) 12 S. W. 1045.

8. A resulting trust is not sufficiently established where the evidence consists mainly in verbal admissions made by defendant thirty-five years before suit brought, and before the date of his parent, and where there is evidence of a statement made by the *cestui que trust*, who died 18 years before the institution of the suit, to the effect that the land belonged to defendant, and where no claim has been asserted by plaintiffs, who claim as heirs of the *cestui que trust*, for over 18 years.—*Burdette v. May*, (Ia.) 12 S. W. 1066.



**Constructive trusts.**

9. Where defendant uses plaintiff's money to purchase land, taking title in his own name, with the understanding that he will afterwards convey to plaintiff, which he refuses to do on plaintiff's subsequent request, and the parties stand in confidential relations to each other at the time of purchase, a trust results in plaintiff's favor.—*Cooper v. Lee*, (Tex.) 12 S. W. 433.

**Termination of trust.**

10. A will, made in 1849, devising lands in trust for emancipated slaves, expressly provided that said lands should never be sold, unless it should be unlawful for "free persons of color" to remain in the state. *Held*, that under existing laws, giving the rights of citizenship to negroes, the necessity for the trust ceases to exist, and it is proper to order a sale, where all the parties interested are before the court, and it appears that a sale would be beneficial.—*Browning v. Ficklin's Adm'r*, (Ky.) 12 S. W. 714.

**Change of trustees.**

11. A deed of trust provided that if the trustee refused to make the sale, the beneficiaries could appoint a substitute. All of the beneficiaries executed a formal appointment of a substitute, except one, who indorsed on the appointment a statement that he acquiesced in it, but that all his interest in the debts secured by the trust had been settled. *Held*, that the substitution was, in effect, made by all the beneficiaries.—*Cates v. Mayes*, (Tex.) 12 S. W. 51.

**Transfer of beneficiary's interest.**

12. Under a conveyance of lands in trust "for the only proper use and benefit of the" beneficiary, "for and during the term of his natural life," the trustee "to hold said lands for the benefit of" the beneficiary "only, and to account to him or his guardian for the rents or yearly issues," the beneficiary's interest is assignable.—*Henson v. Wright*, (Tenn.) 12 S. W. 1035.

13. A conveyance of land in trust, the trustee to take, hold, and convey the remainder, on the death of the beneficiary for life, to persons who shall then be entitled thereto under the provisions of the deed, creates an active trust, which prevents the merger of the legal and equitable estates, so that a mortgage of the beneficiary's interest must be joined in both by the trustee and by the beneficiary.—*Henson v. Wright*, (Tenn.) 12 S. W. 1035.

**Rights of beneficiary.**

14. Gen. St. Ky. c. 63, art. 1, § 21, provides that estates of every kind held in trust shall be subject to the debts of the persons for whose benefit they are held, as if such persons owned the same interest in the property as they own in the use or trust thereof. *Held*, that the estate of a cestui que trust is properly subjected to the payment of a note made by him and his wife, and secured by mortgage on the trust-estate.—*Graves v. Reed*, (Ky.) 12 S. W. 550.

**Pleading.**

15. In proceedings to settle an estate, decedent's wife was made defendant, and in her answer set up a note executed to her by her husband, and alleged that it was given for money which she had allowed her husband to receive from her father's estate, under an agreement that he would hold it in trust for her, and as her separate estate. The reply denied the making of the agreement, and pleaded the statute of limitation. *Held*, that the admissions of the reply, in not denying the relationship, the amount of money received from her father's estate, and the execution of the note, *ipso facto* established a trust in the wife's favor, and a demurrer to the reply was properly sustained.—*Veal's Adm'r v. Veal*, (Ky.) 12 S. W. 384.

**TURNPIKES AND TOLL-ROADS.****Rights of stockholders—Pleading.**

Where plaintiff, a county, has taken stock in a turnpike company, requiring, as a condition of

its subscription, a bond, with sureties, that on completion of the road the company should be free from debt, a petition seeking to recover from the company and the sureties on its bond plaintiff's proportionate share of the earnings of the road, without regard to the company's indebtedness to a surety, who was also an officer of the company, is not demurrable for failure to make a full and specific statement of the cost of the road, the amount of stock subscribed, and the earnings; it being alleged that all these facts were in the knowledge of defendants, and were not known to plaintiff, as the officers of the company had failed to perform their duty in making an official report.—*Harrison County v. Berry & Fairview Baptist Church Turnpike Co.*, (Ky.) 12 S. W. 258.

**Undue Influence.**

See *Wills*, 8-10.

**USURY.****Building associations.**

Where there is actual usury in a transaction between a building association and a subscriber, the association cannot protect itself by a provision in its charter that "no dues, premiums, interest, or fines that may accrue to the association, in accordance with its charter, shall be deemed usurious." Following *Association v. Johnson*, 10 S. W. 787.—*Henderson Bldg. & Loan Ass'n v. Zeller*, (Ky.) 12 S. W. 945.

**Variance.**

Between pleading and proof, see *Pleading*, 9.

**VENDOR AND VENDEE.**

See, also, *Deed*; *Fraudulent Conveyances*; *Judicial Sales*; *Sale*; *Specific Performance*.

Enforcement of vendor's lien, see *Judgment*, 23-26.

**The contract—Construction.**

1. In an action by a father to enforce his lien for the purchase money of land sold his son, for which he held the latter's notes, payable at stipulated times, the son alleged mistake in the execution of the contract, and failure to embody its terms in the deed and notes, and that there was a parol agreement by which he was to pay only the interest during the father's life-time, the principal to be devised by the latter to his children, with the privilege to defendant to pay them their shares at any time; that he had made such payments, and had paid the interest. There was evidence that after the sale plaintiff made a will containing devises as alleged, and stated that it was in accordance with the agreement made between him and defendant when the sale was made, which will, it was insisted, became part of the original agreement when executed. *Held*, that this agreement being inconsistent with the written contract, and amounting to a distribution of the father's estate during his life, plaintiff was entitled to judgment.—*Marrs v. Marrs*, (Ky.) 12 S. W. 141.

2. Defendant should be credited with money paid to plaintiff's children, to be credited on his notes, pursuant to such agreement, at plaintiff's instance.—*Marrs v. Marrs*, (Ky.) 12 S. W. 141.

**Time of performance.**

3. Where a contract for the sale of land stipulates that the vendor is "to make a good title and give a general warranty deed," but fails to "make time of the essence" of the contract, a delay of two months in tendering the general warranty deed is not unreasonable and unnecessary, where the vendor did not have the legal title at the time of the contract.—*Tapp v. Nock*, (Ky.) 12 S. W. 718.

4. When time is not of the essence of a contract for sale of land, and the vendors find their title defective, they are entitled to a reasonable time to perfect it, and tender a deed, and the fact that the title was not good at the date of the contract does not preclude an enforcement of the contract.—*Gaither v. O'Doherty*, (Ky.) 12 S. W. 606.

**Rights of vendor—Action for price.**

5. In an action for the price of land sold in gross, and described by metes and bounds, allegations in the answer that the vendor represented that the tract contained so many acres, and that the vendee purchased relying on such representations, whereas it in fact contained a lesser quantity, do not raise the issue that part of the land described was held by an adverse superior title, whereby its possession was lost to the vendee.—*Bellamy v. McCarthy*, (Tex.) 12 S. W. 849.

6. Default in payment of purchase money due on land gives the vendor the right to rescind his contract of sale, or enforce his vendor's lien, but by suing directly for the purchase money he affirms the contract of sale.—*Gunst v. Felham*, (Tex.) 12 S. W. 233.

7. Where land included in the boundaries set out in a deed is not the vendor's, the vendee may, in an action for the price, claim a deduction without alleging an eviction, or fraud, or insolvency, on the ground of a partial failure of consideration.—*Young v. Lofton*, (Ky.) 12 S. W. 1061.

**— Rescission of contract.**

8. G. sold land by title-bond to defendant, who failed to pay the purchase money, and he afterwards, in 1872, made a contract with him, giving further time in which to pay, with the agreement that, if he failed to pay as agreed upon, the contract for the sale of the land should be regarded as rescinded. G. assigned his benefit under this contract to plaintiff, who, upon defendant's failure to pay, sued for possession. The land was placed in a receiver's hands, and rented to plaintiff; and, after several years, the court decided the case, holding that the rents due from plaintiff had extinguished the defendant's debt for the purchase money. Held, that the contract for the sale of the land to defendant was at an end when he failed to pay under his agreement of 1872, and plaintiff was entitled to possession.—*Morgan v. Oliver*, (Ky.) 12 S. W. 381.

9. Where land is deeded under an agreement that the grantee shall support the grantor for life, and the grantee refuses to comply with his part of the contract, a proper measure of relief is the return of the land to the grantor, where this can be done, and, at the election of the grantor, it should be ordered.—*Reeder v. Reeder*, (Ky.) 12 S. W. 1063.

10. Where one purchases a portion of a tract of land from another, who holds a bond for title from a railroad company for the entire tract, on rescission of the sale of the entire tract to the first vendee, it is error to rescind the sale of the portion to the second vendee, and require the company to refund to him the amount he has paid to his vendor, and expended in improvements.—*Indianapolis Junction Ry. Co. v. Baas*, (Ky.) 12 S. W. 381.

11. Where a vendor conveys land, reserving in the deed a lien for the price, and retaining possession, failure to pay the debt at maturity does not forfeit the grantee's rights, and give the vendor a right to rescind.—*Stitzle v. Evans*, (Tex.) 12 S. W. 326.

**Rights of vendee.**

12. In ejectment by the vendee against his vendor, and for damages for trespass and breach of warranty, the fact that the petition shows that one of the purchase-money notes for which a vendor's lien was retained is past due, but makes no offer to pay the same, does not render the petition defective. If the vendee's claims are sustained, they may constitute a valid set-off against the note.—*Roy v. Clark*, (Tex.) 12 S. W. 845.

13. When the vendee has tendered the price, his title becomes perfect, and in an action against the vendor to recover the land it is proper to refuse to charge that, if the land was defendant's homestead at the time of the conveyance, plaintiff cannot recover, as the contract is no longer executory.—*Stitzle v. Evans*, (Tex.) 12 S. W. 326.

14. Where the contract for purchase of land shows three owners, but rather indicates that they are joint owners, and the purchaser does not know that they own in severalty, though such is the fact,

he is entitled to a deed with a covenant of general warranty by each of the three as to the entire tract of land.—*Gaither v. O'Doherty*, (Ky.) 12 S. W. 306.

15. Complainant purchased land, and had uninterrupted possession for 23 years, without any question as to title, and without knowledge of any rightful claimant, though unknown heirs have been warned for many years. She also received an indemnity bond from the vendor. Held that, on foreclosure of the purchase-money mortgage given to the vendor, complainant was not entitled to have the sale enjoined until the title was perfected by the vendor.—*Woodhead v. Foulds*, (Ky.) 12 S. W. 129.

**— Mistake as to quantity.**

16. A mistake as to the quantity of land having been made, and the price in the deed fixed accordingly, the fact that within six months after taking the deed, and repeatedly thereafter, the vendee promised to pay a specific sum for the excess, will sustain a finding that the excess had not been adjusted and paid for at a less price.—*McCrocklin v. Lloyd*, (Ky.) 12 S. W. 935.

17. Where a vendee desires relief on the ground of mistake or fraud in the quantity of land conveyed by a deed, such quantity must be determined by the calls in the deed, regardless of conflicts with adverse titles.—*Bellamy v. McCarthy*, (Tex.) 12 S. W. 849.

18. Plaintiff conveyed to defendant, by deed of general warranty, a tract of land containing "about 800 acres," and the deed provided that, if there was more than 800 acres, plaintiff was not to claim the price of the excess, and if less, defendant should not receive a rebate for the deficiency. It appeared, however, that within the boundaries set out in the deed was included a certain tract, which plaintiff did not own, nor claim to own. Held, that this was not such a shortage as was contemplated in the deed, and defendant was entitled to an allowance therefor in the purchase price.—*Young v. Lofton*, (Ky.) 12 S. W. 1061.

**— Improvements.**

19. The right of a vendee in possession of land under a contract of sale, to recover the value of his improvements upon a rescission of the contract by the vendor, rests upon principles of equity, and not on provisions relating to claims for improvements in the Texas statutes regulating trespass to try title.—*Eberling v. Deutscher Verein*, 12 S. W. 205, 72 Tex. 389.

20. Where a vendee under contract of sale made by a husband takes possession of a part of a tract of land, another part of which is occupied as homestead by himself and wife, and makes improvements thereon with the knowledge and consent of the wife, her conduct is proper to be considered as showing the good faith of the vendee in making such improvements.—*Eberling v. Deutscher Verein*, (Tex.) 12 S. W. 205.

**Vendor's lien.**

21. Where notes given for the purchase of land, and secured by a vendor's lien, are assigned for value, the original holder does not retain an equity in the land, by virtue of such lien, which can be set up as a defense in an action of ejectment brought against him by the purchaser of land.—*Roy v. Clark*, (Tex.) 12 S. W. 845.

22. It is not necessary, under the statutes of Kentucky, as between the vendor and vendee, that a lien on the land sold be retained by the vendor, as failure to do so only affects the rights of the vendor where third persons purchase from his vendee.—*Barnett v. Salyers*, (Ky.) 12 S. W. 803.

23. The express lien which a vendor of land reserves on the crops for the year when the purchase money shall become due, attaches as soon as the vendee acquires title to the crops, and a subsequent mortgagee thereof without notice, who converts the crops, is liable to the vendor to the extent of his lien.—*Williams v. Cunningham*, (Ark.) 12 S. W. 1072.

24. In an action against the makers and indorser of a note, it appeared that the note sued on was indorsed over by the payee to plaintiff as part of the price of land purchased by the payee from

plaintiff. The deed of the land reserved a lien until "the note, and all interest thereon, are fully paid." The payee testified that the other defendants were insolvent, and that he had frequently requested plaintiff to sue while they were yet solvent, which he neglected to do. *Held* that, though plaintiff's right to a personal judgment against the payee was lost by negligence, the lien could still be enforced as securing the debt created by the note, and a judgment for all the defendants was erroneous.—*Hodges v. Roberts*, (Tex.) 13 S. W. 232.

25. In a suit on a note, and to foreclose a vendor's lien, where a second note has been given for the same debt, a memorandum made on the note sued on, without the knowledge of the parties, by the one transacting the business, to the effect that it was held as collateral security for the new note, is not evidence of the contract, and the testimony of the one making the memorandum as to the circumstances under which, and the purpose for which, it was made cannot be excluded under the rule that parol evidence is inadmissible to vary or contradict a written contract.—*Seeligson v. Mitchum*, (Tex.) 13 S. W. 237.

26. In an action for money advanced, which was used by defendant in paying for land, the facts that plaintiff holds the purchase-money notes, though they have not been assigned to him, and that defendant has made payments to him, which have been credited on the notes, show, as between them, that plaintiff is holding the notes as security for his advances, and he is entitled to a lien as against the defendant's widow's claim for a homestead.—*Dudley v. Goddard*, (Ky.) 12 S. W. 302.

27. Where the grantee of land subject to a vendor's lien covenants in the deed to assume and pay the purchase money due from his grantor, and secured by such lien, such covenant being a part of the consideration for the land, he becomes personally liable to the original vendor for the amount of his incumbrance upon the land.—*O'Conner v. O'Conner*, (Tenn.) 12 S. W. 447.

28. One who purchases a portion of a tract of land from another, who holds a bond for title from a railroad company for the entire tract, takes subject to the company's vendor's lien; and a writing given him by the company's attorney, to induce him to purchase, stipulating that the title is safe, and that a deed will be made to the purchaser for such portion as he may buy, is not a release of such lien, especially when the attorney has no authority to release it.—*Indianapolis Junction Ry. Co. v. Bass*, (Ky.) 12 S. W. 331.

### — Pleading.

29. In an action to enforce a vendor's lien, under Code Civil Proc. Ky. § 694, subd. 3, which provides that all lienholders must be brought before the court, but if all the liens be held by the same party the court may order a sale of enough of the property to pay the debts due, unless it appear that it is not susceptible of advantageous division, or for some other reason the interest of defendant would be seriously prejudiced, an allegation that plaintiff executed a deed for certain land to defendant, who in consideration delivered his three promissory notes to plaintiff; that the notes are unpaid; and that the land can be divided without materially impairing its value,—shows a sufficient cause of action, though it is not alleged that plaintiff had not sold the notes to third persons, and that defendant had promised to pay the notes.—*Ward v. Coffey*, (Ky.) 12 S. W. 145.

30. In an action to garnish a debt owing for land, and to enforce a lien on the land for the security of the debt, where the petition gives such a description of the land sought to be subjected that the court may, from the description given, determine whether or not the land is susceptible of advantageous division, the allegation in that regard need not be made.—*Cockrill v. Mize*, (Ky.) 12 S. W. 1040.

### Bona fide purchasers.

31. The record of deeds reciting the assignment of half a headright certificate to one under whom plaintiffs' vendors claim, was sufficient notice to

persons purchasing after such record.—*Kirby v. Estill*, (Tex.) 13 S. W. 307.

32. The record of an instrument, the acknowledgment of which is so insufficiently certified as to make the record illegal, will not operate as notice to third persons.—*Hayden v. Moffat*, (Tex.) 13 S. W. 320.

33. Under Rev. St. Mo. § 693, providing that no conveyance shall be valid except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record, the notice to a purchaser of real estate which will make his interest therein subject to a prior unrecorded lease, is a question of fact, and in an action by him against the lessee it is sufficient to instruct the jury that knowledge of such facts as would put an ordinarily prudent person upon inquiry in regard to defendant's title, and lead him to discover the truth respecting it, is actual notice, and that knowledge of defendant's possession is evidence tending to show actual notice of his title.—*Drey v. Doyle*, (Mo.) 12 S. W. 287.

34. In trespass to try title, it appeared that defendants had received a deed made by the daughter of the original grantee as his heir, dated January 12, 1873, which proved invalid for want of a proper acknowledgment; and that on May 13, 1887, they obtained a deed of confirmation from the same party, reciting that a valuable consideration had been paid when the invalid deed was given. But it further appeared that on March 9, 1882, a deed from the original grantee, conveying the land in controversy to plaintiff's predecessor in title, was recorded. *Held* that defendants were affected with notice that their grantor had no title when they took the deed of confirmation from her.—*King v. Haley*, (Tex.) 12 S. W. 1112.

35. One who is about to purchase land is under no obligation to make inquiries of persons living near it as to the title thereto.—*Bounds v. Little*, (Tex.) 12 S. W. 1109.

36. In an action of trespass to try title, plaintiff claimed through mesne conveyances under a lost deed alleged to have been executed by the patentee of the land in question in 1856. His title papers were not recorded until December 8, 1884. Defendant, who purchased the land in May 30, 1884, claimed title under a deed from the widow and children of the patentee, reciting that the grantee was "to have and to hold the premises in dispute unto their grantee, his heirs and assigns, forever," and had no actual notice of plaintiff's unrecorded deed. *Held* that, the intent of the deed being to convey the premises and not the grantors' interest therein, it was not a mere quitclaim, and defendant was a *bona fide* purchaser without notice, actual or constructive.—*Garrett v. Christopher*, (Tex.) 12 S. W. 67.

37. An instruction that, to entitle a purchaser to protection against a prior unrecorded lease, it must appear otherwise than from the mere recital of the deed that he paid a valuable consideration, is properly refused, where in such deed he assumes the payment of an incumbrance upon the property, which, of itself, constitutes him a purchaser for value.—*Drey v. Doyle*, (Mo.) 12 S. W. 287.

### — Lis pendens.

38. A purchaser of land from a party to an action involving the right to the land who takes a deed after judgment is rendered in the action, but before the execution of the commissioner's deed in pursuance of the judgment, takes a title subordinate to that of the commissioner's vendee.—*Osenton v. Nichols*, (Ky.) 12 S. W. 278.

## VENUE IN CIVIL CASES.

### Action on bond.

1. A bond to secure performance of a contract payable at no specified place, cannot be sued on in the county in which the contract was to be performed, where the principal and sureties are non-residents thereof.—*Lindheim v. Muschamp*, (Tex.) 12 S. W. 125.

### Trespass.

2. Under Rev. St. Tex. art. 1193, subd. 3, the district court has jurisdiction of an action for a

trespass charged to have been committed in the county, though none of the defendants reside in that county.—*Campbell v. Trimble*, (Tex.) 12 S. W. 863.

#### Death by wrongful act.

3. Under Civil Code Ky. § 73, providing that an action against a common carrier for an injury to a passenger or other person, or his property, "must be brought in the county in which the defendant, or either of several defendants, resides, or in which the plaintiff or his property is injured, or in which he resides," the circuit court of a county in which neither plaintiff nor defendant or its chief officer, resides, and in which the killing did not occur has no jurisdiction of an action against a railroad company for the alleged negligent killing of plaintiff's son.—*Sherrell v. Chesapeake, O. & S. W. R. Co.*, (Ky.) 12 S. W. 465.

#### Fraud.

4. A petition alleging the breach of a verbal contract, which defendants confederated together to induce plaintiff to make, with the fraudulent intent to ruin him, and that their acts in violation of it were done in pursuance of the same scheme, but stating no fraudulent act, nor anything from which fraud might be inferred, does not confer jurisdiction on a court of a county other than that of defendant's residence, under Rev. St. Tex. art. 1193, providing that inhabitants of the state shall be sued only in the county of their residence, except on written obligations and in cases of fraud.—*Baines v. Mensing*, (Tex.) 12 S. W. 934.

#### Change of venue—Affidavit.

5. An affidavit, filed by plaintiff in the trial court, "that the judge \* \* \* will not afford him a fair and impartial trial," without stating any facts upon which such belief is founded, does not entitle him to a transfer of the action to another court.—*Vance v. Field*, (Ky.) 12 S. W. 190.

6. An affidavit for transfer of a cause from the vice-chancellor's court to the Jefferson common pleas, made under Carroll's Code Ky. § 836, providing for such transfer upon an affidavit that the vice-chancellor will not try the case impartially, which merely alleges that the vice-chancellor will not afford a fair and impartial trial, is fatally defective.—*Powers v. Reynolds*, (Ky.) 12 S. W. 293.

#### Practice.

7. Where a case is improperly transferred, under Carroll's Code Ky. § 836, providing for a transfer from the vice-chancellor's court to the Jefferson common pleas, upon an affidavit that the vice-chancellor will not try the case impartially, the fact that the party against whose objection the transfer was made has had an impartial trial does not cure the error.—*Powers v. Reynolds*, (Ky.) 12 S. W. 553.

8. Objection to the transfer of a case is properly made in the court where the suit was instituted, and a motion to remand, in the court to which the case is sent, is unnecessary, as the exception to the error reserved at the time of the transfer follows the record to the court of appeals.—*Powers v. Reynolds*, (Ky.) 12 S. W. 553.

#### Order.

9. The fact that an order changing the place of venue to another court recites that the motion for change was made by one party, when it was actually made by the other, does not affect the latter court's jurisdiction.—*Dimmitt v. Robbins*, (Tex.) 12 S. W. 94.

### Venue in Criminal Cases.

See *Criminal Law*, 8-10.

#### Verdict.

See *Criminal Law*, 73; *Homicide*, 108, 109. Objections to, see *New Trial*, 4.

#### Verification.

See *Pleading*, 6.

### Warranty.

Covenants of warranty, see *Covenants*, 1.

### WATER COMPANIES.

#### Negligence—Fires.

1. A contract of a water company with a city declared that it was made for the protection of private property against destruction by fire, and provided that the city might rescind it for failure of the company to furnish an adequate supply of water for five months, and that the rents should cease in case the water supply was cut off more than five days. Held, that as the only exemption from liability contained in the contract was for damages occasioned by a temporary suspension of the works, upon notice, for repairs or extension, the necessary inference must be that, in the absence of such excuse, and while the contract was in force, the company would be liable for its failure to furnish water sufficient to extinguish fires.—*Paducah Lumber Co. v. Paducah Water Supply Co.*, (Ky.) 12 S. W. 554; *Duncan v. Owensboro Water Co.*, Id. 557.

2. Where a water company makes a contract with a city whose declared object is the protection of private property against fire, an action against the company for the destruction of property by fire, caused by the failure of the company to supply a sufficient amount of water to extinguish it, cannot be defeated on the ground that the plaintiff's damages were not the proximate result of the company's negligence.—*Paducah Lumber Co. v. Paducah Water Supply Co.*, (Ky.) 12 S. W. 554; *Duncan v. Owensboro Water Co.*, Id. 557.

### WEIGHTS AND MEASURES.

#### Public weigher.

Under Rev. St. Tex. final tit., § 20, which provides that "any law passed by the sixteenth legislature in conflict with any provision of this act shall be the law of the state, this act to the contrary notwithstanding," act Tex. April 19, 1879, creating the office of public weigher, passed by the sixteenth legislature, and amended by the act of 1883, is not invalidated by Rev. St. Tex. p. 537, art. 4081, etc., which was passed with the Revised Statutes, and requires the governor to appoint the officer.—*Johnson v. Martin*, (Tex.) 12 S. W. 831.

### Wife's Separate Estate.

See *Husband and Wife*, 5-9.

### WILLS.

See, also, *Descent and Distribution*; *Executors and Administrators*.

#### Capacity to make—Evidence.

1. Testator for some years before making his will had become a physical wreck and partially blind, and went to live with his married sister, shortly afterwards losing his eye-sight entirely. His sister and her husband gave him the most careful and affectionate nursing. He used morphine in large quantities, and while suffering was extremely profane. Up to the time he executed his will he transacted all his business. After living at his sister's house for eight years he made the will, leaving his property to her, her husband, and their children, to the exclusion of his other brothers and sisters. The person who wrote the will testified that besides himself no one was present, and that testator, without aid or suggestion, dictated the will as written, and was at the time in full possession of his mental faculties, the provisions of the will showing unusual intelligence as to the legal effect of restraints and limitations put on the devise. Testator's sister with whom he lived was his favorite sister, and he had twice before made a will leaving her the greater part of his estate. Held, that neither a lack of testamentary capacity nor the existence of undue influence was shown.—*Bush v. Lisle*, (Ky.) 12 S. W. 793.

2. It is not error to allow witnesses who were present when the will was executed, and had testified fully as to testatrix's condition, her appearance and conversation at that time, to give their opinion as to her mental capacity at that time.—*Brown v. Mitchell*, (Tex.) 12 S. W. 606.

3. A refusal to allow witnesses who knew testatrix well, and detailed her conduct and peculiarities from their own observation, to testify as to their opinion as to whether she had mind enough to understand the paper in contest, or could have been taught to understand it, is not prejudicial to the contestants, where the same witnesses testified that in their opinion she had not mind enough to make a will, and understand its nature and contents.—*Overall v. Bland*, (Ky.) 12 S. W. 273.

4. In a suit to set aside a will for incapacity and undue influence, statements made by testatrix before its execution, and relative thereto, are competent to prove the previous state of her mind and affections.—*Thompson v. Ish*, (Mo.) 12 S. W. 510.

5. The admission of evidence that testatrix "was known to the community as a strong-minded woman" is error, but not prejudicial to plaintiffs, where there is abundant competent evidence to the same effect.—*Thompson v. Ish*, (Mo.) 12 S. W. 510.

#### — Instructions.

6. An instruction that, in determining whether or not testatrix had mental capacity to make the will, the jury should determine whether or not, at the time of her signing said will, she knew the nature and extent of her property, is erroneous.—*Brown v. Mitchell*, (Tex.) 12 S. W. 606.\*

7. An instruction as to testamentary capacity which does not withdraw from the jury the circumstances of old age, and weakness of body and mind, but merely asserts that, if testatrix possessed a disposing mind, these circumstances alone did not disable her from making the will, which the jury was to determine from all the facts in evidence, including the fact that she gave all her property to defendant, and that "soundness of mind means the ability to know and comprehend that one is disposing of his property by will, the general value and character of the property, and to whom the same is being given," is proper.—*Thompson v. Ish*, (Mo.) 12 S. W. 510.\*

#### Undue influence.

8. The probate of a will should not be set aside on mere suspicion of undue influence, or on a showing that opportunity to exercise such influence may have existed.—*Brown v. Mitchell*, (Tex.) 12 S. W. 606.

#### — Instructions.

9. It is not error to instruct that if the paper was dictated by testatrix, and expresses and embraces her directions, it was not procured by undue influence, and that, if she had the mental capacity to make a will, such paper is her will, though from association, kindness, or other reasons defendant had influence with her, and had transacted some of her business; but that, if she was under his influence to an extent which destroyed her liberty and free agency in the disposition of her property by the will, and caused her to dispose of it in accordance with his wishes, and not her own, then it is not her will.—*Thompson v. Ish*, (Mo.) 12 S. W. 510.

10. On the issue of undue influence in procuring a will to be made, the jury were instructed that the fact that testatrix may have had spells or disease that affected her mind while they continued, or that may have injured her mind, will not invalidate her will, if at the time she made it she had mind and memory sufficient to make the will, and was not unduly influenced to make it. *Held*, that the instruction was not prejudicial as charging that it was essential, to invalidate the will, that the undue influence should have been exercised at the very moment that testatrix signed it, when undue influence was properly defined in another instruction, and the evidence introduced to show such influence was not confined to that particular time.—*Overall v. Bland*, (Ky.) 12 S. W. 273.

#### Probate and contest.

11. An averment of a petition to set aside the probate of a will that certain persons conspired and confederated with themselves and others, and used and exercised undue influence over deceased, in order to fraudulently procure the execution of said instrument, was a mere statement of conclusions, without any facts to show fraud or undue influence.—*Brown v. Mitchell*, (Tex.) 12 S. W. 606.

12. Evidence of the contents of a revoked will is admissible to show the intention of testatrix at the date of its execution, although all the formalities required by statute were not observed in signing and attesting the revoked will.—*Thompson v. Ish*, (Mo.) 12 S. W. 510.

13. Where the contestants, on the cross-examination of defendant devisee, elicit the fact that he was in debt, and his property heavily incumbered, evidence that some of the contestants are well situated pecuniarily is competent, as tending to show that testatrix considered the circumstances of the respective parties in making her will.—*Thompson v. Ish*, (Mo.) 12 S. W. 510.

#### — Costs.

14. On contest of a will, which is sustained, it is error to tax attorney's fees and costs of contestant against the estate.—*Carter's Adm'r v. Carter*, (Ky.) 12 S. W. 335.

#### Construction.

15. A will disposing of "all the estate I now own and possess" does not show an intent on part of testator to dispose of his wife's interest in community property.—*Haley v. Gatewood*, (Tex.) 12 S. W. 25.

#### — After-acquired property.

16. A will disposing of "all the estate I now own and possess" applies to realty acquired after its execution.—*Haley v. Gatewood*, (Tex.) 12 S. W. 25.

#### Duration of estate.

17. A devise of "all my property, real, personal, and mixed, to my wife, Teresa, so long as she remains my widow; but, should she marry or die, I will one-half of my property to her, or, in case of her death, to her relations, and the remaining half to go to my relations," gives testator's wife a fee-simple in half of the land.—*Mudd v. Mullican*, (Ky.) 12 S. W. 263.

18. Testator, after devising all his estate to his wife, provided that "at her death, if the land I now live on should not be sold, it is to be sold on one and two years' credit, and one-half the proceeds to go to" M. and J. "In case both or either of them should depart this life before my wife, then that portion, as the case may be, on account of death, to descend to the living heirs of" K. and W.: "but, in case she should sell the above-mentioned tract of land in her life-time, she is to have the use of all the money during her life, without interest, and, with that exception, she has the power to dispose of all the balance she may think best." *Held*, that the widow was only entitled to a life estate in the homestead, or, if sold during her life, to the use of the proceeds, without interest.—*McConnell v. Wilcox*, (Ky.) 12 S. W. 469.

19. Under a will, giving testator's real estate to his wife, "during her natural life, and to dispose of discretionary, according to her own free-will and judgment, providing that she never marries a second time," in which event it "shall go to my children now living, or who may be living at the time of my wife's death or marriage," the widow takes a life-estate only, to which her power of disposal is limited. Following *Patty v. Goolsby*, 9 S. W. 846.—*Douglass v. Sharp*, (Ark.) 12 S. W. 202.

20. A will gave the whole of testator's estate to his widow, during widowhood, and provided that, "in case my wife marries or dies, her present heir, M., becomes sole heir to the property, and, in case both die, then all the property not herein bequeathed to other parties reverts to J., my son, and his bodily heirs, equally, forever." *Held*, that the devise to M. took effect at once, and M., having survived the marriage of the widow, became

the owner of the absolute estate.—*Harmon v. Dyer*, (Ky.) 12 S. W. 774.

#### Nature of estate.

21. Testator devised property in trust for his daughter and her children, with power to the trustees to sell and reinvest. The trustees were directed to permit the daughter to have possession and enjoy the property, and to receive the yearly rents and profits during her natural life, "and after her death then in trust for the use and benefit of the children of my daughter and the descendants of such children as may be dead; and, on the arrival at age of the youngest of my daughter's children, or upon the marriage of said youngest child, then to divide the estate into as many shares as there are children of my said daughter then living and children of my said daughter who are dead leaving descendants then alive," and convey one share to each living child, and one to the descendants of each child. *Held*, that the daughter's children took a defeasible fee, which interest could be sold for the payment of their debts during the life of the daughter, notwithstanding the trust, under Gen. St. Ky. c. 68, § 21, which declares that estates of every kind, held or possessed in trust, shall be subject to the debts of the beneficiary.—*Dickison v. Ogden's Ex'r*, (Ky.) 12 S. W. 191.

#### Rights of devisees.

22. The will of testator provided that all his property should go to his four daughters as long as they lived or remained unmarried, to be held jointly as an undivided estate. If any married, the remaining unmarried daughters might give them such portion of the estate as they saw fit, not exceeding one-seventh of the whole, which should be charged to their share in the final division, which should take place on the death or marriage of them all. Upon the death or marriage of them all, the estate should be divided among all of testator's children. *Held*, that as the surviving daughter took her share by inheritance, it was liable to sale at her death, for her debts.—*Mourning v. Missouri Coal Min. Co.*, (Mo.) 12 S. W. 384.

#### Lapsed legacies.

23. Where a devisee dies before his testator, leaving a will by which he bequeaths to his wife all that is coming to him from the first testator, the wife has no interest in the estate devised to her husband, although it appear from the circumstances that the first testator intended the wife to stand in her husband's shoes, as such intention found no expression in the will; and such devise is deemed to have lapsed.—*Dixon v. Cooper*, (Tenn.) 12 S. W. 445.

24. Mill. & V. Code Tenn. § 3036, provides that "whenever a devisee or legatee dies before the testator, or is dead at the making of the will, leaving issue who survives the testator, said issue shall take the estate devised or bequeathed as the devisee or legatee would have done, had he survived the testator," etc. *Held*, that the statute applied only to cases where a devisee or legatee died leaving issue, and not to every case where such person dies before testator.—*Dixon v. Cooper*, (Tenn.) 12 S. W. 445.

#### Election to take under will.

25. Where all the acts of a devisee tending to show an election to take under the will occur before she knows that she has any other title to the land, no election is implied.—*Clark v. Hershey*, (Ark.) 12 S. W. 1077.

26. Nor will an election be implied from a long delay by the devisee in inquiring as to her rights, even in connection with other acts tending to show such election, where such delay occurred during the progress of the civil war, when courts were largely closed, business suspended, and it appears that the devisee's husband became a refugee.—*Clark v. Hershey*, (Ark.) 12 S. W. 1077.

27. The facts that a suit for trespass on the lands devised was brought by the devisee and her husband, and that the latter paid the taxes on the land, do not show an election where the suit was brought without the devisee's knowledge, and her husband testifies that he paid the taxes as agent for another person, and it is not shown that the

devisee ever agreed to take under the will, or entered on the land, or received any rents or profits therefrom.—*Clark v. Hershey*, (Ark.) 12 S. W. 1077.

28. A testator devised a portion of his estate to defendant, his son, and directed him to convey certain land to testator's widow for life, remainder to M. Defendant accepted the devise to him. *Held* that, assuming the land belonged to him, he thereby elected to surrender all right to it, and to make the conveyance directed.—*McQuerry v. Gil-land*, (Ky.) 12 S. W. 1087.

#### Contracts to make wills.

29. Evidence that deceased, before adopting plaintiff, and procuring an act of the legislature changing her name and making her capable of inheriting from him, agreed to make her his heir, and entered into some written contract, which could not be produced at trial, with her father, and afterwards declared that she would have all his property, is not sufficient to show a contract to will to her all his property.—*Davis v. Hendricks*, (Mo.) 12 S. W. 887.

### WITNESS.

#### Competency—Parties.

1. Where a bill of sale has no subscribing witnesses, the vendee is, under Rev. St. Tex. art. 2246, removing the disqualification of persons interested in, or parties to, an action to testify therein, a competent witness to prove its execution.—*Lang v. Daugherty*, (Tex.) 12 S. W. 29.

#### Husband and wife.

2. Under the Missouri statutes the husband is not a competent witness in an action by the husband and wife for personal injuries to the wife.—*Harrington v. City of Sedalia*, (Mo.) 12 S. W. 342.

3. In an action to enjoin the enforcement of a deed of trust securing upon the wife's land certain notes given by the husband in a transaction induced by fraud, the husband and wife may testify as to conversations between themselves as to the transaction, as a part of the *res gestæ*, and also on the ground of fraud.—*Henry v. Sneed*, (Mo.) 12 S. W. 663.

#### Defendant in criminal cases.

4. A defendant who has been convicted of a felony is not incompetent to testify as a witness in his own behalf, under Code Crim. Proc. Tex. art. 730, subd. 5, which declares incompetent as witnesses "all persons who have been convicted of a felony, unless the convict has been pardoned," as Laws 1889, p. 87, declares that "any defendant in a criminal action shall be entitled to testify in his own behalf therein."—*Williams v. State*, (Tex.) 12 S. W. 1108.

5. Act April 4, 1889, permitting defendants to testify in their own behalf, contained an emergency clause, but, failing of the essential two-thirds vote on the passage of the act, the emergency clause did not become operative, and the act did not take effect until 90 days after the adjournment of the legislature. *Held*, that it was not error to refuse to permit the defendant to testify in his own behalf, on a trial occurring before the 90 days had expired.—*Giebel v. State*, (Tex.) 12 S. W. 591.

6. Nor was it error to refuse to continue the case so as to give defendant the benefit of that act.—*Giebel v. State*, (Tex.) 12 S. W. 591.

#### Transactions with decedents.

7. Under Rev. St. Tex. art. 2248, providing that in actions by or against the heirs or legal representatives of a decedent, arising out of any transaction with decedent, neither party shall be allowed to testify against the others as to statements by the testator, unless called to testify by the opposite party, testatrix's husband, a legatee under the will, cannot testify in his own behalf as to declarations made by his wife bearing on the validity of the will.—*Brown v. Mitchell*, (Tex.) 12 S. W. 606.

8. Rev. St. Tex. art. 2246, provides that no person shall be incompetent to testify because he is a party to a suit. Article 2243 provides that, in actions by or against heirs or legal representatives

of a decedent, neither party shall be allowed to testify against the others as to any transaction with such decedent. *Held*, that this did not preclude defendants in an action by the widow of a decedent, in behalf of herself and children, for damages for his alleged wrongful killing, from testifying as to conduct and statements of decedent at the time of his killing, in a personal difficulty with defendants.—*Wallace v. Stevens*, (Tex.) 12 S. W. 238.

9. The grantees in a deed, the common source of title, being dead, a party cannot testify that it was given in satisfaction of a partnership debt which, on a division of the firm assets, had been given to witness' father, who gave it to him, and that the deed was made by mistake to the firm, instead of to witness.—*Glover v. Thomas*, (Tex.) 12 S. W. 684.

10. Where plaintiffs, relying upon the possession of a deceased person to complete their title by adverse possession, introduce the testimony of his administrator as to such possession, it is error to exclude evidence for defendant as to such deceased person's acts in relation to the land on the ground that he was dead, and that plaintiffs claimed by purchase from his administrator; for such exclusion would defeat the purpose of the law, which is to place the parties on an equal footing.—*Hurley v. Lockett*, (Tex.) 12 S. W. 212.

#### Privileged communications—Physicians.

11. In proceedings to contest a will the defendant devisee may waive the protection of Rev. St. Mo. 1879, § 4017, which provides that information acquired by a physician, in his professional capacity, shall be privileged, and may introduce the attending physician of testatrix as a witness.—*Thompson v. Ish*, (Mo.) 12 S. W. 510.\*

#### Credibility.

12. It is error in an action on an insurance policy to exclude testimony as to the excessive valuation placed on the goods insured, because the testimony is that of a witness who was an employe of defendant's agent, as that fact, if it could affect the witness at all, could only do so as to his credibility.—*Lion Fire Ins. Co. v. Starr*, (Tex.) 12 S. W. 45.

13. The bias of one called to testify in a case not being a collateral matter, testimony as to statements made by him which tend to show such bias is competent.—*Crumpton v. State*, (Ark.) 12 S. W. 563.

#### Impeachment.

14. Rev. St. Mo. 1879, § 1791, providing that grand jurors may be required to testify whether testimony of a witness is consistent with that given before them, and section 1780, providing that a grand jury may appoint a clerk "to preserve minutes of their proceedings, and of the evidence given before them, which minutes shall be given to the prosecuting attorney," do not render admissible the minutes of evidence before a grand jury, signed by the witness, to impeach the witness.—*State v. Thomas*, (Mo.) 12 S. W. 643.

15. Defendant may call witnesses, and plaintiffs' witness himself, to show that the latter said he knew nothing about the case, and only swore as directed by another, though such statement was made after he had been discharged.—*Thompson v. Ish*, (Mo.) 12 S. W. 510.

16. Mansf. Dig. Ark. §§ 2902, 2903, provide that a witness may be impeached by the party against whom he is produced by showing that he has made statements different from his testimony, but, in order to so impeach him, he must be asked if he has made the statement assumed, and the examination must indicate the time when and the person to whom it was made. *Held*, that proof of such contradictory statements may be made as well where he testifies that he does not remember them as where he denies them.—*Billings v. State*, (Ark.) 12 S. W. 574.

17. Where a witness for the state testifies on cross-examination that he did not make certain statements out of court, as to which he was not directly examined, and which are merely collateral, defendant cannot impeach him by showing that he

did make such statements.—*Commonwealth v. Hourigan*, (Ky.) 12 S. W. 550.

18. If, for the purpose of laying the predicate to contradict a witness, the prosecution, fixing time, place, and circumstances, asks the witness if he did not make statements contradictory of his evidence on the stand, and the witness answers that he "does not remember," the prosecution may introduce evidence to prove that he did make such contradictory statements.—*Levy v. State*, (Tex.) 12 S. W. 596.

19. When accused himself has testified, the fact that he has sworn to an affidavit, that an absent witness would testify to certain facts, which the prosecution has admitted to be true, does not preclude the prosecution from impeaching his testimony, on the ground that it would be contradicting what it has admitted to be true.—*Pace v. Commonwealth*, (Ky.) 12 S. W. 271.

20. Where a cashier of a bank testifies that the bank had not disposed of certain collaterals held by it to secure a note of one A., as alleged by defendant, in violation of its agreement with him, the sworn answer of the bank by the cashier in a garnishment suit against A., that at the time alleged it held none of his property or effects, is admissible to impeach the witness.—*Smith v. Traders' Nat. Bank*, (Tex.) 12 S. W. 118.

21. In an action for money alleged to have been loaned, the issue being as to whether it was so loaned, and that defendant incurred the obligation while under duress caused by plaintiff, evidence to contradict irrelevant statements made by plaintiff on cross-examination as to whether he had stated out of court that no person knew prior to the alleged duress that he had the money with him except himself and wife, is inadmissible to impeach him.—*Dimmitt v. Robbins*, (Tex.) 12 S. W. 94.

#### WRITS.

See, also, *Arrest; Attachment; Certiorari; Error; Writ of; Garnishment; Habeas Corpus; Injunction; Mandamus; Prohibition, Writ of; Quo Warranto; Replevin; Sequestration.*

#### Service of process.

1. Service on an indorser of a note alleged to be a resident of H. county, made in M. county by process directed to the sheriff of M. county, is a proper service.—*Sanders v. City Nat. Bank*, (Tex.) 12 S. W. 110.

2. Service of a citation in an action on a note on one of several indorsers indorsed, "Came to hand the 17 day of March, A. D. 1888, at 6 o'clock p. m., and executed the 7 day of April, 1888, by delivering to the within named defendant in person a true copy of this writ, together with a certified copy of plaintiff's original complaint," shows proper service under Rev. St. Tex. arts. 1216, 1220, providing that each defendant, if without the county in which the action is brought, shall be served with a certified copy of the petition accompanying the citation.—*Sanders v. City Nat. Bank*, (Tex.) 12 S. W. 110.

#### By publication.

3. In actions against unknown parties, the court acquires no jurisdiction, unless the statement in regard to their interest is verified under oath, as required by Rev. St. Mo. 1879, § 3499, relating to publication against unknown parties.—*Charles v. Morrow*, (Mo.) 12 S. W. 903.

4. In Tennessee, there is no authority for service by publication against the non-resident defendants in an action at law by the holder of a check against the payee and the non-resident drawer and drawee.—*Farmers' & Traders' Bank v. Bank of Allen County*, (Tenn.) 12 S. W. 545.

5. Mansf. Dig. Ark. § 4359, provides that the affidavit of any editor, publisher, or proprietor of any newspaper authorized to publish legal advertisements, to the effect that an advertisement has been published in his paper for the length of time, etc., shall be evidence of the publication thereof. *Held*, that an affidavit of a person that the advertisement was published in a certain paper, without showing his connection with the paper, or his



right to make the affidavit, is not proof of legal publication.—*Cross v. Wilson*, (Ark.) 12 S. W. 576.

6. *Mansf. Dig. Ark. §§ 4339-4342*, provide that in actions by the prosecuting attorney to collect bonds given in payment of lands sold by the state, in case the return of the officer shows that defendant is dead, or on other proof thereof, the clerk shall make and enter an order which shall contain the date and amount of the bond proceeded upon, and a description of the land, etc., and warn generally "the heirs and personal representatives" of the defendant to appear and make defense thereto on the first day of the next term of the court that commences more than 60 days from the date of such order; and the publication of such order, as provided by law, provided it states the month, and day of the month, upon which such term shall commence, shall be equivalent to personal service: provided that upon return of the officer, showing that defendant is not found in the county, the prosecuting attorney shall file an affidavit that he has used due diligence, and has not been able to ascertain whether defendant is dead or alive. *Held*, that a warning order is insufficient which gives the title of the cause and warns "the defendants, the legal representatives of [certain named

persons who were named as defendants in the title] to appear in this court within thirty days, and answer the complaint of" plaintiff.—*Cross v. Wilson*, (Ark.) 12 S. W. 576.

#### Service of process—On non-resident.

7. Service, out of the state, on a citizen and resident of another state, will not sustain a personal judgment against him. *York v. State*, 11 S. W. 869, followed.—*Kimmarie v. Houston & T. C. Ry. Co.*, (Tex.) 12 S. W. 698.

#### — Waiver.

8. Under *Gen. Laws Tex. 1885, art. 1347a*, providing that the acceptance of service and waiver of process shall not in any action be authorized by an instrument sued on or executed prior to the institution of such suit, nor shall it be made until after suit brought, defendant's acceptance of service and waiver of process indorsed on the petition in the suit against him, before it was filed, will not support a judgment by default.—*McAnelly v. Ward*, (Tex.) 12 S. W. 206.

#### Wrongful Attachment.

See *Attachment*. 15-26.

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